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Defining Non-International Armed Conflict: A Historically Difficult Task

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As the initial speaker on the first panel of the Newport conference dealing with non-international armed conflict (NIAC) in the twenty-first century, I was asked to do two things. First, establish the framework for a broad and comprehensive discussion of NIAC by assessing, historically, the way in which the international community has attempted to define this particular form of conflict, to include the issue of whether there now exist various types of NIAC. Second, speak to the U.S. practice with respect to the manner in which the United States has determined whether to designate certain hostilities as NIACs.

In undertaking that mandate, I was reminded of the words of Sir Hersch Lauterpacht: "[I]f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."[1] And, given the nuances of our current subject matter, I would think it appropriate to add to this statement: "If the law of war is at the vanishing point of international law, then, surely, the law related to non-international armed conflict is at the vanishing point of the law of war."

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My addition to the Lauterpacht quote results from the fact that the matter of what activities do—and do not—constitute a NIAC is an exceptionally contentious one. The criteria to be used in making such a determination enjoy no universal acceptance. Time and again these are said to be "evolving." Increasingly, we are advised that today's NIAC is no longer the NIAC of old. And, by "old," commentators speak in terms of a scant ten years ago. Now, the "traditional" NIAC is said to have been joined by what are referred to as asymmetric "transnational" armed conflicts.[2] So, having set forth these uncertainties surrounding the nature of NIACs, how are we to recognize such a conflict when we see one?

In parsing this puzzle, it is best to cast a large net, beginning with an assessment of the concept of "armed conflict" itself. Having done this, we can then move on to examine the direction in which the international community has moved in its attempt to more closely demarcate the boundaries of what is—and is not—armed conflict of a non-international character.

Let us begin with the fact that, as surprising as it might appear, the law of war, or the law of armed conflict as it is also known, provides no definitive definition of "armed conflict," even though this term is specifically referenced in both Common Article 2 and Common Article 3 of the four 1949 Geneva Conventions, articles that deal with international and non-international armed conflict, respectively.[3] And there exists no agreed test for assessing when certain actions have risen to the level of an "armed conflict."

Having said this, however, it is also true that the International Committee of the Red Cross (ICRC) *Commentary* on these articles (Pictet's *Commentary*) has historically been looked to as the principal source of their interpretation.[4] This *Commentary* references identifiable factors to be considered when making a determination as to whether either an international or non-international armed conflict exists.

The matter of determining the existence of a Common Article 2 international armed conflict is, in fact, a rather straightforward one. The text of Article 2 speaks in terms of "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The key here is that the use of force by opposing regular armed forces of two or more States evidences an international armed conflict. The *Commentary* notes in this regard that the reality of the existence of such a conflict is simply not affected by the scope, duration or intensity of the hostilities involved. Instead, the use of the term "armed conflict" in this context was intended to apply to de facto hostilities, no matter their duration or how non-destructive they actually might have been.[5]

Now, having noted that determining the existence of an international armed conflict is not that complex, I would certainly caveat this statement with the

observation that this determinative process may become much more problematic in those instances in which a non-international armed conflict might, at some point, become "internationalized." This occurs when one or more external States intervene in such hostilities. Given the focus of this article, however, the debate over the degree of "effective" or "overall" control that a State must exercise over insurgent elements in order for this "internationalization" process to occur will not be addressed.[6] Suffice it to say that the determinative factors related to international armed conflicts contained in Pictet's *Commentary* really do very little to assist in making a judgment as to whether certain actions may—or may not—be designated NIACs. And the ability to make such a determination is, of course, our ultimate goal.

Given this fact, the starting point in assessing the existence of a NIAC must necessarily be Common Article 3: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . . ." The difficulty, historically, in turning to Article 3 has been, of course, that neither the text nor the commentary to this article provides definitive guidance regarding what is meant by the phrase "conflict not of an international character." Pictet, himself, has noted that the negotiators of the 1949 Conventions "deliberately refrained from defining the non-international armed conflicts which were the subject of Common Article 3."[7] Thus, it has never been clear what level of violence must be reached—and how protracted the actions in issue must be—in order for such hostilities to be deemed a non-international armed conflict. Internal situations that have reached a very high level of violence have often been regarded, certainly by the States in which such violence has occurred, as mere banditry—acts which have not achieved the threshold of "armed conflict."[8]

This uncertainty has persisted over the years, notwithstanding the fact that Pictet's *Commentary* offered what he referred to as some "convenient criteria" for determining the existence of a NIAC:

> (1) That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
>
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
>
> (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
>
> (b) that it has claimed for itself the rights of a belligerent; or

(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

(4) (a) That the insurgents have an organization purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.

