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Starting from Here

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I. Introduction

Professor Garraway and the organizers of this panel asked me to address a piece by Professor Adam Roberts entitled “Detainees, Torture, and Incompetence in the ‘War on Terror.’”¹ As the title indicates, the piece is highly critical of US actions over the past six years, and uses a review of three different books as a launch pad for its arguments. In brief, Professor Roberts takes a largely retrospective look at US detention and interrogation policies since September 11, 2001, arguing that a number of US decisions along the way led to the abuses at Abu Ghraib. He recognizes that it is complicated to apply the law of war to certain individuals fighting US forces in different conflicts, but he concludes that the President’s decision to treat them “humanely” in 2002 did not provide a clear legal framework and charges the Bush Administration with both bad intentions and incompetence. Professor Roberts discusses the legal and policy confusion that currently exists in Afghanistan among the International Security Assistance Force (ISAF) and the government of Afghanistan related to detainee treatment, and proposes that NATO establish rules for treatment of detainees who are not entitled to prisoner of war status. Finally, he reflects the often-heard concern about a perceived threat to US separation of powers principles and concludes that the resort by the United

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States to a “war on terror” paradigm leaves quite a bit to be desired, even in the wake of all of the changes the US government has put in place since September 11.

By way of response, I will spend my time discussing three issues: where US law and policy currently stand in the three conflicts the United States is fighting, the processes by which we arrived at our current positions, and how we might address some of the ongoing legal and operational confusion in Afghanistan among NATO allies. In focusing on the current state of US law and policy, I do not mean to suggest that several still-unresolved debates about the applicability of the Geneva Conventions—and of the war paradigm to our struggle with al Qaeda more generally—are irrelevant. But to move this multiyear dialogue forward, I think it is important to use the current state of play as the jumping-off point, whatever one may think of the decisions that the United States made in the immediate aftermath of September 11, 2001.

Before I dive in, I would like to say something about the abuses of detainees described in the books that Adam Roberts has reviewed. Like many in the US government, including the military itself, I will not and cannot defend that abuse. Events like Abu Ghraib have been devastating to the reputation of the United States, especially in European and Arab States. Professor Roberts raises a number of arguments about the conflicts in Iraq and Afghanistan and with al Qaeda with which I do not agree, and which I look forward to addressing. But I wanted to make clear up front that detainee abuse warrants no defense.

II. Where We Are Now—A Snapshot

The State Department’s Legal Adviser, John Bellinger, spent a week in January serving as a guest blogger on *Opinio Juris*, a website devoted to international law and politics. He posted pieces on Common Article 3, unlawful belligerency and the US conflict with al Qaeda, among other topics.² Professor Garraway served as a guest respondent and opened his post with an old Irish saying. The saying involves a foreigner who asks an Irishman for directions from his current location to the nearest town. The Irishman tells him, “Well, I wouldn’t start from here!”³ But “here” is precisely where I would like to start. As I noted, Professor Roberts concludes his review with an assertion that the United States continues to rely on flawed structures and rules to deal with its conflict with al Qaeda, and bemoans where the United States has ended up in 2007. To evaluate this conclusion, let’s take a snapshot of where we are right now, putting aside the various legal developments that have gotten us to this point.

Because different legal paradigms apply to US conflicts in Iraq and Afghanistan and with al Qaeda, I will treat each of them separately.

A. Afghanistan

ISAF is operating in Afghanistan under (most recently) UN Security Council Resolution 1707, a Chapter VII resolution that authorizes member States participating in ISAF to “take all necessary measures to fulfil its mandate.”⁴ The United States takes part in ISAF and also continues to lead a coalition called Operation Enduring Freedom (OEF), the force that intervened in Afghanistan in November 2001 after the United States decided to respond in self-defense following the September 11 attacks. The United States has not formally revisited its view that the conflict in Afghanistan is an international armed conflict. The argument that it remains an international armed conflict is based on the fact that the US government and the coalition forces that are part of ISAF and OEF continue to fight the same entities that OEF began to fight in 2001, at which time it clearly was an international armed conflict between the United States and the Taliban.

In this ongoing conflict, the United States applies the rules on targeting appropriate to international armed conflict—most notably, distinction and proportionality, as well as limitations on the use of certain weapons. Professor Roberts acknowledged US targeting rules in a talk he gave at the Brookings Institution in 2002, where he stated, “In the conduct of the air war [in Afghanistan], as in Iraq in ’91 and as also in Serbia in ’99, the United States clearly accepted the relevance and indeed value of the rules restricting targeting to militarily significant targets and I think that needs to be frankly and honestly recognized.”⁵ US Department of Defense (DoD) policy, as reflected in the DoD directive on the Law of War Program, is that

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, and that the law of war obligations of the United States are observed and enforced by the DoD Components and DoD contractors assigned to or accompanying deployed Armed Forces.⁶

The Directive defines “the law of war” as encompassing “all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” This reflects a decision by the US military that, as a general matter, applying the rules of international armed conflict to all conflicts however characterized (1) is the right thing to do as a moral and humanitarian matter and (2) gives the military a single standard to which to train.

The US processing and treatment of detainees in Afghanistan is governed by several laws and policies. To ensure that we are detaining only those people who

pose a security threat, we have established status review processes (just as we have in Iraq and at Guantanamo). The first review takes place at the time of capture to determine if the person being detained is an enemy combatant. The second review occurs usually within seventy-five days and in no event more than a hundred days of the individual's coming into DoD custody. The review is based on all reasonably available and relevant information. A detainee's status determination may be subject to further review if additional information comes to light. The combatant commander may interview witnesses and/or convene a panel of commissioned officers to make a recommendation to him. That commander must review the detainee's status on an annual basis, although he has tended to do so every six months. The Review Board also nominates certain Afghan detainees for entry into Afghanistan's reconciliation program. The government of Afghanistan then vets the nominees and selects some to return to their village elders to be reintegrated.⁷

We also have established clear treatment rules. First, the Detainee Treatment Act of 2005 (DTA) makes clear that no detainee in US custody or control, regardless of where he is held or by which US entity, may be subjected to cruel, inhuman or degrading treatment,⁸ as those terms are understood in the US reservations to the Convention Against Torture (CAT).⁹ Second, the DoD detainee directive issued in September 2006 provides that "all detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy."¹⁰ The latter further states that all persons subject to the Directive shall apply at a minimum the standards articulated in Common Article 3 of the 1949 Geneva Conventions without regard to a detainee's legal status. The Directive also requires that detainees not be subjected to public curiosity, reprisals, medical or scientific experiments, or sensory deprivation. And it states that all persons in DoD control will be provided with prisoner of war protections until a competent authority determines some other legal status. Some have expressed concern that the rules in the Detainee Directive are policy protections, not legal protections. But soldiers who mistreat detainees can be prosecuted under the Uniform Code of Military Justice (UCMJ).

