

## ARTICLE

Folk International Law: 9/11 Lawyering and the  
Transformation of the Law of Armed Conflict to Human  
Rights Policy and Human Rights Law to War  
Governance

---

Naz K. Modirzadeh\*

## Abstract

This Article argues that the positions many U.S.-based lawyers in the disciplines of international humanitarian law and human rights law took in 2013 on issues of lethal force and framing of armed conflict vis-à-vis the Obama Administration would have been surprising and disappointing to those same professionals back in 2002 when they began their battle against the Bush Administration's formulations of the "Global War on Terror." In doing so, the Article demonstrates how, by 2013, many U.S.-based humanitarian and human rights lawyers—in the face of a perceived existential threat to their relevance from the Bush Administration's general rejection of international law as a binding constraint in the "Global War on Terror"—had traded in strict fealty to international law for potential influence on executive decision-making. These lawyers and advocates would help to shape the Obama Administration's articulation of its legal basis for the use of force against al Qaeda and others by making use of "folk international law," a law-like discourse that relies on a confusing and soft admixture of IHL, *jus ad bellum*, and IHRL to frame operations that do not,

---

\* Senior Fellow, Harvard Law School-Brookings Project on Law and Security. B.A., University of California at Berkeley, 1999; J.D., Harvard Law School, 2002. The author would like to thank Dustin Lewis, Gabriella Blum, Marko Milanovic, William Alford, Jonathan Horowitz, Andrew March, Michael Schmitt, Janet Halley, the Harvard Law School International Law Workshop, 2011, The Columbia Law School Human Rights Institute Counterterrorism & Human Rights Project, and the Editors of the Harvard National Security Journal. In particular, the author would like to thank Jessica Burniske and Anand Sudhakar for outstanding research assistance. All views and errors are solely those of the author.

ultimately, seem bound by international law—at least not by any conception of international law recognizable to international lawyers, especially those outside of the U.S. In chronicling the collapse of multiple legal disciplines and fields of application into the “Law of 9/11,” the Article illustrates how that result came about not simply through manipulation by a government seeking to protect national security or justify its actions but also through a particular approach to legal argumentation as mapped through various tactical moves during the course of the legal battle over the war on terror.

“We’re in a new kind of war, and we’ve made very clear that it is important that this new kind of war be fought on different battlefields.”

– Condoleezza Rice, November 2002<sup>1</sup>

“The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”

– Harold Hongju Koh, March 2010<sup>2</sup>

## Introduction

On March 25, 2010, State Department Legal Adviser Harold Koh, a prominent and well-respected international lawyer, human rights scholar, and former Dean of the Yale Law School, gave an address at the American Society of International Law Annual Meeting, laying out, for the first time, the Obama Administration’s perspective on the legality of the so-called

---

<sup>1</sup> *Condoleezza Rice on Fox News Sunday*, FOX NEWS (Nov. 11, 2002), <http://www.foxnews.com/story/0,2933,69783,00.html>, [<http://perma.law.harvard.edu/04pjFndWstN>].

<sup>2</sup> Harold Koh, Legal Advisor to the U.S. Dep’t of State, Speech at the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>, [<http://perma.law.harvard.edu/0WFyysLMMno>] [hereinafter ASIL Speech].

“war on terror.” It was a heavy moment. By that time, news had come out that President Obama and his team had approved a massive increase in the use of CIA-led weaponized unmanned aerial vehicles (drones) outside the conflict in Afghanistan,<sup>3</sup> with numerous strikes in Pakistan and elsewhere. Many in the fields of international humanitarian law (“IHL”) and international human rights law (“IHRL”) had high expectations for both the Obama Administration and Harold Koh. Indeed, many hoped that Dean Koh would restate the commitment of the U.S. to international law, distance the Obama Administration from these secretive attacks, and mark the firm and final end to the Bush-era “global war on terrorism.”

That did not happen. Instead, Koh articulated the “Law of 9/11,”<sup>4</sup> largely reiterated the previous Administration’s understanding of an ongoing armed conflict between the United States and al Qaeda and justified the use of lethal force across multiple “battlefields” spanning the globe. Many in IHL and IHRL, by that point, had struggled for years with the U.S. government against the claim that international law was “quaint,” with the Bush Administration seeming to reject the idea that international law—as law—had any place in this new war. International law certainly played a role in Koh’s speech that March day, but in ways that those who had long awaited that moment could not have expected. It was, for many, a depressing day in what had been a depressing decade. Three years later, as the end of the Obama Administration’s first term neared, the executive’s publicly asserted legal basis for key facets of the prosecution of the “war on terrorism”—not least, the targeted killing of Americans and foreigners “associated” with al Qaeda anywhere at any time—remained strikingly opaque and strikingly innovative in comparison to well-established international humanitarian law, *jus ad bellum*, and international human rights law.

But that is the end of the story. This Article starts with the beginning.

---

<sup>3</sup> Jane Mayer, *The Predator War*, NEW YORKER (Oct. 26, 2009), [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer), [<http://perma.law.harvard.edu/0eeTWj8iRtY>].

<sup>4</sup> Koh appears to have coined this term, referring to “what I call the Law of 9/11: detentions, use of force, and prosecution.” ASIL Speech, *supra* note 2.

This Article seeks to track the debates within the two disciplines central to the international legal regulation of the U.S. use of force that led to this moment. Debates within and across the fields of IHL and IHRL, and the disintegration of the boundaries between these two fields of law, seemed to have played, if unwittingly, into arguments that Koh made that day and that the Obama Administration continues to promote as of this writing.

The arc of this story demonstrates a real-world convergence between international human rights law, as interpreted and applied largely through U.S. constitutional law, and international humanitarian law. This convergence conflates and confounds long-standing principles and rules of both branches of public international law.<sup>5</sup> Convergence of IHL and IHRL is often presented as a victory for humanitarianism—a move towards a single body of international law that protects individuals in all circumstances, in all places, in an almost borderless conception of the world. In a previous article,<sup>6</sup> I raised a number of criticisms of the extraterritorial application of human rights law in armed conflict, and I questioned the theoretical and practical grounds for full extraterritorial application of human rights on top of and within IHL. One of the main doctrinal and operational criticisms of convergence is that it dilutes the clarity of the law of armed conflict. A far less common critique is that it also dilutes the clarity and moral resonance of human rights law and human rights advocacy by introducing IHL's often brutal balance between military necessity and humanity into situations that would otherwise be governed by more restrictive approaches, especially regarding the right not to be arbitrarily deprived of life.

This Article develops that criticism by pointing to a practical cost of convergence: the dilution and weakening of international law-based arguments against the U.S. government's legal construction of the "war on terror." The thickly legal construction of the Obama Administration's global war on al Qaeda, the Taliban, and associated forces was enabled in part by U.S.-based human rights and IHL lawyers who, over the past decade and in the face of a perceived existential threat to their relevance, traded in certain

---

<sup>5</sup> The period following 9/11 led to an unprecedented overlap between the domains of constitutional lawyers, on the one hand, and of human rights lawyers and advocates, on the other.

<sup>6</sup> Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. SER. U.S. NAVAL WAR COL. 349 (2010).

principles for (potential) influence on executive decision-making. These lawyers and advocates helped to fuel the Obama Administration's articulation of its legal basis for the use of force against al Qaeda and others by making use of "folk international law," a law-like discourse that relies on a confusing and soft admixture of IHL, *jus ad bellum*, and IHRL to frame operations that do not, ultimately, seem to be bound by international law—or at least by any conception of international law recognizable to international lawyers, especially non-Americans.

The practical impact of convergence and the extent to which convergence has confused and diluted the sharpness of law, as well as the division of labor between two fields of legal professionals, must be seen against the backdrop of the incredibly intense debate over central concepts of international law and the "war on terror" since September 2001. As will be demonstrated, while this debate and this major shift occurred within the field of elite international lawyers working in the United States, the Bush and Obama Administrations developed a number of legal strategies that depended on diluting the boundaries between various fields of international law and diminishing the clarity of binding rules and fields of legal application.

Two narratives fuel this story. The first is the uneasy relationship between U.S.-focused IHL and IHRL legal professionals and scholars and the rather thinly articulated doctrine of convergence, being worked out while each field was also marshaling its resources to fight the battle of its life against the Bush Administration's attack on international law in the early 2000s. The second is the government's position that international law and the boundaries it prescribed needed to be made more flexible in order to facilitate the fight against a transnational terrorist organization that had made clear its intent to murder many thousands of individuals across the world. As these two narratives collided, human rights law and humanitarian law themselves changed, as did their practices.

This Article presents a chronological journey through these shifts and proceeds in four parts. It examines three discourses: the position of the Bush and Obama Administrations; the simultaneous and often overlapping debates within and between international humanitarian law and human rights law; and the key themes that were the focus of pitched battles.

Part I of the Article focuses on the immediate aftermath of 9/11 (2001–2003), and presents the key international legal theme of that era as focused on the debate over whether the “war on terror” should be properly thought of as a “war” or as a global law enforcement operation. Part II explores the next phase (2003–2006), beginning with the war in Iraq and ending with the U.S. Supreme Court decision in *Hamdan v. Rumsfeld*. It explores the debate over what law applied to detainees captured during the “war on terror,” and how that war, if it was one, ought to be classified within IHL. Part III covers the period directly after *Hamdan* through the early months of the Obama Administration (2006–2009), and presents the stakes of the highly technical debate over the notion of the direct participation of civilians in hostilities. Part IV moves to the period of 2009–the present, focusing on the changes in rhetoric and legal discourse of the Obama Administration and the two disciplines’ responses. This last Part submits that the field of argumentation over the use of CIA-led lethal operations—also known as “targeted killings”—away from the recognized battlefield is profoundly diminished as a result of the compromises made within and between the disciplines along the way. It concludes that four outcomes emerge from a decade of debate within and between IHL and IHRL: convergence as purported law, convergence as lawyering, the flattening of the distinction between international and non-international armed conflict, and the blurring of civilian immunity and combatant targetability.

Given the enormity of the subject matter and the sheer volume of academic, popular, and professional writing on the topics at hand, this will not proceed as a bibliography of the “war on terror” or as a comprehensive analysis of every position taken. Indeed, in the 2010–2012 period alone hundreds of academic articles, commentaries, and notes concerning “targeted killing” were published.<sup>7</sup> Rather, I will use somewhat artificial time periods and substantive themes to provide an overview of the debates

---

<sup>7</sup> See, e.g., Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA Targeted Killing*, 2011 UNIV. ILL. L. REV. 1201, 1203 (2011), available at <http://illinoislawreview.org/article/measure-twice-shoot-once-higher-care-for-cia-targeted-killing/>, [<http://perma.law.harvard.edu/0mX3NNtb8uQ>]; Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SEC. J. 145 (2010),

in U.S.-focused IHL and IHRL and their key players,<sup>8</sup> and to put forward an argument that a largely scholarly, elite, and intra-legal-domain shift in the approach to IHL and IHRL and the lawyering style of each had a real and tangible impact on what lawyers were able to argue convincingly by 2013. The debate among lawyers in this intense period is significant for its impact on international legal discourse, and as a demonstration of how international legal projects forged in crisis can influence and reshape not only the state, but also the disciplines themselves.

## I. 2001–2003: The War versus Law Enforcement Model

### A. *U.S. Government*

In the months following the tragic attacks of September 11th, the Bush Administration began to signal that international law was not going to stand in the way of its approach to national security. The government made clear that it saw the struggle against al Qaeda and its associates as a “war,” and that it was going to utilize whatever means necessary to fight this war around the world. In quick succession, the United States invaded Afghanistan, opened the detention center at Guantánamo Bay, Cuba, and articulated a position on international law that was profoundly difficult to understand and apply. At this stage, the internal legal memoranda and debates within the Bush Administration were not yet known to the public,

---

*available at* <http://harvardnsj.org/2010/06/law-and-policy-of-targeted-killing/>, [<http://perma.law.harvard.edu/0owsKgDtqei>]; Mike Dreyfuss, *My Fellow Americans, We are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 *VAND. L. REV.* 249 (2012), *available at* <http://www.vanderbiltlawreview.org/2012/01/my-fellow-americans-we-are-going-to-kill-you-the-legality-of-targeting-and-killing-u-s-citizens-abroad/>, [<http://perma.law.harvard.edu/02xq3TRWYX6>].

<sup>8</sup> The very notion of a “discipline” or a “field” is of course also somewhat artificial. There is no master list of U.S.-based international humanitarian lawyers or human rights advocates. I rely on arguments made by and within the elites of each discipline, and in their moments of public engagement with the government or in scholarly and professional debates within the disciplines. In characterizing the views of “the field,” I naturally overlook tremendous internal diversity of opinion and divergence of perspective, especially on issues as contested as the ones discussed here. However, I argue that in each moment, and as to each key substantive theme, some type of consensus, either as to substantive legal argumentation or legal style of engagement with the government, emerges. Each consensus, of course, has its detractors, and I do not give them their due here. Finally, I should mention at the outset that I take each field at its center. In this, I do not engage the many fascinating critiques of each theme from peripheral voices, critical outsiders, and the many other legal disciplines that have taken a role in the debates over how law relates to terrorism.

but it was clear that the Bush Administration had determined that law would need to be made flexible in order to facilitate a rapid response to what was seen as an existential threat not just to the United States, but to freedom and our way of life.

Rather than cataloguing the arguments of this period in great detail, I provide the central claims and legal rhetorical positions, which were often perceived by those receiving them less as legal arguments and more as the international law equivalent of being told to take a hike:

- The United States is at war. In this war, the President is authorized to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the attacks of September 11th carried out by al Qaeda.<sup>9</sup>
- Everything is up for grabs. The Administration may or may not utilize existing international and domestic law in order to pursue its aims, but all of this is being reevaluated and reconsidered in light of the current threat.<sup>10</sup>
- International law does not apply as law, but rather (at most) as a matter of policy.<sup>11</sup>

---

<sup>9</sup> Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. § 2(a) (2001), available at <http://thomas.loc.gov/cgi-bin/query/z?c107:S.J.RES.23.ENR.>, [<http://perma.law.harvard.edu/0ojetQsjcam>].

<sup>10</sup> Memorandum from George W. Bush, President, to Richard B. Cheney, Vice President, et al., Humane Treatment of al Qaeda and Taliban Detainees, para. 1 (Feb. 7, 2002), available at <http://www.torturingdemocracy.org/documents/20020207-2.pdf> [hereinafter Bush Memo on Detainees] (explaining that the war on terror “ushers in a new paradigm . . . . Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war . . .”).

<sup>11</sup> Given that this is a well-established approach of the United States to certain arenas of international law, there was a significant amount of legal language and argumentation lying around in government to be used to effectuate this argument. This is best captured in President Bush’s executive order stating 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.” Bush Memo on Detainees, *supra* note 10, at para. 3. See also Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001), available at <https://www.federalregister.gov/articles/2001/11/16/01-28904/detention-treatment-and-trial-of-certain-non--citizens-in-the-war-against-terrorism>, [<http://perma.law.harvard.edu/0kTEokPZ48j>].

- The executive branch is the only decision-maker in determining the legal framework applicable to the war on terror, and it alone will determine how international law regulates (if at all) the behavior of the United States. International law (including customary international law) is applicable to the United States at the pleasure of the President, and the U.S. Constitution supports this view.<sup>12</sup>
- While international law certainly does not apply as law, it may also *not* apply as policy.<sup>13</sup>
- The United States is faced with a new war. This new war is materially different from any war that has come before it, and therefore a new war needs either new law or no law or some mysterious set of laws that are found in the perceived gaps between existing laws.<sup>14</sup>
- Because recognizing that the United States is in a “war” on a global level activates the laws of war, the United States is faced with a set of Old Rules that were not crafted for this New War.

As this general approach to international law and IHL was tested out and articulated, two more specific legal arguments were put forward. First, the U.S. went to war in Afghanistan, which it recognized as an international

---

<sup>12</sup> The genesis of this argument would later be seen in the John Yoo memo. See Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William J. Haynes II, Gen. Counsel of the U.S. Dep’t of Def., *Military Interrogation of Alien Unlawful Combatants Held Outside the United States* 47 (Mar. 14, 2003), available at <http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf> [hereinafter Yoo Memo on Military Interrogation] (noting that “customary international law lacks domestic legal effect, and in any event can be overridden by the President at his discretion”).

<sup>13</sup> See, e.g., Memorandum from Albert R. Gonzales to the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With al Qaeda and the Taliban (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> (advising the President that, “[o]f course, you *could* nevertheless, as a matter of policy, decide to apply the principles of [Geneva Convention III] to the conflict with al Qaeda and the Taliban” (emphasis added)).

<sup>14</sup> See, e.g., Memorandum from the President to the Vice President et al., on the Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) (Appx. C to *Independent Panel to Review DoD Detention Operations*, Chairman the Honorable James R. Schlesinger to U.S. Secretary of Defense Donald Rumsfeld (Aug. 24, 2004)) available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>; Gonzales, *supra* note 13, at 2; Brief for Respondents, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 460875, at \*38–40, \*48.

armed conflict as a matter of IHL, though only after being pressured to recognize the Taliban as a state party for purposes of IHL. However, it argued that the individuals captured in that war, and the party against which the United States was fighting in Afghanistan (meaning members of both the Taliban and al Qaeda), did not enjoy any privileges under the laws of war. Therefore, while international armed conflict (“IAC”) rules applied to the overall execution of hostilities (thus providing the highest set of binding standards on the U.S. in terms of its own conduct of hostilities as well as its privileges as a party to the conflict), the U.S. did not recognize that those very same rules could be applied as a matter of law to the individuals that it engaged on the battlefield. This argument was then expanded to cover the entire “war on terror.” It was at this point that the Bush Administration put forward the argument that the global war on terror was classified as an international armed conflict *globally*, but that the principal enemy in this war, al Qaeda, did not enjoy any privileges under the law applicable to international armed conflict, including the right to conduct hostilities, immunity from prosecution for acts conducted in compliance with IHL, and treatment as Prisoners of War upon capture.<sup>15</sup> At the time, many characterized this argument as a perversion of IHL to provide all available privileges of killing and indefinite detention to the government with none of the obligations in terms of treatment of the enemy.

### *B. International Humanitarian Law and Lawyers*

Before we enter into the impact of these arguments on IHL as a discipline and a profession, and the substantive debates that quickly came in response to the arguments listed above, it is useful to take a step back and understand the legal discipline of IHL. It is a rather peculiar sub-species of international law, with its own rituals, sacred texts, and leaders. The nature and aesthetics of the field will come to matter significantly for our story. What did this field look like on September 10th, 2001, as it went about its

---

<sup>15</sup> See Mary Ellen O’Connell, *When is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT’L & COMP. L. 535, 536 (2005). O’Connell explains that, “[w]ithin hours of the September 11 attacks President Bush declared that the United States was at war. Shortly thereafter, he said the ‘war’ ‘will not end until every terrorist group of global reach has been found, stopped, and defeated.’” According to O’Connell, the GWOT moniker “was a strategic blunder . . . . Apparently this was belatedly recognized in the Pentagon and an attempt was made in the summer of 2005 to back away from the policy . . . . President Bush, however, rejected the change, saying that the U.S. was in a war.” *Id.* at 539.

business, unaware that it was about to be blindsided by perhaps the greatest challenge to its existence since World War II?

IHL lawyers, as a whole, are very fond of rules and rules-talk. For other international lawyers, IHL lawyers often seem remarkably positivist: They spend a great deal of time debating and discussing black-letter rules, their interpretation, their manifestation, and the consequences of their violation.<sup>16</sup> They take such talk very seriously, and it has fueled, for many decades, the vast bulk of scholarship and debate within this relatively insular field. For American international lawyers who join the discipline (and until very recently, they have been a minority), the rules-ness of IHL may even be one of the reasons they are drawn to the discipline. There is a feeling that one has finally found what one went to law school for, but never got: real rules, real lawyering, real codes,<sup>17</sup> real authority.

Rules and their perceived realness can also function as a guardian to membership in the discipline and its society; hardcore IHL lawyers not only know many, many articles from memory, but they can recite key points from the famous commentaries, know the seminal debates by the leading figures, contribute to the same *Festschriften*, and speak about armed violence in a certain clinical, somber, and respectful way. Rules help to separate IHL lifers from dilettantes, particularly because the laws of war strike lay individuals and even other international lawyers unfamiliar with the field as abhorrent (in that it weighs the value of the lives of ten children against the perceived military advantage of destroying a tank) or ridiculous (in that it purports to enforce rules amid the chaos of war).

In these senses, the costs of entry to the discipline are high, and on or before September 10th, entrants were likely to be seeking careers in IHL as scholars or were required to know the law as a government or military lawyer. The ability to nimbly move between the rules and their application served as a test of one's true grasp of the discipline.

---

<sup>16</sup> Another way of saying this is that IHL is a very European discipline of public international law, and one that has remained so despite the rise of American law schools and policy programs.