(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[9]

Despite these criteria, States have, nevertheless, consistently resisted recognition of the existence of an armed conflict within their borders for fear, understandably, of affording some form of de facto status or legitimacy to those responsible for fostering the violence in issue—that is, to those who are engaging in hostile acts in an effort to displace the de jure government. This lack of certainty and lack of consensus regarding the scope of Article 3's applicability has, over the years, led to attempts to better define Common Article 3 conflicts as a means of more effectively triggering the law applicable to them.

Protocols I and II to the 1949 Geneva Conventions

Each of the protocols to the 1949 Geneva Conventions attempted to bring more clarity to activities which were—and were not—to be deemed non-international armed conflicts.[10] The significance of Protocol I to this issue is, of course, its characterization in Article 1(4) of certain essentially non-international, internal conflicts as "international" in character—that is, "armed conflicts in which peoples are fighting against colonial domination [Portugal's colonies in sub-Saharan Africa] and alien occupation [Israel's occupation of territories captured in 1967] and against racist regimes [the then-existing regimes in Rhodesia (now Zimbabwe) and South Africa] in the exercise of their right of self-determination."

While the United States is not a party to Protocol I and is not bound by—and does not accept—Article 1(4) as customary international law, for the purposes of this discussion it must be noted that the ICRC *Commentary* on Protocol I states that the situations specifically set forth in Article 1(4) constitute an "exhaustive

list" of those types of internal conflicts that may be viewed as "international" in character.[11] Accordingly, it is apparent that the Protocol has no bearing on internal, non-international conflicts that do not fall within one of these three narrow categories. And, as a practical matter, when has there last been seen an internal conflict that would meet these criteria? In sum, Protocol I really does very little to better enable the international community to define and determine the existence of a NIAC.

Protocol II was, of course, the first attempt to regulate, by treaty, the methods and means of the employment of the use of force in internal armed conflicts. Its purpose was to confirm, clarify and expand upon the minimal protections contained in Common Article 3. The inherent difficulty with Protocol II, given our stated purpose of discerning how to better define and determine the existence of a NIAC, is the fact that this Protocol establishes a much higher threshold of application than does Common Article 3. While Common Article 3 is said to apply to all conflicts "not of an international character," Article 1(1) of Protocol II states that it applies only to armed conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

This decision by the drafters of Protocol II to define non-international armed conflict, thus triggering the application of the Protocol's provisions on the basis of objective criteria, has, in fact, had the result of substantially narrowing the number of NIACs to which the Protocol might apply. The criteria set forth obviously restrict the Protocol's applicability to those conflicts of a high degree of intensity—essentially classic civil wars. The Protocol has seldom been deemed applicable to the great number of internal armed conflicts that have occurred since its inception, as insurgent groups have rarely, if ever, been able to meet the stringent requirements of Article 1(1).

Moreover, while Article 1(2) goes on to state that the Protocol will not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts," many cases of internal violence that do not meet the criteria of Article 1(1) are, nevertheless, far more intense in nature than are riots and sporadic violence. As a result, these types of scenarios might legitimately be viewed as non-international armed conflicts to which Common Article 3 should apply. The bottom line is that the criteria contained in Article 1(1) do not greatly assist, as

was their intent, in determining the existence of a NIAC. Indeed, it can be argued that the high bar of application established by this provision has served as a further excuse for governments to deny the existence of non-international armed conflicts within their borders.

In summary, then, as a result of Protocols I and II, the Geneva Conventions now recognize and regulate three distinct categories of non-international armed conflict: (1) the very specifically identified and limited internal "wars of national liberation," as defined in Article 1(4) of Protocol I, to which all of the provisions of Protocol I apply; (2) classic "civil wars" as defined in Article 1(1) of Protocol II; and (3) the ambiguously defined Common Article 3 "conflicts not of an international character." Thus, despite the stated intentions of the drafters of the Protocols, it might understandably be argued that we have returned to where we started—an inability to systematically identify, with very few exceptions, when violent activities occurring within States may legitimately be characterized as non-international armed conflicts. If this is the case, where do we next turn?

