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Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead

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I. Introduction

On January 22, 2009, President Obama issued three executive orders mandating, among other things, a review of US detention policy, a review of US interrogation policy, and the closure of the Guantanamo Bay detention facility as soon as practicable and, in any case, within a year of the order. With these orders, the President ensured that the US government would revisit a whole range of domestic and international legal positions governing its use of force against al Qaeda and the Taliban, two groups with which it has been engaged in armed conflict since late 2001.

One issue which the new administration may have occasion to consider in the context of the above-mentioned reviews, and as it contemplates further military engagement in Afghanistan, is the question of which body of international law governs the use of force by the United States in extraterritorial armed conflicts—and, in particular, whether the governing international legal regime is the law of armed conflict, human rights law or some combination of the two. In this area, the new

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administration will be working against a backdrop of a US government position that was vigorously advanced by (though in many respects it did not originate with) the Bush administration to the effect that US human rights obligations do not apply to actions arising in extraterritorial armed conflicts, both because of treaty-based territorial limitations and because of the doctrine of *lex specialis*.

Given the work that lies ahead, it seems a useful moment to pause and revisit some of the key legal and policy arguments advanced by the Bush administration and in some cases its allies or other commentators in this sensitive area. The purpose of this article is not either to advocate or criticize these arguments or to offer a view about whether departure from them is legally available. Instead, it is to lay down a marker on where the prior administration and like-minded participants in the discussion of these issues stood as the transition to a new US administration approached. As discussed in greater detail below, the arguments advanced by this group drew from, among other things, a combination of observations about (1) historical US positions on the territorial limitations of human rights obligations, (2) uncertainty in international case law about the extent to which human rights obligations extend into extraterritorial armed-conflict situations and (3) practical challenges faced by European allies operating within a human rights legal framework in Afghanistan.

II. Overview: General Legal Framework for Military Operations against al Qaeda and the Taliban as of 2008

By way of background, it is useful to review the legal framework in which the United States conducted military operations against al Qaeda and the Taliban in 2008. Between 2001 and 2008, the primary legal basis for the US government's use of force against these groups remained largely the same, while the legal framework for its treatment of detainees changed dramatically (with all three branches of government taking steps to provide additional measures of protection to detainees). The US government's approach to diplomacy concerning these issues changed as well, with an increasing emphasis after 2004 on outreach to European and other close allies to seek common ground on the international legal framework concerning the use of force against transnational terrorists. But despite important legal and policy changes during this period, including the US Supreme Court's 2008 decision in *Boumediene v. Bush*,¹ which recognized the right of Guantanamo detainees to challenge the legality of their detentions in US courts (albeit on constitutional rather than human rights law grounds), the United States maintained its legal position with respect to the non-application of its human rights obligations to extraterritorial armed conflicts.

From 2001 through 2008, the basis for operations rested on the premise that the United States was in an armed conflict with al Qaeda and the Taliban in Afghanistan—a conflict arising out of a series of attacks against the United States, culminating in the attacks of September 11, 2001, to which the United States responded in self-defense as notified to the UN Security Council in October 2001.² During the ensuing seven years, US operations were divided between two coalitions. Some US forces fought as part of Operation Enduring Freedom (OEF), a US-led coalition that operated with the consent of the post-Taliban elected government in Afghanistan.³ Others fought under the auspices of the International Security Assistance Force (ISAF)—a NATO-led coalition that operated both with the consent of the Afghan government and under a UN Security Council mandate.⁴ As a result, the legal basis for US operations in Afghanistan might be described as “self-defense plus,” with the “plus” being consent of the Afghan government and, in the ISAF case, a UN Security Council mandate. As a matter of domestic law, Congress recognized the US government’s right to use force in self-defense in its Authorization to Use Military Force dated September 18, 2001,⁵ and the Supreme Court confirmed its right to detain combatants as an incident of its right to use force in its *Hamdi v. Rumsfeld* decision in 2004.⁶