Finally, interrogations of individuals in DoD custody, wherever held, are governed by the Army Field Manual on Human Intelligence Collector Operations, which is publicly available, and which expressly prohibits a number of interrogation techniques, including using military working dogs, inducing hypothermia or heat injury, applying physical pain, and placing hoods or sacks over the eyes of detainees.¹¹

Does all this mean that the conflict in Afghanistan no longer poses hard legal, policy or tactical questions? It does not. These are the US rules, but thirty-seven nations contribute to ISAF, and each contingent operates within a different legal framework. The contributing member States have different views about what type

of conflict exists in Afghanistan; some question whether an armed conflict exists at all. I will address lingering complications about the situation in Afghanistan later in this article.

B. Iraq

The activities of the Multi-National Force–Iraq (MNF-I) currently are governed by a UN Security Council resolution issued pursuant to Chapter VII. Under Resolution 1546, which the Security Council adopted unanimously on June 8, 2004, the mandate of MNF-I is “to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters [from Secretary of State Powell and then–Iraqi Prime Minister Ayad Allawi] annexed to this resolution.”¹² The annexed letters describe a broad range of tasks that MNF-I may undertake to counter “ongoing security threats,” including “internment where this is necessary for imperative reasons of security.”¹³ The letter from Secretary Powell states that the “forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.”¹⁴

Security Council Resolution 1546 required review of the MNF-I mandate within twelve months. Subsequent resolutions have extended this authority temporally—most recently Resolution 1723, which extends the Resolution 1546 mandate until December 2007. Resolution 1723 affirms the importance for all forces promoting security and stability in Iraq to act in accordance with the law of armed conflict, and the annexed letter from Secretary Rice states that the forces that make up MNF-I remain committed to acting consistently with their obligations and rights under international law, including the law of armed conflict.¹⁵

The detention standard contained in Resolution 1546 (“imperative reasons of security”) is drawn directly from Article 78 of the Fourth Geneva Convention,¹⁶ and was included in the annexed letters to indicate that the same basis for detentions that coalition forces applied before June 28, 2004 would continue to apply after governing authority was transferred to the sovereign government of Iraq. Domestic Iraqi law (in the form of CPA Memorandum No. 3¹⁷) provides detailed requirements for the conditions and procedures for security internment, including review of detention within seven days, as well as further periodic reviews. These periodic reviews occur in the form of the Combined Review and Release Board (CRRB), a majority-Iraqi board that assesses the threat posed by each detainee.¹⁸ Memorandum No. 3 states that the operation, condition and standards of any internment facility established by MNF-I shall be in accordance with the Fourth Geneva Convention, Part III, Section IV.¹⁹ (This includes requirements to provide internees with food, water, clothing and medical attention, and give them the

ability to hold religious services, engage in physical exercise, and send and receive letters.) Memorandum No. 3 requires MNF-I to release individuals from security internment or transfer them to the Iraqi criminal justice system no later than eighteen months from the date of detention, unless further detention is approved by the Joint Detention Committee, which is staffed by senior officials.²⁰ The CPA Memorandum also provides for guaranteed International Committee of the Red Cross (ICRC) access to internees.²¹

To break my own rule and dive backward into history, I want to correct misimpressions about whether the United States as a government ever asserted that the Geneva Conventions did not apply to its conflict with the government of Iraq in 2003 and the subsequent occupation of Iraq. Professor Roberts refers in his review of Mark Danner's book *Torture and Truth* to an excerpt of an e-mail written in mid-August 2003 from a captain in military intelligence in Iraq.²² That e-mail suggests that the captain believed that he could apply different rules of engagement and interrogation techniques to "unlawful enemy combatants" detained in Iraq. Danner also cites an effort by Lieutenant General Ricardo Sanchez, then-Commander MNF-I, to change the legal status of some of those detained to "unlawful enemy combatants";²³ however, General Sanchez did not have the authority to make that determination. Indeed, this was not and did not become US policy. In mid-2004, then-Secretary of Defense Donald Rumsfeld stated, "Iraq's a nation. The United States is a nation. The Geneva Conventions applied. They have applied every single day from the outset."²⁴

Similarly, in his commentary *The Torture Memos*,²⁵ Josh Dratel fails to distinguish between the different rules that apply to Afghanistan, Guantanamo and Iraq; he is not correct when he asserts that the United States desired to abrogate the Geneva Conventions with respect to the treatment of persons seized in the context of armed hostilities in Iraq. The Geneva Conventions applied directly to that conflict up to the end of occupation on June 28, 2004, and continued to apply—as the Conventions require—to any individual who remained detained as a prisoner of war or protected person. The Security Council resolutions, the annexed letters referring to MNF-I compliance with the laws of war and CPA Memorandum No. 3 now provide the governing rules for MNF-I, and US laws such as the Detainee Treatment Act²⁶ and the War Crimes Act²⁷ provide additional rules for the US contingent of MNF-I.