The 1995 Tadić *Jurisdiction Decision*

In October of 1995, the International Criminal Tribunal for the former Yugoslavia (ICTY) issued what has become known as the *Tadić* jurisdiction decision,[12] a decision that many have since contended has considerably influenced the development of the law of armed conflict. This assertion is centered on the argument that the ICTY's statements on when, and in what manner, the basic principles of this body of law should be applied serve as authoritative determinations on such matters. Indeed, some have embraced the Tribunal's pronouncements as an almost instant form of customary law of armed conflict. And, while I am not among those who give such weight to this decision, given our stated purpose, it is useful to examine the definition of "armed conflict" set forth by the ICTY: "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[13]

The Tribunal thus defined non-international armed conflict as "protracted" armed violence that occurs between governmental authorities and organized armed groups or, significantly, between such armed groups themselves within a State. Important, as well, is the fact that the use of the term "protracted" in the Tribunal's definition of non-international armed conflict can be viewed as meaning that hostilities need not be continuous.

In turn, in interpreting this definition of non-international armed conflict articulated by the *Tadić* Appeals Chamber, the *Tadić* Trial Chamber opined the following:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.[14]

These two aspects of internal armed conflict set forth by the *Tadić* Trial Chamber—the "intensity" of the conflict and the degree of "organization of the parties" involved in the conflict—it might be argued, can now serve as a basis for the recognition of "de facto" non-international armed conflicts, and thus for the application of Common Article 3 to such conflicts. Support for this view can be found in the fact that, in determining the existence of non-international armed conflict within Rwanda, the International Criminal Tribunal for Rwanda employed precisely this approach, noting that in making such a determination, "it is necessary to evaluate both the 'intensity' and 'organization of the parties' to the conflict."[15]

Further endorsement of the reasoning contained in the ICTY's *Tadić* decision is reflected, as well, in the adaptation of the "*Tadić* formula" in the Rome Statute of the International Criminal Court. The second sentence of Article 8(2)(f) of the Statute states that the Statute applies "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."[16] This adaptation originated in a proposal submitted by Sierra Leone and was accepted in an apparent effort to provide a positive definition of non-international armed conflict.[17]

Given these developments, even absent a detailed examination of the exact meaning of the terms "intensity" of a conflict and "organization of the parties" to a conflict, it is apparent that a legitimate argument can now be made that the *Tadić* formula may well have had the effect of lowering the threshold required for the recognition of a non-international armed conflict. Very importantly, however, it remains to be seen whether future State practice will, in fact, sanction the validity of this approach.

"Global" Non-International Armed Conflicts?

At this juncture, it is essential to recognize that all of the preceding discussion regarding the nature and scope of non-international armed conflict has centered on violence—that is, hostilities—occurring within the boundaries of a State, thus, internal armed conflict. There is good reason for this. This is the geographical context in which NIACs have historically—and legally—been defined. Common Article 3 conflicts "not of an international character" have, since the adoption of the 1949 Geneva Conventions, consistently and uniformly been viewed in this manner. And no State, to include the United States, has ever challenged this interpretation.

So, given this reality, what has recently driven an attempted move away from this historical interpretation of Common Article 3 and non-international armed conflict? The answer resides in the events of 9/11 and the resultant attempts by the Bush administration to exercise the essentially unfettered "wartime" powers of a unitary executive. This resulted in an unprecedented misapplication of international law, in general, and the law of armed conflict, in particular.[18] And, when challenged by this overreach of executive authority, a compliant Congress failed to step forward to exercise its responsibility to rein in an administration running roughshod over the law, particularly that applicable to detainees held in the custody of the U.S. government.