<sup>17</sup> Many IHL lawyers travel with well-worn, dog-eared, highlighted copies of the Geneva Conventions and Additional Protocols. One can see those who have been in the field for decades with taped-up bindings or notations from their school days.

Within the discipline, certain topics that have changed, shifted, destabilized, or broadened other fields of public international law are almost never discussed, written about, or turned into professional projects: gender, peacemaking as an alternative to regulating warfare, culture, critique. This is not because members of the discipline do not care about these issues, or because they want war, hate women, or deride cultural difference. Rather, it is because the military discipline of the field discourages entering into intellectual and professional projects that are not obviously and immediately linked to reality. The macho nature of IHL stems not so much from its predilection for violence or its interest in war, but rather from the pride the discipline takes in its perceived rigor, form, method, clarity of argumentation, and what all of that means in terms of shaping a particular kind of legal discourse. In addition (and again unlike other disciplines of international law), the intellectual and political leadership exercised over the field as a whole by the International Committee of the Red Cross (“ICRC”) is central not only to gatekeeping in terms of membership, but also in terms of what types of substantive topics rise to debate. While the ICRC enjoys a formal role as the guardian of the Geneva Conventions, and has for decades provided authoritative or at least influential commentaries on the law, its real power in this regard is in its agenda-setting function within the discipline.

This aesthetic should not be misunderstood as suggesting a particular ideological commitment within the substance of the law. Indeed, many of the luminaries of the field are long-time members of the office of the Legal Adviser of the ICRC, and consider themselves to be invested in bringing humanity and humanitarian considerations to the most wretched circumstances of war. But they, too, seem to see the field as defined by the characteristics discussed here: Individuals who rise to the top have paid their dues, know their law, can enter deeply into technical legal debates, and have vast historical familiarity with the major wars of the last six decades. Most of them have also spent some time in these wars, either as soldiers or as humanitarians, or have spent time as government lawyers advising political actors or ministers who fight wars or conduct diplomacy during wars.

Surprises are hard to come by in the IHL discipline: One does not find many conferences on Foucault, “LOAC and the Body,” or explorations

of how hegemonic worldviews may have developed the principle of distinction. While such critical thought or viewpoints may be expressed outside the discipline, these outsiders are rarely permitted within the club. Interestingly, this is not because all IHL lawyers are positivists who reject critical legal perspectives or government functionaries who find it impossible to contemplate how law serves to justify state power and violence. Rather, it is that methodologies and forms of speech and interaction associated with critical legal studies, anthropology, and post-modern philosophical inquiry are culturally anathema to the way that most IHL lawyers conduct themselves and engage in debates within the discipline. There is also a real sense of the gravity of the subject matter at hand: These are practitioners and scholars who have dedicated themselves to a field of inquiry that focuses on death, violence, destruction, injury, pain, and rupture. There is little in the way of disciplinary humor or levity. The small group of the discipline's well-known leaders takes its project seriously. It sees its project as constantly and necessarily tested by practice: Even those IHL scholars who have never served in or advised government or worked for the ICRC must construct their arguments and articulate their approach to law in the language of applicability and pragmatism.<sup>18</sup> If it seems that no major state would accept a particular argument, or that a given approach to IHL could not be easily articulated to a commander, this is usually not seen as a valuable or relevant scholarly contribution.

On September 10th, 2001, the IHL discipline was focused on a number of issues, largely unnoticed by other international lawyers: the ongoing development of the ICRC's Customary International Humanitarian Law Study,<sup>19</sup> a new treaty on anti-personnel land mines, questions about how rules regulate the use of air power, how violative states could be convinced to accept the key tenets of the rules, how and to what extent the laws of armed conflict would apply in ever-increasing situations of peacekeeping and peace enforcement, and so-called cyberwarfare.<sup>20</sup> Its members met in the usual IHL power centers: Geneva and San Remo. Perhaps some were thinking ahead to the twenty-fifth anniversary of the

---

<sup>18</sup> This may also explain the lack of "critical IHL studies" as a sub-field.

<sup>19</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (2005), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>, [<http://perma.cc/KZ7L-7AR8>] [hereinafter CIHL Study].

<sup>20</sup> Thanks to Michael Schmitt for insight on this point.

Additional Protocols to the Geneva Conventions and imagining what sorts of conferences or celebrations of the field might take place.

It is at this point that the arguments of the Bush Administration, summarized above, come crashing into the discipline of IHL. It is difficult to overstate the sense of crisis, despair, and concern that permeated the field at that time. There was a very real sense, one that must be deeply appreciated in order to understand the choices made by leading IHL lawyers and institutions in the years to come, that the United States might simply walk away from the law.<sup>21</sup> As statements from President Bush and his top officials came out on an almost weekly basis questioning the very applicability of IHL to the United States, many in the ICRC and in significant positions of influence in the field of IHL were deeply concerned that the United States might actually choose to stop applying the law at all. The concern was not only that the United States would walk away from IHL in carrying out its own global war on terror, but that it would burn down the house on its way out the door. For individuals who had negotiated with Chechen fighters to bring lifesaving humanitarian goods to individuals in Grozny, or who had spoken with Congolese militias about the basic distinction between civilians and combatants, the possibility that IHL as they knew it could be destroyed seemed very real and very terrifying.

Aside from the fear of what might happen if the United States made good on its threats to depart from IHL altogether in its war against al

---

<sup>21</sup> My argument is not whether this sense was or was not justified (and there was a huge academic debate within broader public international law and legal theory over whether the global war on terror was outside of law or made by law; against law or created through law), but rather that it is important to recognize that within the discipline in late 2001 and all of 2002, this was a very real fear. For more on the debate in international law, sparked by the global war on terror and especially by the “legal black hole” of the detention center in Guantánamo, see Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 *THE INT’L & COMP. L. Q.* 1, 1–15 (2004); Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 *EUROPEAN J. INT’L L.* 613 (2005); Raulff Urlich, “Interview with Giorgio Agamben—Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life,” 5 *GERMAN L. J.* 609 (2004), available at <http://www.germanlawjournal.com/article.php?id=437>, [<http://perma.law.harvard.edu/0tEewV8jvToj>]; Andrew Neal, Review of the Literature of the ‘State of Exception’ and the Application of this Concept to Contemporary Politics, *CHALLENGE* (2004), <http://www.libertysecurity.org/article169.html>, [<http://perma.law.harvard.edu/0766zpQdZEY>].

Qaeda,<sup>22</sup> there was also the personal impact of the advent of the global war on terror and its legal discourse on the careers and lives of IHL lawyers. Suddenly, their small corner of international law was the subject of op-eds, bold statements by members of Congress, and the general concern of the public. IHL lawyers felt there needed to be a swift response, one that would reassert the power, reassurance, and calm majesty of IHL. Led by the ICRC, the reactions and responses that made up the legal discourse from IHL lawyers at the time can be characterized as follows:

- “Humanitarian law is basically fine.”<sup>23</sup>
- Interstate conflict (with states as belligerents against other states) is a precondition for the existence of international armed conflict (“IAC”); therefore, the global war on terror cannot be classified as an armed conflict to which IHL applicable to IAC applies.
- There are very clear lines between IHL and other fields of law, and it is critical that these lines be maintained. This is because there is a very serious danger of applying IHL where it does not belong, and where the threshold of armed conflict has not been reached: IHL allows for lawful killing, collateral damage, the indefinite detention of individuals (until the end of hostilities), and the massive lawful destruction of property. Therefore, any reference to IHL rules must be made in the context that the *entire corpus* and field of application of IHL are relevant: The US cannot simply utilize IHL in a context where it does not apply, and it cannot apply the rules of IHL to an abstract conflict with a common noun. If it is allowed to do so, a host of activities which would otherwise be illegal under IHRL would be legally sanctioned as part of armed conflict.

---

<sup>22</sup> For an early articulation of the doctrine of preemption, see THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002) (emphasizing that the U.S. will “disrupt and destroy terrorist organizations by . . . defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders . . . . [W]e will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists . . .”).

<sup>23</sup> Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF. 55, 69 (2003), available at <http://dl.tufts.edu/bookreader/tufts:UP149.001.00054.00006#page/15/mode/2up>, [<http://perma.law.harvard.edu/05ApnefmdeG>].

- There is no new war. The threat of terrorism can be analogized to many historic conflicts and threats, and international humanitarian law and international law more generally were crafted to deal with precisely such threats. We must trust that the drafters of the law, working in the shadow of the horrors of previous wars, knew what they were doing when they laid down the laws of war. Because there is no new war, there is no need for new law.
- It is critical that lawyers and legal scholars committed to IHL and its survival hold down the fort. The only way to do this is to create a unified front, one that does not allow for any incursion by Bush Administration arguments. This mode of argumentation is captured by the statement (almost rising to the level of a creedal claim): “International humanitarian law, in its current form, is, on the whole, adequate as a legal basis for responding to the challenges of contemporary international armed conflicts.”<sup>24</sup>
- Anyone who suggests that IHL ought to be reformed, revised, updated, or reexamined in the current political crisis is effectively siding with the Bush Administration, as they are (either naively or cunningly) creating an intellectual platform for reopening the law, which in this political climate will result in a denigration of the rules *in toto*.<sup>25</sup>
- The conflict in Afghanistan (but *not* the global war on terror or the war against al Qaeda more generally) is properly classified as an international armed conflict, to which the full Geneva Conventions and those provisions of the First Additional Protocol recognized as customary international law apply to the United States. This means that members of the Taliban who are captured should be treated as Prisoners of War (“PoW”).

It is striking how much of the debate for IHL lawyers at this stage was about law/not law, as opposed to the substance of law. For the small discipline of

---

<sup>24</sup> See, e.g., Jakob Kellenberger, President, Int’l Comm. of the Red Cross, Address at the 28th International Conference of the Red Cross and Red Crescent (Dec. 3, 2003), available at <http://www.icrc.org/eng/resources/z3temp/traning%20tests/5tvhu9.htm>, [<http://perma.law.harvard.edu/085GPwWhisV>].

<sup>25</sup> See Nora Boustany, *Swiss Reconsider Geneva Conventions*, WASH. POST, Sept. 18, 2002, at A26.

IHL, shot into the headlines by 9/11 and its immediate aftermath, the major concern was to defend the law, to protect the edifice, and to ensure that the United States did not do significant and lasting damage to the entire corpus of rules. The main technical debates of this time focused on *jus ad bellum* arguments about whether 9/11 could be considered an armed attack under the U.N. Charter (not an arena in which IHL lawyers as such would intervene, recognizing this as the domain of public international lawyers more generally), and the classification of detainees taken during the war in Afghanistan (the debate over PoW status). The reaction of the discipline, when backed against a wall by the United States, was to reiterate over and over and over that the law was gapless and suited to any conflict that might be envisioned as parts of the global war on terror, absolutely clear in all of its rules and regulations, and not in any way in need of reform or revision in light of terrorism.

The story was very different for human rights lawyers, who could immediately engage on a range of detailed substantive law questions raised by the Bush Administration's approach to the global war on terror.

### *C. Human Rights Law and Lawyers*

In line with the sketch of the professional discipline of IHL as it headed into the crisis after 9/11, it is useful to illustrate what U.S. human rights law and lawyering looked like on September 10th. In some ways, this is a far more difficult task, as the very thing that makes IHRL lawyering so different from IHL is its vastness, the size of its corps, and the diversity of its commitments, projects, and approaches to international law.

In terms of its relationship to positive treaty law (and even binding customary international law), IHRL has a far more flexible, open, permeable approach to rules and rules-talk. While the legal texts of IHRL are central to the profession and are often cited as core elements of legal argumentation, rule-mastery and rigor are not necessarily prized as the preeminent skills of the U.S. IHRL lawyer. There are multiple possible explanations for this. First, there is just far *more* international human rights

law available than international humanitarian law.<sup>26</sup> Second, human rights law is heavily influenced by a variety of quasi-judicial and soft law mechanisms, including the various U.N. treaty bodies, the work of the U.N. Human Rights Council, the reports of various Special Representatives of the Secretary General, U.N. General Assembly Resolutions, as well as the counterparts for many of these within regional bodies.<sup>27</sup> Third, rules as black-letter law may also matter less to U.S. human rights lawyers because their approach to law is far more policy-friendly: They recognize that the application of broad human rights obligations to individual states may depend as much or more on policy arguments, advocacy approaches, naming and shaming, media attention, and other factors rather than on law alone.

Unlike IHL, the field of application of IHRL is virtually unlimited. While states must have become party to the individual topical treaties in order for them to be binding as treaty law and in order to activate the institutional oversight of the treaty bodies and the quasi-judicial mechanisms, IHRL can, in the view of proponents of human rights law,

---

<sup>26</sup> While IHL lawyers spend years learning the *travaux*, debates, text, commentaries, and interpretations of the key articles of the Hague Regulations, Geneva Conventions, and Additional Protocols (with some going on to specialize in the weapons conventions or the protocol on Emblems), human rights lawyers may point to the International Covenant on Civil and Political Rights (“ICCPR”), International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), International Convention on the Rights of the Child (“CRC”), and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (“CAT”). And these are just the global treaties. Human rights law, as international law, is also expressed in a variety of regional treaties including the European Convention on Human Rights (“ECHR”), African Convention on Human and Peoples’ Rights (“ACHPR”), Inter-American Convention on Human Rights (“IACHR”), and the Cairo Declaration. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976); International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (entered into force Jan. 3, 1976); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33 [hereinafter CEDAW] (entered into force Sept. 3, 1981); International Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1448 (entered into force Sept. 2, 1990); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

<sup>27</sup> For instance, the European Union and other regional bodies often appoint a Special Representative for Human Rights. See *The EU and Human Rights*, EUROPEAN UNION, [http://eeas.europa.eu/human\\_rights/index\\_en.htm](http://eeas.europa.eu/human_rights/index_en.htm), [<http://perma.law.harvard.edu/0biHsZLak4W>].

apply to more and more situations and actors.<sup>28</sup> In this sense, IHRL lawyering has deep experience with legal argumentation through analogy or by reference, and appealing to law through policy, morality, goodness, and justice. In short, IHRL's aesthetic approach to law and lawyering is far more difficult to summarize than that of IHL in part because the community of professionals itself cannot be seen as a unitary disciplinary field, and it lacks the kind of uniform intellectual and practical leadership provided by the ICRC in the case of IHL.<sup>29</sup> Human rights lawyers are also far more comfortable than IHL lawyers to criticize themselves, their discipline, their law, and their colleagues.<sup>30</sup>

On September 10th, it would have been impossible to classify fully the key debates or dilemmas capturing the discipline, but some included the relationship between international human rights law and religion; critical approaches to human rights law; human rights law and third world approaches to universal standards; and the rise of international economic, social, and cultural rights as a wave of positive rights moving beyond the

---

<sup>28</sup> This includes private actors, corporations, individuals, transnational actors, and international financial institutions.

<sup>29</sup> There is a far less coherent professional picture here, and the professionals themselves feel far less united to "international human rights *law*" as a whole than their counterparts in the laws of war. To be a part of the general club of "human rights lawyers," one could be a government human rights lawyer working for a national commission, a human rights activist working for a local NGO, an elite professional human rights advocate working for one of the major human rights INGOs, a U.N. employee working as a human rights officer in a peacekeeping field office, or a human rights litigator, representing clients in court in order to demand specific remedies. Unlike IHL, there are no central annual conferences or single cities that bring the field together or provide moments for shared reflection, for the affirmation of membership, or for introducing new members to the group.

<sup>30</sup> Because, perhaps, their sense of "their" international law is that it is generally in the mode of "speaking truth to power," or convincing states to do things that they are reluctant to do, human rights lawyers may have far less of a sense of being protective of their texts or their methodologies to critique, or difference, or mutiny by their own ranks. Importantly in terms of membership and the sense of fealty to a particular methodology in relating to international law and lawyering, one does not need to be an international lawyer in order to be central to the human rights law project. Many of the leading figures in the field hail from political science, anthropology, economics, constitutional law, and, as such, the intellectual and practical projects stemming from the discipline are as varied as the imagination can muster topics. There are a variety of "human rights" topics for conferences, journal volumes, and funded research projects that focus on the ways that human rights law, norms, approaches, and arguments relate to other disciplines, other discourses, and other ways of advocating for justice in the world. Contrary to the gatekeeping and cost of entry associated with rising through the ranks of IHL, IHRL is an open field, with a globally dispersed leadership, little or no centralized direction or agenda setting, and an ever-growing substantive expansion into new disciplines and fields.

strictly “negative” obligations of civil and political rights. In terms of the aesthetic of the field at this time and what modes human rights law professionals saw themselves engaging in, the millennium saw the rise of networked activism. Furthermore, human rights law professionals developed their credibility not through apprenticeship or formal appointment as a government lawyer but through monitoring missions to abusive states, participation in a major UN human rights conference, and access to a global network of human rights scholars, activists, advocates, and researchers.

In some sense, the moment of impact hit human rights lawyers very differently than their IHL counterparts. For U.S.-based human rights lawyers,<sup>31</sup> the immediate aftermath of 9/11 was not experienced as an existential threat to their discipline.

At this stage, human rights advocates argued:

- The global war on terror is not a war, and it should not be framed as a war. It is a law enforcement operation that will manifest in a variety of domestic and international forms and should be primarily focused on prosecution or extradition of alleged terrorists and their supporters.<sup>32</sup>
- Criminal law and domestic courts are fully equipped to handle the problem of al Qaeda and transnational terrorism, and should be the central approach to dealing with the fight against what is essentially an international criminal network.<sup>33</sup>

---

<sup>31</sup> This paper focuses on human rights lawyers either based in the United States or focused on U.S. advocacy and analyzes the American debates within and between the IHL and IHRL disciplines over the period discussed. There are significant and important cleavages between the U.S. debate on the legal and strategic issues discussed here, and European and other experts working outside the American context.

<sup>32</sup> This argument held that as a law enforcement operation, counterterrorism efforts should comply with all applicable human rights protections. It was at this point that other countries’ antiterrorism operations such as the British campaign against the IRA were held up as models for the United States (because those states did not classify their actions as war). For a discussion of choice of law and the fight against global terrorism, see Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SEC. LAW AND POLICY 343 (2010).

<sup>33</sup> See Rona, *supra* note 23, at 69 (“There is little evidence that domestic and international laws and institutions of crime and punishment are not up to the task when terrorism and the War on Terror do not rise to the level of armed conflict.”).

- The global war on terror implies significant violations of central human rights, such as the right to be free from torture, the right to a fair trial, the right to privacy, and the rights of immigrants and refugees.<sup>34</sup>
- Provisions such as the U.S.A. PATRIOT Act and other law enforcement approaches adopted in a dangerous war mentality may lead to discrimination against minority groups and denial of key rights of the accused.
- The U.S. might lose its role as a global leader in human rights law and human rights enforcement.

While human rights advocates thought it was important to reiterate the ICRC's main position that IHL is completely coherent and gapless and that the law does not need to be revised or reconsidered in light of the threat of terrorism, this issue was not a significant substantive project for human rights lawyers. Human rights law was generally seen as being far more powerful in arguing against war as such and against the types of detention and treatment that were occurring in the broader context of the global war on terror.<sup>35</sup>

#### *D. Summary*

This phase of the international law response to the global war on terror is captured most clearly in the debate over whether a law enforcement or war model was more appropriate for understanding the "war on terror." For IHL lawyers, at this point in the story the debate was as much about where IHL *should not apply* as about where it should. For human rights lawyers, the debate was relevant principally as a matter of rhetoric. Unfamiliar with the details of IHL, many human rights law advocates simply saw the use of the term "war" as a way to justify human rights abuses and as a framework that would allow the U.S. to become a bad actor on the world stage. There was little sense then that the two fields would approach the crisis together.

---

<sup>34</sup> Keep in mind that at this point in the story, while there were many allegations and rumors that there was significant cruel, inhuman, and degrading treatment of detainees/prisoners carried out in the global war on terror, as well as secret CIA prisons, etc., the extent of the abuse had not yet been proven.

<sup>35</sup> Dinah PoKempner, Op-Ed., *America's Dangerous New Style of War*, BOS. GLOBE, Jan. 29, 2003, at A15.

## II. 2003–2006: Detention and Classification

*“We have reached a historic dichotomy in international law. One position is that we are in a whole new arena of warfare, and there are no existing rules for many of the issues and circumstances with which we are now dealing. The other position is the strict interpretation of existing law.”*<sup>36</sup>

This phase in the story involves perhaps the darkest days for international lawyers working on the war on terror. With the start of the Iraq war on March 19, 2003,<sup>37</sup> the release of graphic photographs of abuse of detainees in Abu Ghraib prison on April 28, 2004,<sup>38</sup> and the release of what are now known as the “Torture Memos,”<sup>39</sup> the scope of the early Bush Administration’s assertion of executive power and manipulation of existing legal regimes began to emerge.<sup>40</sup> The role of international law in all of this took many forms. Looking back on it now, one has the sense that many felt that they were in the fight of their lives: those who were engaged in day-to-day negotiations with the U.S. government,<sup>41</sup> in litigation against the government regarding specific detainees, and in internal disciplinary projects to try to re-calibrate legal standards to contain a superpower (internationally) and a President (domestically) that seemed to be raging

---

<sup>36</sup> Commander Gregory P. Noone et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1, 55 (2004).

<sup>37</sup> George W. Bush, President, Address to the Nation on Iraq (Mar. 19, 2003), in 39 WEEKLY COMP. PRES. DOC. at 342, available at <http://www.gpo.gov/fdsys/pkg/WCPD-2003-03-24/html/WCPD-2003-03-24-Pg342-4.htm>, [<http://perma.law.harvard.edu/0GxREnTYeVVV>] (“American and coalition forces are in the early stages of military operations to disarm Iraq, to free its people, and to defend the world from grave danger.”).

<sup>38</sup> *60 Minutes II* (CBS television broadcast Apr. 28, 2004). See also Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 92 (2006).

<sup>39</sup> See generally THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>40</sup> A sentiment typical of the time is captured in an amicus brief filed by three human rights experts (two academics, one practitioner), two of whom would within five years find themselves acting as government lawyers: “In *amici*’s experience, the Executive’s rhetoric and practice evoke not so much our own Government’s historical practices as those of dictatorial foreign governments that the U.S. State Department has traditionally condemned.” Brief for Louis Henken, Harold Hongju Koh, & Michael H. Posner as Amici Curiae Supporting Respondents, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), at 17.

<sup>41</sup> See, e.g., Quentin Peel, *A Humanitarian Crisis of Conscience*, FIN. TIMES (Jan. 29, 2004), <http://www.icrc.org/eng/resources/documents/misc/5vwazz.htm>, [<http://perma.law.harvard.edu/0Q63su2oiUK>].

forward without constraint. As the United States captured and held thousands of detainees, many under an increasingly confusing and complex quasi-legal framework combining individuals taken from the battlefields of Iraq and Afghanistan with individuals from third countries who were flown to a variety of locations, and as hostilities raged on two fronts, scholarly projects and political decisions on law began to move at a brisk pace to keep up with new U.S. activities.

Against a nightmarish background in which international law was perceived to be entering a black void, a number of significant concessions were made to some of the most radical early Bush Administration policies and abstract proposals. Whether this was for pragmatic reasons<sup>42</sup> (a last-ditch effort to save the broader corpus of international law by granting what were then seen as narrow concessions) or an effort to regulate the exception by bringing it into the realm of law,<sup>43</sup> what emerged from this period is a very different approach to IHL and IHRL than seen in the last phase. I first present an overview of the U.S. government's main positions and those of IHL and IHRL. Then, I present the key theme that shoots through these debates: the response to a massive worldwide detention operation, justified through a vague and innovative quasi-legal qualification of international armed conflict.

#### *A. U.S. Government*

As the Bush Administration sought to articulate how broad, vague, and rhetorical positions on the global war on terror would be turned into domestic and foreign policy, and as they provided more detailed justification for their legal positions, lawyers saw for the first time the scope of the Bush Administration's vision of itself and its approach to law. In government filings responding to litigation, previously secret memoranda, President Bush's acknowledgment of the extensive role of the intelligence service in detention, and investigations of abuse, we see a number of key

---

<sup>42</sup> That is, international law is meaningless if a state simply refuses to understand it as international law, therefore we have to interpret rules in a plausible manner that will at least create the grounds for conversation and compliance. See Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010).

<sup>43</sup> See Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134 (2005) (book review).

arguments and positions emerge on the relationship between IHL and the global war on terror. The executive saw the global war on terror as an international armed conflict, subject to the “common laws of war.” According to the Bush Administration:

- This international armed conflict was, however, not regulated by IHL and the Geneva Conventions nor by the domestic War Crimes Act, because neither Common Article 2 nor Common Article 3 of the Geneva Conventions applied to the war with al Qaeda and its associates.<sup>44</sup>
- As such, individuals captured and detained during the global war were neither subject to domestic criminal and constitutional law (because they were enemy combatants), nor protected by the Third or Fourth Geneva Conventions, either as Prisoners of War or as civilian internees.
- The President, at a time of war, has vast unitary power. It is necessary for him to be able to carry out these powers with swiftness and dispatch.<sup>45</sup> In carrying out these powers, all decisions regarding the interpretation of law, conduct during war, capture, incommunicado detention, transfer of detainees, and judicial process of detainees is entirely within the discretion of the President.
- By dint of this power, the President has the authority to authorize interrogations of detainees (held in secret CIA locations as well as in Guantánamo) and—aside from not being bound by the Geneva

---

<sup>44</sup> The main argument of the Administration at this time was that because al Qaeda is not a state actor, the condition precedent for the protections in the law does not apply. *See also* Memorandum from John C. Yoo, Deputy Assistant Atty. Gen. & Robert J. Delahunty, Special Counsel, for Alberto R. Gonzales, Counsel to the President, Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces in that Conflict (Nov. 20, 2001), *available at* [http://www.aclu.org/files/pdfs/natsec/olcdod20091215/20011131\\_yoo\\_delahunty\\_memo.pdf](http://www.aclu.org/files/pdfs/natsec/olcdod20091215/20011131_yoo_delahunty_memo.pdf), [<http://perma.cc/3URC-38HY>]. The memorandum goes on to conclude that even if it were determined that the Geneva Conventions apply as a matter of law to the war in Afghanistan, the President could (acting alone) suspend their application by declaring that he finds that Afghanistan is a “failed state,” or could also suspend the application of the Conventions through his authority as President (even if he did not find that it was a “failed state”). Yoo generally cites himself as authority for this claim. *Id.* at 17.

<sup>45</sup> THE FEDERALIST No. 64 (John Jay).

Conventions and customary IHL—would be able to authorize “harsh” procedures that would assist in obtaining information.<sup>46</sup>

- The Geneva Conventions applied to the armed conflict in Iraq, at least vis-à-vis the United States and Iraq, as well as to the occupation of Iraq and any protected persons in Iraq. But they did not apply to non-Iraqi al Qaeda operatives who were found in Iraq during the course of the international armed conflict and occupation.<sup>47</sup>
- For its part, the CIA was engaged in the capture, detention, interrogation, and rendering of individuals in the course of the global war on terror.
- Individuals have been, are being, and will be held in secret CIA detention sites (in undisclosed locations outside the United States).<sup>48</sup> Rules developed to apply to military interrogations in the wake of the Abu Ghraib scandal did not apply to the CIA interrogations,<sup>49</sup> but the CIA was not authorized to “torture” detainees.

Many lawyers were involved in crafting this structure.<sup>50</sup>

---

<sup>46</sup> By 2005, the above position was to some extent repudiated, insofar as extreme pain causing organ failure or death no longer seems to be used as the standard. Even between 2005 and 2006, however, treatment of detainees is certainly not seen as regulated by IHL or IHRL.

<sup>47</sup> Memorandum from Jack L. Goldsmith, Assistant Atty. Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention (March 18, 2004), at 3–4, available at <http://www.justice.gov/olc/2004/gc4mar18.pdf>, [<http://perma.cc/JZQ6-6T64>].

<sup>48</sup> President Bush, in the first speech openly acknowledging this, stated: “In addition to the terrorists held at Guantánamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency.” George Bush, President, Address on the Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>, [<http://perma.cc/L3KK-BRMV>].

<sup>49</sup> Eric Lichtblau, *Gonzales Says '02 Policy on Detainees Doesn't Bind C.I.A.*, N.Y. TIMES (Jan. 19, 2005), <http://www.nytimes.com/2005/01/19/politics/19gonzales.html>, [<http://www.perma.cc/0HngDwPduRt>] (quoting Alberto Gonzales).

<sup>50</sup> WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY AND OPERATIONAL CONSIDERATIONS (April 4, 2003) available at <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf>.

*B. International Humanitarian Law and Lawyering*

Responding to the assertions and arguments above posed a number of legal, strategic, and political challenges to IHL lawyers, particularly as dissent within the discipline emerged. While the ICRC continued to act as the intellectual and professional leader of non-government lawyers, military lawyers arose as central actors at this stage (including many who had been diligently arguing internally against Administration policies since 2001 but were now in a position publicly to voice their concerns) as well as more general public international law scholars who were speaking in IHL terms about topics that had captured the imagination of the American legal academy more broadly.

An important shift occurred. Given that at this stage it was clear that the Bush Administration planned to continue to detain people around the world based on a war model, many began to consider whether the initial position that IHL does not need to be modified would need to give way to a compromise that would in some way accommodate the Administration's view. As we will see, the push for compromise may have been hastened by what was happening in the arena of human rights law, as coalitions of lawyers in the United States began to bring cases against the government on behalf of individual detainees, significantly heightening the intensity and the demand for some kind of workable legal framework.

In the course of the debates over detention and qualification of conflict, three key arguments, positions, and professional moves may be observed.

1. "Direct Participation in Hostilities" for Detention

In September and December of 2003, the ICRC presented as part of its work plan for the coming four years a project on the notion of "direct participation in hostilities." This notoriously vexing concept, based on a provision in Article 51(3) of Additional Protocol I, states that, "civilians shall enjoy the protection afforded by [their immunity from direct attack] unless and for such time as they take a direct part in hostilities." In September 2003, nearly at the peak of the crisis (but just before the release of the Torture Memos and Abu Ghraib photos), the ICRC published its

much-anticipated report for States and Delegates for the twenty-eighth International Conference of the Red Cross and Red Crescent.

Under the category of *international armed conflicts*, the paper introduces the topic of “direct participation in hostilities” and notes:

Under humanitarian law applicable in international armed conflicts, civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities.” It is undisputed that apart from the loss of immunity from attack during the time of direct participation, civilians, as opposed to combatants, may also be criminally prosecuted under domestic law for the mere fact of having taken part in hostilities. In other words, they do not enjoy the combatant’s or belligerent’s “privilege” of not being liable for prosecution for taking up arms and are thus sometimes referred to as “unlawful” or “unprivileged” combatants or belligerents. One issue that has, especially in recent months, given rise to considerable controversy is the status and treatment of civilians who have taken a direct part in hostilities.<sup>51</sup>

This can be read as a direct response to the Bush Administration’s introduction and use of the term “unprivileged combatants” or “unlawful combatants” into almost all discussion of the global war on terror, and perhaps also a reaction to the fact that, two years into the crisis, the term did not seem to be going away. Recall that at this point, the United States was arguing that there was a third category of individuals, between combatants and civilians, that enjoyed no protections under IHL and had no claims to a particular type of treatment.

At this point, the Administration was not only detaining individuals in Afghanistan and referring to them as “unlawful combatants” that fall into a third (at that time non-existent) category of detainee with no protections under international law. They were also capturing individuals all over the

---

<sup>51</sup> THE INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 9 (2003), *available at* [http://www.icrc.org/eng/assets/files/other/ihlcontemp\\_armedconflicts\\_final\\_ang.pdf](http://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf), [hereinafter ICRC REPORT].

world and detaining them as “enemy combatants” with no explanation of what this category meant, how it was defined, or how an individual could know whether they were committing acts that would run afoul of this notion. All of this was in a context in which the Administration’s adherence to international law as a matter of law had been thrown into question. Given, at that point, the real concerns about torture, ill treatment, and the increase of the detainee population to the thousands or even tens of thousands, it seemed as though the United States planned to use the global war on terror essentially to go on a global manhunt, capture people for purposes of interrogation and intelligence gathering, and then indefinitely detain them through executive power according to vague “laws of war.” It was in this context that the ICRC opened up the door to a discussion and indeed an evaluation of the critical concept of direct participation right at the height of its disputes with the Bush Administration, despite its significant concerns that *any* opening of debate on *any* core issue of IHL at that time would create an opportunity for the Administration to denigrate and diminish the protective shield of IHL.<sup>52</sup>

While the report of the first informal expert seminar on the topic in June 2003 indicated strong attention to the question of targeting, it is fascinating that the first articulation of the notion of direct participation in hostilities (“DPH”) raised not only the issue of the loss of immunity from direct attack but also questions of status and treatment in detention and

---

<sup>52</sup> One indication that there was at least some recognition and awareness of the compromise at hand can be found in comments by a leading figure in the field, Marco Sassoli, who suggests that Taliban fighters could possibly be classified as civilian “unlawful combatants,” and then notes:

It may appear strange to qualify heavily armed Taliban fighters as “civilians.” In our view, they are indeed prisoners of war. Convention III prescribes that they must be treated so “until such time as their status has been determined by a competent tribunal.” This is not the place to discuss whether the denial of prisoner of war status to all persons held in Guantánamo is lawful. However, if a few, or indeed many, of those persons fail to fulfill the requirements of Convention III . . . they are “civilians.” This may not correspond to the use of that term as it is commonly employed, but in law borderline cases never correspond to the ideal type of a category and fall nevertheless under its provisions.

Marco Sassoli, *Comments on the Waging of War: Jus In Bello and the Challenge of Modern Conflicts*, 97 AM. SOC’Y INT’L. L. PROC. 193, 198 (2003).

immunity from prosecution. Within years (if not months), it would become clear that these questions were not going to provide the grounds for any agreement amongst the group, and the nature of the ICRC's work on direct participation in hostilities changed considerably.

## 2. Release of the ICRC's Customary International Humanitarian Law Study

It is unlikely that the two lead authors and over fifty expert researchers involved in the ten years of work that went into the ICRC's much discussed Customary International Humanitarian Law Study would have anticipated that the Study would be published into an international legal environment as divided as that of 2005.<sup>53</sup> The Study, a high point of the positivist search for law through state practice and *opinio juris*, involved detailed review of many state military manuals, court decisions, official government statements, and other relevant materials. Importantly for developments in this period, the Study submitted that "many rules applicable in international armed conflicts have also become applicable in internal armed conflicts as customary international law."<sup>54</sup>

The United States had long applied this approach *as a matter of policy* and considered the laws of international armed conflict applicable to the conduct of hostilities in non-international armed conflicts ("NIAC").<sup>55</sup> Prior to the global war on terror, the fact that the United States did not consider IAC rules binding in NIAC as a matter of law likely had little practical impact. The United States is considered one of the most IHL-abiding states in the world, has some of the finest training in IHL for its soldiers, and prides itself on the quality of its military lawyering and operational legal advising. With the advent of the global war on terror, however, the boundaries of binding international law in NIAC would come to matter tremendously. The Customary International Humanitarian Law Study and its approach to the customary rules applicable to NIAC may have prepared the ground for IHL lawyers to be open, later in the story, to accept the notion that situations that they previously would have seen as IACs

---

<sup>53</sup> CIHL Study, *supra* note 19.

<sup>54</sup> Red Cross, *supra* note 51, at 15; *see also* CIHL Study, *supra* note 19, at xxxv.

<sup>55</sup> *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM 2 (1998). *See also* Major Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other than War*, 159 MIL. L. REV. 152 (1999).

could be classified as NIACs without diminishing legal protections. The Customary International Humanitarian Law Study served to create the feeling (and at this point, good feelings in IHL were hard to come by) that IAC and NIAC rules were, for the most part, “essentially the same.” While not espoused by the authors of the Study, who were more careful to qualify claims, this motto seemed to become a refrain used more and more once the Study was released.<sup>56</sup>

### 3. Transnational Non-International Armed Conflict as a Means of Regulating Iraq and Afghanistan

This part of our story provides for the rapid emergence of a consensus on what had been a clearly divisive issue from the outset of the war on terror. It further tracks the remarkable impact that a handful of scholars at this time had on policymaking.

At the time, international lawyers generally agreed that under international law there could not be an armed conflict with a non-state actor *independent of the territorial state*, with the exceptions of a conflict with a non-state actor fighting the state on its own territory or a conflict between non-state armed groups on the territory of a state. By the second phase, however, it had become clear, through legal memoranda, that Bush Administration lawyers had argued that the Geneva Conventions did not regulate the war on al Qaeda because al Qaeda was not a state. Neither was the war regulated by Common Article 3 and customary rules applicable to non-international armed conflict, because this was a war fought on the

---

<sup>56</sup> One of the Study’s main authors notes, in responding to the U.S. government’s criticism of the Study, that:

State practice and customary humanitarian law have thus filled important gaps in the treaty law governing non-international armed conflicts. The divide between law on international and non-international armed conflicts, in particular concerning the conduct of hostilities, the use of means and methods of warfare and the treatment of persons in the power of a party to a conflict, has largely been bridged. But this is not to say that the law on international and non-international armed conflicts is now the same. Indeed, concepts such as occupation and the entitlement to combatant and prisoner-of-war status still belong exclusively to the domain of international armed conflicts.

Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT’L REV. RED CROSS 473, 487 (2007).

territory of a High Contracting Party.<sup>57</sup> Further, by 2005, leaked documents, released photographs, investigative journalism, and brave and candid comments from uniformed military lawyers indicated that the Bush Administration's approach of explicitly stating that there was no known law applicable to the war was having real consequences for torture, for rendition, for treatment of detainees, for access to them by the ICRC, and for legal rights available to detainees to challenge their detention.<sup>58</sup>

A number of scholarly articles had by this point suggested that a mutated form of non-international armed conflict, generally referred to as "transnational non-international armed conflict," might apply to some formulation of the "war on terror."<sup>59</sup> At that point, IHL scholars and practitioners saw the idea as relatively narrow in its practical application *as far as IHL was concerned*. The idea began to gain more support once it appeared that there was general agreement that the 2006 Israeli war in Lebanon against Hezbollah fell into this category.<sup>60</sup> Given the urgent need to create a regulatory framework that could plausibly deal with the now thousands of detainees in U.S. custody, the ability to apply some form of NIAC rules became more appealing. It is possible that this idea would have

---

<sup>57</sup> See Memorandum from John C. Yoo, Deputy Assistant Atty. Gen. & Robert J. Delahunty, Special Counsel, for Alberto R. Gonzales, Counsel to the President, Authority for the Use of Military Force to Combat Terrorist Activities Within the United States, at 26 (Oct. 23, 2001), available at <http://ccrjustice.org/files/memomilitaryforcecombatus10232001.pdf>, [<http://perma.cc/BHC4-P432>]. See also Bush Memo on Detainees, *supra* note 10, at 2 (noting that "I also accept the legal conclusion of the Department of Justice and determine that Common Article 3 of the Geneva Conventions does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and Common Article 3 applies only to 'armed conflict not of an international character'").

<sup>58</sup> On this point, see generally the strongly worded article by a long-serving military lawyer, who states, in discussing conduct of hostilities: "Rather than flout the laws of war, coalition forces have generally held to the policy that the Geneva and Hague Conventions are applicable in any armed conflict, no matter how characterized." Colonel Richard B. Jackson, *Stick to the High Ground*, 2005 ARMY LAW. 2, 4 (2005).

<sup>59</sup> There was vast disagreement about what this might mean. A very early articulation of the notion suggests that there might be some sort of global non-international armed conflict with al Qaeda, see Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003), but that had little traction at the time. A highly respected ICRC lawyer then suggested that there might be some ways in which the core rules of NIAC might apply to conflicts with terrorist groups. See Jelena Pejic, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRIT. Y.B. INT'L L. 71 (2004).

<sup>60</sup> See, e.g., Human Rights Watch, *Questions and Answers on Hostilities between Israel and Hezbollah* (Aug. 2, 2006), <http://www.hrw.org/news/2006/08/01/questions-and-answers-hostilities-between-israel-and-hezbollah>, [<http://www.perma.cc/0sXEvuHmWbS>].

developed and ripened into accepted and applied practice on its own. However, the sense of crisis for IHL lawyering, and the overall mood at the time that an agreed-upon framework was desperately needed, may have prematurely shoved this theory into the heart of the practice.

What pushed this new, drawn-from-analogy, never-fully-explained concept of transnational armed conflict from academic theory to practice? What was the main demand for such a framework? For this part of the debate, we cross disciplines.

### *C. International Human Rights Law and Lawyering*

It is at this phase that IHL went to trial in the U.S.,<sup>61</sup> mediated through constitutional law and human rights lawyering. Rather than recount the details of the various key cases and their jurisprudence, I want to focus on the core approach to our two themes—detention and classification—how they differ and how they often reflect the debates within the IHL field. The main concern of U.S. human rights lawyers was the Administration’s introduction of military commissions through executive order, and the claim that the Authorization for Use of Military Force extended to any individuals that the U.S. chose to detain anywhere in the world.<sup>62</sup> In addition, there

---

<sup>61</sup> A prescient military lawyer and scholar predicted that this would eventually happen, noting:

The painful, inexorable re-imposition of those standards [referring to IHL] (through court action and public policy changes) will eventually bring the law of war back on an even keel. But it is clear, in 20-20 hindsight, that the Administration should have listened to the wise counsel of the secretary of state and senior military lawyers to eschew any deviation from well-established international legal principles (and the extant DOD policy on the application of the law of war).

Jackson, *supra* note 58, at 9 (internal citations omitted).

<sup>62</sup> See, e.g., Harold Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2355 (2005–2006) (explaining that the Bush Administration “rejects human rights universalism in favor of executive efforts to create law-free zones: extralegal spaces (Guantánamo), extralegal courts (military commissions), extralegal persons (enemy combatants) and extralegal practices (extraordinary rendition) . . .”).

were significant concerns regarding U.S. citizens taken into custody as “enemy combatants” and slated to appear before military commissions.<sup>63</sup>

The concerns of U.S. human rights lawyers bringing cases on behalf of detainees were very different from those of IHL lawyers. Lawyers who likely had had little or no contact with the laws of war prior to their engagement on the war on terror may well have not been very impressed with that body of law’s due process safeguards. IHL was at best a set of tools that could be operationalized alongside constitutional law, human rights law, and criminal law and procedure in order to advocate on behalf of their clients.

It is imperative to understand the distinctions in approach to law and lawyering between IHL lawyers and human rights lawyers. IHL lawyers saw their role as shaping big-picture decisions like the classification of conflict, understanding that this evaluation would automatically activate a specific set of rules. As they brought cases against the government on behalf of individual clients, human rights lawyers had to grapple with the fine-grained details of how to combat the Administration’s claim of unitary executive power and full discretion to fight the war on terror—in wars far away but also in specific cases on U.S. soil and in Guantánamo—and to do so through U.S. legal procedures.

From the perspective of the theory of convergence, the U.S. detention cases demonstrate a peculiar moment. Whatever one thinks of the outcome of the cases or their jurisprudence, it is clear that neither a majority of lawyers litigating the cases nor the judges deciding them had a great deal of familiarity with IHL and its inner workings. IHL rules and concepts were often watered down in order to fit within the methodology, form, and language of U.S. courts. In some cases they were simply presented incorrectly or out of context.<sup>64</sup> While many cases had amici from human rights experts and IHL scholars, the large teams working on complex litigation over a number of years were unlikely to have had much training or

---

<sup>63</sup> See, e.g., Amanda Schaffer, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government’s Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 *FORDHAM URB. L.J.* 1465 (2002–2003).

<sup>64</sup> As discussed below in Section III.C.

familiarity with IHL.<sup>65</sup> Similarly, most judges deciding these cases did not have a background or training in the complex arguments and style of IHL and would have been unlikely to develop it while presiding over a case, particularly given the other complex and critical issues of law at stake.

*D. Hamdan: Classification of Conflict*

On June 29, 2006, the U.S. Supreme Court decided, in a landmark moment in our story and one of the first real meaningful victories for those challenging the Bush Administration's framing and execution of the war on terror, that there were some constraints on the power of the President.<sup>66</sup> The Court received numerous amici briefs from IHL and IHRL experts, and the Court's decision can be read as being highly influenced by these submissions.

Building on a number of other detainee cases, the experts drafting the Law of War amici brief in *Hamdan* adopted a theory that had been percolating for at least five years by this point: the notion of global transnational non-international armed conflict.<sup>67</sup> As one of the most important instances of human rights lawyering through IHL during that time

---

<sup>65</sup> There were, of course, military lawyers who were involved in a number of these cases, and who had litigated on behalf of their Guantánamo clients for years. These individuals did have extensive IHL training and operational experience, but it is unclear when reading filings, memoranda, and judicial decisions how much their perspectives were balanced with the many other forms of scholarly and legal knowledge at work. *See* Katyal, *supra* note 38, at 118 (“In total, there were well over 1000 people working on the *Hamdan* case in one capacity or another . . .”).

<sup>66</sup> The case centered on a habeas corpus petition filed by Salim Hamdan, a Yemeni national captured in Afghanistan in 2001 while acting as Osama bin Laden's driver. He was brought to the detention facility at Guantánamo Bay, Cuba in 2002 as an “enemy combatant,” and President Bush ordered he be brought before a military commission in 2003 on charges that were later specified as “conspiracy to commit offenses triable by military commission.” Hamdan argued that the military commission was unlawful under the Uniform Code of Military Justice and the Geneva Conventions, and that the commission was not authorized by Congress. The government argued that Hamdan could not access the federal courts because he was not a Prisoner of War (but rather an enemy combatant), and that the Geneva Conventions did not apply to his detention or trial (because the conflict with al Qaeda is not with a signatory to the Conventions, yet is also not a Common Article 3 conflict because it is international in character). *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

<sup>67</sup> One of the authors of the amicus brief was a very early promoter of the notion that Common Article 3 should apply to the entire global war against terror/war against al Qaeda. *See* Jinks, *supra* note 59. It is worth noting that Jinks' article proposes the idea that Common Article 3 could apply to the war against al Qaeda from a very different direction than where things are by 2006. Writing in the more immediate aftermath of the 9/11 attacks

(and perhaps to this day), the Brief's legal arguments and approaches merit close attention both as signposting a shift in discourse and as impacting the framing of how law applied in the conflict. The Supreme Court ultimately adopted the most innovative argument of the amici.<sup>68</sup> The amici took what was then a controversial approach to IHL, and presented it as absolutely settled law. In order to reach the desired legal conclusion that Hamdan's military commission trial violated Common Article 3, the Law of War amicus brief made three main arguments. First, Hamdan was captured during an international armed conflict, to which the Third Geneva Convention was applicable. For that reason, he should benefit from Prisoner of War status, even if his status is in doubt. So far, classic IHL. Second,

---

(and the kind of debates that characterized Part I), Jinks states:

[T]he "laws of war" provide a widely accepted normative and legal framework within which deep political divisions can be negotiated and reconciled . . . . I argue that the laws of war applicable in non-international armed conflict govern the September 11 attacks and that the attacks violated these laws . . . . Furthermore, I maintain that the substantive provisions of Common Article 3 of the Geneva Conventions bind the parties to this conflict and that violations of these rules constitute "war crimes."

*Id.* at 6, 9. My sense is that in 2003, Jinks saw the argument of Common Article 3 applying to the war with al Qaeda as having four principle functions: (1) it was a framework that could capture the attacks *by al Qaeda*; (2) it could provide a framework within which al Qaeda operatives and fighters could be brought to justice as war criminals; (3) it could provide a lens through which to understand detention of those captured in Afghanistan; and (4) it would provide a legitimate politico-normative basis on which the United States could engage international allies, moving away from the more offensive and bellicose "war on terror." It does not appear that he had in mind a global regulatory framework that would *a priori* recognize any exertion of lethal force by the United States as falling within an already existing Common Article 3 NIAC.

<sup>68</sup> Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Note that the decision even repeats a faulty pincite used by the amici. This issue is the subject of a robust debate on the *Opinio Juris* blog between Marko Milanovic and the authors of the brief (Goodman, Jinks, Slaughter). The point, of course, is not whether they cited the correct page of the Commentary in their brief (which was then incorrectly re-cited by the Court), but rather whether the substance of their argument comports with the vast bulk of existing IHL scholarship or jurisprudence up until that point. As Milanovic points out, it is of course *possible* (and as we see, it indeed becomes an uncomfortable consensus) to argue that there is such a thing as transnational non-international armed conflict and to adopt the traditional rules of NIAC for this purpose. But it is a questionable IHL (as opposed to human rights law) position to assert that this was always imagined to be part of the field of application of NIAC rules. See Marko Milanovic, *Footnote Filching and Other Unsavory Practices in the U.S. Supreme Court, Part I*, *OPINIO JURIS* (Apr. 30, 2007), <http://opiniojuris.org/2007/04/30/footnote-filching-and-other-unsavory-practices-in-the-us-supreme-court-part-i/>, [<http://www.perma.cc/0UavKvao64F>]; Marko Milanovic, *Footnote Filching and Other Unsavory Practices in the*

Hamdan's military commission was unlawful under IHL (and here the amici depart from traditional understandings of classification) *because* "Common Article 3 applies to trans-territorial non-international armed conflict."<sup>69</sup> Third, even if the government was correct and the war against al Qaeda was an "international armed conflict," Common Article 3 also applied to such a conflict. In putting forward the argument that non-international armed conflicts have always been thought of as including trans-territorial conflicts, the amici help lay the foundation of a claim that will become important under very different circumstances a mere five years later.<sup>70</sup>

In attempting to counter the government's argument that international law effectively applied *nowhere* in its conflict with al Qaeda, the amici took on the position that the law applied *everywhere* in the U.S. conflict with al Qaeda. It is important to note that the brief did not actually

---

*U.S. Supreme Court, Part II*, OPINIO JURIS (May 1, 2007), <http://opiniojuris.org/2007/05/01/footnote-filching-and-other-unsavory-practices-in-the-us-supreme-court-part-ii/>, [<http://www.perma.cc/0HV6zD2E6yN>]; Marko Milanovic, *Footnote Filching and Other Unsavory Practices in the U.S. Supreme Court, Part III*, OPINIO JURIS (May 2, 2007), <http://opiniojuris.org/2007/05/02/footnote-filching-and-other-unsavory-practices-in-the-us-supreme-court-part-iii/>, [<http://www.perma.cc/0tNdG9N15Kx>]. See also Ryan Goodman, Derek Jinks & Anne-Marie Slaughter, *Hamdan, the ICRC Commentary to Protocol II, and Conflict Party Structure: A Reply*, OPINIO JURIS (May 3, 2007), <http://opiniojuris.org/2007/05/03/hamdan-the-icrc-commentary-to-protocol-ii-and-conflict-party-structure-a-reply/>, [[www.perma.cc/0DmhSHUmRYk](http://www.perma.cc/0DmhSHUmRYk)]. For Milanovic's response, in which he clarifies that the citation was not his main area of concern, see Marko Milanovic, *Hamdan, the ICRC Commentary to Protocol II, and Conflict Party Structure: A Response*, OPINIO JURIS (May 3, 2007), <http://opiniojuris.org/2007/05/03/hamdan-the-icrc-commentary-to-protocol-ii-and-conflict-party-structure-a-response/>, [[www.perma.cc/0Vi51Y5K4ea](http://www.perma.cc/0Vi51Y5K4ea)]. Milanovic points out:

The brief is naturally a very ably written piece of advocacy. Its arguments were designed to WIN the case (i.e. to garner five votes in the Court), not necessarily to present the BEST possible interpretation of international law. Each of the three principal arguments presented in the brief seems to have been designed to overcome a particular difficulty, but each of them also faced severe obstacles.

Milanovic, *Part II*.

<sup>69</sup> Brief of Professors Ryan Goodman, Derek Jinks & Anne-Marie Slaughter as amicus Curiae Supporting Reversal (Geneva—Applicability), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), at 18.

<sup>70</sup> "International bodies have consistently and unequivocally maintained that Common Article 3 applies to trans-territorial conflicts." *Id.* at 23.

say (and arguably, though it is a source of debate, neither did the Court)<sup>71</sup> that the United States is in a global conflict with al Qaeda, and that global conflict is transnational non-international as a matter of IHL classification. However, the amici did say: “The Government maintains *correctly* that at least since September 11th, an armed conflict exists between the United States and al Qaeda,”<sup>72</sup> and “Common Article 3 applies to armed conflicts that extend across state borders.”<sup>73</sup> With these two sentences we see a nascent scholarly concept in IHL shift to human rights advocacy and then to *the* landmark decision of the U.S. Supreme Court on these issues.<sup>74</sup>

The Court was very careful not to go further than necessary, and there is significant debate as to whether the decision was indeed a clear classification of the conflict with al Qaeda as a Common Article 3 NIAC in IHL terms. It may be that the Court conceived of the application of Common Article 3, as was arguably framed by the amici, as merely a way to determine core rights applicable to all detainees, and as providing a clear and practical framework for individuals held at Guantánamo and captured around the world. The decision was hailed as a tremendous human rights

---

<sup>71</sup> My sense is that the Court’s opinion on the IHL element to the case is far narrower than it has been read. Essentially, the Court is saying that there is a war and that the individuals in Guantánamo have Common Article 3 protection. One of the downsides of moving from IHL to IHRL lawyering, however, is that it may well be that the Court failed to understand properly that this is now how IHL works.

<sup>72</sup> Brief of Goodman, Jinks & Slaughter, *supra* note 69, at 18 (emphasis added).

<sup>73</sup> *Id.* at 18.

<sup>74</sup> In the following form:

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being “international in scope” does not qualify as a “conflict not of an international character.” That reasoning is erroneous. The term “conflict not of an international character” is used here in contradistinction to a conflict between nations.

*Hamdan*, 548 U.S. at 630.

victory and a check on the President's claim to unitary power.<sup>75</sup> And it was, in those senses.

The decision came to stand for the idea that the U.S. was bound to apply international law.<sup>76</sup> Yet it did so at a great potential cost, for the

---

<sup>75</sup> One account of the euphoria immediately following the decision states:

The decision was such a sweeping and categorical defeat for the Bush administration that it left human rights lawyers who have pressed this and other cases on behalf of Guantánamo detainees almost speechless with surprise and delight, using words like “fantastic,” “amazing,” “remarkable.” Michael Ratner, president of the Center for Constitutional Rights, a public interest law firm in New York that represents hundreds of detainees, said, “It doesn’t get any better.”

Both overseas and in the United States, critics of the administration's detention policies praised the decision and urged President Bush to take it as an occasion to shut down the Guantánamo prison camp. “The ruling destroys one of the key pillars of the Guantánamo system,” said Gerald Staberock, a director of the International Commission of Jurists in Geneva. He added: “Guantánamo was built on the idea that prisoners there have limited rights. There is no longer that legal black hole.”

Linda Greenhouse, *Supreme Court Blocks Guantánamo Tribunals*, N.Y. TIMES (June 29, 2006), [http://www.nytimes.com/2006/06/29/washington/29cnd-scotus.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/06/29/washington/29cnd-scotus.html?pagewanted=all&_r=0), [http://www.perma.cc/0rEWsPLveTQ]. Providing a reading of the decision that would later be seen much more expansively, Greenhouse continues, “Perhaps most significantly, in ruling that Common Article 3 of the Geneva Conventions applies to the Guantánamo detainees, the court rejected the administration's view that the article does not cover followers of al Qaeda.” *Id.*

<sup>76</sup> It is also perhaps the case that *Hamdan* marked, for the legal profession as a whole, the sense that the Court's decision had somehow redeemed lawyering. The sense that events were speeding over a cliff (with law and lawyering on board) was abated by Justice Stevens' strong words, “Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless.” *Hamdan*, 548 U.S. at 635. *Hamdan* may have given a sense of closure to what many lawyers felt was a dark period in American law in general. As Jeremy Waldron asked:

How did this happen? How did our profession end up in a situation in which bright lawyers and law professors are described by their peers as war criminals, complicit in war crimes, or in conspiracy to violate the laws of armed conflict, and where their colleagues must rebut these characterizations? How did it happen that we had to begin drawing distinctions of this kind among our friends?

Jeremy Waldron, *The Rule of International Law*, 30 HARV. J. L. & PUB. POL'Y 16, 28 (2006–2007).

decision seemed to accept that the U.S. was in a potentially global war against al Qaeda. In IHL terms, *Hamdan* provides the imprimatur of the highest court in the land to extending Common Article 3 beyond Afghanistan to the world—and with Common Article 3, as with all applications of IHL, comes not only a set of restraints on how states must treat people in their power but also a set of rights for states to kill lawfully.

#### *E. Summary*

By this point in our story, for IHL lawyers working in the U.S., the notion that “humanitarian law is basically fine” no longer holds, especially regarding the war on terror. Insisting on the status quo, unchanged by the advent of global terrorism, began to seem like it had real costs. While the field was able to fend off efforts to reopen the Geneva Conventions, redraft the law, or create new positive law to address war against transnational terrorist organizations, U.S.-based IHL elites made smaller, less obvious moves to accommodate the U.S. government’s legal position in this phase. In order to try to impose regulation on a state that refused to acknowledge any known legal framework, certain IHL lawyers sought to stretch the rules to encompass the types of capture and detention tactics employed by the United States, as well as to try to provide a classification of conflict that neither over- nor under-extended IHL in terms of its general applicability. In order to demonstrate that IHL could “handle” the war on terror, the law must at the very least have been re-articulated to cover detainees of various nationalities being flown to a camp in Cuba. There was a sense that if IHL lawyers could just bend on giving the Administration the terrorists, the rest of the law and its forward progression would not break.

For U.S.-based human rights lawyers, we end on a (relative) high note. They were able to use successfully human rights law (here mainly as habeas corpus) and aspects of IHL—after five long years—to bring binding rules to bear on the President during wartime. Incorporating elements of substantive IHL into human rights strategies and advocacy approaches, they were in a position to open up a host of new claims against the government through U.S. courts. Influenced, but not bound, by debates that began in IHL, human rights lawyers had convinced the highest court in the land that international law applies to the (now globally conceived) war on terror.

By the end of this phase, the firmament of IHL had been loosened in a few ways that may not have seemed particularly significant at that time. First, the notion of transnational non-international armed conflict against a non-state actor moved in warp speed from an idea floating in several academic papers to a decision of the Supreme Court and, by the end of this phase, an uneasy and somewhat vague consensus among certain influential American IHL lawyers. There were indications that this was a highly uncomfortable conclusion for many within the discipline of IHL, but they may well have had the sense (and it was perhaps a well-founded one) that this was the best opportunity to ensure that the U.S. would agree to at least *some* clear baseline of rules that would be applicable in Iraq and Afghanistan.

The aforementioned compromise served to do away with the early Bush Administration's claim that the global war on terror was an international armed conflict that did not fall within known rules of IHL.

### III. 2006–2009: Distinction and Direct Participation in Hostilities

After *Hamdan*, the ground beneath both disciplines shifted. Most IHL lawyers harbored deep concerns about the classification of the war against al Qaeda as a global non-international armed conflict to which Common Article 3 applied, but at least there was no longer a need to convince the Administration that IHL mattered *at all*. For human rights lawyers, *Hamdan* and related cases (notably *Rasul*<sup>77</sup> and *Hamdi*<sup>78</sup>) opened the door to litigating the contours of the Administration's approach to detention, treatment, access to justice, and applicable law, in an attempt to secure sufficient safeguards and due process for all detainees.

Dilemmas relating to the conduct of hostilities rose to the top of the IHL agenda, largely due to trends in Afghanistan and Iraq. In Afghanistan, there was a turn from reconstruction and development to a brutal Taliban resurgence. Massive suicide attacks against civilians began to occur for the

---

<sup>77</sup> *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the federal habeas corpus statute provides federal courts with jurisdiction to hear habeas corpus petitions brought by or on behalf of individuals detained at Guantánamo).

<sup>78</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that while the AUMF permits the President to detain U.S. citizens as enemy combatants, due process considerations permit Hamdi to challenge his classification as an enemy combatant in federal court).

first time in that nation's long history of warfare. In Iraq, Baathist and Fedayeen insurgent groups splintered into dozens of armed factions, including a powerful al Qaeda faction headed by Abu Musab al-Zarqawi. As U.S. and allied forces faced the task of conducting a massive conventional ground war within the rubric of a "multinational" NIAC, significant questions arose as to how the framework of NIAC would provide a regulatory regime for detention operations, both in terms of grounds for detention and in terms of the process and protections that must legally be afforded to detainees. At this stage, the PoW debate on newly-captured detainees was all but concluded, given that by this point everyone seemed to accept that there was no PoW status available in either Afghanistan or Iraq for insurgents and other security detainees.

#### *A. U.S. Government*

Facing multiple military fronts, legal challenges domestically, as well as a change in Administrations, the government's position was more varied and slightly more tentative across this phase. In general, however, the trend of asserting executive power and discretion over the war on terror continued, as did the overall global armed conflict approach. As the Obama Administration came to power, it attempted to signal a commitment to international law and to indicate clear distinctions from the Bush Administration while also maintaining as much flexibility and permissiveness within the rules as possible.<sup>79</sup>

---

<sup>79</sup> Part of the back-story to legal debates during this phase relates to key developments in Israel. While outside the scope of our inquiry, the 2006 Lebanon war (which provided an opportunity to test out theories of transnational NIAC in practice), the December 2006 so-called *Targeted Killing* decision of the Israeli Supreme Court, and the 2008–2009 war in Gaza (Operation Cast Lead) served to inform a number of the key dilemmas in IHL and IHRL throughout this time. The Israeli Supreme Court decision, which has received tremendous attention in scholarship (and which has perhaps been seen as saying far more about situations outside the Israeli-Palestinian conflict than the judges or litigators intended), dealt with the issue of direct participation in hostilities more than any judicial body had at that time. See HCJ 769/02 Public Committee against Torture in Israel et al. v. Government of Israel et al. [13 Dec. 2006] (Isr.), available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/A34/02007690.A34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf). In addition, the Israeli Supreme Court provides that the state is responsible for carrying out a very detailed analysis before and after such attacks, including a requirement to capture if at all possible. For more on the Supreme Court decision, see Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT'L REV. RED CROSS 373 (2007).

The government's key positions and arguments during this time may be summarized as follows:

- The new version of the Military Commissions Act and the Detainee Treatment Act attempt to resolve some of the constitutional flaws of the laws at issue in the detainee cases, providing some basic protections for detainees, yet still far away from both Uniform Code of Military Justice and criminal due process baselines.<sup>80</sup>
- The term “enemy combatant” is used less frequently, and abandoned by mid to late 2009.<sup>81</sup>
- The Authorization for the Use of Military Force (“AUMF”)—expanded, restricted, enhanced, or unaffected by (depending on who is speaking and at what point) IHL—is the sole and sufficient basis for legal authority to detain in the war against al Qaeda.<sup>82</sup>
- Detainees in the Guantánamo Bay detention center should not, despite the Supreme Court decision in *Hamdan*, have access to habeas corpus review, nor should they be able to access domestic courts or criminal law in order to challenge their detention.<sup>83</sup>

---

<sup>80</sup> See generally *Hamdan*, 548 U.S. 557 (holding that the military commissions established by President Bush did not comply with the Uniform Code of Military Justice or IHL).

<sup>81</sup> The term was never meaningful as a matter of IHL (it simply means a combatant who fights for enemy forces) but was for some time utilized as a designation for people, including U.S. citizens, who were placed under the authority of the Department of Defense for detention purposes (either within the United States or in Guantánamo). See ASIL Speech, *supra* note 2 (explaining that the United States has “based our authority to detain not on conclusory labels, like ‘enemy combatant,’ but on whether the factual record in the particular case meets the legal standard”).

<sup>82</sup> *Id.* (explaining that, “as a matter of *domestic law*, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President’s Article II authority as Commander-in-Chief,” as was claimed by the previous Administration, but rather “on legislative authority expressly granted to the President by Congress in the 2001 AUMF”) (emphasis in original). Furthermore, Koh explains that the Administration interprets the scope of its detention authority “on authority authorized by Congress in the AUMF *as informed by the laws of war.*” *Id.* (emphasis in original).

<sup>83</sup> See, e.g., Neil Lewis & Kate Zernike, *Measures Seek to Restrict Detainees’ Access to Courts*, N.Y. TIMES (Sept. 21, 2006), available at [http://www.nytimes.com/2006/09/21/washington/21habeas.html?hp&ex=1158811200&en=42d736eddb2f98cb&ei=5094&partner=homepage&\\_r=0](http://www.nytimes.com/2006/09/21/washington/21habeas.html?hp&ex=1158811200&en=42d736eddb2f98cb&ei=5094&partner=homepage&_r=0), [<http://perma.law.harvard.edu/0GaJaPAcUTo>] (describing efforts by the Bush Administration and Republicans in Congress to prevent federal courts from hearing habeas corpus challenges from Guantánamo detainees and other foreigners held abroad).

- The basis for the detention of civilians in the wars in Iraq and Afghanistan is legally framed by *analogy* to international armed conflict,<sup>84</sup> in which protected persons can be interned “if the security of the Detaining Power makes it absolutely necessary.”<sup>85</sup>
- In 2009, it is announced that the term “global war on terror” will no longer be utilized by the Administration.<sup>86</sup> It is unclear at the time of this announcement whether this has any legal implications or whether this will alter the approach of the government vis-à-vis the key legal and practical debates of the time.<sup>87</sup>
- An overly narrow approach to the notion of civilian direct participation in hostilities, in either IAC or NIAC, is not acceptable to the United States and is not practical for states fighting complex wars around the world.<sup>88</sup>

### B. International Humanitarian Law and Lawyering

During this period, perhaps unlike the preceding two, IHL lawyers were required to address how their body of law regulated its area of core concern and highest relevance: the conduct of hostilities and treatment of

---

<sup>84</sup> Brief of Respondents at 1, *In Re Guantánamo Bay Detainee Litigation*, No. 08-442 (D.D.C. Mar. 13, 2009) (emphasizing that “[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized for the current armed conflict”).

<sup>85</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

<sup>86</sup> Scott Wilson & Al Kamen, ‘*Global War on Terror*’ Is Given New Name, WASH. POST (Mar. 25, 2009), [http://articles.washingtonpost.com/2009-03-25/politics/36918330\\_1\\_congressional-testimony-obama-administration-memo](http://articles.washingtonpost.com/2009-03-25/politics/36918330_1_congressional-testimony-obama-administration-memo), [http://perma.law.harvard.edu/0W5xhhVpURB].

<sup>87</sup> For instance, see Ryan Goodman, *Flip Flops: The Conflict with Al Qaeda is (Not) a War*, JUST SECURITY (Sept. 23, 2013), available at <http://justsecurity.org/2013/09/23/flip-flops-conflict-al-qaeda-not-war/>, [http://perma.law.harvard.edu/0NLRU4ro1TE] (explaining that, over time, the answer to the question of whether the United States is at war with al Qaeda has depended upon on the various interests at stake).

<sup>88</sup> See Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a), 120 Stat. 2600, 2601 (codified at 10 U.S.C. 948(a)(1)(A) (2006)) (defining one who directly participates in hostilities, or an “unlawful enemy combatant,” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)”). *But see* Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2657-58 (2005) (finding that “the President’s notion of ‘enemy combatants’ in [the global war on terror] exceeds the scope of LOAC [the law of armed conflict]”).

civilians in armed conflict, as traditionally understood. At this point, there was a rapid demand for scholarship and practical advising on how the rather thin rulebook of NIAC could be operationalized for major theaters of fighting and detention.

Two developments bear emphasis. First, the consensus that emerged around classification of Afghanistan and Iraq as NIACs, despite tremendous international involvement and control, profoundly narrowed the range of binding IHL applicable to the U.S. in each of those conflicts. Second, the notoriously complex question of whether there was any kind of combatancy recognized in NIAC needed to be quickly addressed. Scholars and military practitioners had long discussed that the notion of “direct participation in hostilities” by civilians<sup>89</sup> required further elaboration and understanding. The lack of uniformed, state-led armed forces fighting on behalf of either Iraq or Afghanistan brought the question to the fore. To put it another way, it was one thing to refer to the war against al Qaeda as a Common Article 3 NIAC in an abstract way meant to determine treatment of detainees brought into U.S. custody. It was another thing to apply the classification of NIAC to major ground wars involving hundreds of thousands of troops from multiple countries operating outside their own territory.<sup>90</sup> For IHL to remain relevant to U.S. decisionmakers in this mode, lawyers and proponents of the law had to be able to present a plausible account of how NIAC rules could be utilized to target, detain, and protect civilians. It was against this backdrop that the IHL debates of this phase took place.

Entire books could—and likely will—be written about the debate over the notion of direct participation in hostilities.<sup>91</sup> In May 2009, the ICRC published the Interpretive Guidance on the Notion of Direct

---

<sup>89</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 [hereinafter Protocol II].

<sup>90</sup> Other states fighting in the coalitions, such as Australia, were party to Protocol II and considered themselves also bound by IHL.

<sup>91</sup> A striking amount of scholarship was created in the direct aftermath of the ICRC process. An entire issue of the New York University Journal of International Law and Politics was dedicated to the issue, and a number of members of the expert group also wrote about their personal views as well as their sense of the key debates in prominent journals. See 42 N.Y.U. J. INT'L L. & POL. 637 (2010).

Participation in Hostilities Under International Humanitarian Law (“Interpretive Guidance”).<sup>92</sup> By this time, the central focus of the study had changed significantly: It had narrowed from detention *and* targeting to focusing solely on lawful targets, and it had expanded from exclusively addressing IAC to both IAC and NIAC.<sup>93</sup>

Focused on the principle of distinction in terms of targeting people, the Interpretive Guidance did not discuss detention bases at all. Nor did it argue that the standard of DPH for targeting would be the same as or satisfy a standard of DPH for detention. Rather, the Interpretive Guidance formulated a fairly classical standard for the principle of distinction for IAC and a more innovative one for NIAC. In IAC, anyone who was not a member of the armed forces of a party to the conflict (or a member of a *levée en masse*), and in NIAC, anyone who was not a “member of State armed forces or organized armed groups of a party to the conflict,” was a civilian entitled to protection against direct attack unless and for such time as he took a direct part in hostilities. The Interpretive Guidance defined organized armed groups as consisting “only of individuals whose continuous function it is to take a direct part in hostilities (continuous combat function or “CCF”).”<sup>94</sup> The ICRC enumerated three “constitutive elements of direct participation in hostilities,” which essentially required

---

<sup>92</sup> See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991 (2008), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> [hereinafter ICRC INTERPRETIVE GUIDANCE].

<sup>93</sup> By the time of publication (and arguably for much of the expert process), the key goals of the Interpretive Guidance were described as twofold by a prominent member of the Expert Group:

First, by clarifying the “black letter” legal text associated with the question of who can lawfully be killed in warfare, the analysis could put to an end the longstanding debates surrounding targeting and the bifurcated categorization of participants in hostilities (as lawful “combatants” or “civilians”) set out in the Additional Protocols. Second, the Interpretive Guidance presented an opportunity to comprehensively address the question of targeting in non-international armed conflicts.

Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 643 (2010).

<sup>94</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 92, at 995.

that the specific act must have a certain threshold of harm, a direct causation to that harm, and a belligerent nexus.

Despite the political environment surrounding the Interpretive Guidance drafting process, and the ongoing public debate over terms like “unlawful enemy combatant,” a general consensus emerged around the concept of “functional membership” in an organized armed group. Some experts voiced strong concerns that this concept would create a third category of status outside of civilians and combatants. The most contentious issues of the Interpretive Guidance, and those that finally broke the group, included the requirement of a belligerent nexus with a party to the conflict and the restraints on the kind and degree of force that could be used against someone not entitled to protection against direct attack.

It is still too early to determine how states will react to the Interpretive Guidance, and whether and to what extent it will be incorporated into domestic military manuals and, ultimately, into tailored rules of engagement. However, it is clear that the process had the impact of drawing and focusing tremendous scholarly and practitioner interest on the question of the definition of a civilian, and the determination of what constitutes membership and function in an organized armed group, such that a member could be targeted in the same way as a combatant under IHL applicable to IAC. In putting before the expert group the contested question of whether IHL maintained a bifurcated approach to status,<sup>95</sup> IHL lawyers were in a position to air a range of views on this question. It is possible that, while ultimately articulating what many on the “military” side of the profession saw as far too narrow and restrictive a model of DPH, the Interpretive Guidance *process* provided a high-level forum for, and possibly legitimized, a series of alternative conceptions of direct participation. The process opened up questions of who is a “real” civilian, and of the continued relevance of blanket status determinations for targeting (as

---

<sup>95</sup> Meaning that all individuals on the battlefield are either combatants or civilians.

opposed to a functional analysis of every individual's contribution to the enemy's war effort).<sup>96</sup>

### C. International Human Rights Law and Lawyering

The U.S. Supreme Court, in the cases following *Hamdan*, indicated that it expected the lower courts to determine the substantive boundaries imposed on the government in habeas trials<sup>97</sup> and to provide a more detailed analysis of the legality of various Administration approaches to detention.<sup>98</sup>

---

<sup>96</sup> See, e.g., Raul Pete Pedrozo, Panel Remarks at the U.S. Naval War College International Law Department Conference, 2010, *The Changing Character of Weapon Systems: Unmanned Systems/Unmanned Vehicles*, available at [http://www.usnwc.edu/Research---Gaming/International-Law/Past-Events-\(1\)/International-Law-Conference/ILD2010.aspx](http://www.usnwc.edu/Research---Gaming/International-Law/Past-Events-(1)/International-Law-Conference/ILD2010.aspx), [<http://perma.cc/NKX8-2WS9>]. For a functional approach to targeting soldiers, see Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115 (2010).

<sup>97</sup> For an insightful analysis by one of the lead attorneys in *Rasul v. Bush* of the U.S. Supreme Court's approach to process and substance in the "war on terror" cases, and the ways in which the Court avoided entering into key questions about applicable law, authority to detain, and authority to continue detention, see Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008).

<sup>98</sup> One judge presents a sobering view of the task presented to courts during this period:

The Supreme Court in *Boumediene* and *Hamdi* charged this court and others with the unprecedented task of developing rules to review the propriety of military actions during a time of war, relying on common law tools. We are fortunate this case does not require us to demarcate the law's full substantive and procedural dimensions. But as other more difficult cases arise, it is important to ask whether a court-driven process is best suited to protecting both the rights of petitioners and the safety of our nation. The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple. None of those factors exist in the Guantánamo context. The number of Guantánamo detainees is limited and the circumstances of their confinement are unique. The petitions they file, as the *Boumediene* Court counseled, are funneled through one federal district court and one appellate court. See *Boumediene v. Bush*, 128 S. Ct. at 2276. And, in the midst of an ongoing war, time to entertain a process of literal trial and error is not a luxury we have.

*Al-Bihani v. Obama*, 590 F.3d 866, 881-82 (D.C. Cir. 2010) (Brown, J., concurring). She

After *Boumediene*,<sup>99</sup> as a glut of cases reached the courts, contested IHL concepts began to appear in human rights lawyering and argumentation. This was an important moment with significant potential consequences. The notion of direct participation in hostilities took on a different life when channeled into human rights litigation by way of constitutional law arguments for individual clients. This phase presented a tapestry of complex and interwoven district court cases. A number of prominent human rights and humanitarian law academics wrote competing and often contradictory amicus briefs for detainees. The Supreme Court provided confusing direction, and scholars produced voluminous analysis of the jurisprudence.

The goal of this Section is to describe the overall trends in the legal debates, looking at what the concept of DPH did for human rights argumentation and how it was used by amici and by justices in some of the decisions. In the context of a vaguely defined Common Article 3 NIAC against al Qaeda, what were the implications for the kind of law that would apply? This Section looks at how the latest innovations in IHL were transposed to human rights litigation.

While the ICRC and most IHL lawyers would deny that there is any such thing as a standard of DPH for detention, that is precisely the issue that lawyers, amici experts, and courts faced during this period. As “law of war concepts” were brought to bear in detainees’ cases, the concept of DPH moved from a purely IHL *conduct of hostilities* notion to a measure of whether the government had the authority to *detain* (or continue to detain). This is true despite the fact that IHL was not a body of law crafted for

---

concludes:

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.

*Id.* at 882.

<sup>99</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that foreign nationals detained at Guantánamo had a constitutional right to habeas review of their continued detention, and that provisions denying habeas review to these individuals, as contained in the 2006 Military Commissions Act, were unconstitutional).

individual standing and provided no means for individuals to bring claims against state parties to armed conflict.

The NIAC detention regime did not provide a regulatory model for major detention operations or the management of individual detainee cases. As such, all those engaged in these cases (the Administration, the military, lawyers for the detainees, and judges) relied on some combination of IAC, NIAC, and IHRL, including domestic criminal law, to come up with an evolving kaleidoscopic system. DPH for *targeting* implicates the juridical space of Iraq or Afghanistan, providing a general set of legal interpretations that will inform how commanders and their legal advisers determine targeting decisions, attack strategies, and air campaigns. DPH for *detention* imagines Guantánamo as its key space of argumentation. The archetypal detainee in most of the cases in this period was captured well before the litigation (many in Afghanistan or the U.S. in 2001–2002) and had been held in Guantánamo for a significant period of time. Therefore, when talking about direct participation in this mode, there was little concern that these individuals were going to be *targeted* in Chicago or Peoria or Cuba.

There were several main arguments for the human rights lawyers and the amici during this period. They included: the government had no authority to detain these individuals in the first place; even if it did have that authority initially, it no longer had any basis to continue to detain them; the law of war did not provide grounds for their detention; and the laws of war are the only legal basis on which the AUMF can be seen to allow for detention. Therefore, the courts must find against the government and demand increased process, access to better justice, or release.

By this phase, whether or not the *Hamdan* Court wished to indicate that the United States was in fact engaged in global armed conflict, courts seemed to have applied that decision as such.<sup>100</sup> So, given that the government relied on the AUMF as the authority to detain individuals captured during the war on terror, the question became how and to what extent IHL could be read into or could be read to supplement the AUMF in order to determine both the standard for authority to detain and the basis for

---

<sup>100</sup> According to the *Hamdan* Court, “To begin with, the U.S. conflict with al Qaeda is a non-international armed conflict; hence, Article 4 and Additional Protocol I do not apply.” *Hamdan v. Obama*, 616 F. Supp. 2d 63, 73 (D.D.C. 2009).

continued detention. This is where the very fresh debate over DPH came to be utilized. A review of legal proceedings from this period reveals four arguments relating to DPH. First, there was no basis in NIAC to detain other than domestic criminal law. Second, there *was* authority to detain under NIAC, but this authority stemmed only from DPH (the contours of which seem to diverge by various degrees from that presented by the Interpretive Guidance). This meant that simple membership in an armed group was not enough. Rather, the government must actually demonstrate that the detainee was participating in hostilities. Third, there *was* authority to detain under NIAC, based on the very formal Interpretive Guidance direct targeting standard of performing a “continuous combat function” in an organized armed group. Fourth, in order to continue detaining a person captured in a NIAC, the government must demonstrate that he was likely to rejoin the fight, again using standards derived from DPH.

For the amici and lawyers in the post-*Hamdan/Boumediene* cases, a hard distinction between IAC and NIAC for detention purposes became critical to their arguments and to their ultimate success.<sup>101</sup> This goes in the opposite direction of a contemporaneous trend in IHL, which emphasized that the rules were functionally the same, *including as to detention*, in order to extend the most protection to those that were detained *in theater*.<sup>102</sup>

The arguments used by human rights lawyers produced strange outcomes overall. As IHL went to court in human rights mode, it was clear that complex debates over DPH influenced the detainee cases and the arguments being put before courts by international law experts. However, because these cases all focused on authority to detain in the past and grounds for continued detention in the present, they took DPH concepts and translated them from questions of status and targetability to questions of conduct, membership, and “guilt” for purposes of detention. Given that the question of DPH for purposes of detention was abandoned at the very early stages of the ICRC process, this type of argumentation and brief drafting

---

<sup>101</sup> See, e.g., Brief for Amici Curiae Experts in the Law of War, at 8, *Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (No. 08-368) (stating that the “two types of armed conflict differ in important respects”).

<sup>102</sup> The Law of War experts’ amici brief in *Al-Marri* states: “Unlike international armed conflicts, non-international armed conflicts are not subject to extensive regulation under the Geneva Conventions. Only Common Article 3 applies by its terms to these conflicts.” *Id.* at 10.

lead not only to some bizarre interpretations of settled IHL (like the notion that there are no grounds in IHL to detain combatants in an IAC), but also to confusing conclusions regarding whether a very restrictive or a very permissive DPH would be a basis for detention. While this may be fascinating as a matter of federal courts jurisprudence, given that these decisions and arguments were occurring during several ongoing armed conflicts, one might have wondered at this point how all this uncertainty would impact commanders and JAGs on the battlefield.

#### *D. Summary*

As this period drew to a close, it was unclear whether the IHL establishment realized its own worst fear in carrying out the DPH process: that “re-opening” or even debating core rules and concepts of IHL during this politically divisive time would result in diminishing the rules or respect for the plausibility of IHL on the battlefield. The DPH Interpretive Guidance, its consensus having been destroyed in large part due to the article incorporating human rights principles,<sup>103</sup> had an uncertain future, and may well have set the stage for a far broader category of individuals who were targetable on the battlefield. As to detention, IHL lawyering responded pragmatically to the developing situation on the ground (particularly in Afghanistan and Iraq) during this period, by emphasizing the flattening of the wall between IAC and NIAC and by indicating that the concepts and principles applicable to both are very similar while incorporating some elements of human rights law. Human rights lawyers, for their part, took on some of the most nuanced and challenging concepts of IHL in human rights lawyering mode in U.S. courts, litigating for individual war-on-terror detainees. These arguments and debates transformed DPH concepts of targetability into standards for detention (claims for which the DPH standards were arguably not intended), and provided an overall confusing jurisprudence of the significance of the IAC/NIAC distinction in terms of authority to detain and protections owed to detainees.

---

<sup>103</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 92, at 1044.

#### IV. 2009–Early 2013: Targeted Killing

*“Over time, a consensus will likely evolve that targeted killing of suspected terrorists under some circumstances is legal under IHL. If this is the likely evolution of the law, it is all the more important to determine how IHL, assuming it applies, should regulate targeted killing.”*<sup>104</sup>

This brings us to the end of our story. At this point, a major break occurred. After eight difficult, traumatic years, it appeared that light shone once again on international law in the U.S. government. The Administration of Barack Obama began to articulate its positions on the war on terror. From the outset, expectations among international lawyers were high and everything seemed very, very different.

President Obama rang in a “new era of engagement,” where “respecting our values doesn’t make us weaker, it makes us safer and it makes us stronger.”<sup>105</sup> As the President stated in his Nobel Peace Prize address of December 2009, “adhering to . . . international standards, strengthens those who do and isolates those who don’t.”<sup>106</sup> It was perhaps for this reason that many in the IHL and IHRL disciplines, particularly in the U.S., were taken by surprise when the Obama Administration decided during this period to take the fight to al Qaeda: a fight not carried out through detention, rendering, and interrogation, but through Predator drones and Hellfire missiles.<sup>107</sup> This iteration of the war on terror was, in short, about killing.

##### *A. U.S. Government*

There has been, and will continue to be, a tremendous amount of debate regarding to what extent, if at all, the Obama Administration actually rejected or moved away from Bush-era policies regarding the war on terror. In focusing on the legal arguments and rhetorical moves articulated around

---

<sup>104</sup> Radsan & Murphy, *supra* note 7, at 1203.

<sup>105</sup> President Barack Obama, Address to Joint Session of Congress (Feb. 24, 2009), available at <http://www.nytimes.com/2009/02/24/us/politics/24obama-text.html>, [<http://perma.law.harvard.edu/0XAASXj2H8X>].

<sup>106</sup> President Barack Obama, Nobel Peace Prize Address: A Just and Lasting Peace (Dec. 10, 2009), available at [http://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama-lecture\\_en.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html), [<http://perma.law.harvard.edu/0ZDjsbM5E9i>].

<sup>107</sup> This theme introduces yet another large genre of fast-produced scholarly literature.

the issues of concern to our inquiry, the change in tone and approach is certainly striking. There are a number of positions, decisions, and arguments that typify the early Obama Administration approach to the war on terror:

- This Administration perceives itself as very different from its predecessor. It considers the lawfulness of its actions to be paramount. In terms of rhetorical framing, the U.S. government officially rejected the term “global war on terror.”<sup>108</sup> Later articulations of the conflict seemed to move away from this term, and Obama stated in May 2009: “We are indeed at war with al Qaeda and its affiliates.”<sup>109</sup> The Administration articulated for the first time the concept of the “Law of 9/11.”<sup>110</sup>
- As to individuals held at Guantánamo and as to domestic courts (and presumably for individuals captured pursuant to the war on terror/war against al Qaeda), the Administration no longer purportedly based its authority (solely) on executive authority or the Commander-in-Chief authority of the President.<sup>111</sup> Indeed, it was “not asserting an unlimited detention authority.”<sup>112</sup> Rather, it now based that authority on the AUMF *informed by the principles of the laws of war.*<sup>113</sup>

---

<sup>108</sup> In a memorandum circulated to Defense Department staff, the Obama Administration first seems to favor the term “overseas contingency operations.” Oliver Berkemen, *Obama Administration Says Goodbye to 'War on Terror,'* THE GUARDIAN (Mar. 25, 2009), <http://www.theguardian.com/world/2009/mar/25/obama-war-terror-overseas-contingency-operations>, [<http://perma.cc/6AZV-DPEQ>].

<sup>109</sup> President Barack Obama, Remarks by the President on National Security, National Archives (May 21, 2009) *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/), [<http://perma.law.harvard.edu/0XD2AozJa5H>].

<sup>110</sup> ASIL Speech, *supra* note 2; *see also* Harold Koh, Powerpoint for Keynote Address at the U.S. Naval War College International Law Department: International Law and Armed Conflict in the Obama Administration (June 22, 2011), *available at* <http://www.usnwc.edu/getattachment/f53eec9c-1e22-48bb-8fb2-85f6f70b9c9b/>, [<http://perma.law.harvard.edu/0JyvFk45HL/>] [hereinafter NWC PPT].

<sup>111</sup> ASIL Speech, *supra* note 2.

<sup>112</sup> *Id.*

<sup>113</sup> The Obama Administration further states that “[t]he laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law.” Respondent’s Memorandum at 1, *In Re Guantánamo Bay Detainee Litigation*, No. 08-442 (D.D.C. March 13, 2009).

- The Administration explicitly recognized the armed conflict<sup>114</sup> with al Qaeda as a NIAC.<sup>115</sup> However, the Administration stated that the authority to detain is rooted in IAC rules “by analogy.”<sup>116</sup> The Administration based its authority to detain under international law on self-defense and, at least in Afghanistan, on the consent of the territorial state, as well as on a

---

<sup>114</sup> Some have expressed doubts as to whether the Obama Administration actually sees the conflict with al Qaeda as a global armed conflict, or an actual “armed conflict” (in IHL terms) as opposed to a “war” (in rhetorical or lay terms). A close reading of all official Administration statements on the matter does not bear out this expression of optimistic doubt.

<sup>115</sup> See NWC PPT, *supra* note 110 (stating that “[u]nder domestic law, we rest our detention authority in the NIAC with Al Qaeda on a statute—the 2001 AUMF—as informed by the principles of the laws of war”) (emphasis added). Similar statements by executive branch officials include: David Kris, Address at the Brookings Institution, Law Enforcement as a Counterterrorism Tool (June 11, 2010), available at [http://www.brookings.edu/~media/events/2010/6/11%20law%20enforcement/0611\\_law\\_enforcement\\_kris\\_remarks.pdf](http://www.brookings.edu/~media/events/2010/6/11%20law%20enforcement/0611_law_enforcement_kris_remarks.pdf), [<http://perma.law.harvard.edu/0svbS5pdZWC/>]; Harold Koh, *The Lawfulness of the U.S. Operation Against Osama Bin Laden*, OPINIO JURIS (May 19, 2011), <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>, [<http://perma.law.harvard.edu/0zZRqHT6shw/>]; John O. Brennan, Address at Harvard Law School, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>, [<http://perma.law.harvard.edu/0Usmf4VoGLc/>]; Jeh C. Johnson, Speech to the Heritage Foundation, Washington, DC (Oct. 18, 2011), available at [http://www.lawfareblog.com/wp-content/uploads/2011/10/20111018\\_Jeh-Johnson-Heritage-Speech.pdf](http://www.lawfareblog.com/wp-content/uploads/2011/10/20111018_Jeh-Johnson-Heritage-Speech.pdf); Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, [<http://perma.law.harvard.edu/0JGidNaFy4Q/>]; Stephen W. Preston, Address at Harvard Law School, CIA and the Rule of Law (Apr. 10, 2012), available at <http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912>, [<http://perma.law.harvard.edu/0iuG1VwtPnF/>]; John O. Brennan, Address at the Woodrow Wilson International Center for Scholars, The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), available at <http://www.lawfareblog.com/2012/04/brennanspeech/>, [<http://perma.cc/B7TL-GXSK>].

<sup>116</sup> See Respondent’s Memorandum at 2, *In Re Guantánamo Bay Detainee Litigation*, D.D.C. March 13, 2009, (No. 08-442), stating:

Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict. Accordingly, under the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.

United Nations Security Council resolution authorizing the use of “all necessary measures.”<sup>117</sup> Furthermore, the Obama Administration explicitly tied its approach to detention, which seemed unchanged in terms of operations on the ground in Iraq and Afghanistan, to the ICRC DPH Interpretive Guidance.<sup>118</sup>

- The President explicitly prohibited torture as a tool of interrogation, explicitly rejected the legal reasoning of the “torture memos,” and instructed the CIA to discontinue its use of “black sites.”<sup>119</sup>
- The Obama Administration stated it would no longer utilize the term “enemy combatant,” but would rather take a “facts-based” approach to determining whether individuals have a DPH-style functional membership in al Qaeda and associated forces.<sup>120</sup>

---

In addition, the Obama Administration believes that there is a separate set of NIAC black-letter rules that support authority to detain. *See* NWC PPT, *supra* note 110 (“Common Article 3 and APII recognize—and U.S. Supreme Court recognized in *Hamdi*—detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of armed conflict.”).

<sup>117</sup> ASIL Speech, *supra* note 2.

<sup>118</sup> *Id.* (“While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at ‘functional’ membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).”). *See also* NWC PPT, *supra* note 110.

<sup>119</sup> *See* Exec. Order No.13491, 74 Fed. Reg. 4893 (Jan. 22, 2009) (revoking a 2007 Executive Order on interrogation and applicable rules, prohibiting torture and ill-treatment of detainees, mandating Common Article 3 as a minimum baseline for treatment, and ordering the closure of CIA detention facilities).

<sup>120</sup> The term was officially withdrawn on March 13, 2009, in a Department of Justice filing providing a new standard for the authority to detain individuals in the detention center in Guantánamo Bay, Cuba. In re-articulating detention authority as resting on the AUMF, the Department of Justice stated:

The definition does not rely on the President’s authority as Commander-in-Chief independent of Congress’s specific authorization. It draws on the international laws of war to inform the statutory authority conferred by Congress. It provides that individuals who supported al Qaeda or the Taliban are detainable only if the support was substantial. And it does not employ the phrase “enemy combatant.”

Press Release, Department of Justice, Department of Justice Withdraws “Enemy Combatant” Definition for Guantánamo Detainees (Mar. 13, 2009), *available at* <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>, [<http://perma.cc/M4TT-9RTP>].

- The Administration significantly increased,<sup>121</sup> but did not openly acknowledge, CIA-controlled or CIA-led drone strikes on targets in Afghanistan, Pakistan, Yemen, and Somalia.<sup>122</sup> The relationship and chain-of-command structure between the military and the CIA was kept vague, but many observers suggested that CIA control of the program was critical in order to avoid legal exposure and maintain legal flexibility.<sup>123</sup>
- As to the *jus ad bellum*,<sup>124</sup> the government based its authority to attack<sup>125</sup> targets outside of the armed conflicts in Iraq and Afghanistan on three

---

<sup>121</sup> The numbers are widely disputed, but there is no dispute as to the increase of the program under the Obama Administration. The total numbers of deaths since the Obama Administration began using weaponized drones seems to be between 1,000–3,000, in over 200 attacks. See Editorial, *The C.I.A. and Drone Strikes*, N.Y. TIMES (Aug. 13, 2011), <http://www.nytimes.com/2011/08/14/opinion/sunday/the-cia-and-drone-strikes.html>, [<http://perma.cc/79Z8-EMRD>].

<sup>122</sup> There are claims that there are drone strikes in a number of other countries: “The Obama Administration has vastly expanded the shadow war against terrorists, using the military and the C.I.A. to track down and kill in a dozen countries.” *Id.* On secrecy of the program, see Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES (Aug. 12, 2011), <http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all>, [<http://perma.cc/Y8QR-3ZHG>]; ASIL Speech, *supra* note 2 (“With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly.”).

<sup>123</sup> “By putting the operations under C.I.A. control, they could be carried out as ‘covert action.’” Mark Mazzetti, *C.I.A. Building Base for Strikes in Yemen*, N.Y. TIMES (June 14, 2011), <http://www.nytimes.com/2011/06/15/world/middleeast/15yemen.html>, [<http://perma.cc/R9KH-2FE7>]. *But see* John Dehn, *Was the C.I.A. Director in Charge of the Bin Laden Operation? Apparently so. Does it Matter?*, OPINIO JURIS (May 4, 2011), <http://opiniojuris.org/2011/05/04/was-the-cia-director-in-charge-of-the-bin-laden-operation-apparently-so-does-it-matter/>, [<http://perma.law.harvard.edu/0JAuEpU9LLv>] (stating that if the President is Commander-in-Chief of the armed forces and Chief Executive directing the CIA, then perhaps “whether his operational order passes through a civilian director of the CIA to the military, or whether that order passes through a civilian Secretary of Defense” may not make a difference).

<sup>124</sup> In following these arguments, it is exceptionally difficult to demarcate clear lines between *jus ad bellum* and *jus in bello* claims.

<sup>125</sup> It is important to point out here that, as to pure IHL, the term “targeted killing” is somewhat curious. In an armed conflict, any lawful attack would likely be “targeted,” in the sense that a non-targeted killing would suggest that the party to conflict is not engaging in any distinction. Whatever term one uses to refer to the use of lethal force to cause death in an armed conflict (murder, assassination, attack, killing), as long as it is carried out according to the laws of war, it does not require complex justification or legal acrobatics under IHL. The proliferation of the term suggests the awareness of the use of this type of killing outside the bounds of armed conflict.

concepts.<sup>126</sup> The government has not articulated which of these principles it relied upon or how the three concepts legally interacted.<sup>127</sup> First, the U.S. is engaged in an ongoing non-international armed conflict with al Qaeda, the Taliban, and associated forces around the world, authorized by the AUMF.<sup>128</sup> Second, the U.S. may be operating within a given territorial state, such as Yemen or Pakistan, with that state's consent. That consent may take the form of inviting the U.S. to support that nation in its own preexisting NIAC with a particular purported branch or associated force of al Qaeda or the Taliban.<sup>129</sup> Such a framework tracks the same logic as the multinational/transnational NIACs of Iraq and Afghanistan, where the sovereign territorial states have invited the U.S. to remain on their

---

<sup>126</sup> The arguments here become incredibly complex and difficult to follow. In an effort to avoid analysis or extrapolation, I endeavor to present the legal argumentation for each aspect of targeted killing as clearly as possible. It is, however, an unfortunate (and perhaps telling) feature of the debate by this stage that its contours and implications can only really be followed by the most experienced international lawyers, and even they often become lost in the curious arithmetic of this emerging field of law. There are also indications of significant disagreement within government regarding these arguments. See Charlie Savage, *At White House, Weighing Limits of Terror Fight*, N.Y. TIMES (Sept. 16, 2011), <http://www.nytimes.com/2011/09/16/us/white-house-weighs-limits-of-terror-fight.html?pagewanted=all>, [<http://perma.cc/566W-8CCC>].

<sup>127</sup> I would call this formulation “war in the alternative,” in the sense that it puts forward an explicit claim that the United States is in an armed conflict as such (which would seem to, by itself, provide the grounds for killing carried out in the midst of such an armed conflict), but also presents an alternative ground for the “use of lethal force.” There is a mountain of discussion on these sub-topics, particularly in the international law blogosphere. See, e.g., Kevin Jon Heller, *The DOJ White Paper's Fatal International Law Flaw*, OPINIO JURIS (Feb. 5, 2013), <http://opiniojuris.org/2013/02/05/the-doj-white-papers-fatal-international-law-flaw/>, [<http://perma.cc/Z68D-V9FV>]; Kevin Jon Heller, *The DOJ White Paper's Confused Approach to Imminence and Capture*, OPINIO JURIS (Feb. 5, 2013), <http://opiniojuris.org/2013/02/05/the-doj-white-papers-confused-approach-to-imminence-and-capture/>, [<http://perma.cc/X3MX-DHT6>]; Benjamin Wittes and Susan Hennessey, *Just Calm Down About the DOJ White Paper*, LAWFARE BLOG (Feb. 5, 2013), <http://www.lawfareblog.com/2013/02/just-calm-down-about-that-doj-white-paper/>, [<http://perma.cc/CL2D-GLAP>]; Jens David Ohlin, *Targeted Killings Symposium: Introduction*, OPINIO JURIS (June 4, 2012), <http://opiniojuris.org/2012/06/04/targeted-killings-symposium-introduction/>, [<http://perma.cc/KSH5-KDGZ>].

<sup>128</sup> This functions as a *jus ad bellum* argument in the sense that it suggests that because the United States is engaged in a global NIAC, even a single attack against al Qaeda/the Taliban/associated forces could “activate” IHL rules and initiate a specific instance of that armed conflict.

<sup>129</sup> This argument would hold, therefore, that Pakistan was in a NIAC with the Pakistani Taliban and invited the United States to engage in attacks in support of the government or in a way that would assist the government in its own conflict; or that Yemen was in a NIAC with elements of al Qaeda in the Arabian Peninsula, and invited the United States to enter into its territory in order to support it.

territory. Alternatively, that consent may be given simply to allow the U.S. to intervene on the sovereign territory of the state in order to pursue the U.S.'s armed conflict with al Qaeda, the Taliban, and/or associated forces in that particular instance. This consent need not be public; it need not be officially or formally articulated; it may be construed by silence; and it may indeed be gleaned from lack of objection after the attack has occurred.<sup>130</sup> Third, the U.S. maintains a seemingly separate legal justification for attacks against al Qaeda, the Taliban, and/or associated forces targets in *any country* based on self-defense. Such self-defense would allow the United States to attack if the territorial state is “unable or unwilling” to obviate the threat from terrorists on its territory. Furthermore, a self-defense claim may be legally sound if a state cannot control its own territory, or is a “failed state.”<sup>131</sup> Meanwhile, some American academics began to argue for a theory—reportedly developed

---

<sup>130</sup> There are minimal government statements regarding the legal framework utilized in order to support these contentions. Much of the detailed support for the legality of U.S. targeted killing/global NIAC has come from a small group of scholars writing during this phase. I would classify these scholars as a third category, neither IHL lawyers nor human rights lawyers, but national security lawyers in a particular post-9/11 mold. This field does not see itself as defined by either discipline and displays little dogmatic attention to its texts. National security law may turn to IHL because it is part of the international legal infrastructure around the United States' response to the terrorist attacks, and its primary intellectual and disciplinary commitment is to a broader field that has emerged since 9/11, which encompasses some *mélange* of constitutional law, criminal law, IHL, IHRL-lite, and *jus ad bellum*/Security Council law. It may be that this field one day swallows all of these others in some formal or institutional sense, but for now, while the national security law lawyers may share a great deal with their IHL counterparts, and may even hold similar political commitments, they are kept at arms' length from the heart of the discipline. This is not to suggest that commitment to international law is morally superior to a multi-disciplinary approach to U.S. security interests. However, this small sub-discipline is critical to this last chapter insofar as its members may be more comfortable moving between legal fields, questioning traditionalist approaches to the field of application of the law of armed conflict, and do so with great attention to legal complexity, the rigors of legal scholarship, and reference to multiple fields of international legal literature. *See, e.g.,* Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. OF INT'L HUMANITARIAN L. 3 (2011) (providing a detailed analysis of the legality of targeted killing in Yemen according to all of the categories listed in this Section).

<sup>131</sup> *Id.* at 22.

by Koh<sup>132</sup>—of “elongated imminence” based on “battered spouse syndrome.”<sup>133</sup>

- As to *jus in bello* rules applicable to the geographically unbounded NIAC against al Qaeda, the Taliban, and/or associated forces, and associated targeting operations, including against U.S. citizens, the government “takes great care to adhere to the principles” of distinction and proportionality, as defined in IHL.<sup>134</sup> While the CIA and any military agencies acting under its orders or authority are to act in accordance with IHL “principles” in their targeting, it is not clear whether the CIA can or will be held accountable for any violations of IHL, or whether, particularly when acting in “covert operations,” they would be subject to criminal liability under the Uniform Code of Military Justice or the War Crimes Act.<sup>135</sup>
- In February 2013, an unsigned and undated Department of Justice White Paper on “The Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated

---

<sup>132</sup> Daniel Klaidman, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA ADMINISTRATION* 219–223 (2012).

<sup>133</sup> Imminence can play a role in this discussion either as a *jus ad bellum* concept determining the threshold for activating a state’s right to act in self-defense or as a threshold for the use of lethal force under IHRL. *See, e.g.*, Michael W. Lewis, *Elongated Imminence and Operational Realities*, *OPINIO JURIS* (Jan. 29, 2013), <http://opiniojuris.org/2013/01/29/elongated-imminence-and-operational-realities/>, [<http://perma.cc/G3CT-PLCY>]. The archetypal example of imminence of threat justifying the use of lethal force under IHRL is that of a violent hostage situation where lethal force appears the only option for saving the lives of those held by a hostage-taker. Klaidman argues that Koh’s theory (and this is where it is arguably “elongated” beyond the immediate hostage situation archetype) was that “[i]f a husband demonstrated a consistent pattern of activity before beating his wife, it wasn’t necessary to wait until the husband’s hand was raised before the wife could act in self-defense.” Klaidman, *supra* note 132, at 219.

<sup>134</sup> “In U.S. operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.” ASIL Speech, *supra* note 2.

<sup>135</sup> One prolific former assistant general counsel to the CIA has suggested in numerous publications and testimony before the House of Representatives that the CIA should utilize the office of the Investigator General to provide “internal due process” according to principles of IHL. *See* Afsheen John Radsan, *Loftier Standards for the CIA’s Remote-Control Killing: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on the Judiciary*, William Mitchell College of Law Legal Studies Research Paper 2010–11 (Apr. 28, 2010), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1604745](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604745). *See also* Radsan & Murphy, *supra* note 7, at 1235–37.

Force” publicly surfaced.<sup>136</sup> While the White Paper does not provide the DOJ’s comprehensive legal analysis, it does serve as a sort of “folk international law” primer, conflating concepts, rules, and principles from IHL, IHRL, and *jus ad bellum*. For instance, the White Paper invokes a concept of imminence that appears to be unrecognizable under long-standing IHRL and *jus ad bellum*.<sup>137</sup> It also seems to take an extraordinarily narrow view under international law of the Administration’s obligation to seek the capture of terrorists away from “hot” battlefields before using lethal force.<sup>138</sup> Finally, it argues for territorially unbounded NIAC by way of analogy.<sup>139</sup>

Combined, this remarkably opaque collection of purported international legal bases for the CIA and, perhaps less so, the military to target members of al Qaeda, the Taliban, and associated forces in any country at any time may make some nostalgic for the days when the government simply rejected the applicability of international law to the war on terror. These legal arguments and positions indicate that while the Bush Administration coined and regularly used the term “war on terror,” the Obama Administration much more actively pursues an armed conflict with al Qaeda, the Taliban, and associated forces in a *global context*.<sup>140</sup> That is, it extends the conduct of hostilities, as opposed to detention operations or CIA capture operations, to multiple sites around the world, and explicitly states that it is doing so pursuant to an armed conflict with a terrorist organization and its associates. In doing so, the Obama Administration purportedly expands the scope of the applicability of IHL to any place that the United States targets these individuals, typically with only a passing

---

<sup>136</sup> Department of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force*, White Paper (Nov. 8, 2011), available at <http://www.fas.org/irp/eprint/doj-lethal.pdf>.

<sup>137</sup> *Id.* at 7–8 (explaining that the threat posed by al Qaeda “demands a broader concept of imminence,” one that “must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off disastrous attacks on Americans”).

<sup>138</sup> *Id.* at 8 (finding that capture “would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation”).

<sup>139</sup> *Id.* at 3 (finding that “[a]ny U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities. . . . For example, the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes”).

<sup>140</sup> See, e.g., ASIL Speech, *supra* note 2.

reference to the “sovereignty” of the state on which the terrorist is being targeted.<sup>141</sup> It then states that certain IHL principles are being applied—or at least considered—by a clandestine branch of the government whose accountability to the rules of IHL is unclear.<sup>142</sup>

Whether or not it is meaningfully different, and whether or not Obama Administration officials lament the condition in which they found the country and the government, it is certainly the case that President Obama made the “war against al Qaeda” much more than a rhetorical flourish or a tool that is mainly used to capture individuals abroad and bring them into secretive prisons or Guantánamo. The upshot is that the Obama Administration treats the war against al Qaeda and associated forces much more as a *war* in the sense of actual armed attacks against targets all over the world than did the Bush Administration. While there had been several instances of such treatment during the Bush Administration, perhaps most infamously the 2002 attack in Yemen, the scale and speed of the attacks under President Obama is far greater than anything carried out by his predecessor.

The Obama Administration’s policy shift occurs within an entirely different rhetorical environment and in a context in which this approach—which one could reasonably call “global war”—is articulated through the language of IHL. After the profound dismay felt by many in the legal profession and academia over the legal memoranda provided to President Bush, the Obama Administration appoints some of the country’s finest international lawyers, many of them well known to the IHL and human rights lawyers who have been fighting against the war on terror throughout

---

<sup>141</sup> See President Barack Obama, Address at the National Defense University (May 23, 2013), available at <http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all>, [<http://www.perma.cc/0fa8QKB615q>] (emphasizing that “America cannot take [drone] strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty”).

<sup>142</sup> But see John T. Bennett, *White House Quietly Shifts Armed Drone Program from CIA to DoD*, DEFENSE NEWS (May 24, 2013), <http://www.defensenews.com/article/20130524/DEFREG02/305240010/>, [<http://perma.cc/N648-BFL8>] (citing senior Administration officials and new presidential policy guidance indicating “a preference for the Department of Defense” to conduct drone strikes (emphasis added)).

this story.<sup>143</sup> Indeed, many of the international lawyers who join the Obama Administration have been involved in legal or scholarly efforts to curtail the Bush Administration's pursuit of the global war on terror. In this sense, as we head into the reactions by IHL and IHRL to these positions, there seems to be far more benefit of the doubt granted to this Administration's approach to the conflict.<sup>144</sup>

---

<sup>143</sup> Dean Harold Koh is of course the most notable example, as he was one of the leading proponents of international law and international human rights law in the United States for many years prior to his appointment as Legal Adviser to the Department of State. Other key figures at the State Department held key positions in international law prior to their appointment including Sarah Cleveland, a Professor of international human rights law at Columbia University; William Burke-White, a prominent international law and human rights scholar at the University of Pennsylvania; Anne-Marie Slaughter, Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University and a leading international law scholar (and one of the authors of the *Hamdan* Law of War amicus brief); at the National Security Council: Samantha Power, Director of the Carr Center for Human Rights Policy at the Harvard Kennedy School; at the Pentagon: Rosa Brooks, Director of the Human Rights Institute at Georgetown University Law Center. Many human rights lawyers and humanitarians attended law school with some of these officials, taught in the same departments, had them on their boards, went on human rights missions with them, and asked them for amicus briefs. There is perhaps a much greater willingness to compromise with these specific people in power.

<sup>144</sup> For example, in responding to Koh's remarks, some have presented a seemingly charitable interpretation, suggesting that his legal claims are ambiguous and open to interpretation. There seems to be a sense that despite the very clear statement by Dean Koh that the Obama Administration is treating this as a global armed conflict, and taking that term seriously with regard to actually targeting the enemy in this armed conflict, there could be a different reading of his meaning. *See, e.g.*, Human Rights Institute, Colum. Univ., Background Note for American Society of International Law Annual Meeting, *Targeting Operations with Drone Technology: Humanitarian Law Implications* (Mar. 25, 2011), at 8, available at [http://www.law.columbia.edu/ipimages/Human\\_Rights\\_Institute/BackgroundNoteASILColumbia.pdf](http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf) (“[I]t is not clear whether the Administration would characterize *all* hostilities beyond Afghanistan as part of a singular war. Even if it did, it is unclear whether the Administrations [sic] uses ‘war’ synonymously with the term ‘armed conflict’; thus, the United States may refer to a single ‘war,’ as a rhetorical matter, but regard itself as engaging in multiple armed conflicts.”). Mary Ellen O’Connell addresses

In a strange coda to the arguments and positions taken by the government throughout these debates, a number of officials suggest by the end of this phase that *killing* suspected terrorists has become legally and logistically easier than detaining them. Indeed, many have argued that this is precisely what is happening in various situations around the world—whether in Iraq and Afghanistan, as troop drawdown is contemplated in earnest, or in Somalia,<sup>145</sup> Yemen,<sup>146</sup> and Pakistan<sup>147</sup>—with members of the armed forces and drone operators reportedly finding it easier to kill targets<sup>148</sup> than to take them into U.S. custody.<sup>149</sup>

---

another view that has been aired (that she rejects):

Another interpretation [of] Dean Koh's remarks is that he may have been referring to the U.S. right to resort to self-defense in Afghanistan, and, related to that right, the right to kill or detain al Qaeda or the Taliban members who may be participating remotely by cell phone or computer or who may be preparing to join the fight. Dean Koh mentioned a case from World War II in which the U.S. set out to kill a named individual far from actual hostilities when it attacked the plane carrying Japanese General Yamamoto, a reputed planner of the Pearl Harbor attack.

Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343, 361 (2010).

<sup>145</sup> Jeremy Scahill, *The CIA's Secret Sites in Somalia*, THE NATION (July 12, 2011), <http://www.thenation.com/print/article/161936/cias-secret-sites-somalia>, [<http://perma.cc/P8CS-9NZG>].

<sup>146</sup> Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST (Jan. 27, 2010), [http://articles.washingtonpost.com/2010-01-27/news/36850012\\_1\\_regional-al-qaeda-operations-with-yemeni-troops-cia-list](http://articles.washingtonpost.com/2010-01-27/news/36850012_1_regional-al-qaeda-operations-with-yemeni-troops-cia-list), [<http://www.perma.cc/0uUbkQuqGnZ>].

<sup>147</sup> See generally THE BUREAU OF INVESTIGATIVE JOURNALISM, *Covert Drone War*, <http://www.thebureauinvestigates.com/category/projects/drones>; Jane Perlez & Ismail Khan, *Deadly Drone Strikes by U.S. May Fuel Anger in Pakistan*, N.Y. TIMES (April 22, 2011), <http://www.nytimes.com/2011/04/23/world/asia/23pakistan.html>, [<http://www.perma.cc/07Hp6DH38ZB>].

<sup>148</sup> Whether they are *lawful* targets depends in part on whether IHL applies.

<sup>149</sup> One news account provides, "Killing wanted militants is simply 'easier' than capturing them, said an official, who like most interviewed for this story support the stepped-up program and asked not to be identified. Another official added: 'it is increasingly the preferred option.'" Adam Entous, *Special Report: How the White House Learned to Love the Drone*, REUTERS (May 18, 2010), <http://www.reuters.com/article/2010/05/18/us-pakistan-drones-idUSTRE64H5SL20100518>, [<http://www.perma.cc/04b4cSegqgh>]. Another official reflects this thinking: "Michael Hayden, a former director of the CIA, frames the puzzle this way: 'Have we made detention and interrogation so legally difficult and politically risky that our default option is to kill our adversaries rather than capture and interrogate them?'" David Ignatius, Op-Ed., *Our Default is Killing Terrorists by Drone*

### *B. International Humanitarian Law and Lawyering*

To the extent that the conflict with al Qaeda is indeed a global (non-international) armed conflict—or whatever other term one chooses to apply to this concept, such as “non-geographically strict understanding of the material field of application of IHL” or “transnational non-international armed conflict triggered by a single attack”—one might have expected that the response of IHL lawyers would simply have been to say that this is not armed conflict, and the rules of IHL do not apply. That is, one might have expected a response very similar to that of IHL in the first phase of our story: The targeted killing question looks like a classic case of having to determine whether the situation should fall under war or law enforcement. However, by this stage, the government seems to have embraced this criticism, and rather than reject law enforcement for war (the Bush Administration mode, at least rhetorically), it creates a seamless “Law of 9/11,” which is simultaneously war/not-war. For as long as the rhetorical war on terror manifested itself as a global detention operation, it was easier

---

*Attack. Do You Care?*, WASH. POST (Dec. 2, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/01/AR2010120104458.html>, [<http://www.perma.cc/0c24BZDAMgA>]. Finally, a U.S. Senator states, “‘Over a year after taking office, the Administration has still failed to answer the hard questions about what to do if we have the opportunity to capture and detain a terrorist overseas, which has made our terror-fighters reluctant to capture and left our allies confused.’ . . . ‘If given a choice between killing or capturing, we would probably kill.’” Karen DeYoung & Joby Warrick, *Under Obama, More Targeted Killings than Captures in Counterterrorism Efforts*, WASH. POST (Feb. 14, 2010), [http://articles.washingtonpost.com/2010-02-14/news/36915640\\_1\\_obama-administration-intelligence-officials-saleh-ali-nabhan](http://articles.washingtonpost.com/2010-02-14/news/36915640_1_obama-administration-intelligence-officials-saleh-ali-nabhan), [<http://perma.cc/GM6T-HMFJ>]. See also Dahlia Lithwick, *You Say Torture, I Say Coercive Interrogation*, SLATE (Aug. 1, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/08/you\\_say\\_torture\\_i\\_say\\_coercive\\_interrogation.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/08/you_say_torture_i_say_coercive_interrogation.html), [<http://perma.cc/VFJ2-ENE9>], quoting John Yoo:

If you were really worried about civil liberties, you would be jumping up and down yelling and screaming about targeted drone killings just as much as, if not more than, what I do prefer to call aggressive or coercive interrogation and not torture. Because in drone killings, we are not just putting pressure on people to give us information about where Osama Bin Laden is; we are killing them. We are depriving them of their fundamental human right, which is to be alive. . . . I don't see the civil liberties crowd or the media jumping up and down claiming that we are engaging in massive human rights deprivations even though this Administration has . . . killed way more people using drones than were ever water-boarded by the Bush Administration. I think the figure the CIA guys gave yesterday was three people.

to focus on the interpretive challenges of Iraq and Afghanistan as discrete armed conflicts and to deny that IHL privileges were available to the government. Once the “conflict” took on the classic characteristics of conduct of hostilities outside of Iraq and Afghanistan—planning, targeting, and execution of attacks involving targets that cannot be classified as traditional combatants—it may be far more difficult to avoid implicating IHL as the *jus in bello* at a global level.

As IHL scholars and practitioners take in this unexpected development, they expand and dilute IHL in a number of ways. First, many take the position that ascertaining whether each instance of targeted killing is illegal is a matter solely of *jus ad bellum*. This position essentially holds that the legality of the use of force in the attacks is not at issue for IHL, and instead focuses on whether the attacks may violate the sovereignty of the territorial state or on whether the consent of the territorial state or whether that state is “unable and unwilling” to obviate threats emanating from its territory may be problematic.<sup>150</sup> Others in the field appear to focus not on the lawfulness of the resort to force but on compliance *during* the attacks and with reference to IHL principles, as opposed to binding conduct-of-hostilities rules. In this way, many IHL lawyers can engage the government and each other on technical legal issues of proportionality, distinction, and DPH as to specific operations despite the enormous implications in expanding the battlefield to include any corner of the globe where a senior member of al Qaeda or an associated force may be. Still others focus on the conduct-of-hostilities issues, largely avoiding the question of whether they are raised as “a matter of policy” or as “fundamental principles,” as opposed to law, holding that IHL can be discussed and applied in each attack as a discrete NIAC.

### *C. International Human Rights Law and Lawyering*

Human rights lawyers, when faced with leading members of their profession within the Obama Administration supporting a much more muscular version of the war against al Qaeda, respond in a number of surprising ways given their positions at the outset of the global war on

---

<sup>150</sup> See, e.g., INTERNATIONAL COMMITTEE OF THE RED CROSS, *The Use of Armed Drones Must Comply with Laws* (May 10, 2013), <http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>, [<http://www.perma.cc/0bC7np7FJYY>].

terror. Chiefly, having gained a degree of fluency in IHL concepts over the course of the war on terror debates, many respond to the challenge of CIA-led targeted killing occurring outside Iraq and Afghanistan by pointing to the role that human rights can play in regulating the killing of terrorists.<sup>151</sup> This may be explained by an effort to maintain a dialogue with the

---

<sup>151</sup> Examples of this type of approach include inserting human rights into the discussion in the following ways:

International human rights law permits the use of lethal force outside of zones of armed conflict if it is strictly and directly necessary to save life. In particular, the use of lethal force is lawful if the targeted individual presents an imminent threat to life and less extreme means, such as capture or non-lethal incapacitation, are insufficient to address that threat.

Letter from Kenneth Roth to President Barack Obama (Dec. 7, 2010), *available at* <http://www.hrw.org/en/news/2010/12/07/letter-obama-targeted-killings>, [<http://www.perma.cc/0Das3bVXdq>].

Our position on targeted killing is that its use can be legally justified so long as it is limited to situations involving a combatant on a genuine battlefield *or its equivalent beyond the reach of law enforcement, or in a law enforcement situation when the threat to life is imminent and there is no alternative*. A case could be made that these conditions have at times been met in Yemen—for example, if there is credible evidence that a targeted individual is planning attacks on the US, the threat is imminent, and he or she is in a place where an arrest operation would be impossible. And if such conditions have been met, a case could also be made that drones are one of the best weapons from the point of view of reducing the likelihood of harm to civilians, since they deliver small warheads with precision, and can hover over their targets to observe if civilians are present.

Tom Malinowski, *Human Rights Watch Responds*, LAWFARE BLOG (Oct. 26, 2010), <http://www.lawfareblog.com/2010/10/human-rights-watch-responds/>, [<http://www.perma.cc/071dQxM4ZrK/>] (emphasis added). In the new spirit of agreement between those who might in earlier years have viciously disputed one another's views, a national security law expert responds to Human Rights Watch's position, noting:

This relatively flexible approach to imminence could go a long way toward reducing the importance of determining whether IHL ever applies to a strike occurring in locations geographically-removed from conventional battlefields. It would not eliminate the difference, of course, insofar as the IHL model is understood to convey the authority to target based in status alone irrespective of involvement in particular plots, yet it would at least collapse the difference in an important set of cases.

Robert Chesney, *Malinowski on IHL Away from the Battlefield and on the Meaning of*

government, and a desire to take advantage of the friendlier posture towards international law discourse and concepts by proffering practical ways that law can regulate killing. While some do articulate a clear position that human rights law makes targeted killing illegal, this argument—made almost exclusively by non-Americans—is rarely presented on its own.<sup>152</sup> Indeed, few U.S.-based human rights lawyers suggest that the entire targeted killing program outside Iraq and Afghanistan is illegal and that thus there is no legitimate role that human rights law or human rights discourse can play in regulating the attacks themselves. Instead, often arguing conditionally or in the alternative, human rights advocates present IHL-like arguments about targetability, which focus on whether specific individuals satisfy the criteria for DPH by analogy to a situation of armed conflict, or focus on the need for obtaining additional information from the government

---

*Imminence*, LAWFARE BLOG (Dec. 14, 2010), <http://www.lawfareblog.com/2010/12/malinowski-on-ihl-away-from-the-battlefield-and-on-the-meaning-of-imminence/>, [<http://www.perma.cc/0W4zfgy61iq/>]. Chesney himself carries out an IHRL analysis on the case study of killing Anwar al-Awlaki in Yemen and concludes:

Al-Awlaki . . . can be killed consistent with IHRL so long as the U.S. government does indeed have substantial reason to believe that he will continue to play an operational leadership role in planned attacks against the United States and that he cannot plausibly be incapacitated with sub-lethal means. IHRL in this specific respect produces much the same result as would IHL, thereby reducing the significance of determining which model controls in the first place.

Chesney, *supra* note 130, at 56. To be clear, in all of the statements above, what is being imagined are operations in which the only objective is to kill an individual or group of individuals, not efforts to capture individuals that ultimately result in the imminent need to use lethal force.

<sup>152</sup> Philip Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, A/HRC/14/24/Add.6 (May 28, 2010), *available at* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

before making a final judgment regarding the legality of strikes.<sup>153</sup> In short, for many U.S.-based human rights advocates, a pragmatic assessment of access to power begins to make human rights as war policy look more and more appealing; a blend of vague IHL concepts and human rights standards

---

<sup>153</sup> One report by a human rights organization states:

Many scholars and advocates with divergent views on the substantive debates . . . agree that clarity is warranted . . . . Commentators who agree on the need for clarity have varying policy motivations. For example, many observers appear to agree that greater clarity about U.S. standards is warranted by recent reports of drone strikes against mid- or low-level militants, rather than high-level leaders with known histories . . . many commentators share the concern that the U.S. use of drone technology sets a global precedent, and that a failure to articulate specific legal constraints could, in the near-future, be cited by less law-abiding governments or groups as justification for evading accountability.

HUMAN RIGHTS INSTITUTE, *supra* note 144, at 38. A joint letter from leading human rights organizations calls upon the Administration publicly to disclose key targeted killing standards and criteria; ensure that U.S. lethal force operations abroad comply with international law; enable meaningful congressional oversight and judicial review; and ensure effective investigations, tracking, and response to civilian harm. In asking the Administration to make public information about the targeted killing program, the letter states, “In fact, improved transparency may serve national security by demonstrating the legal bases for targeted killing policies and practices.” AMERICAN CIVIL LIBERTIES UNION et al, STATEMENT OF SHARED CONCERNS REGARDING U.S. DRONE STRIKES AND TARGETED KILLINGS 2 (Apr. 11, 2013), *available at* [http://www.hrw.org/sites/default/files/related\\_material/4-11-13\\_US\\_LetterToPresidentObamaOnTargetedKillings.pdf](http://www.hrw.org/sites/default/files/related_material/4-11-13_US_LetterToPresidentObamaOnTargetedKillings.pdf). Finally, on the issue of international law, the document—rather uncharacteristically for human rights and advocacy organizations—does not appear to make any actual statements about the legality of the Administration’s actions. The document states:

Senior officials have claimed that the administration applies international humanitarian law to its targeted killing program. However, unlike international human rights law, the circumstances under which international humanitarian law applies are narrow and exceptional. There must be an armed conflict: hostilities must be between the United States and a group that is sufficiently organized and must reach a level of intensity that is distinct from sporadic acts of violence. Outside of an armed conflict, where international human rights law applies, the United States can only target an individual if he poses an imminent threat to life and lethal force is the last resort. A key preliminary issue is thus whether or not the United States is using lethal force as part of hostilities in an armed conflict.

*Id.* (internal citations omitted). As I will argue later in this Section, regardless of its legal accuracy, this approach would likely have surprised and disappointed many of the same organizations in 2002.

seems as though it is the only way that these advocates will maintain a meaningful role in the policy discussion.

This approach to law and style of argumentation seem to take the form of seeking out grounds for agreement with the government, jumping over the question of whether the overall framing of the war against al Qaeda is anathema to human rights law and entering into the regulation of the killing itself. The discourse seems both to accept that the Administration's commitment to international law is genuine and to seek to accommodate this commitment by focusing on restraining the *types* and *frequency* of strikes and expanding available public information regarding the hostilities associated with the war against al Qaeda.

#### *D. Stitching the Threads Together*

In the folk international law approach to targeted killing, IHL and international law more generally operate as a set of principles and norms informing the decisions and actions of the government, frequently cited and referenced,<sup>154</sup> yet applied broadly by analogy as “fundamental principles,” used for “internal oversight,” or the subject of “great care.”<sup>155</sup> For international lawyers, this is certainly a drastic shift from the first eight years of this period, where the relevance of law was often questioned by government, and when executive authority served as a rhetorical, practical, and legal shield against any principles-based challenge. Yet, as many have

---

<sup>154</sup> A recent example, likely to be widely cited, states:

The principle that guides all our actions, foreign and domestic—we will uphold the core values that define us as Americans, and that includes adhering to the rule of law. And when I say “all our actions,” that includes covert actions, which we undertake under the authorities provided to us by Congress.

Brennan, Address at Harvard Law School, *supra* note 115.

<sup>155</sup> For examples of this approach, see Harold Koh's remarks at ASIL, *supra* note 2 (noting that “great care is taken to adhere to these principles in both planning and execution” of drone strikes). See also Department of Justice, *supra* note 136, at 6 (noting that, on drone strikes against a U.S. citizen outside an area of “active hostilities,” such an operation would be lawful amongst other conditions “where such an operation would be considered consistent with applicable law of war principles”).

observed,<sup>156</sup> placing each stage of legal argumentation side by side suggests that while the style and rhetoric of the Obama Administration may be far different from its predecessor, the legal and substantive reality of a global (non-international) armed conflict remains largely unchanged.

It now appears that the conflict formerly known as the “Global War on Terror” will continue for some time,<sup>157</sup> and that the use of special forces, drones, and small elite commando units will take the place of massive ground troop commitments in a variety of countries where al Qaeda and its affiliates are active.<sup>158</sup> If international human rights or humanitarian lawyers were therefore to respond to the government today by simply saying, “We refuse to acknowledge that this is armed conflict; we refuse to acknowledge that this is NIAC; and we will not participate in arguing in the alternative,” there is a chance that the state would simply forge ahead in conducting lethal strikes in a variety of sovereign states around the world, covertly and overtly. It may be that to the extent humanitarian lawyers and, increasingly, human rights lawyers are involved in this discussion, they are able to at the very least ensure that minimum standards are applied to operations involving targeting and detention.

However, it does seem clear that whatever international law is doing in this new formulation of global armed conflict, it is certainly outside the boundaries of long-established IHL and IHRL as understood at the outset of our story. The Obama Administration appears to be engaging in conduct that in 2001 would have been seen as a manipulation and instrumentalization of IHL and a co-optation and violation of IHRL. Further, these operations are presented as framed through a confusing admixture of IHL-like language, human rights rhetoric, and conduct-of-hostilities principles. In this mode,

---

<sup>156</sup> See, e.g., Tom Curry, *Obama Continues, Extends some Bush Counterterrorism Policies*, NBC NEWS (June 6, 2013), [http://nbcpolitics.nbcnews.com/\\_news/2013/06/06/18804146-obama-continues-extends-some-bush-terrorism-policies?lite](http://nbcpolitics.nbcnews.com/_news/2013/06/06/18804146-obama-continues-extends-some-bush-terrorism-policies?lite), [<http://www.perma.cc/09fAnRGeRGC/>] (citing a number of prominent legal academics discussing the extent to which President Obama’s policies mark a break or a continuation of President Bush’s approaches to the war on terror).

<sup>157</sup> See Obama, *supra* note 141 (“Now, make no mistake, our nation is still threatened by terrorists. . . . So that’s the current threat—lethal yet less capable al Qaeda affiliates; threats to diplomatic facilities and businesses abroad; homegrown extremists. This is the future of terrorism.”).

<sup>158</sup> *Id.* (noting that future efforts to fight terrorism will be defined “as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten [America]”).

IHL functions not as binding international law regulating the behavior of the armed forces and armed groups in a territorially bounded and externally recognizable armed conflict, but rather as a free-floating and shifting set of principles that provide guidance for how to kill ethically. Unbound from its very narrow field of application, and delinked from the predicate political and factual tests that allow for its operation, this distinct body of international law thereby becomes what could be called “folk international humanitarian law,” a set of concepts spoken and interpreted by a broad range of actors to provide a loose moral restraint on the organized use of lethal force.

I argue in this Section that the compromises, as well as the strategic and tactical professional choices, made over the course of the key debates presented herein played a role in constructing “folk international law.”

### 1. Convergence as Law

The central purpose of the convergence of IHL and IHRL is to increase the protection of individuals in armed conflict. The notion behind the insistence that IHL and IHRL are part of the same discipline suggests that IHL is *part of* the far larger and more broadly applicable legal realm of IHRL. Indeed, the very idea of the “humanization of humanitarian law”<sup>159</sup> is that the cold, brutal balancing of IHL, its perceived deference to the military and the needs of the state is opened up and mitigated by a body of law that protects the individual’s human rights against the state. Yet here the story flips: It is IHRL that seems to become part of IHL. It is IHRL that, by the end of our narrative, seems to be brought into the service of conflict, to act *not* as a powerful check on the brute force of the sovereign, *not* as the voice of the international community against those who wish to prioritize national security over individual liberties, but rather as a *means to regulate the use of lethal violence*. Having argued vociferously that IHRL applies in all situations of armed conflict at all times in order to protect individuals, the argument suddenly turns in the other direction. It becomes possible to say that IHRL can be utilized to allow for one state to invade another state’s territory in order to murder individuals without an attempt to arrest, detain, charge, and try these individuals. What is so striking in this view is how

---

<sup>159</sup> Theodor Meron, Editorial Comment, *Revival of Customary International Humanitarian Law*, 99 AM. J. INT’L L. 817 (2005).

well—if that is the right word—the convergence argument worked, or at least how much work convergence ended up doing. Remarkably, many who wish to justify a far broader and even more aggressive CIA drone program cite convergence as a basis for doing so.<sup>160</sup>

For the application of IHL, on the other hand, the dominant assumption of convergence—that human rights law and IHL are part of the same general field, that they apply simultaneously, and that they are part of the same conversation—may have had the effect of loosening the boundaries around the field of application of IHL. As the two bodies of law began to be used interchangeably—as an attack utilizing a five hundred pound bomb is analogized to a police officer using a weapon when faced with the imminent danger of a hostage situation—one effect on the perception of IHL may be that it is no longer seen as a tightly controlled body of law. As many leading IHL lawyers warned in 2001 and 2002, once IHL is applied, many ugly things that we generally see as illegal, as outside the realm of rule of law, suddenly become lawful.

Those IHRL lawyers who argued that IHRL applies simultaneously to IHL during armed conflict may have contributed to the blurring of the line between war and not-war.

## 2. Convergence as Lawyering

We began this story with two distinct professions on September 10, 2001, and a description of what made them distinct. By 2013, this is certainly no longer the case. That IHL and IHRL are no longer discrete areas of practice has an impact on the kinds of arguments we see presented by the final stage, and creates a smaller universe of possible arguments that we will see in the future.

By 2013, once there is systematic killing going on outside of Iraq or Afghanistan, and as the government frames that killing in a law-sounding manner, it is highly appealing to turn to IHL. That is, after all, what IHL regulates: armed conflict. But this is where IHL as a discipline and a

---

<sup>160</sup> See, e.g., Radsan & Murphy, *supra* note 7, at 1208 (“Analyzing the legality of targeted killing can be difficult because the practice falls between the two dominant legal models that generally are understood to control the state’s use of force: human rights law and IHL.”).

profession is so critical, and that may have been lost in the turn of human rights discourse towards IHL. Human rights lawyers, by invoking IHL standards of proportionality and distinction into situations that do not satisfy the material field of application of IHL, move into a mode of engaging with the state that is foreign to traditional approaches.

IHL assumes that everyone is on a very particular, very peculiar field: armed conflict. It is already a place where everyday life has been, to some extent, suspended. It is a place where most of our assumptions about the way in which human beings interact have been upended. The lawyers who think about this place, the lawyers who conceptualize and work through the rules that apply there, are for this reason modest, constrained, and tempered in their approach to international law. Not because they are realists or because they doubt the force of law, but because they recognize that it is the job of other lawyers to ensure that the activation of their law is rare and well thought out. They understand the gravity of entering into the language and style of IHL lawyering. IHL lawyers may share little with their colleagues in human rights, but they appreciate that the latter exist precisely because it is the human rights lawyers who can say and do things that the IHL lawyer cannot. The particular private and collegial style with which IHL lawyers engage one another and governments may be well suited to the narrow set of IHL rules, but may be ill-suited for the aims and contributions of human rights advocates.

Humanitarian lawyers understand that theirs is not a law that they will practice every day—indeed, they hope they do not—and it is not a law whose criteria for application they seek to expand.<sup>161</sup> They are not engaged in a broad institution-building project, and they are deliberate about constructing new law—due in part to concern that newer norms may diminish legal restraints applicable in armed conflict. IHRL takes a different approach to norm development and diffusion.

Human rights lawyers take an expansive approach to their discipline, to its institutions, and to its growth: More law is good, as are

---

<sup>161</sup> “The broadest, most significant criticism of humanitarian law seems to be that it should adopt provisions to cover so-called ‘new forms of conflict.’ Those who take this view are either wittingly or unwittingly calling for expansion of the concept of armed conflict, or the expansion of the scope of application of humanitarian law beyond armed conflict.” Rona, *supra* note 23, at 63.

more institutions, more debate, and more people engaging in disparate projects that nominally fly the flag of the discipline. Practitioners are much less concerned with the idea that IHRL begins to apply at a particular moment. Human rights lawyers are accustomed to overlapping norms and to dealing with multiple municipal laws and regional systems.<sup>162</sup>

By 2013, the human rights profession is attempting to utilize a new set of norms and principles derived from IHL, but not always with the level of nuance humanitarian lawyers would apply. This style, when applied to the finely calibrated concepts and balances of violence and humanity held within IHL, inadvertently expand the battlefield and may ultimately allow concepts of distinction, proportionality and precautionary measures to supplant more protective human rights provisions. The collapse of multiple disciplines and fields of application into the “Law of 9/11” is not simply the product of a manipulative move by the government to justify its actions.<sup>163</sup> It is also the result of a particular approach to legal argumentation, mapped through various tactical moves made through the course of the legal battle over the war on terror.

### 3. The Flattening of the IAC/NIAC Distinction

Another theme that emerges from this decade of 9/11 lawyering is the move away from two clear sub-species of armed conflict: that applicable to wars between states (international armed conflict) and that applicable in internal conflicts (non-international armed conflict) between states and rebels or between armed groups within the territory of a state.

---

<sup>162</sup> In comparison, IHL has no regional treaties and no regional enforcement bodies.

<sup>163</sup> A more recent instance of the “Law of 9/11” can be seen in remarks by the Assistant to the President for Homeland Security and Counterterrorism:

An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to “hot” battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa’ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa’ida and its associated forces without doing a separate self-defense analysis each time.

Brennan, Address at Harvard Law School, *supra* note 115. As is increasingly common, Brennan refers to this as a “pragmatic” approach (“[N]either a wholesale overhaul nor a wholesale retention of past practices.”). *Id.*

For IHL lawyers, facing the danger of an angry superpower ready to walk away from the rules altogether, the functional merging of the body of rules applicable to each type of armed conflict served to ensure two things. First, it averted the risk that the United States would push for a new body of law at a time when it seemed nearly certain that any such law-making enterprise would result in a far less civilian-protective regime. Second, it ensured that at least some set of norms, even if not recognized as binding law, would apply to Afghanistan, and later Iraq, as those wars transitioned from classic international armed conflicts into far more complex, multinational engagements.

For its part, the ICRC clearly never accepted the notion of a global Common Article 3 NIAC, and continues to reject such a notion to this day.<sup>164</sup> It argues that you can have a multinational or transnational NIAC against a non-state actor, but that any determination regarding whether a NIAC exists must be subject to a case-by-case analysis of the facts.<sup>165</sup> It further argues, here in the mode of law as policy, that the *rules* applicable in IAC would nonetheless be applicable in almost all ways to NIAC, and that in this sense, the difference matters far less than it once did.<sup>166</sup>

For human rights lawyers, the flattening of the distinction between the rules of IAC and NIAC may not have been as carefully considered, but it functioned to provide discrete legal arguments in the many cases of individual detainees brought before U.S. courts. The decision to argue that Common Article 3 applied to the war against al Qaeda was made in the context of a specific case against a government that argued it was fighting a global war with no rules derived from international law, as it took hundreds

---

<sup>164</sup> See, e.g., INTERNATIONAL COMMITTEE OF THE RED CROSS, Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law* (Mar. 2008), at 3–5, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (describing the parameters of NIACs within the context of Common Article 3).

<sup>165</sup> Interview by ICRC with Kathleen Lawand (Dec. 10, 2012), available at <http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>, [<http://www.perma.cc/02Wv6PDmN9J/>] (explaining that the existence of a NIAC requires armed groups involved to “show a minimum degree of organization” and the conflict “must reach a minimum level of intensity”; the fulfillment of these criteria is determined on a “case-by-case basis, by weighing up a number of factual indicators”).

<sup>166</sup> CIHL Study, *supra* note 19, at 198 (noting that some customary rules of IHL “are indicated as being ‘arguably’ applicable [in NIACs as well as IACs] because practice generally pointed in that direction but was less extensive”).

of people into detention marked by brutal interrogations and secret transfers across borders.

Today, many non-IHL specialists see *Hamdan* as contributing to a solution to the problem of the war on terror by regulating the U.S. conflict with al Qaeda through Common Article 3. Whatever the Court meant to say as to the broader question of global armed conflict, its decision was later framed by many human rights lawyers as saying that Common Article 3 applied to the war on terror. At the time of the decision, that may have been understood more as a question of constitutional doctrine. The lawyers involved in that case and others following it were not tasked with contemplating how IHL as a regulatory regime would be impacted by such moves: They utilized IHL as a piece of the litigation puzzle that would assist their clients.

The reasons and motivations for going beyond existing law to argue that IAC and NIAC are essentially the same *and* to argue that NIAC could apply were understandable. These decisions came at a time when concerns about detention were paramount, and when both professions were facing a government denying the applicability of IHL, where it clearly should have been applied.

The law of NIAC assumes, as its paradigmatic case, that a state is fighting against rebels who seek to take power, to take over the state as the new government. It stands to reason that such states would not, for example, have an interest in completely destroying infrastructure (that they would then have to repair), or killing scores of civilians (who are, after all, their own people, whom the state wishes to prevent from becoming supporters of the rebels), or destroying cultural property (again, it would be their own valuable property). Unlike IAC, a key background assumption of NIAC is that unless you have a sociopathic head of state, the state wants to get things back to peace as soon as possible. Indeed, for many years, and still today outside of the global war on terror context, the main dilemma of seeking compliance with the rules of NIAC in traditional internal armed conflicts is that states are loathe to admit to the international community and even to their own publics that they are at “war” with an insurgent group.

The concept of “Transnational NIAC” does not rest on this assumption. It now serves to provide the sense that some set of “minimal

rules” or “foundational IHL principles” can be applied to conduct of hostilities in a range of countries, and even in a single instance of attack. In this way, it flips the purpose of opening up the boundaries of classification and softening the line between the two types of conflict: Rather than increasing restraints on the state, it serves as simultaneous *jus ad bellum* and *jus in bello* permissiveness, allowing the government to argue that any action is already in an armed conflict context, and that as such some subset of IHL rules applies.

As we look at the debate over targeted killing, it is clear that the “non-territorially strict material field of application of IHL” approach preferred by some who support expansion of the CIA drone program finds much support in arguments made in the heat of the struggle against the Bush Administration.

#### 4. Blurring of the Distinction between Combatants and Civilians through DPH

The debates over the distinction between combatant and civilian—the rise of the concept of direct participation in hostilities and, particularly, the notion of a “continuous combat function” in an organized armed group—came similarly out of a discrete set of arguments with the government.

For IHL lawyers, the fact that the Bush Administration seemed to refuse to recognize *any* conventional definition of combatancy, particularly in the first two stages when it defined the war on terror as an international armed conflict unrestricted by IHL rules on detainees, meant that there was a high degree of pressure to ensure that existing law could be made plausible for the United States. IHL divides the battlefield into civilians and combatants, with a presumption in favor of civilian status. In the war on terror, this stringency seemed ever more unsustainable, even—in the eyes of some—allowing Osama bin Laden to enjoy the protections of civilian immunity. Whether this was correct as a matter of law, by 2006 many thought that revisiting the concept of direct participation in hostilities would maintain the relevance of IHL. The hoped-for consensus was never reached. Out of the debates, two points emerged. First, one of the world’s leading promoters of IHL had, at the very least, identified a category of individuals who did not enjoy the privilege of combatancy but who could be targeted and killed as though they were combatants. Second, the distinction between

civilians and combatants, often framed as the very bedrock, nearly absolute principle of IHL, was now seen by many as a disputed concept, one that was open to multiple reasonable interpretations.

For human rights lawyers, this topic, one of the most complex concepts of IHL and little known to those outside of the discipline, was borrowed as a tool for challenging the detention authority of the government, particularly as to whether specific detainees had in fact served as fighting members of al Qaeda or the Taliban. As these arguments were made before the courts, human rights lawyers translated DPH and CCF from determinations of targetability in situations of armed conflict into standards for capture and detention.

Seen from the vantage point of 2013, the DPH debate, both in terms of the ultimate legal outcome and in terms of the ideas and disagreements that were fleshed out through the process of drafting the Interpretive Guidance, has come to play out in a much broader arena. When coupled with the increasingly fuzzy boundaries around the field of application of IHL (or between war and law enforcement), and the concept of transnational Common Article 3 NIAC, DPH has come to stand for the idea that individuals anywhere can be identified as targetable and therefore subject to the IHL principles for targeting.

## V. Conclusion

It is always risky to write about a legal field as it is developing. The debates discussed here will likely continue to be reshaped and reformulated, with new actors, new ideas, and new impacts. Young lawyers entering the fields of international humanitarian law and human rights today were likely in secondary school when this story began, and may have an entirely different understanding of these two professions than that presented here. The distinctions between IHL and IHRL may one day very soon appear quaint, dated—a tale from a bygone time.

In the years to come, we may see the emergence of a new legal elite who does *not* sense that it is experiencing an existential crisis like the one that drove so many of the debates discussed here, and does not insist on the kind of boundaries and lines I have presented. This legal elite, entering adulthood and their legal training in a solidly post-9/11 world, may

understand what they do as a blend of IHRL, IHL, and national security law, bringing in principles or concepts when and where they are useful, seeing the line between binding rules and convincing policies as vanishingly thin, and understanding the difference between war and not-war as one of opinion or taste—and of no real legal consequence.

Much has been written about the role of government lawyers in the war on terror, and surely the debates over the past ten years confirm that their work is critical to the ways that the state presents its choices through or against international law.<sup>167</sup> Our story, however, has focused on the role of IHL and IHRL as disciplines, as communities of lawyers, and as people who were involved in a decade of lawyering that many saw as a battle to save the very existence of international law in, and as a constraint on the behavior of, the U.S. Their engagements continue with the government, with each other, and with divisive and profoundly important substantive questions of law: When is a situation of violence a war, and when is it a policing exercise? When is a conflict “international” in some meaningful sense, and when is it bounded within the control of a single sovereign? Who can be killed, whose liberty can be deprived, and for what reasons? In some sense, neither discipline could nor wished to answer fully these questions, yet both desired to be deeply relevant to the regulatory framework that restrained and licensed the state’s behavior and its legal justifications for that behavior. Both disciplines wished to capture the actions of the U.S. within their legal texts, their interpretive tools, and their normative commitments. To do so, each discipline had to make significant compromises, to shift its doctrinal boundaries, and to imagine how old definitions would come to accommodate new kinds of fighting, imprisonment, and force.

Ultimately, the fields of international humanitarian law and human rights impacted one another and the government, and the debates within and between the disciplines had important consequences. In the phases identified in this Article, we see new terms and concepts used on the battlefield; we see disputed theories move from scholarly works to the highest court in the land; and we see many who began the decade disputing

---

<sup>167</sup> See, e.g., Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT’L & COMP. L. REV. 179 (2009); Waldron, *supra* note 76, at 16.

the arguments of government lawyers becoming government lawyers themselves.

Amid the muddle, what seems clear is that neither IHL nor IHRL are the disciplines that they were in 2001, and neither form of lawyering has remained untouched by the debates that took place. What remains most unclear is what will happen next. As these fields look forward, at least three significant questions arise. Will clarity be lost once again in order to make room for new authorities and new approaches? Will rigor diminish in order to gain and maintain access to government interlocutors? Will more lines be blurred in attempts to ensure that IHL and IHRL are able to maintain the hard-earned place they now have at the table of deciding how war will be fought into the second decade of the twenty-first century? The answers may be shaped by a coming legal elite forged in the battles of the last twelve years, perhaps defined more by responding to the demands of policy than by fealty to international law. The extent to which international law can meaningfully constrain authority during the tumult of armed conflict and other situations of lethal force may be at stake.