Questions about how to classify the conflict, and what protections detainees should receive, were the source of more pronounced movement in the law. The initial position of the US government at the beginning of the fighting in Afghanistan was to treat the conflicts with both groups as international in character, given that neither was limited to a conflict within the territory of a single State, but to deny detainees captured in the conflicts protections under the Geneva Conventions.⁷ With respect to the Taliban, the US government concluded that the conflict was governed by Common Article 2 of the Geneva Conventions⁸ because the Taliban qualified as a high contracting party to the Conventions (in light of its governing role in Afghanistan), but that Taliban fighters did not meet the criteria set forth in Article 4 of the Third Geneva Convention. President Bush determined that Taliban detainees accordingly would not benefit from prisoner of war protections. As concerns al Qaeda, the US government concluded that because the group was not a high contracting party to the Geneva Conventions, it was not eligible for any protections under those treaties. In the case of both groups, the US government took the position that Common Article 3⁹ was inapplicable, because it governed only conflicts of a non-international character.¹⁰

In 2006, the landscape shifted when the Supreme Court held in *Hamdan v. Rumsfeld* that the conflict with al Qaeda is of a non-international character and that Common Article 3 accordingly applies as a matter of treaty law.¹¹ While *Hamdan* did not speak to the legal protections that apply with respect to the

Taliban, the Department of Defense issued, in the same year, a detainee directive that applied Common Article 3 and additional protections as a baseline to all Department of Defense detention operations. These protections were in addition to certain administrative procedures that the Department of Defense created through separate mechanisms to review whether detainees were being properly detained as combatants and, on a periodic basis, whether they posed a threat sufficient to merit continued detention.¹²

In 2008, the Supreme Court determined in *Boumediene v. Bush* that the Combatant Status Review Tribunals created for purposes of Guantanamo status reviews were not an adequate and effective substitute for the ability to seek the writ of *habeas corpus*, and that Guantanamo detainees have a constitutional right to contest the legality of their detentions in a habeas proceeding in US courts.¹³ It remained unclear, however, whether the federal courts would extend habeas rights to detention operations at facilities such as Bagram in Afghanistan where the US government exercises control short of the total and indefinite control the Court deemed it to enjoy at Guantanamo.¹⁴

While the courts were changing the legal landscape, the US government was working to change the diplomatic landscape. Following the 2004 election, the prior administration began to expand its outreach to foreign governments on detention-related issues, responding in part to a recommendation by the 9/11 Commission¹⁵ that the United States should engage its allies to develop a common framework for the treatment and detention of terrorists. A major theme of this outreach effort was to underscore that the international legal framework governing military operations, and in particular detention operations, in extraterritorial non-international armed conflict was underdeveloped. Department of State Legal Adviser John Bellinger argued that among the fundamental issues that the law of armed conflict failed to address were questions about whom a State could hold as enemy belligerents, what sort of status determination procedures detainees should receive, how to determine when the end of conflict had arrived such that detainees must be released, and what sort of “non-refoulement” style protections should apply to the transfer or release of detainees outside a State’s territory.¹⁶

The US government under the prior administration argued that these ungoverned areas in the law of armed conflict presented troubling areas of uncertainty for the US government, its allies and its courts (all of which had reason to be concerned about the conduct of detention operations in the absence of clear legal guidance). But the government nevertheless resisted the position—advanced by human rights advocates, the International Committee of the Red Cross and others—that human rights law did or should present a legal basis for filling them. While the US government agreed that consideration should be given as to how the legal

framework governing non-international armed conflict should be expanded, it also maintained that an across-the-board acceptance of the application of human rights principles in conflict was not required by law and was to some extent unrealistic as a matter of policy.¹⁷ The balance of this article describes certain legal and practical arguments that the prior administration (and in some cases its allies) advanced in support of this position.

III. Legal Arguments

This section highlights three of the arguments that the prior administration—or, in one case, the government of Canada—advanced in support of its legal position concerning the territorial limitations of certain human rights obligations. One argument the US government advanced was that both the text and the negotiating history of the International Covenant on Civil and Political Rights¹⁸ (which, as the most comprehensive articulation of relevant human rights obligations to which the United States is party, was the focus of much of the debate in this area) indicated that it was only intended to apply within a State's own territory. Another argument was that even States purporting to apply the law of armed conflict and human rights law conjointly to extraterritorial armed conflicts did not appear to have a clear understanding about how to balance certain fundamental tensions between the two bodies of law. A third relevant argument—advanced in litigation between the Canadian government and Amnesty International—was that certain key decisions by foreign courts and international tribunals reflected a persistent uncertainty about whether and to what extent human rights law should apply in extraterritorial armed conflicts.

A. Text and History

The prior administration's positions with respect to the text and history of the International Covenant on Civil and Political Rights were thoroughly explored in the US government's 2005 report to the UN Human Rights Committee (the body of experts who review treaty reports under the Covenant)¹⁹ and elsewhere.²⁰ The arguments begin with the text of Article 2, which provides that a State party will apply the Covenant to persons "within its territory and subject to its jurisdiction." While over time commentators, including Thomas Buergenthal,²¹ the UN Committee on Human Rights, and some courts developed arguments that Article 2 should be interpreted to mean that obligations under the International Covenant on Civil and Political Rights apply to a State's conduct toward persons who are either in its territory *or* subject to its jurisdiction, the US government continued to take the view

that the plainest reading of the text is that both territory and jurisdiction requirements must be met in order for the Covenant to apply.

Moreover, the US government took the position—for example, in its observations to the UN Committee on Human Rights’ General Comment 31—that, to the extent it was necessary to look beyond the text of Article 2 to the *travaux préparatoires* to clarify the intent of the framers in drafting the provision, the *travaux* fully supported the US government perspective on the scope of the Covenant.²² Here, the US government noted that Eleanor Roosevelt and the US team negotiating the Covenant had insisted on the reference to “territory” in Article 2 because they did not believe it would be practicable to apply the guarantees of the Covenant extraterritorially—specifically in situations of occupation.²³ The US delegation encountered resistance from certain other delegations, which tried to amend the operative language that constrained the application of the Covenant to a State’s own territory, but the US position prevailed.²⁴ By way of context, commentators have noted that the post-war environment in which the International Covenant on Civil and Political Rights was framed was one in which much of the international community saw the law of armed conflict and human rights law as coming from different sources and occupying different spheres—with human rights law being derived from enlightenment-era principles about the affirmative rights of individuals vis-à-vis their governments, and the law of armed conflict being a mostly restrictive set of principles reflecting a grand bargain among States about the proper balance of military necessity against humanitarian limits.²⁵

The prior administration also noted that, while certain other governments and international bodies had subsequently accepted a broader interpretation of the scope of application of the International Covenant on Civil and Political Rights, the US government’s position had been consistent across decades and administrations—and had been advanced not only by Mrs. Roosevelt at the time the Covenant was negotiated but also by State Department Legal Adviser Conrad Harper in the first US report to the United Nations Human Rights Committee in 1995.²⁶

B. The Nuclear Weapons/Wall Conundrum

One of the key sources of the position that human rights law and the law of armed conflict apply conjointly in the context of international armed conflict is a 1996 advisory opinion of the International Court of Justice, the so-called *Nuclear Weapons* advisory opinion. In that opinion the ICJ wrote as follows:

The Court observes that the protection of the International Covenant [on] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national

emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.²⁷

Several years later, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ reinforced and elaborated on its *Nuclear Weapons* holding as follows:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.²⁸

When these two ICJ passages are read together, the key principles that emerge appear to be that (1) human rights law continues to apply in armed conflict; (2) in armed conflict, some rights may be governed by human rights law, some by the law of armed conflict, and some by both; and (3) when a human rights rule is in conflict with a law of armed conflict rule, the law of armed conflict takes precedence as *lex specialis*.²⁹

In reflecting on whether tensions between human rights law and the law of armed conflict could be reconciled by applying these or other principles, the prior administration noted that reconciliation might be achieved in some cases, but would be difficult if not impossible in others. One area where it acknowledged that the two bodies might be reconciled concerns the right not to be arbitrarily deprived of one's life, as set forth in Article 6 of the International Covenant on Civil and Political Rights.³⁰ Here, the US government's analysis tracked that of the ICJ, which discussed the application of Article 6 in armed conflict in the above-quoted language from its *Nuclear Weapons* opinion. The ICJ found that in armed conflict, Article 6 continues to apply, but that a deprivation of life would not be deemed arbitrary for purposes of Article 6 if it occurred in a manner that complied with the law of armed conflict (i.e., in a manner consistent with the principles of proportionality and distinction, and that did not run afoul of any other treaty or customary international law rule). The *Nuclear Weapons* discussion of Article 6 does not

make entirely clear whether the law of armed conflict rule displaces the human rights rule (suggesting that in cases where there is a violation the remedy is limited to what is afforded under the law of armed conflict) or whether it more accurately gives content to a human rights rule while the two rules apply simultaneously (suggesting that where there is a violation the individual is accountable under both human rights law and the law of armed conflict). It does, however, make clear that action consistent with the law of armed conflict is not a human rights violation.

But the prior administration also suggested that commentators calling for the joint application of human rights law and the law of armed conflict had failed to give meaningful guidance on how to achieve reconciliation between the two bodies of law where the tension between them is more nuanced—for example, on the issue of whether an individual detained in armed conflict may seek review of detention in court. Here, the Geneva Conventions do not offer procedures by which combatants may challenge the legality of their detentions, either in international or non-international armed conflict. By contrast, Article 9 of the International Covenant on Civil and Political Rights prohibits arbitrary detention and provides a right of review for all prisoners and detainees. A question that accordingly presents itself is whether the absence of a procedure for judicial review of detentions under the Geneva Conventions suggests that the law of armed conflict is not, on this point, the *lex specialis*, leaving human rights law to furnish the relevant rule. In reflecting on this issue, US Legal Adviser John Bellinger asked:

Would it be practical to expect States detaining tens of thousands of unprivileged combatants in a non-international armed conflict to bring them before a judge without delay? This is not something States must do even for prisoners of war under the Third Geneva Convention. If the answer is that the State should derogate from Article 9 if the exigencies of a civil war so demand, then what contribution has human rights law made to answering questions regarding the procedures owed combatants in non-international armed conflict?³¹

An area of similarly subtle tension between the two bodies of law concerns the principle of “non-refoulement.” Under human rights law, the principle of non-refoulement (memorialized in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³² and elsewhere) provides a safeguard against the transfer of individuals to situations where they are likely to be tortured. As Legal Adviser Bellinger noted, however, the law of armed conflict provides for no such protection with respect to the transfer of prisoners of war and other detainees at the end of an armed conflict.³³ While in practice the prior administration looked to human rights law to guide its transfer policy with respect to individuals detained in the conflict with al Qaeda (for example, it established a firm

policy against transferring Guantanamo detainees to countries where it determined they were more likely than not to be tortured), Bellinger noted the complications that arose as a result, observing that “[t]his policy, central as it is to Western values, has meant that dozens of detainees who cannot be repatriated . . . have remained at Guantanamo for years after we have wished to transfer them.”³⁴

In a similar vein, the prior administration’s pleadings in *Munaf v. Geren* also pointed to certain sovereignty-related complications that may arise through the application of human rights non-refoulement principles in armed conflict—particularly when one State is conducting hostilities against a non-State actor on another State’s territory. In *Munaf v. Geren*, the US government argued that the Supreme Court should deny the relief sought by two American citizens held in Iraq, who had requested that the Court enjoin the US government from turning them over to the government of Iraq for prosecution, because of their concerns about post-transfer mistreatment.³⁵ In ruling for the government, the Court appeared to weigh human rights considerations—noting, among other things, the US government’s statement that it had a policy not to transfer individuals in cases where torture would likely result—but also appeared to place greater emphasis on Iraq’s legitimate sovereign interest in bringing to justice individuals accused of committing crimes on its territory. The Court wrote that

because Omar and Munaf [the two prisoners] are being held by United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts . . . release of *any* kind [as opposed to transferring the detainees to Iraqi custody] would interfere with the sovereign authority of Iraq “to punish offenses against its laws committed within its borders.”³⁶

In this passage, the Court highlighted one of the quandaries that a State may face when it seeks to apply its human rights standards on the territory of another State and accordingly appeared to echo the concern expressed by the US delegation that negotiated the text of Article 2 of the International Covenant on Civil and Political Rights—i.e., that it might not be possible for States to enforce their human rights obligations outside their sovereign territory.

C. Uncertain Litigation Landscape

Another relevant argument—this one successfully advanced by the Canadian government in its litigation with Amnesty International—was that international legal precedent concerning the extraterritorial application of human rights obligations in armed conflict is unsettled, and that to the extent it supports the extraterritorial application of human rights obligations, it does so only in limited cases.³⁷

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The Canadian government advanced this argument in defending a lawsuit brought by Amnesty International. Amnesty had sued Canada under the Canadian Charter³⁸ to prevent it from transferring detainees captured in Afghanistan to Afghan custody, because of non-refoulement concerns. Because the question of whether the Canadian Charter applies extraterritorially turns in part on the question of whether Canada's international human rights obligations apply in Afghanistan, the Canadian government's pleadings explored foreign and international case law concerning the extraterritorial application of human rights obligations. In its pleadings, the Canadian government observed that the Grand Chamber of the European Court of Human Rights had ruled in its *Bankovic*³⁹ opinion of 2001 that the scope of the European Convention on Human Rights⁴⁰ is normally confined to the territorial limits of the Convention's contracting States. While *Bankovic* acknowledged that the European Convention on Human Rights applies extraterritorially in certain cases (e.g., where the conduct in question occurs in a State's embassies, consulates, airplanes or vessels, and in cases where a State exercises some or all of the public powers in the territory of another State) the Court ruled that no such additional basis existed in the context of a NATO bombing raid on a Serbian radio station that killed sixteen people.⁴¹

The Canadian trial court hearing the case acknowledged that several subsequent European Court of Human Rights cases appeared to go considerably further than *Bankovic* on the question of when the European Convention on Human Rights applies extraterritorially (e.g., by finding that the Convention may apply when a contracting State has effective control over a particular person outside its own borders, regardless of whether it controls the territory where that person is being held) but took the position that these cases do not take precedence over the Grand Chamber's decision in *Bankovic*.⁴² In ruling for the Canadian government, the court concluded that as a whole the body of jurisprudence relating to the extraterritorial application of human rights law appeared "uncertain,"⁴³ and that the Charter accordingly did not confer rights on Afghans detained by Canadian forces in Afghanistan.⁴⁴

IV. Practical Issues: Afghanistan

Moving from law to practice, commentators observing ISAF/NATO operations in Afghanistan noted certain practical concerns arising from the application of human rights obligations in extraterritorial armed conflict.

One concern relates to operational constraints that human rights law imposes on combat operations. In May 2008, a European news magazine reported that a European partner in the ISAF coalition had failed to capture a Taliban leader who

was believed by NATO commanders to be active in planting roadside bombs and sheltering suicide bombers, and to be responsible for a 2007 attack on a sugar factory that had resulted in almost eighty deaths. When an effort to capture this individual failed, the coalition partner's troops had an opportunity to target him, but had to pull back because they lacked the authorization to do so, permitting him to flee. A senior official from this coalition partner explained to the magazine that "a fugitive like [the escaped Taliban leader] is not an aggressor and should not be shot unless necessary."⁴⁵ The magazine additionally reported that this coalition partner considered "[t]he use of lethal force [to be] prohibited unless an attack is taking place or is imminent."⁴⁶ The emphasis on using force only in self-defense suggested that either the coalition partner did not believe itself to be engaged in an armed conflict, or that it had nevertheless instructed its troops to act in accordance with a human rights law framework and treat its Afghan operations as a law enforcement exercise. The magazine noted that this coalition partner considered the different approaches by its allies to targeting in Afghanistan as "not being in conformity with international law" and suggested that the difference in legal approaches contributed to "tension and friction" among NATO partners.⁴⁷ The magazine's account accordingly suggested that the application of human rights law may impede effective military operations both by limiting the scope of operational flexibility where applied to the exclusion of law of armed conflict principles and by creating coordination issues between coalition partners.

A second concern that has been raised by commentators is that the discrepancy between US and European approaches to detention may be partly responsible for having impaired the ability of NATO/ISAF to conduct effective detention operations. Under a rule that applies to all NATO/ISAF forces (including US components under NATO/ISAF command), forces are generally prohibited from holding detainees for longer than ninety-six hours before transferring them to Afghan authorities.⁴⁸ This system avoids legal and other complications that might arise out of medium- or long-term detention, particularly for States that might face challenges under the European Convention on Human Rights, but it has its costs. In 2006, David Bosco, a senior editor at *Foreign Policy* magazine, wrote that, as a result of this system,

NATO troops have no system in place for regularly interrogating Taliban fighters for intelligence purposes. Whenever possible, they let the Afghan troops they operate with take custody. When that's not possible, they house their prisoners briefly in makeshift facilities while they arrange a transfer to the Afghans. NATO guidelines call for the handover of prisoners within 96 hours, far too brief a time for soldiers to even know whom they're holding. And once prisoners are in Afghan hands, international forces easily lose track of them.⁴⁹

Human rights advocates such as Amnesty International have also criticized the ninety-six-hour rule—from a different angle—arguing that it actually creates human rights concerns, because it requires the transfer of detainees to Afghan authorities notwithstanding what Amnesty has argued to be an unacceptable risk of mistreatment. Indeed, it was concern about NATO/ISAF transfer policies that led Amnesty to bring the above-described lawsuit seeking to enjoin the government of Canada from transferring detainees to Afghan custody pending an improvement in post-transfer human rights safeguards.