Recognizing this congressional failure, the U.S. Supreme Court had little choice but to act. And, while it can be argued that its intentions were good, the Court's legal reasoning was both faulty and self-serving. In June 2006, the Court issued its *Hamdan* decision.[19] Relevant to the topic at hand, the Court opined that Common Article 3 was, in fact, applicable to a "conflict not of an international character" then being waged between the United States and the terrorist organization Al Qaeda. Its reasoning: the phrase "conflict not of an international character" appears in Common Article 3 simply to evidence a contradistinction to a conflict between nations. "In context," the Court opined, this phrase must bear its literal meaning. And, while acknowledging that "the official commentaries [Pictet's *Commentary*] accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protections to rebels involved in one kind of 'conflict not of an international character,' *i.e.*, a civil war," the Court then proceeded to note that "the commentaries also make clear 'that the scope of the Article must be as wide as possible.'"[20] In referencing this statement, however, the Court intentionally chose to ignore the context in which this comment was made. The *Commentary* text, following the listing of criteria set forth to

assist in determining the existence of what clearly can only be viewed as "internal" non-international armed conflicts, reads as follows:

> Does this mean that Article 3 is not applicable in cases where armed strife breaks out *in a country*, but does not fulfil any of the above conditions . . . ? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible. There can be no reason against this. For, contrary to what may have been thought, the Article in its reduced form does not in any way limit the right of a State to put down rebellion. Nor does it increase in the slightest the authority of the rebel party.[21]

An objective assessment of Pictet's commentary to Article 3 clearly evidences the fact that the Court either failed to appreciate or deliberately chose to ignore the historical and consistent interpretation of Common Article 3's application to—exclusively—internal armed conflicts occurring within the territorial boundaries of one of the high contracting parties to the 1949 Geneva Conventions. In my view, it was the latter. Unwilling to challenge the President's ill-conceived determination that the United States was engaged in a "global war against terrorism,"[22] the Court, in essence, said: "If you seek to invoke the law of armed conflict to indefinitely incarcerate individuals seized in this 'war,' you must, at the very least, afford such individuals the minimal safeguards provided by this body of law—those of Common Article 3." And, rather than framing such safeguards as customary law of armed conflict provisions (given both the administration's and the Court's disdain for the legitimacy of customary international law), the Court was determined to posture Article 3's requirements as a treaty obligation. Thus, the Court's clearly tortured interpretation of the phrase "conflict not of an international character."

And so was born the misguided notion of the potential existence of non-international armed conflicts capable of spanning State boundaries. Indeed, the *Hamdan* decision has since been cited as definitive proof of this fact, given the Court's recognition of the existence of a "global" NIAC to which Common Article 3 was said to apply.[23] The reality is, of course, that the U.S. Supreme Court does not—and cannot—speak for the international community when it comes to the interpretation of multilateral international agreements. Nevertheless, the Court's attempt to significantly expand the definition and scope of a non-international armed conflict has unquestionably triggered the recent advocacy of the existence of a new form of conflict now said to be in play—that is, "transnational armed conflict."

This term has been used in different ways. One commentator makes use of it to describe a hybrid form of conflict, neither international nor non-international in character, but hostilities that fall somewhere in between and which represent the extraterritorial application of military combat power by the regular armed forces of

a State against a transnational non-State entity.[24] Others have identified such conflicts as those that occur between a State and a non-State group (or between non-State groups) on the territory of more than one State, and would characterize these as "armed conflicts of a non-international character." In their view, the geographical element should not serve as the determinative factor in assessing whether a conflict is international in nature. "Internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict."[25] The most cited examples of what these commentators would adjudge to be "transnational armed conflicts" would appear to be the Israel Defense Forces' incursions into southern Lebanon in 2006 and into Gaza in 2009. While I remain unconvinced of either the existence or the need for creation of this new form of armed conflict, the discussion of such is certain to continue.

So where does this leave us in terms of being able to reasonably identify violence that has risen to the level of a non-international armed conflict? In brief, see Common Article 3, Article 1(4) of Protocol I (which transforms certain NIACs into international armed conflicts), Article 1(1) of Protocol II, and, at least potentially, depending on future State practice, the determinative criteria articulated in the *Tadić* decision.

Identifying Non-International Armed Conflicts: U.S. State Practice

Now to my second assigned mission at the conference: U.S. State practice with respect to the manner in which it determines the existence—or non-existence—of a non-international armed conflict. Here, I am tempted to simply bring this article to a close with the concluding remark "there is none." And while such a premature conclusion is perhaps untenable, I, nevertheless, believe the statement to be an accurate one.