C. Conflict with al Qaeda

The United States is aware that many States and scholars continue to be skeptical that a State can be in an armed conflict with a non-State actor primarily outside that State's territory. However, the United States, for reasons the State Department

Legal Adviser has set forth publicly in some detail, continues to believe that such a conflict can and does exist. The US Supreme Court has supported that view, most recently in *Hamdan v. Rumsfeld*.²⁸ In the wake of that opinion, the protections of Common Article 3 apply to all members of al Qaeda detained in that conflict. Those al Qaeda members we detain in Afghanistan and Iraq are subject to the detention and review provisions I have already described. The treatment of al Qaeda members detained at Guantanamo is governed by the DTA and the Army intelligence collection manual.²⁹ (All of the detainees there are in DoD custody.) Further, because the Supreme Court has held that our conflict with al Qaeda is a non-international armed conflict, the Military Commissions Act (MCA)³⁰ provisions that criminalize violations of most provisions of Common Article 3, including torture, cruel treatment, intentionally causing serious bodily injury, rape and mutilation, would apply to those who mistreat al Qaeda detainees. The ICRC has access to everyone held at Guantanamo.

The detention review process for individuals held at Guantanamo, many of whom are associated with al Qaeda, is somewhat different from review processes in Iraq and Afghanistan. I assume that the readers are familiar with the Combatant Status Review Tribunals (CSRTs), by which the United States determines whether these individuals are in fact enemy combatants. As recently updated in the MCA, detainees may appeal their CSRT determination to a federal civilian court, the DC Circuit Court of Appeals. That Court, in the *Bismullah v. Gates* and *Parhat v. Gates* cases, currently is considering the evidentiary standards by which it will review CSRT decisions.³¹ There is another process by which the United States reviews ongoing detention in Guantanamo: when the CSRT upholds a detainee's status as an enemy combatant and the United States does not intend to prosecute the detainee in a military commission, the detainee receives an annual review by an Administrative Review Board (ARB), which assesses whether he continues to pose a serious security threat to the United States. Hundreds of individuals have been released from Guantanamo since it opened, under the CSRT and ARB processes.

These processes are more detailed and more regularized than the Article 5 tribunals that the Third Geneva Convention delineates for cases of doubt regarding prisoner-of-war status. This is so because we are trying to balance—on the one hand—the fact that the law of war recognizes that a State can detain enemy combatants fighting against it until the end of the conflict with—on the other hand—an acknowledgment that the end of this conflict may be a long way off. The United States is aware of concerns about indefinite detention that flow from the fact that this conflict is of indefinite length and has taken these steps so that we are not holding anyone longer than necessary.

D. Hard Questions

This is where the law, rules and procedures have ended up in mid-2007. I will leave it for others to discuss whether or how Abu Ghraib might have been avoided. But in any case it should be clear that these issues are hard, and getting it right has taken some trial and error. We are not the first government to have grappled with difficult questions at the beginning of a period of violence and terrorist attacks, and we will not be the last. Professor Roberts has described elsewhere the fact that the United Kingdom initially ignored international standards of treatment in Northern Ireland, which “led them into terrible trouble.”³² In fact, the United Kingdom in the initial, militarized phase of the “Troubles” occasionally used “war talk,” although, unlike the United States, the government generally did not characterize the fighting as an armed conflict in the legal sense.³³ The UK government resorted to detention without charge and interrogation techniques that the European Court of Human Rights later deemed to violate the European Convention on Human Rights (ECHR). Professor Roberts makes a fair point about the lessons of history in his book review: any State fighting a non-State actor, including the United States, would be well served to pay attention to the examples of the United Kingdom in Ireland and the French in Algeria. I was not working on these issues at the time, but I expect that there was a strong belief that an attack by nineteen terrorists that killed over three thousand people in one day lacked historical precedent in key ways. Even Professor Roberts recognizes that it was not obvious how to apply existing laws and rules to this type of non-State actor.

If application of law of war rules to the conflict with al Qaeda were easy, we would not see so many people—in foreign governments, non-governmental organizations and the academy—hold so many different views on how to treat this conflict. Some say it is not an armed conflict, so the United States should have used law enforcement measures to quash al Qaeda after the 9/11 attacks. Others say that there is an armed conflict in Afghanistan, but that a State cannot be in an armed conflict with a non-State actor outside its territory without also being in an armed conflict with the State in which the non-State actor is operating. Yet others acknowledge that a State can be in an extraterritorial armed conflict with a non-State actor when hostilities between those groups meet the threshold level of violence that constitutes an armed conflict. The US government has explained elsewhere why exclusive reliance on a law enforcement paradigm was not possible, and described how the UN Security Council and NATO have recognized that non-State actors can engage in armed attacks against States at a level to trigger that State’s right of self-defense. But we recognize that others do not agree.

Even the more traditional conflicts are complicated. The Geneva Conventions provide rules for a three-stage process: armed conflict between States, occupation

by one State of the other State and peace. But what happens when, as in Iraq, armed conflict continues after occupation ends? What is the status of the many different conflicts in Iraq? Or in Afghanistan, where a new government took power less than a year after the fighting began, but the conflict between the United States and the Taliban continues? If the Afghan conflict has switched from international to non-international, what does that mean for those detained in the international phase of the conflict? Does it matter for allies in a coalition with a host government how that host characterizes the violence? Can Chapter VII resolutions render some of these questions moot? These are not easy questions, and we continue to work with our allies to find good answers.

III. How We Got Here—The US System

With regard to the United States and the three armed conflicts I have discussed, many look at the glass as still half-empty. This seems to be due at least in part to the suspicion about the United States that the last five years has engendered among legal scholars, European allies and human rights advocates. These views are colored by abuses in Guantanamo and Abu Ghraib, by objections to the CIA interrogation program and undisclosed detention facilities overseas, and concern about the use of renditions. But one may also look at the current state of law and practice as a glass half-full, where the United States has built on the decisions made in 2001–02 to move to a clear, robust framework for treatment, where everyone knows the rules. In addition to assessing the substance of the current rules, I also want to talk a bit about the process by which we arrived “here,” because that process is another reason to be optimistic about the United States.

We arrived “here” in 2007 as the result of vigorous debate and activity within each of our three branches of government. The executive branch established a number of detainee policies related to the conflict with al Qaeda and the Taliban in Afghanistan and set up military commissions to try those suspected of war crimes and related offenses. In 2001, Congress passed the Authorization to Use Military Force,³⁴ and later enacted the Detainee Treatment Act and the Military Commissions Act. The federal courts have opined on several of these executive decisions about detainee policies and military commissions, and on the MCA. This, in my view, speaks to the strength of the US constitutional system. Professor Roberts expresses a sense that our bedrock separation of powers principles are threatened and suggests that the executive branch has dominated the decision making. Consider, however, recent comments by Professor Neil Katyal, who argued the *Hamdan* case in the Supreme Court on behalf of the detainee. He states, “I believe that the *Hamdan* decision—which invalidated the President’s system of military

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commissions—represents a historic victory for our constitutional process, and, in particular, the role of the United States Congress and federal judiciary in our tripartite system of government.”³⁵ He also stated:

[A]s a student of history, I know it’s hard for the Supreme Court in a time of armed conflict to rebuke the President And here the Administration has managed to [lose a case during armed conflict] several times [The Department of Justice] said . . . [detainees] won’t have habeas corpus rights. Well, the Supreme Court said no in the *Rasul* case. The Administration said that U.S. citizens can be held indefinitely incommunicado. The Supreme Court said no in *Hamdi*. The Administration said, you can have military commission [*sic*] and try these people. The Supreme Court said no in *Hamdan*.³⁶

The justices themselves seem confident that our separation of powers is healthy. In Justice Breyer’s concurring opinion in *Hamdan*, he writes that the Court’s conclusion “ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’”³⁷ He further describes the majority opinion as keeping “faith in those democratic means” necessarily implicit in the Constitution’s tripartite structure. These statements recall Justice Souter’s concurrence in *Hamdi*, in which he stated, “For reasons of inescapable human nature, the branch of government asked to counter a serious threat is not the branch on which to rest the Nation’s reliance in striking the balance between the will to win and the cost in liberty on the way to victory”³⁸

Many, including Professor Roberts, might have wished for us to get to this place in the first instance—to get it right immediately after September 2001, with cool heads and a clear understanding of the lessons of history. It would have saved years in litigation, permitted the United States to try detainees accused of war crimes much faster and avoided significant tension with European allies—but we did not develop on September 12 all of the processes and laws we have in place now. It is important to recognize, however, that the Supreme Court has confirmed several of the Administration’s basic legal positions with respect to its detention policies. It has confirmed that the United States is in a state of armed conflict with al Qaeda. It has confirmed that the law of war, and in particular Common Article 3 of the Geneva Conventions, applies to that conflict.

More fine-tuning is likely to follow because there are several important cases pending or on appeal in our courts. I already mentioned the *Parhat* case, where the DC Circuit will decide whether it can look to documents beyond those contained in a detainee’s CSRT record to determine whether to uphold the CSRT determination. A panel of the Fourth Circuit recently decided the *Al Marri* case.³⁹ In 2003, the United States detained al Marri as an enemy combatant; at the time of al

Marri's detention he resided in the United States. (He has been held in a brig in South Carolina since that time.) The United States agreed that the detainee had constitutional rights, including a right to habeas corpus, but argued that the Military Commissions Act applied to him, and that Congress in the MCA had created an adequate and effective substitute by which al Marri could contest his detention. The Fourth Circuit panel held that the Military Commissions Act did not apply to al Marri; that the Court therefore had jurisdiction over his habeas corpus claim; that al Marri had constitutional due process rights; and that, despite the President's determination in 2003 that al Marri was an enemy combatant closely associated with al Qaeda, the United States could not detain al Marri as an enemy combatant because it had not properly determined that he (1) was a citizen or member of an armed force at war with the United States, (2) was seized on or near a battlefield on which an armed conflict with the United States was taking place, (3) was in Afghanistan during the armed conflict there, or (4) directly participated in hostilities against the United States or its allies.⁴⁰ The Court granted al Marri habeas relief, while noting that the US government was free to prosecute him for criminal offenses.⁴¹ The United States has appealed this decision, seeking rehearing *en banc*.

Another court will consider whether Majid Khan, one of the fourteen detainees brought to Guantanamo Bay in September 2006 and someone to whom the US government previously had granted asylum, has a constitutional right to habeas corpus. And as military commissions get under way, we should expect to see appeals of final commission decisions to the DC Circuit, which will need to interpret the standards of review contained in the DTA, as amended by the MCA. And it is clear, even now, that the military judges are acting independently. In the *Khadr* and *Hamdan* cases, the two military judges dismissed the prosecution cases without prejudice. The basis for their decisions was that the CSRTs had not determined that the accused were "unlawful" enemy combatants (a prerequisite status for trial by military commission), but rather that they simply were enemy combatants. It seems safe to say that we have not seen the last of any of the three branches as we attempt to "strick[e] the balance between the will to win and the cost in liberty on the way to victory."

IV. Lingering Confusion—Afghanistan

Just because the US government has a clear set of rules for detention in Afghanistan does not mean that we are working seamlessly with allies that have different rules. Professor Roberts flags the "precious little uniformity" and "ongoing policy confusion" in Afghanistan. This is particularly true on detainee issues: some States are

reluctant to detain combatants at all, other States hand detainees over quickly to the government of Afghanistan and yet other States choose not to transfer all of their detainees to the Afghans. Why is this the case, and can we move toward greater harmony?

A. Different Views of the Conflict

One reason that contributing States approach detainee treatment differently in Afghanistan is that they take different views of the legal nature of the situation there. There are four possible positions: that it is an international armed conflict; that it is a non-international armed conflict; that it is not an armed conflict at all, and thus that ISAF is engaged in security or peacekeeping operations; and that, depending on the level of hostilities, it is at times an armed conflict and at times a security operation.

As I mentioned earlier, the argument that it is an international armed conflict flows from the idea that the conflict is very similar to the conflict that began in November 2001 in Operation Enduring Freedom and that the initial conflict has continued without interruption between the same parties. Under this theory, the right to self-defense continues, the consent of the government of Afghanistan to troop presence is important but not necessary, and individuals detained in the international armed conflict may continue to be detained.⁴² It is not clear whether the *Hamdan* decision, which deemed at least the al Qaeda part of the conflict non-international, affects the US view of the status of the conflict in Afghanistan.

The argument that it is a non-international armed conflict flows from a belief that, as of June 2002, when the Karzai government took power, the conflict in Afghanistan evolved away from a conflict between two States (the classical conflict identified in Common Article 2 of the Geneva Conventions) and became a conflict between the new Afghan government and countries supporting it on the one hand, and Taliban and al Qaeda forces on the other. Thus, the conflict resembles an internationalized non-international armed conflict of the type that Hans-Peter Gasser described in 1983.⁴³ The ICRC takes this view, and asserts that Common Article 3, customary international law applicable in non-international armed conflicts and Afghan human rights laws apply to the conflict.⁴⁴ Canada presumably also takes this view: although it is treating its detainees in Afghanistan consistent with the Third Geneva Convention, it appears to be doing so as a matter of policy, not law. However, the fact that it is relying on a core law of war treaty for detention guidance suggests that it views the situation as an armed conflict.⁴⁵

Third, the German government may not believe that it is an armed conflict at all. German documents describing its role in Afghanistan refer only to stability operations—the documents make no reference to armed conflict.⁴⁶ This seems

surprising, given the level of violence, numbers of troops killed and widespread use of military responses around the country to suppress the Taliban. Finally, at least one State seems to take the view that the situation fluctuates between being an armed conflict and falling below the threshold of conflict that triggers application of the law of war.

What is the view of the Afghan government on this question? It is not clear that the government has formally stated its view that this is or is not an armed conflict, but its use of its military to fight the Taliban and detain individuals without charge, as well as its consent to the presence of thousands of foreign troops who continue to engage in combat operations, suggests that the Afghan government would conclude that it is in an armed conflict. It has not, however, invoked a state of emergency under its constitution. If it is a non-international armed conflict, Common Article 3, customary international law applicable in Common Article 3 conflicts and Afghanistan's domestic human rights obligations would govern Afghanistan's treatment of detainees held in the conflict. (This explains why the ISAF/Interim Administration document that Professor Roberts cites refers to the Interim Administration's obligation to conform with "internationally recognized human rights.")

It should also be recognized that Security Council Resolution 1707 provides a legal basis under Chapter VII of the UN Charter for ISAF operations, including detention, regardless of the nature of the fighting in Afghanistan. In some respects, this makes the need to resolve the precise nature of the conflict less important, as ISAF's authorities under the resolution do not depend on the nature of the conflict (or even on the continued existence of a conflict). It also suggests that potentially differing views of the conflict by ISAF members need not prevent effective detention operations on the ground. One could imagine some kind of future arrangement whereby ISAF States were to agree that they would, at a minimum, apply Common Article 3 to detainees; and that States could at their discretion apply higher standards of treatment as a matter of policy; and if the Afghan government agreed that it would apply Common Article 3 and applicable human rights provisions in the International Covenant on Civil and Political Rights⁴⁷ and the government of Afghanistan's constitution and laws, then it may not be necessary formally to reconcile the competing descriptions of what is happening on the ground in Afghanistan.

B. Different Legal Obligations and Domestic Politics

Another reason that ISAF States have taken diverse approaches to detention is that they have different legal obligations and face different political pressures. Most notably, European member State contributors to ISAF may be concerned that, in some circumstances, the European Convention on Human Rights⁴⁸ extends to

their activities outside their own territories, even during armed conflict. In *Al-Skeini and others v. Secretary of State for Defence*, for instance, the United Kingdom conceded that the ECHR applied to its detention of one individual who died in its custody in Iraq.⁴⁹ The UK Court of Appeal upheld a High Court finding that the United Kingdom's Human Rights Act⁵⁰ and the ECHR applied to that individual's case because he was within the authority and control of UK forces in Iraq.⁵¹ The House of Lords has just upheld that decision, with the apparent result that any person held by UK forces abroad (and therefore in the United Kingdom's "effective control") would be covered by the Human Rights Act and the ECHR.⁵² Similarly, the European Court of Human Rights, in the *Saramati* case, just considered whether troops from France, Germany and Norway, acting as officers of the NATO Peacekeeping Force in Kosovo (KFOR) and UN Mission in Kosovo (UNMIK), violated Articles 1, 5, 6 and 13 of the ECHR in detaining a particular individual.⁵³ And in the *Behrami* case, the European Court of Human Rights just considered whether France violated an individual's right to life when the individual died from unexploded ordnance in the area of Kosovo in which France was participating in the KFOR mission.⁵⁴ The European Court of Human Rights concluded that these cases were inadmissible because each respondent State's acts were "attributable" to the United Nations, pursuant to Chapter VII authority that authorized KFOR and UNMIK, and that the European Court of Human Rights was not in a position to scrutinize these acts. The Court, therefore, was not forced to address how it would have decided the questions if the States had been acting in their sovereign capacities.

Even though France, Germany and Norway won their cases, one imagines that the possibility of such cases, and the lingering ambiguity about whether the Court would have reached a different conclusion if the States were not acting under UN auspices, must create different, and potentially very cautious, political and legal approaches to conflict and peacekeeping for ECHR States parties.

In addition to the ECHR, most NATO member States are parties to Additional Protocols I and II to the Geneva Conventions,⁵⁵ whereas the United States is not. In the Afghan conflict, it is not clear whether this fact would have (or has had) any significant impact on the ground. Further, most NATO member States believe that their legal obligations flowing from treaties such as the International Covenant on Civil and Political Rights⁵⁶ and the Convention Against Torture⁵⁷ apply to their activities extraterritorially. This may account for the fact that the bilateral agreements between NATO States and the Afghan Ministry of Defense regarding individuals detained by ISAF contain provisions that appear to reflect the non-refoulement obligations contained in Article 3 of the CAT. The United States historically has not taken the position that its CAT obligations apply extraterritorially, although as a matter of policy the United States will not transfer

an individual outside of its territory to a country where it is more likely than not that he will be tortured.

Human Rights Watch has described these bilateral arrangements with the government of Afghanistan as follows:

[T]hey share many common features, such as an agreement that NATO forces will release detainees or transfer them to Afghan custody within 96 hours, and that NATO and Afghan authorities will treat detainees in accordance with international law. The agreements further stipulate that Afghan authorities will not try, release, or transfer detainees to a third country without the explicit agreement of NATO forces (presumably to avoid transfer of detainees to . . . jurisdictions where detainees may be subject to mistreatment). Under the agreements seen by Human Rights Watch, NATO forces, as well as the International Committee of the Red Cross, will have access to detainees even after they have been transferred to Afghan custody.⁵⁸

When Canada operated as part of OEF, the Canadian forces turned detainees over to US forces in Afghanistan, but came under public pressure not to do so.⁵⁹ Under the original 2005 Canada-Afghanistan Detainee Transfer Arrangement, the Afghanistan Independent Human Rights Commission had guaranteed that it would report any abuses to the Canadian government. As a result of public concern about the mistreatment in Afghan custody of detainees turned over by Canadian forces, the Canadian government recently amended the 2005 Arrangement to bring it into line with pre-existing Denmark-Afghanistan, United Kingdom-Afghanistan and Netherlands-Afghanistan arrangements.⁶⁰ The new Arrangement allows Canadians to enter Afghan detention facilities at “any time.”⁶¹

The United States in its OEF capacity has been cautious about turning over detainees to the government of Afghanistan, due in part to our desire to confirm with greater clarity the legal basis on which the government of Afghanistan would hold them. Contrast the Canadian position: General Gauthier, the lieutenant general who commands the Canadian Expeditionary Forces Command and thus oversees all Canadian forces deployed abroad, was quoted as saying, “Our default setting is transfer. We haven’t held anybody for more than a few hours and we would prefer not to.”⁶² As a result of certain allies’ concerns about turning detainees over to the United States or to the Afghans, some allies are choosing not to detain at all, which renders the mission less effective.⁶³

Consider the following by David Bosco:

About 7,000 troops from Canada, Britain and the Netherlands are fending off a Taliban resurgence. The demanding mission . . . has also confronted alliance members with the uncomfortable reality that fighting often means taking prisoners. America, of course,

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has been taking prisoners in Afghanistan for some time. And that's part of the problem. The European and Canadian publics have been disgusted by reports of prisoner abuse, and they want nothing to do with what they see as American excess So NATO countries have essentially opted out of the detainee business. Before committing their troops to combat areas, the Canadian, Dutch and British governments signed agreements with the Afghan government stating that any captured fighters would be handed over to Afghan authorities rather than to American forces. In practice, these agreements mean that 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. It's not good policy. Not only is NATO forfeiting the intelligence benefits that can come with real-time interrogation, it's sending detainees into an Afghan prison system poorly equipped to handle them and rife with abuse.⁶⁴

A Human Rights Watch report confirms the reluctance to detain that Bosco describes. That report, from November 2006, states,

Dutch forces operating in Oruzgan announced their first five detainees two weeks ago, while British and Canadian forces operating in Helmand and Kandahar, respectively, have publicly acknowledged fewer than 100 detainees. Given the ferocity of the fighting in these areas, the absence of more detainees raises two alarming alternatives: either that NATO forces are not taking detainees, or, more likely, that NATO forces are circumventing their bilateral agreements by immediately turning over detainees to Afghan authorities and thus abrogating their responsibility to monitor the detainees' treatment.⁶⁵

Even the political approaches to the fighting in Afghanistan are different. The *New York Times* described the Dutch and US approaches as follows:

[H]ere in Uruzgan Province, where the Taliban operate openly, a Dutch-led task force has mostly shunned combat. Its counterinsurgency tactics emphasize efforts to improve Afghan living conditions and self-governance, rather than hunting the Taliban's fighters. Bloodshed is out. Reconstruction, mentoring and diplomacy are in. American military officials have expressed unease about the Dutch method, warning that if the Taliban are not kept under military pressure in Uruzgan, they will use the province as a haven and project their insurgency into neighboring provinces.⁶⁶

C. Toward Greater Harmonization

Presumably greater harmony in our approach to the situation in Afghanistan would be useful, as it would permit us more easily to transfer detainees among the various contingents, increase the intelligence we can gather from detainees, approach the Afghan government with a united front, and increase interoperability. Can we achieve greater harmonization? Professor Roberts suggests that the government of Afghanistan establish a country-wide detention regime, although it is not clear if he is suggesting that the regime would or should apply to individuals picked up and held by ISAF forces as well. He also suggests that NATO develop a binding set of rules on all aspects of treatment of security detainees not entitled to prisoner-of-war protections. This seems sensible, although NATO already tried once to achieve such a framework for Afghanistan and was able only to come to agreement on broad parameters.⁶⁷ Other ideas might include a new UN Security Council resolution containing language parallel to Resolution 1546, and a more detailed framework modeled on CPA Memorandum No. 3 (such that standards of any internment facility shall be in accordance with the Fourth Geneva Convention, Part III, Section IV). Finally, ISAF States could agree as a policy matter to treat all detainees in their custody as prisoners of war. One might also explore practical changes as well, such as a “left-seat, right-seat” approach to Afghan detention facilities, whereby the government of Afghanistan runs the detention facility with assistance and oversight by NATO forces from different countries. Any such solutions would require certain legal and political concessions from both the US government and other NATO contributors.

V. Conclusion

I would like to circle back to Professor Roberts’s ongoing discomfort with the US efforts dealing with the “war on terror” since September 11. Professor Roberts, like many other critics of US policy over the last six years, is concerned about the phrase “war on terror.” But the phrase “global war on terror” is a political statement, not a legal assertion.⁶⁸ The United States uses this term to mean that all nations must strongly oppose terrorism in all of its forms, around the world. We do not think we are in an armed conflict with all terrorists everywhere. We do, however, believe that we are in a legal state of armed conflict with al Qaeda, which includes an armed conflict in Afghanistan. That said, the questions raised by this armed conflict are difficult, and the laws in place on September 11—internationally and domestically—were not crafted to deal with the factual scenario we suddenly faced. In working through these difficult problems, the balance of powers in the US system has worked—not failed—for many of the critical elements of the three

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conflicts discussed. I would challenge this audience and our friends and critics to look objectively at where the law now stands, and determine on that basis whether a detention framework now exists that strikes an appropriate and durable balance between humanitarian concerns and military requirements in this and future non-traditional conflicts. I would also suggest that detention in Afghanistan presents hard questions not just for the United States but for all States contributing to ISAF, and that we should continue to put our heads together on these difficult and pressing questions.

Notes

1. Adam Roberts, *Torture, Detainees, and Incompetence in the "War on Terror,"* 49 SURVIVAL, Spring 2007, at 199, available at http://ccw.politics.ox.ac.uk/publications/roberts_survival49-1_reviewarticle1_torture.pdf.
2. Available at http://www.opiniojuris.org/posts/chain_1169503291.shtml.
3. *Id.*
4. S.C. Res. 1707, U.N. Doc. S/RES/1707 (Sept. 12, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/517/70/PDF/N0651770.pdf?OpenElement>.
5. Adam Roberts, Counterterrorism and the Laws of War: A Critique of the U.S. Approach, Address at the Brookings Institution (Mar. 11, 2002), available at <http://www.brookings.edu/events/2002/0311terrorism.aspx>.
6. US Department of Defense, Directive 2311.01E, DoD Law of War Program (May 9, 2006), available at http://www.fas.org/irp/doddir/dod/d2311_01e.pdf.
7. See Declaration of Colonel James W. Gray, submitted in the case of Fadi Al Maqaleh v. Gates, US District Court for the District of Columbia, Civil Action No. 06-CV-01669 (JDB).
8. Detainee Treatment Act of 2005, Pub. L. No. 109-148, sec. 1003(a), 119 Stat. 2680, 2739 (codified as amended at 42 U.S.C.A. sec. 2000dd (West 2001 & Supp. 2006)), available at <http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>.
9. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Feb. 4, 1985, G.A. Res. 46, U.N. GAOR 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 INTERNATIONAL LEGAL MATERIALS 1027 (1984), available at <http://www.hrweb.org/legal/cat.html>.
10. US Department of Defense, Directive 2310.01E, The Department of Defense Detainee Program (Sept. 5, 2006), available at http://www.fas.org/irp/doddir/dod/d2310_01e.pdf.
11. Headquarters, Department of the Army, FM 2-22.3, Human Intelligence Collector Operations (Sept. 2006), available at http://www.fcnl.org/pdfs/civ_liberties/Field_Manual_Sept06.pdf.
12. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/381/16/PDF/N0438116.pdf?OpenElement>.
13. *Id.*
14. *Id.*
15. S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006) and annexed letter dated Nov. 17, 2006 from the US Secretary of State to the President of the Security Council, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/632/35/PDF/N0663235.pdf?OpenElement>.

16. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 301 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

17. L. Paul Bremer, Coalition Provisional Authority Memorandum No. 3 (Revised) (June 27, 2004), *available at* http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf [hereinafter CPA Memorandum No. 3].

18. The United Kingdom similarly uses a CRRB comprised of UK and Iraqi members. See <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfa/209/7011108.htm>. CRRBs review detainee files approximately every six months.

19. CPA Memorandum No. 3, *supra* note 17, sec. 6(4).

20. *Id.*, sec. 6(5) and (6).

21. *Id.*, sec. 6(8).

22. See Roberts, *supra* note 1, at 201.

23. MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 44 (2004).

24. Campbell Brown, *New Front in Iraq Detainee Abuse Scandal?*, MSN.COM (May 20, 2004), *available at* <http://www.msnbc.msn.com/id/5024068/>.

25. Karen J. Greenberg & Joshua L. Dratel, *A Legal Narrative: The Torture Memos*, COUNTERPUNCH, Feb. 1, 2005, *available at* <http://www.counterpunch.org/dratel02012005.html>.

26. *Supra* note 8.

27. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C.A. sec. 2441 (West 2000 & Supp. 2007)).

28. 126 S.Ct. 2749 (2006). The Court did not even treat the issue as in doubt; the majority, concurring and dissenting opinions in *Hamdan* all assumed the existence of an armed conflict with al Qaeda, though the various justices did not all agree on the nature of the conflict (non-international or international).

29. US Army Field Manual 2-22.3, Human Intelligence Collector Operations, (Sept. 2006), *available at* <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

30. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *available at* http://www.washingtonpost.com/wp-srv/politics/documents/cheney/military_commissions_act.pdf.

31. Parhat v. Gates, No. 06-1397 (D.C. Cir.); Bismullah v. Gates, No. 06-1197 (D.C. Cir.). Transcript of oral argument (May 2007) *available at* <http://www.scotusblog.com/movabletype/archives/May%2015%202007%20CA%20detainee%20hearing.pdf>.

32. Roberts, *supra* note 5.

33. See Colm Campbell, “Wars on Terror” and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict, 54 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 321, 326 (2005). (“There were echoes of this approach in the early stages of the Northern Ireland conflict. For the British Home Secretary in 1971, the Government was ‘at war with the IRA’, a categorization also employed by the Northern Ireland Prime Minister (‘we are, quite simply, at war with the Terrorist . . .’). This language was quickly dropped. For the most part, the UK was careful to create a narrative of its behaviour in terms of a response to terrorist criminality, even if from time-to-time, the rhetoric of ‘war’ was drawn upon to justify particularly harsh measures.”)

34. Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), *available at* <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>.

35. See *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on Armed Services*, 109th Cong. (July 19, 2006) (statement of Neal

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Katyal), available at <http://www.law.georgetown.edu/faculty/nkk/documents/Katyal.testimony.SASC.v18.pdf>.

36. To receive testimony on legal issues regarding individuals detained by the Department of Defense as unlawful enemy combatants: Hearing Before the S. Comm. on Armed Services, 110th Cong. (Apr. 26, 2007) (testimony of Neal Katyal), available at <http://www.senate.gov/~clinton/news/statements/details.cfm?id=273211>.

37. Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2799 (2006) (Breyer, J., concurring).

38. Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part and concurring in the judgment).

39. Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).

40. *Id.* at 166.

41. *Id.* at 195.

42. Some who believe that the international armed conflict in Afghanistan ended in June 2002 when President Karzai took power submit that the United States was obligated to release at that time those individuals it detained in that conflict. Amnesty International has taken this position. See Written Evidence submitted by Amnesty International UK to the House of Commons, Select Committee on Foreign Affairs (Nov. 7, 2006), available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44we03.htm>. Amnesty International does acknowledge the ability to detain in non-international armed conflict. In a case in which an international armed conflict has become a non-international armed conflict, albeit with the same basic parties to the conflict, it seems very formalistic to insist that the United States release Taliban detainees from an international armed conflict, only to turn around and pick up those same detainees in the non-international armed conflict.

43. Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AMERICAN UNIVERSITY LAW REVIEW 145 (1983).

44. See International Committee of the Red Cross, International humanitarian law and terrorism: questions and answers (May 5, 2004), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5YNLEV> (asserting that the Afghanistan conflict became a non-international armed conflict in June 2002).

45. See THE SENLIS COUNCIL, CANADA IN KANDAHAR: NO PEACE TO KEEP: A CASE STUDY OF THE MILITARY COALITIONS IN SOUTHERN AFGHANISTAN 21–22 (2006), available at http://www.senlisCouncil.net/documents/Kandahar_Report_June_2006.

46. See, for example, <http://www.auswaertiges-amt.de/diplo/en/Startseite.html> (Germany's Federal Foreign Office website) (making no reference to armed conflict); http://www.germany.info/relaunch/politics/new/pol_bwehr_isaf_06_2006.html (same, and stating that fighting the Taliban and al Qaeda is primarily the mission of OEF forces, not ISAF).

47. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www1.umn.edu/humanrts/instrtree/b3ccpr.htm>.

48. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.hri.org/docs/ECHR50.html>.

49. The Queen (on the application of Al-Skeini and Others) v. Secretary of State for Defence [2006] 3 W.L.R. 508, para. 6 [hereinafter Al-Skeini (CA)].

50. Human Rights Act, 1998, c. 42, available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1.

51. Al-Skeini (CA), *supra* note 49.

52. Al-Skeini and others v. Secretary of State for Defence [2007] UKHL 26, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm>.

53. *Saramati v. France, Germany and Norway*, App. No. 78166/01, ECHR—Grand Chamber (May 31, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=saramati&sessionid=6090347&skin=hudoc-pr-en>.

54. *Behrami v. France*, App. No. 71412/01, ECHR—Grand Chamber (May 31, 2007), available at *id.*

55. 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; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 16, at 422 and 483, respectively.

56. *Supra* note 47.

57. *Supra* note 9.

58. Letter from Brad Adams, Executive Director, Asia Division, Human Rights Watch, to NATO Secretary General (Nov. 28, 2006), available at http://hrw.org/english/docs/2006/11/28/afghan14684_txt.htm [hereinafter Letter to NATO].

59. CBC News, *The controversy over detainees*, CBC.CA, Apr. 27, 2007, <http://www.cbc.ca/news/background/afghanistan/detainees.html>.

60. Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, Can.-Afg., Dec. 18, 2005, available at http://www.forces.gc.ca/site/operations/archer/Afghanistan_Detainee_Arrangement_e.pdf. For a description of the Dutch and UK agreements, see Michael Byers & William A. Schabas, *Canadian War Criminals? Experts want top officials investigated*, THE TYEE, Apr. 27, 2007, <http://thetyee.ca/Views/2007/04/27/WarCrime/>.

61. CBC News, *World court asked to look into Afghan detainee controversy*, CBC.CA, Apr. 26, 2007, <http://www.cbc.ca/canada/story/2007/04/26/afghan-detainees.html>. The article cited in endnote 60 states that the Dutch-Afghan agreement guaranteed Dutch military forces, embassy officials and the ICRC access to detainees. That arrangement also required written notification of a prisoner's transfer to a third party or any other significant changes.

62. Paul Koring, *Troops Told Geneva Rules Don't Apply to Taliban*, GLOBE AND MAIL (Canada), May 31, 2006, at A1, available at <http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind0605&L=justwatch-l&O=D&P=89330>.

63. David Bosco, *A Duty NATO Is Dodging in Afghanistan*, WASHINGTON POST (Nov. 5, 2006), at B07, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18842&prog=zgp&proj=zme>.

64. *Id.*

65. Letter to NATO, *supra* note 58. Human Rights Watch seems to be speculating that the relevant countries are turning over detainees to the government of Afghanistan on the battlefield, rather than processing them through the countries' internal systems before turning them over to the government of Afghanistan pursuant to the formal arrangements. See also Second Memorandum from the Ministry of Defence, *The attitude of the people towards the International military presence inside Afghanistan* para. 7 (Feb. 14, 2006), Written Evidence submitted to the House of Commons, Select Committee on Defence, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmdfence/558/558we04.htm> [hereinafter Second Memorandum] ("Since 2001 we have detained in Afghanistan on very few occasions, and all individuals were subsequently released. The UK has not transferred any detainee to the Afghan authorities or into the custody of US forces, and there are currently no individuals being detained under UK authority in Afghanistan. Current UK policy is not to detain individuals

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unless absolutely necessary; and indeed it has rarely been necessary to do so in ISAF's current area of operation").

66. C.J. Chivers, *Dutch Soldiers Stress Restraint in Afghanistan*, NEW YORK TIMES, Apr. 6, 2007, at A1, available at http://www.nytimes.com/2007/04/06/world/asia/06afghan.html?_r=1&scp=1&sq=&st=nyt&oref=slogin.

67. Second Memorandum, *supra* note 65, paras. 4–6 (“ISAF policy, agreed by NATO, is that individuals should be transferred to the Afghan authorities at the first opportunity and within 96 hours, or released . . . NATO Rules of Engagement set out the circumstances in which individuals may be detained by ISAF troops, but do not cover their subsequent handling . . . Work continues within NATO on clarification of detention issues, in discussion with the Afghan government, as NATO prepares for expansion beyond the North and West of Afghanistan. Handling of detainees after detention is a matter for individual states to negotiate with the Afghan Government as appropriate.”).

68. See John Bellinger, *Legal Issues in the War on Terrorism*, Address at the London School of Economics (Oct. 31, 2006), available at <http://www.state.gov/s/l/rls/76039.htm>.