V. Conclusion

As discussed, the prior administration took the view that the law of armed conflict did not provide an adequate legal framework for addressing all of the issues that arise in armed conflict with non-State groups, but argued that legal and policy considerations weighed against the notion that gaps in the framework should be filled simply by looking to human rights law. Instead, it emphasized that the international community needed to work together to develop new approaches that would address the gaps while steering clear of the legal and policy pitfalls it associated with the application of human rights law in armed conflict.⁵⁰ The new administration will, of course, develop its own views about where the gaps lie and how to address them. In determining whether or how to depart from the path taken by the prior administration, a first step will be to look back at some of the arguments and concerns described in this article and elsewhere that helped to put the US government on its present course.

Notes

1. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).
2. Letter from John Negroponte, US Ambassador to the United Nations, to the President of the UN Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), available at http://avalon.law.yale.edu/sept11/un_006.asp.
3. Christopher Greenwood, Report, International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces para. 13 (2007), available at [http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20\(14%20Aug%2007\).pdf](http://web.ncf.ca/fk624/data/Report%20-%20Greenwood%20(14%20Aug%2007).pdf).
4. *Id.*, para. 9.
5. Pub.L. 107-40, 115 Stat. 224 (2001).
6. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
7. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.

135 [Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Geneva Convention IV]; all *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.

8. Geneva Conventions I–IV, art. 2, *supra* note 7, at 198, 222, 244 and 301, respectively.

9. Geneva Conventions I–IV, art. 3, *supra* note 7, at 198, 223, 245 and 302, respectively.

10. Memorandum from George Bush to Vice President et al., Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134 (Karen J. Greenberg & Joshua Dratel eds., 2005), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

11. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

12. For a discussion of these administrative procedures, see Jack Goldsmith & Robert Chesney, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STANFORD LAW REVIEW 1079, 1110–11 and 1132 (2008).

13. Boumediene v. Bush, 128 S. Ct. 2229 (2008).

14. In March 2009, the United States District Court for the District of Columbia ruled that certain Bagram detainees who were captured outside Afghanistan enjoyed the same habeas rights as Guantanamo detainees. *Al Maqaleh v. Gates*, No. 06-1669 (D.D.C. Apr. 2, 2009).

15. The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (2004), *available at* <http://www.9-11commission.gov/>.

16. John B. Bellinger, US State Department Legal Advisor, Oxford Leverhulme Programme Lecture on the Changing Character of War, *available at* <http://2001-2009.state.gov/s/l/2007/112723.htm> [hereinafter Bellinger Oxford Speech].

17. *Id.*

18. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

19. Because the United States had two outstanding reports, it consolidated the Second and Third Reports into one report. This single report is referred to as the “Second and Third Periodic Report.” U.N. Human Rights Committee, Third Periodic Reports of States Parties Due in 2003: United States of America, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005), *available at* <http://www.state.gov/g/drl/rls/55504.htm#annex1> [hereinafter Report to the UN].

20. US Observations on Human Rights Committee General Comment 31 (Dec. 27, 2007), *available at* <http://2001-2009.state.gov/s/l/2007/112674.htm>.

21. Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981).

22. See US Observations, *supra* note 20.

23. Matthew Waxman, Head of US Delegation, Principal Deputy Director of Policy Planning, US Department of State, Opening Statement (July 17, 2006), *available at* <http://geneva.usmission.gov/Press2006/0717Waxman.html>.

24. Report to the UN, *supra* note 19.

25. Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MILITARY LAW REVIEW 1, 2–4 (2008).

26. Summary record of the 53rd Session, 1405th meeting: United States of America, UN Human Rights Committee, U.N. Doc. CCPR/C/SR 1405, paras. 7, 20 (1995).

27. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240, para. 25 (July 8).

28. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178, para. 106 (July 9).

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29. The ICJ additionally ruled in the *Wall* opinion that the International Covenant on Civil and Political Rights applies extraterritorially, meaning that territorial limitations on human rights obligations are not an available tool for reconciling tensions between the two bodies of law. *Id.*, para. 111.

30. See Bellinger Oxford Speech, *supra* note 16 (observing that if human rights obligations applied in armed-conflict situations “[s]ome rights deemed non-derogable by the [International Covenant on Civil and Political Rights], such as the right to life, would be clearly displaced by more specific law of war rules that govern as the *lex specialis*”).

31. *Id.*

32. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

33. For purposes of international armed conflicts, Article 118 of Geneva Convention III, *supra* note 7, simply states that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”; as concerns non-international armed conflicts, Common Article 3, *supra* note 9, is entirely silent on repatriation/transfer safeguards.

34. Bellinger Oxford Speech, *supra* note 16.

35. Brief for the Federal Parties, *Munaf v. Geren* (No. 06-1666) (2008), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-394_FederalParties.pdf.

36. *Munaf v. Geren*, 128 S. Ct. 2207 (2008).

37. Respondent’s Factum Re: Determination of Two Questions, Pursuant to Rule 107 of the Federal Courts Rules, Regarding the Application of the Canadian Charter of Rights and Freedoms ¶¶ 62–66, *Amnesty International Canada v. Chief of the Defence Staff*, Court File No. T-324-07 (2008), available at <http://www.bccla.org/antiterrorissue/factumcrown.pdf>.

38. Canadian Charter of Rights and Freedoms, Constitution Act, 1982 (Schedule B to the Canada Act 1982 (U.K.)), available at <http://laws.justice.gc.ca/en/charter/>.

39. *Bankovic and Others v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 123 ILR 94.

40. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

41. The *Bankovic* decision states that

[i]n sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.

Bankovic, *supra* note 39, para. 71. In comparing the European Court of Human Rights holding in *Bankovic* to the US government’s position that the International Covenant on Civil and Political Rights never applies extraterritorially, it bears mention that unlike Article 2 of the Covenant, the jurisdictional provision of the European Convention on Human Rights does not include a reference to “territory.” Article 1 of the Convention provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

42. The Canadian court noted in particular the European Court of Human Rights decision in *Issa v. Turkey*—which addressed whether the European Convention on Human Rights governed Turkey’s conduct toward a group of shepherds apprehended inside Iraq and advanced the argument that a State may be held accountable for violations of its obligations under the

Convention against “persons who are in the territory of another State but who are found to be under the former State’s authority and control.” *Issa & Others v. Turkey*, App. No. 31821/96, 41 Eur. Ct. H.R. Rep. 567 (2004). But the Canadian court agreed with Lord Brown in the UK *al Skeini* case, who stated that the *Bankovic* opinion issued from a higher chamber of the European Court of Human Rights than *Issa* and, to the extent of any discrepancies, appeared to be better law. *Amnesty International Canada v. Chief of the Defence Staff (Canada)*, [2008] F.C. 336, paras. 234–35, available at <http://www.unhcr.org/refworld/docid/49cb8cff2.html>.

43. *Amnesty International Canada*, *supra* note 42, para. 214.

44. While not discussed in *Amnesty*, two other major decisions from the past two years arguably have contributed to the uncertainty surrounding the question of when human rights obligations might be deemed to apply in extraterritorial armed conflict. First, in its *Behrami* and *Saramati* cases, the European Court of Human Rights suggested that provisions of the European Convention on Human Rights do not reach the extraterritorial military activities of member State armed forces if acting as part of a UN mission, because the Court lacks jurisdiction over the United Nations and its operations. *Behrami v. France and Saramati v. France*, 45 Eur. Ct. H.R. 10 (2007). Second, the UK House of Lords held in its *al Jeddah* decision that where a UN Security Council resolution has provided authority for security detention, this effectively trumps the prohibition against detention in Article 5 of the Convention, because Article 103 of the UN Charter provides that in cases where a State’s Charter obligations conflict with its other treaty obligations, the Charter prevails. At the same time, however, the House of Lords held that the UK government must ensure that detainee rights under Article 5 are not infringed “to any greater extent than is inherent in such detention.” *R (on the Application of Al-Jedda) (FC) v. Secretary of State for Defence* [2007] UKHL 58, para. 39, available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>.

45. Suzanne Koelbl & Alexander Szandar, *Not Licensed to Kill*, SPIEGEL ONLINE INTERNATIONAL (Apr. 19, 2008), <http://www.spiegel.de/international/world/0,1518,554033,00.html>.

46. *Id.*

47. *Id.*

48. Ashley Deeks, *Detention in Afghanistan: The Need for an Integrated Plan* (2008), available at http://www.csis.org/media/isis/pubs/080213_deeks_afghanistan.pdf.

49. David Bosco, *A Duty NATO Is Dodging in Afghanistan*, WASHINGTON POST, Nov. 5, 2006, at B07.

50. Bellinger Oxford Speech, *supra* note 16.