Given the Supreme Court's decision in *Hamdan*, a product of the Bush administration's bastardization of the law of armed conflict, the United States may now feel compelled to at least give lip service to the possibility of affording a slightly broader view of the phrase "conflicts not of an international character." However, I would see the government, having given a nod in this direction, then hastening to note that as the international community has been unable to achieve consensus on an agreed definition of non-international armed conflict, and given that a transition from international to non-international armed conflict is often quite subtle in nature,[26] a decision as to whether any form of violence has—or has not—evolved into a non-international armed conflict is, ultimately, the responsibility of the government faced with the armed threat in issue.

Having taken this position, the United States may well take the view that, in those cases in which it engages in foreign internal defense operations (the provision of U.S. advice and/or assistance to a foreign government faced with an internal threat from a non-State actor), while the decision as to whether this threat does—or does not—constitute a non-international armed conflict might be made jointly by the United States and the host government, the United States would ordinarily defer to the latter's judgment on this matter.[27]

The bottom line is that past practice indicates that the U.S. approach toward the issue of determining whether certain combatant activity is or is not a non-international armed conflict is completely self-serving, as it is for every State. From a purely bureaucratic standpoint, a determination as to whether U.S. military operations taken against an armed non-State actor should be characterized as a non-international armed conflict might be cited as a matter for U.S. interagency coordination. In reality, however, U.S. practice again reflects the fact that in most, if not all, cases, no "official" U.S. government determination is ever made. This was certainly the case in both Iraq and Afghanistan as these conflicts transitioned from international to non-international conflict. Instead, the United States has historically sought to protect its personnel involved in military operations that fall short of international armed conflict—or that might arguably be characterized as non-international armed conflict—and has sought compliance with the basic provisions of the law of armed conflict by its adversaries in such situations by formally stating that, as a matter of policy rather than law: "Members of the DoD Components comply with the Law of War during all armed conflicts, however such conflicts are characterized, and in all other military operations."[28]

I see no reason to expect a change in this U.S. approach toward dealing with the matter of NIAC characterization in the future. The U.S. government will continue to make no "official" determinations regarding whether certain hostilities do or do not constitute non-international armed conflicts. Again, while completely self-serving, it is an approach grounded in practicality and one that has produced a reasonably successful track record thus far.

Notes

1. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 360, 381–82 (1952).

2. For a discussion of the concept of "transnational" armed conflicts, see Andreas Paulus & Mindia Vashakmadze, *Asymmetric War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 95, 110–12 (2009).

3. 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; 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; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; 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.

4. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952) [hereinafter PICTET COMMENTARY].

5. *Id.* at 32.

6. For a discussion of the "internationalization" of a non-international armed conflict, see MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2 (2006); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 79 & 82 (July 8); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 115 (June 27).

7. JEAN S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAl HUMANITARIAN LAW 47 (1985).

8. For a discussion of State denial of the existence of a non-international armed conflict within its borders, see Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MILITARY LAW REVIEW 66, 83–88 (2005).

9. PICTET COMMENTARY, *supra* note 4, at 49–50.

10. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

11. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶¶ 108–13 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

12. Prosecutor v. Tadić, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

13. *Id.*, ¶ 70.

14. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

15. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 620 (Sept. 2, 1998).

16. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

17. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, 35th Meeting of the Committee Whole, ¶ 8, U.N. Doc. A/CONF.183/C.1/SR.35, *available at* http://untreaty.un.org/coddiplomaticconferences/icc-1998/docs/english/vol2/a_conf_183_c1_sr35.pdf.

18. For a detailed discussion of the Bush administration's misapplication of the law of armed conflict to the issue of detainees held by the U.S. government post-9/11, see David E. Graham, *The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable*, 48 WASHBURN LAW JOURNAL 325 (2009).

19. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

20. *Id.* at 630–31.

21. PICTET COMMENTARY, *supra* note 4, at 50 (emphasis added).

22. *See, e.g.*, THE WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM 18 (2003), *available at* http://www.comw.org/qdr/fulltext/0302nsct.pdf.

23. Paulus & Vashakmadze, *supra* note 2, at 99.

24. Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 295 (2007).

25. Paulus & Vashakmadze, *supra* note 2, at 112.

26. Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom are classic examples of the subtle nature of such transitions.

27. It can be argued, however, that, in the matter of making a decision as to whether the ongoing conflict in Afghanistan has, over time, transitioned into a non-international armed conflict, the United States has neither deferred to nor acted jointly with the Afghan government in making such a decision.

28. Department of Defense, DoD Directive 2311.01E, DoD Law of War Program ¶ 4.1 (2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf.