3. Human Rights, Humanitarian Law and the "War on Terrorism" in Afghanistan

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1 Introduction

A little more than a decade ago Louis Henkin suggested that ours was the "age of rights," that human rights was the "idea of our time."1 Building from a few terse phrases in the UN Charter, the last half century has witnessed the steady universalization and internationalization of the 1948 Universal Declaration of Human Rights (UDHR) and the consequent transformation of international law and politics.2 At the same time, and largely in response to these developments, that older body of norms known as the "laws of war" has been transformed into the modern "law of human rights in armed conflict" or "international humanitarian law."3 The basic idea of humanitarian constraints on the waging of war has similarly woven itself into the fabric of customary and conventional international law and the practice and opinio juris of armed forces and states alike.

If all of this has been settled practice, then, on 11 September 2001, the Age of Rights was dramatically and tragically confronted with what some see as the emer-

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2 Today, the UN human rights regime consists of a web of Charter-based and treaty-based institutions and mechanisms, and an expansive body of international human rights norms. Its reach and effectiveness is further supplemented, shaped and, increasingly, challenged by a proliferation of domestic and international nongovernmental organizations. Faced with these developments, some states have resisted the airing of charges of their own human rights violations on the grounds that these are outside the proper sphere of operation of international organizations such as the UN, which is forbidden under the terms of its own Charter "to intervene in any matters which are essentially within the domestic jurisdiction of any state:" Article 2(7), UN Charter. As Henkin has observed, however, UN practice long ago rejected that objection, in effect reflecting the conclusion that human rights violations were not a matter of domestic jurisdiction, or that UN discussion of them is not intervention, or both.

3 Kalshoven and Zegveld note that in the 1960s and 1970s, the UN began to take an active interest in the promotion and development of the law of armed conflict under the heading "human rights in armed conflict." This marked the increasingly important relationship between the law of armed conflict and human rights law and highlighted the "idea of the protection of the fundamental rights of human beings even in times of armed conflict." See Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Geneva: ICRC, third edition, 2001, p. 32.
gence of the Age of Terrorism. While acknowledging, for example, that since the end of the Cold War human rights had become the “dominant moral vocabulary in foreign affairs,” Michael Ignatieff questioned whether after the events of 11 September, “the era of human rights has come and gone.” He noted that “Rome has been attacked, and Rome is fighting to reestablish its security and hegemony” and that, accordingly, the international human rights movement will have to engage in “the battle of ideas: it has to challenge directly the claim that national security trumps human rights.”

That battle of ideas – between contested conceptions of security and humanitarianism, which is an underlying theme of this collection of essays – has begun in earnest and is being waged in a number of different fora and in relation to a number of issues, each raising its own problems and implications for the future promotion and protection of human rights and humanitarian law. This chapter explores several dimensions of this relationship by considering the application of these two bodies of law to the armed conflict initiated by a US-led coalition of states in Afghanistan following the dramatic events of 11 September 2001. This analysis falls into three parts. First, I describe the new geopolitical reality of the “Bush doctrine” and assess its implications for international law governing the resort by states to the threat or use of force (jus ad bellum). Second, against this background I examine how the US-led “war on terrorism” poses a radical challenge to the existing rules of humanitarian law (jus in belli) and human rights law in general. This is illustrated by examining US treatment of persons detained in Afghanistan, Guantánamo Bay and on its own territory since 11 September. Finally, I suggest that the United States has exhibited a continuing attitude of unilateralism, exceptionalism and general disregard for international law during its military offensive in Afghanistan, which has serious consequences for the future protection of human rights and humanitarian law in all parts of the world.

2  Jus Ad Bellum: The New “Bush Doctrine”

On 11 September 2001, international terrorists, members of al-Qaeda, carried out attacks on the Pentagon in Washington D.C. and on the World Trade Center in New York killing approximately 3,000 people. The terrorists hijacked four civilian aircraft and flew them into these targets (with one aircraft crashing in Pennsylvania) killing all passengers on board and causing mass deaths and injuries to civilians and massive destruction of property. The next day, the Security Council adopted a resolution unequivocally condemning the attacks, declaring them to constitute a “threat

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to international peace and security” and recognizing the “inherent right of individual or collective self-defense in accordance with the Charter.”

On 28 September, the Security Council, acting under Chapter VII of the Charter, unanimously adopted a resolution directed at combating terrorists and all states which support, harbor, provide safe haven to, finance, supply weapons to, help recruit, or aid terrorists and requiring all member states to cooperate in a wide range of areas – from suppressing and financing of terrorism to providing early warning, cooperating in criminal investigations, and exchanging information on possible terrorist acts. The resolution also provided for the establishment of a new “terrorism committee” of the Security Council, consisting of all members of the council, to which all member states were required to report within 90 days on the steps they were taking to implement the resolution. Thus, Resolution 1373 quickly established a comprehensive legal framework – backed by Chapter VII enforcement power – for states to address the threat of international terrorism through mutual cooperation and coordination of their criminal justice systems.

A week later, on 7 October, the then US Ambassador to the United Nations, John Negroponte, delivered a letter to the president of the Security Council stating that the United States, together with other states, had “initiated actions in the exercise of its inherent right of individual and collective self-defense” against al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan on the basis of “clear and compelling information” that al-Qaeda, supported by the Taliban regime in Afghanistan, had a “central role in the attacks.” The letter further stated that while still in the early stages, the United States “may find that our self-defense requires further actions with respect to other organizations and other States.” Thus was born the “Bush doctrine” – the asserted right of a state (or at least the United States) to use military force in “self-defense” against other states which aid, harbor or support international terrorists or terrorist organizations.

This proposition turned a number of settled principles of international law on their head. First, the notion of an “armed attack” under Article 51 was traditionally understood to mean an attack against a victim state by the regular armed forces of another state (or states) across an international border. Here, the United States had been attacked not by the armed forces of a state but by a non-state terrorist organization. Second, and in response to this problem, the Bush administration – with the tacit acquiescence of the Security Council and the international community – attributed the legal responsibility for these attacks to the Taliban regime, and thus to the state of Afghanistan itself.

Under international law the question of state responsibility for terrorist acts is far from settled. Complicated legal issues arise when terrorist activities are of unknown provenance, and especially when there is an attack on personnel of one state in the territory of another state. Politically, as well as legally, the response of the international system, and of individual states, is troubled by uncertain facts – by the uncer-

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tain identity of the terrorists, uncertainty as to whether terrorist activities are sponsored by a state, and if so, by which state. In the context of “indirect aggression” during the Cold War, it was suggested by some scholars that if rebels are effectively supported and controlled by another state, then that state is responsible for a “use of force” as a consequence of that agency. However, in cases in which “aid is given but there is no agency established, and there is no exercise of control over the rebels by the foreign government, it is very doubtful if it is correct to describe the responsibility of that government in terms of a use of force or armed attack.” This position was confirmed in the 1986 Nicaragua case, when the International Court of Justice (ICJ) held that the cross-border acts of mercenaries (which it said could constitute an “armed attack” if of sufficient gravity) would not be imputed to a state unless they were effectively controlled by the state in question; it was not enough that they were merely dependent on that state for finance, training, equipment and intelligence. Thus, although the United States helped finance, train, organize and equip the Contras, their acts of attacking pipelines, storage facilities, and naval patrol boats, and in mining Nicaraguan ports were not found to be imputable to the United States for lack of effective control.

The Nicaragua test must be seen in the context of two further cases. First, in the 1979 Tehran Hostages case, the ICJ held that Iran’s failure to take appropriate steps to protect the US Embassy in Tehran, combined with conduct greater than negligence but falling short of actual authorization, translated the action of the students in attacking the embassy into acts of state. The decision has been interpreted to mean that subsequent acknowledgment or endorsement of wrongful acts by a state may give rise to state responsibility. Second, in the recent Tadić decision of the International Criminal Tribunal for the Former Yugoslavia, the Tribunal applied a threshold test of overall (rather than effective) control, holding that the acts of the Bosnian Serb forces were attributable to the Former Republic of Yugoslavia (FRY).

Read together these cases reveal an apparent inconsistency: a state is responsible for failure to control individuals on its own territory but not if it actively supports and encourages armed attacks in another state (at least to an extent less than the exercise of overall control). In the Afghanistan context then, the question facing the Security Council was the extent of the control exercised by the Taliban over al-Qaeda’s terrorist operations. Resolution 1368 appears to have settled this uncertainty in the law: a state which aids, harbors, or supports terrorists who carry out armed

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11 *Tadić Appeal Decision*, para. 107 (It should be noted that the decision was reached in the context of a finding of individual rather than state responsibility).
attacks against another state will be held responsible under international law and will be subject to the use of force in self-defense.

This leaves, however, numerous ambiguities that have profound human rights and humanitarian law implications. First, how close must the connection be between the host state and terrorist organization, and who ultimately is to decide this issue? That is, is presence alone of a terrorist group on a state’s territory sufficient, and is Security Council approval required before any military action may be taken in self-defense? In this regard it should be recalled that, despite the absence of any threat of veto by the other permanent members, the United States initiated its military offensive in Afghanistan without seeking Security Council authorization under Chapter VII of the Charter, choosing instead to rely upon its “inherent right” to individual and collective self-defense.

Second, in the case of international terrorist networks, which by definition operate across and within the territories of many states, how far and for how long does this right to self-defense extend? Would it extend, for instance, to a suspected al-Qaeda cell outside of Afghanistan in Somalia, Syria or the Sudan? Would it extend to other terrorist organizations in third states that have not attacked the United States but which may be planning or supporting future terrorist attacks? If this broader notion of “anticipatory” self-defense is accepted, does it extend to a “terrorist” or “rogue” state suspected to be developing weapons of mass destruction (as in the case of Iraq)? If so, this would represent a radical change to the norms controlling the use of force under the Charter – a change that poses potential threats to both the stability of the interstate state system and the international protection of human rights.

The reason for this is that an expanded conception of “anticipatory” self-defense against non-state terrorist groups opens the way for a new and dangerous exception to the Charter’s basic prohibition in Article 2(4) on the unilateral threat or use of force. The framers of the Charter recognized that Article 2(4) was fundamental to the aim of saving “succeeding generations from the scourge of war” and securing peace. As the supreme value of the state system, it is regarded as more compelling than competing values, even human rights. While states have at various times asserted “benign” exceptions to Article 2(4), none have been accepted by the majority of states. For example, Brezhnev’s assertion of a right to intervene to protect socialism in Czechoslovakia in 1968, and the former President Bush’s assertion of a right to intervene by force to protect democracy in Panama in 1989, were both widely condemned. In relation to the doctrine of humanitarian intervention, the international community appears to have accepted the so-called “Entebbe exception” – the right to liberate hostages if the territorial state will not or cannot – but it has not accepted a unilateral right to intervene by force to topple a government or occupy its territory even if that were truly necessary to terminate atrocities or liberate detainees.

Of course, the absolute prohibition on the use of force by states has come under greater scrutiny following the genocide in Rwanda and deplorable inaction on the part of the international community. In Kofi Annan’s landmark speech to the General Assembly on 20 September 1999, the Secretary-General directly confronted the conflict between state sovereignty and “individual sovereignty” (human rights).
He posed the question whether, if a coalition of states had been prepared to act in defense of the Tutsis but had not been able to obtain Security Council authorization, the coalition nevertheless should have stood aside as the horror unfolded? In confronting this conundrum, however, Annan stressed not the abandonment of the collective security arrangements established by the UN Charter but rather the need for their application in a new era based on the principle that massive and systematic violations of human rights – wherever they occur – should not be allowed to stand. This would require interventions to be applied consistently and fairly: for states to define their “national interests” in terms of the collective interest; for the Security Council to be the relevant actor where the use of force is necessary to uphold the principles of the Charter in defense of common humanity and to avoid “self-help” by states; and for states to commit themselves to peace and post-conflict development and assistance. Thus, Annan’s speech should be read not as advocating a loosening of Article 2(4) in the name of human rights (or toward any other ends, including the use of force against global terrorism) but rather a strengthening of Chapters VI and VII. A similar approach has been advocated by a special Commission recently convened to address these issues.12

State practice prior to 11 September also categorically rejected a putative right of states to use anticipatory self-defense against terrorist threats. When on 1 October 1985 Israel bombed the PLO’s headquarters near Tunis in Tunisia, Israel justified its actions to the Security Council on the basis that Tunisia had “knowingly harbored” terrorists who had targeted Israel. Benjamin Netanyahu, then Israeli Ambassador to the UN, argued that a “country cannot claim the protection of sovereignty when it knowingly offers a piece of its territory for terrorist activity against other nations.” In response, the Security Council rejected this claim and voted to condemn the Israeli action by a vote of 14-0 (with the United States abstaining).13 The resolution condemned “vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the UN Charter, international law and norms of conduct.” It also called Israel’s actions a “threat to peace and security in the region.”

The next year in 1986, the United States declared that the Libyan government was responsible for terrorist acts in Europe, including the bombing of a nightclub in Berlin frequented by US servicemen, in which a soldier was killed and many wounded. The United States responded by bombing targets in Libyan territory. President Reagan declared the “preemptive action against Libya’s terrorist installations” as “fully consistent with Article 51 of the UN Charter,” presumably because in the view of the United States the terrorist acts constituted an “armed attack” justifying the use of force in self-defense. The bombing of Libya was widely condemned by the foreign ministers of the non-aligned countries as an “unprovoked act of aggression,” and the claimed justification was widely rejected by states.14 A resolution of

14 General Assembly Resolution 41/38 (XII) (1986).
condemnation in the Security Council received nine votes, but was vetoed by the United States, France and the United Kingdom. A few years later, in 1993, US forces launched 23 Tomahawk missiles at Iraqi intelligence headquarters in Baghdad, declaring the attack to be in response to an Iraqi plot to assassinate ex-President George Bush while on a visit in Kuwait. The United States did not seek authorization for its action from the Security Council, nor did it claim to be acting under previous resolutions (which had in effect put Iraq under the council’s continuing control in the aftermath of its 1990 invasion of Kuwait). Instead, US officials claimed that the attack on Iraqi intelligence headquarters was a necessary and proportionate response in self-defense against the attempted Iraqi attack on the ex-president.

This self-defense rationale has similarly been employed by the United States in relation to the prior activities of al-Qaeda. In August 1998, the United States launched 79 cruise missiles against bin Laden’s reputed training camps near the Pakistan border and at a pharmaceutical plant in Sudan’s capital Khartoum that US officials linked to bin Laden’s operations. The strikes came in the wake of the terrorist bombings of the US embassies in Nairobi and Dar es-Salaam, which killed more than 200 people, including 12 Americans. On 15 October 1999, the Security Council imposed sanctions on the Taliban to turn over bin Laden, banning Taliban-controlled aircraft from takeoff and landing, and freezing the Taliban’s assets abroad.15 On 12 October 2000, a US warship, the USS Cole, was bombed while refueling in the Yemeni Port of Aden by two suicide bombers in a fiberglass skiff loaded with explosives, killing 17 American sailors. The Taliban’s continuing failure to hand over bin Laden led to an expansion by the Security Council of the sanctions regime on 19 December 2000, including an arms embargo on the Taliban, a ban on travel outside Afghanistan by Taliban officials of deputy ministerial rank and the closing of Taliban offices abroad.16

This chronology of events highlights the difficulties inherent within the terms of chapters VI and VII of the Charter (which were drafted with a different model of armed conflict in mind) of specifying lawful responses for states to new types of terrorist activity. Even accepting these difficulties, however, and the clear need for reform of UN collective security arrangements, scholars such as Henkin have argued that it is dubious whether a failed attempt to assassinate an ex-president was an “armed attack” on the United States within the meaning of Article 51 and that it is far-fetched to say that the bombing of Libyan targets was a “necessary” and “proportional” response. International law has always made a clear distinction between armed reprisals and self-defense. If terrorists entered one state from another, the first state was permitted to use force to arrest or expel the terrorists but, having done so, it was not entitled to retaliate by attacking the other state. As discussed above, the Security Council has at various times condemned Israel for carrying out armed reprisals against its neighbors, and, in 1970, the General Assembly declared that

“states have a duty to refrain from acts of reprisal involving the use of force.”17 Furthermore, in its 1996 Advisory Opinion on the Legality or Use of Nuclear Weapons, the ICJ stated that armed reprisals in times of peace “are considered to be unlawful.” Thus, international law has been reluctant to situate permissible responses to terrorism within the paradigm of self-defense under Article 51. That position has been radically altered after the events of 11 September, at least in the case of state-sponsored terrorism.

This broadening of the *jus ad bellum* poses new dangers for the international protection of human rights and humanitarian law. Responding to terrorism through military interventions in other states tends to lead to an escalation of violence and, in time, full-scale armed conflict with the certainty of gross human rights violations on both sides. The deplorable situation in Israel and the Occupied Territories over the last five years — where extra-judicial executions in anticipatory self-defense and suicide bombings have become routine — is perhaps the clearest illustration of this vicious cycle of spiraling violence. Even in the case of suggested military “humanitarian interventions,” the use of force must be tightly constrained. Again, the reasons for this are apparent. Human rights violations occur in all states, and in many states, gross human rights violations are evident. Even international human rights proponents recognize that these violations can serve as a pretext for invasion; the Entebbe hostage situation apart, it is rare for a state to intervene for an authentic humanitarian purpose; and that such military intervention may result in greater injury to human beings and human rights than do the violations they seek to terminate. Accordingly, this is not a choice the UN Charter left for individual states to make, establishing instead a comprehensive framework for the collective use of force “in the common interest” under the aegis of the Security Council.

For well-known reasons of *realpolitik*, the permanent members of the Security Council have failed to discharge their responsibilities under Chapter VII of the Charter, especially in the case of gross violations of human rights. Indeed, in the wake of NATO’s bombing campaign directed at targets in Kosovo and other parts of Serbia and Montenegro in early 1999, without express Security Council approval, some scholars and diplomats began to argue for a new distinction between “legality” and “legitimacy” for the purposes of humanitarian intervention, at least where a coalition of states is acting to halt ethnic cleansing. But now, in the “Age of Terrorism,” a second and equally complex question confronts the international state system: May a state or coalition of states intervene in anticipatory self-defense, without Security Council authorization, in another state which is alleged to be aiding, harboring or supporting terrorists? Mr. Negroponte’s letter of 7 October appears to leave open this possibility. Unless the international system moves to develop effective lawful responses to the scourge of terrorism, target states will be tempted to seek unilateral solutions by force — often the “instinctive” response from frustration — although they rarely serve their alleged purpose and are often destructive for the state as well as human values.

From a humanitarian perspective this creates two dangers. First, it leaves the door open for any state that is the victim of a terrorist attack to use military force in response (whether in the territory of other states or on its own territory), thus encouraging resort to international or internal armed conflict rather than other legal and diplomatic measures short of the use of force. Even if increased adherence to international human rights and humanitarian norms durante belli by states and combatants is possible, this can only ever serve as damage control once the jus ad bellum threshold has been crossed. One need only think of the 2002 terror attacks on the Indian parliament by suspected Pakistani militants and of the host of other terrorist bombings in Russia, Israel, Colombia, the Philippines and Indonesia to foresee the consequences of an unrestrained right of self-defense in the context of an ongoing global “war on terrorism.” Indeed, many states have already co-opted the language of self-defense to justify the use of military force against “terrorists.” For example, “India is already using President Bush’s own logic on terrorism to justify its own implicit threat to attack militant training camps in Pakistan territory.”

Second, this approach conceptualizes responses to international terrorism in a “war” rather than “justice” paradigm, thereby changing the normative legal framework governing the conduct of states’ anti-terrorist activities, a matter with profound human rights consequences (which are discussed in the next section). Both Human Rights Commission Special Rapporteur, Kalliori Koufa pre-11 September, and High Commissioner for Human Rights, Mary Robinson post-11 September, warned in strong terms of the consequences of such a paradigm shift. A failure to properly distinguish acts of war from acts of terrorism is likely to have its greatest consequences in internal conflict situations where significant “gaps” remain in the law.

For example, in situations short of armed conflict (i.e., where Common Article 3 of the four Geneva Conventions and Additional Protocol II do not apply) internal violence may lead a state to derogate from its obligations under international human rights treaties. This allows the state to engage in conduct forbidden to it in normal times and under more serious conditions of civil war. Thus, states which are engaged in struggles with internal armed groups such as Spain (in relation to the ETA), Turkey (in relation to the PKK), Indonesia (in relation to the GAM in Aceh), Russia (in relation to Chechen rebels), the Phillipines (in relation to the Abu Sayyaf), Pakistan (in relation to numerous militant groups in Pakistan and Kashmir), Israel (in relation to groups such as Hamas in the Occupied Territories), China (in relation to the Uighurs in Xinjiang province) and Colombia (in relation to the FARC) are likely to rely on this grey zone between war and peace in the name of anti-terrorism measures.

This danger has for some years led to calls for minimum humanitarian standards to close the “gap” in cases of internal conflicts that fall below the Additional Protocol II threshold and that are insufficiently covered by either humanitarian or human rights protections. Indeed, this issue has been on the agenda of the

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Commission on Human Rights since 1994,\textsuperscript{19} has generated two reports by the Secretary-General,\textsuperscript{20} and has led to a series of expert meetings. Such minimum humanitarian standards would apply in at least four situations: first, where the threshold of applicability of international humanitarian law is not reached or disputed; second, where the state is not a party to the relevant international instruments; third, where derogation from specific standards is invoked; and fourth, where the relevant actor is not a government but some other group. In an Age of Terrorism, where armed force is employed by states both internationally and internally, the need is greater than ever for an irreducible core of nonderogable humanitarian and human rights norms. This must include core due process guarantees, limitations on excessive use of force and on methods of combat, prohibition of deportation, rules pertaining to detention and humane treatment and guarantees of humanitarian assistance (see further below).

Neither of these dangers escaped the attention of the UN Secretary-General. Upon receipt of Negroponte’s letter and after the initiation of extensive US and UK military operations in Afghanistan, Kofi Annan stated that while the “states concerned have set their current military action in Afghanistan in [the context of self-defense]” to defeat terrorism, we need a “sustained effort and a broad strategy to unite all nations ... working together and using many different means – including political, legal, diplomatic and financial means.” The next day, on 9 October, Annan made a brief statement indicating that he and other diplomats were “disturbed” by the statement in the US letter to the Security Council claiming a legitimate right to extend military attacks beyond Afghanistan. “There is one line in that letter that disturbed some of us,” Annan stated. “I think the one sentence which has caused some anxiety amongst the membership – which I have also asked about – was the question that they [the US] may find it necessary to go after other organizations and other states, beyond al-Qaeda and Afghanistan. Basically, it is a statement that they are at early stages and keeping their options open,” he said. At that time, the US State Department’s list of “terrorist states” included Iraq, Iran, Syria, Sudan, Libya, North Korea and Cuba.

While it is perhaps too early to assess the \textit{opinio juris} of states toward the Bush doctrine, the politics of state practice have quickly revealed a host of problems and double standards. The United States emphatically urged restraint on the use of force by both India against Pakistan and by Israel against the Palestinians and neighboring states despite evidence that various states have been supporting, financing and harboring terrorist groups. Furthermore, in the case of US economic or strategic “allies” such as Saudi Arabia (from whom the US receives annually 17 percent of its crude oil imports, receives nearly half a trillion dollars in investments, and to whom it exports the largest amount of arms among developing countries) or Pakistan (which


is providing strategic assistance to the US-led military coalition against terrorism),
clear evidence of financing or supporting terrorist groups appears not to have acti-
vated the Bush doctrine. Conversely, attempts by the United States to link the
"rogue regime" of Saddam Hussein in Iraq to the al-Qaeda terrorist network in order
to justify the preemptive (or "preventive") war without Security Council authoriza-
tion were met with worldwide skepticism and resistance.

3. The Convergence of Human Rights and Humanitarian Law
(*Jus in Bello*)

For years both scholars and practitioners have been observing the gradual conver-
gence of international human rights and humanitarian law.21 Indeed, today we no
longer refer to the "laws of war" but rather to "international humanitarian law,"
reflecting the influence of the human rights movement and basic principles of hu-
manity. In many respects the older body of humanitarian law, which derives histori-
cally from distinct medieval notions of chivalry and reciprocity guaranteeing "fair
play" and minimizing unnecessary suffering in times of armed conflict, is being
"humanized" to accord with a more modern conception of individual human dignity
that is thought to prevail in all circumstances.

This can be seen in a number of areas: as compared with the Lieber Code and
early Hague law, the guarantees against torture, arbitrary arrest and detention, discri-
mination, and of due process in the 1949 Geneva conventions and 1977 Addi-
tional Protocols reflect the unmistakable influence of the UDHR; the domain of
legitimate reprisals (collective responsibility on the many for violations by a few)
has diminished and been influenced by the emphasis in human rights law on
individual responsibility; violations of humanitarian law are increasingly subject to
prosecution in third states under the principle of universal jurisdiction; the classic
distinctions in thresholds of applicability between "international"22 and "noninter-
national"23 armed conflicts has begun to break down with increasing calls for the
formulation of fundamental standards of humanity that protect an "irreducible core
of non-derogable norms," and we have seen the emergence of the notion of "crimes
against humanity" with no a priori nexus to armed conflict.

While these convergences are welcome developments, it is important to realize
that there remain important differences between human rights and humanitarian law.
Humanitarian law regulates aspects of a struggle for life and death between contest-
tants who operate on the basis of formal equality; it allows the killing of "combats-
ants" and tolerates the killing and wounding of innocent civilians not directly par-

21 Theodor Meron, "The Humanization of International Humanitarian Law," *AJIL*, Vol. 94,
No. 2, 2000, pp. 239-278.
22 Art. 2, 1949 Geneva Conventions and Additional Protocol I.
23 Common Art. 3, 1949 Geneva Conventions and Additional Protocol II.
ticipating in the armed conflict as "lawful collateral damage;" it permits deprivations of personal freedom without convictions in a court of law; it allows an occupying power to resort to internment and limits the appeal rights of detained persons; and it permits far-reaching limitations on freedoms of expression and assembly. Thus, while humanitarian law attempts to impose constraints on the savagery of war, especially regarding unnecessary suffering of civilians and inhumane methods and means of warfare, it nevertheless permits violations of fundamental human rights. It is of critical importance, therefore, to determine whether the threshold requirements of either an international or internal "armed conflict" have been met or whether states remain bound by the full array of international obligations that exist under human rights law and other regimes providing for the protection of the rights of the individual. The danger of an expanded right of states to self-defense in response to actual or anticipated terrorist acts is that it indefinitely places anti-terrorism actions of states in the framework of an international armed conflict. This allows for the killing of anyone persons meeting the definition of "combatants" and means that the rights of prisoners and civilians in the target state(s) are governed primarily by international humanitarian law. While international human rights law continues to apply in such situations of armed conflict and to fill any "gaps" in the humanitarian law regime, it may be limited or derogated from by states leaving only a small "core" of human rights law applicable.24 Where there is a conflict between the two bodies of law, the law of armed conflict, as the *lex specialis*, will prevail.25

The initiation of the global "war on terrorism" by a US-led coalition of states has blurred the relationship between these two bodies of law and, in many instances, has weakened individual protections. As seen above in the discussion of *jus ad bellum*, this is partly the function of a new type of armed conflict which does not easily fit into the post-World War II collective security framework designed for conflicts between states or between states and internal insurgent groups. But it is also a function of a pervasive attitude of unilateralism, exceptionalism and general disregard for international law, which has characterized US actions since the start of its military offensive in Afghanistan. This role has been problematic for at least the following three reasons.

3.1 Status of detainees under international humanitarian law

First, in determining the status of persons captured on the battlefield and subsequently detained in Afghanistan and in Cuba, the United States adopted an evasive approach toward the basic protections of international humanitarian law. Since the commencement of US military operations in Afghanistan on 7 October 2001, thousands of persons have been detained by anti-Taliban Afghan forces and by the US armed forces. These include both Taliban and al-Qaeda fighters. In addition to Af-


ghan nationals, many Pakistani nationals are reportedly among the detainees, as well as smaller numbers of Saudis, Yemenis and others from Arab states, Uzbeks, Chechens from Russia, Chinese, Europeans and others. The US military has been screening and interrogating detainees in Afghan custody to identify persons whom the United States wants to prosecute or detain, or who may have useful intelligence information (such as the whereabouts of Taliban or al-Qaeda leaders, or knowledge about the inner workings of the al-Qaeda network). The United States has taken custody of several hundred detainees held by Afghan forces and transferred them to its own detention facilities: a US military detention facility located outside Kandahar and detention facilities in off-shore Navy ships such as the USS Peleliu. In addition, US military forces have directly taken custody of persons while carrying out military operations inside Afghanistan. In January 2002, the United States began transferring these persons from the detention facilities in the immediate theater of conflict to a more permanent detention facility at the US military base in Guantánamo Bay, Cuba. According to the Defense Department, as of 28 January 2002, 482 prisoners were being held by US forces in Afghanistan and at Guantánamo Bay, about one-fifth of whom were Saudi nationals.

On 13 November 2001, the US President issued a military order entitled the “Detention, Treatment, and Trial of Certain Non-Citizens in the War on terrorism” 26. Section 2 of the Order provides for the trial in military commissions of any non-US citizen whom the President determines is or was a member of al-Qaeda or has engaged in, aided or abetted, or conspired to commit acts of international terrorism that have damaged or threaten to damage US citizens, national security, foreign policy or the economy; any individual who has knowingly harbored any such persons; or where “it is in the interest of the United States that such individual be subject to this order.” The unprecedented scope of the Order permits detentions of persons of different nationalities with varying degrees of involvement in the fighting in Afghanistan, association with al-Qaeda or the Taliban, and connection to the events of 11 September, or future acts of international terrorism.

Immediately following the release of the order, a number of concerned states and human rights NGOs questioned whether the determination by the United States of the status of detainees being held at Guantánamo Bay and other military locations complied with the requirements of international humanitarian law. Both the United States and Afghanistan are parties to the four Geneva Conventions, which together provide a comprehensive legal framework for determining the status and ensuring the protection of captured combatants and civilians during situations of armed conflict. 27 Under Geneva III and IV, different regimes of protection apply depending on

27 Afghanistan was one of the High Contracting Parties of the 1949 Geneva Conventions: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 31 (“Geneva I”); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done 12 Au-
the status of persons not, or no longer, taking an active part in hostilities. An individual may be either a "prisoner of war" under Geneva III (Treatment of Prisoners in War)\textsuperscript{28} or a "protected person" under Article 4 of Geneva IV (Protection of Civilian Persons in Time of War).\textsuperscript{29} According to the authoritative commentary to the Ge-


\textsuperscript{28} Geneva III, Art. 4A sets out the requirements for POW status. This includes (1) "members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces;" and (2) "members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory" provided that such militias fulfill four conditions: (a) they are subject to responsible command; (b) they have a "fixed sign" recognizable at a distance; (c) they carry arms openly; and (d) they conduct their operations in accordance with the laws and customs of war. Members of "regular armed forces" include those who "profess allegiance to a government not recognized by the Detaining Power:" Art. 4A(3). Thus, the non-recognition of the Taliban regime by the US government is not a relevant consideration for the purposes of determining the status of captured Taliban forces under Geneva III.

\textsuperscript{29} Geneva IV, Art. 4 defines "protected persons" as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." It has generally been understood that those persons taking part in hostilities who do not qualify as "combatants" (and hence POWs) will generally qualify for protected person status under Geneva IV. In any cases of doubt, AP I, Art. 75 provides residual "fundamental guarantees" applying to all persons who do not receive greater protection under other provisions of international law regardless of their status (including basic standards of humane treatment and due process). Thus, to the extent that these provisions may be regarded as customary law, the protections in Article 75 would apply to any person ineligible for POW status and who could not also be said to qualify as a protected person.
nevá Conventions of the International Committee of the Red Cross, all detainees must fall within the protections of one of these two conventions—"There is no intermediate status; nobody in enemy hands can fall outside the law." In the event of "any doubt" as to whether an individual is entitled to POW status, that person must be treated as a POW "until such time as their status has been determined by a competent tribunal."\(^{30}\)

On 7 February 2002, the Bush Administration issued a statement indicating that the United States would (after some initial uncertainty) apply the Geneva conventions to those persons detained on the battlefield in Afghanistan.\(^{32}\) In applying the conventions, however, the United States determined that Taliban detainees were not entitled to POW status, as in its view, they did not meet the requirements of Article 4 of Geneva III. Although comprising the armed forces of the government in effective control of Afghanistan, they were said not to wear uniforms that sufficiently distinguished them from the civilian population and not to conduct their operations in accordance with the laws and customs of war. In relation to al-Qaeda detainees, the United States claimed that, as members of a non-state international terrorist organization, these individuals fell outside of the Geneva law altogether. They were akin to saboteurs or spies, which operate within the territory of an adversary out of uniform and without openly carrying arms. In both cases the detainees were said to be "unlawful" or "non-privileged" combatants, a term that does not appear in the Geneva Conventions but rather derives from the World War II-era decision of the US Supreme Court *Ex Parte Quirin*.\(^{33}\) Despite their suggested status as unlawful combatants, the United States indicated that it would, for the most part, treat Taliban and al-Qaeda detainees "in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate," and that they would receive "humane treatment."

The blanket denial of POW status to the Guantánamo detainees constitutes an unprecedented interpretation of humanitarian law, which deviates both from prior US practice and general state practice under the Geneva Conventions. For present purposes, it is unnecessary to join the debate on competing constructions of Article 4 of

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\(^{30}\) Paust noted that during an armed conflict "all persons who are not prisoners of war, including so-called unprivileged or unlawful combatants who may or may not have prisoner of war status [which must be determined by an Art. 5 tribunal], have at least various non-derogable rights to due process under the Geneva Civilian Convention and Geneva Protocol I." See Jordan J. Paust, "Antiterrorism Military Commissions: Courting Illegality," *Michigan Journal of International Law*, Vol. 23, No. 1, 2001, pp. 1-29 at 7, n. 15.


\(^{32}\) Geneva III, Art. 5.


317 US 1, 32 (1942) (eight German saboteurs captured on US territory were denied POW status and tried before a special military commission).
Geneva III. It is sufficient to observe that regardless of the correct interpretation, an Article 5 tribunal must be established to resolve the legal status of each detainee. Such tribunals were convened by the United States in the Vietnam and Gulf wars in cases where doubt existed as to whether captured enemy personnel war-

34 Most legal scholars agree that the Taliban should be accorded POW status under Geneva III. See “Agora: Military Commissions,” AJIL, Vol. 96, No. 2, 2002, pp. 320-358; Paust, supra n. 29. The status of members of al-Qaeda under humanitarian law, however, is more controversial. Following the authoritative ICRC commentaries, al-Qaeda members should be accorded the status of “protected persons” under Geneva IV who may be prosecuted in the same manner as all other civilians who are prohibited from taking a direct part in hostilities. Alternatively, they may in some cases have attained the status of POWs in accordance with Geneva III, Art. 4A(2); AP I, Art. 44; and relevant customary norms. The US Department of the Army Field Manual further confirms this position stating that if a “person is determined by a competent tribunal, acting in conformity with Art. 5 [Geneva III] not to fall within any of the categories listed in Article 4 [Geneva III], he is not entitled to be treated as a prisoner of war. He is, however, a “protected person” within the meaning of Article 4 [Geneva IV]” (citations omitted): FM 27-10, para. 73, infra n. 35. There is, however, at least one difficulty with this position. Geneva IV, Art. 70 provides that protected persons shall not be “arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation ... with the exception of breaches of the laws and customs of war.” If al-Qaeda members were accorded the status of protected persons, the US would thus be prohibited from prosecuting them for terrorist acts such as those committed on 11 September 2001. Presumably, however, they could be prosecuted for war crimes committed in Afghanistan prior to 7 October 2001. Clearly, Art. 70 is in need of revision if the rules of humanitarian law are to remain relevant in the wake of 11 September.

On 25 February 2002, a petition was lodged with the Inter-American Commission on Human Rights, of which the US is a member, seeking certain provisional measures in relation to the Guantánamo detainees. See Detainees in Guantánamo Bay, Cuba, Request by the Center for Constitutional Rights, the Human Rights Clinic at Columbia Law School and the Center for Justice and International Law for Precautionary Measures under Article 25 of the Commission’s Regulations, 25 February 2002. On 13 March, the Commission upheld the petition and ruled that the US must immediately convene a “competent tribunal” as required by Art. 5 of Geneva III to resolve the legal status of each of the detainees. The US has challenged the Commission’s ruling, arguing that it has already conducted multi-agency, case-by-case screening procedures on the battlefield in Afghanistan which render an Art. 5 tribunal unnecessary. See Response of the United States to Request for Precautionary Measures – Detainees in Guantánamo Bay, Cuba, 12 April 2002. It is questionable, however, whether these screening procedures comply even with the US Army’s internal code of conduct. The relevant provisions in the US Army Field Manual, which stand as the US interpretation of its obligations under international humanitarian law, require a “competent tribunal” to comprise a board of “not less than three officers” in determining whether a person claiming treatment as a POW, and who has committed a “belligerent act or has engaged in hostile activities in aid of the armed forces,” is entitled to that status. See US Department of the Army, Field Manual 27-10, The Law of Land Warfare, 15 July 1976, Ch. 3, Sec II, Art. 71, “Interim Protection.”
ranted POW status. In several instances, detainees were found to be civilians who had taken no part in the hostilities and were transferred to refugee camps. Only a competent tribunal is able to properly assess the differing circumstances and degrees of involvement of individuals detained on the battlefield in the Taliban and al-Qaeda ranks. Whatever determinations of status are made, the US assertion of blanket "unlawful combatant" status creates a dangerous and vague grey area between combatant and civilian status that not only violates the object and purpose of the Geneva Conventions but leaves the Guantánamo detainees without any defined legal rights protecting their fundamental human dignity under international law.

The Guantánamo Bay detentions have also raised a host of other problems under international law. A unique aspect of the Afghan conflict was the prevalence of non-Afghan fighters among both the Taliban and al-Qaeda forces. The roughly 550 detainees being held in Cuba and Afghanistan come from more than 36 different coun-

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36 AP I, Art. 44 indicates that humanitarian law is progressively developing in such a way that criteria such as the uniform requirement are subordinate to the issue of whether individuals are members of a party to the armed conflict. Art. 44 deals mainly with combatants using methods of guerrilla warfare and ensures that once captured such persons are given "protections equivalent in all respects to those accorded to prisoners of war" under Geneva III. See AP I, Art. 44(4). During the Vietnam War, the US granted captured Viet Cong fighters POW status despite their lack of uniform or identifying insignia. The curious logic of the current US position means that even soldiers of the Northern Alliance – who operated as proxy forces for the US in the fourth phase of the armed conflict in Afghanistan and who similarly fail to meet the uniform criteria – may be regarded as "unlawful combatants." If accepted, this position would have far-reaching and illogical consequences in any future war crimes trials in Afghanistan. As "unlawful combatants," Northern Alliance soldiers could be prosecuted along with Taliban and al-Qaeda members as common criminals in accordance with AP I, Art. 45 for merely taking part in the hostilities both against each other and against the US and other international military forces ("lawful combatants"). Even if this were the case, however, such persons must at a minimum be treated in accordance with the fundamental guarantees of AP I, Art. 75 (provided that Geneva IV, to the extent that it is applicable, does not grant more favorable treatment). See Dieter Fleck, ed., The Handbook of Humanitarian Law in Armed Conflict, Oxford: Oxford University Press, 1995, p 68.

37 According to Paust, whether "various al-Qaeda units in Afghanistan were 'militias or volunteer corps forming part of such armed forces' would have to be considered in context." See Paust, loc. cit. n. 29, p. 7, n. 15. See also B. Bender, "Red Cross Disputes US Stance on Detainees," Boston Globe, 9 February 2002 at p. A1 (stating that the ICRC considers "both the Taliban and al-Qaeda fighters held by US forces ... to be prisoners of war"). The status of "terrorists" such as members of al-Qaeda is analogous in many respects to the older question of the status of "guerrilla fighters" under international humanitarian law. See Keith Suter, An International Law of Guerrilla Warfare: The Global Politics of Law-Making, New York: St. Martin's Press, 1984; International Symposium of the Red Cross, Guerrilla and International Humanitarian Law, Brussels: Belgian Red Cross, 1984.
tries. One of the most difficult legal issues in relation to these detainees has been to determine their respective rights under humanitarian and general international law. For example, Article 4(2) of Geneva IV excludes from the definition of “protected persons” nationals of a co-belligerent state as well as nationals of neutral states in the home territory of a party to the conflict, so long as such states have normal diplomatic representation in the state in whose hands they are. Thus, an al-Qaeda member of Italian citizenship residing in the United States and alleged to have participated in the 11 September attacks would not qualify as a protected person, nor would a British national fighting with al-Qaeda in Afghanistan, since the United Kingdom may be regarded as a co-belligerent. However, nationals of neutral countries present in Afghanistan are protected persons. The United States, however, has refused to provide home states or immediate families with specific details regarding the identities of, or charges to be brought against, the Guantánamo detainees. This raises potential violations of international human rights law as well as other conventions, such as the Vienna Convention on Consular Relations, which protects the rights of individuals who are in the territory of or subject to the jurisdiction of foreign states.

3.2 Rights and future trials of detainees under international humanitarian law

The second problematic feature of US military actions post-11 September has centered on the volatile issue of whether the ongoing detention and proposed future trials of detainees in military commissions accord with the rights of prisoners under humanitarian law and the rights of all persons under international human rights law. In establishing its own mechanisms to determine the rights of prisoners and to prosecute individuals for crimes under international law, the United States undermined

38 In addition, at least six of the detainees were detained outside of Afghanistan: see Amnesty International, Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, AMR 51/053/2002, April 2002 (noting that six detainees are Algerian nationals seized by US officials in Bosnia-Herzegovina on 18 January 2002 in violation of an order by the Human Rights Chamber for Bosnia and Herzegovina).


40 Several cases are currently before the US courts seeking to challenge the indefinite detention of individuals captured on the battlefield in Afghanistan and subsequently transferred to Guantánamo, e.g., Coalition of Clergy v. Bush, Case No. 02-570, 21 February 2002 (petition for habeas corpus rejected in federal court in California); Fawzi Khalid Abdullah Fahad Al Odah v. US, Case No. 02-828, July 2002 (federal action brought by 11 Kuwaiti nationals and their family members alleging that their arbitrary detention on Guantánamo Bay violates customary international law and constitutional due process standards); Shafiq Rasul v. Bush, Case No. 02-299, July 2002 (habeas corpus proceeding brought in the District of Columbia on behalf of Guantánamo detainees).
well-defined international standards and adopted a generally unilateralist position toward the norms and mechanisms of international justice.

Photographs revealing the detainees kneeling, shackled, wearing blacked-out goggles and ear mufflers has raised questions about possible violations of "humane treatment" and the 1984 Torture Convention. In relation to future trials before military commissions, President Bush's 13 November Military Order has come under withering attack both within and outside of the United States. Section 4 of the order requires the secretary of defense to formulate rules for the conduct of "full and fair trials" subject to a few minimum requirements. The order, however, provides for no right of judicial appeal or other independent review mechanism; sentencing (including imposition of the death penalty), not on the basis of unanimity but rather a two-thirds majority of commission members present; a standard of proof to be decided by the secretary of defense; no express presumption of innocence; the possibility of secret proceedings and hearsay evidence; no requirement that a defendant be given adequate time to prepare a reasonable defense; no explicit disclosure obligations on the prosecution, including of the nature of the charges filed against him or her; and no explicit right for defendants to select their own attorney. Furthermore, the proposed military commissions will lack any independence from the executive branch. The president has accorded to himself, or the secretary of defense, the power to determine who will be tried, to appoint the members of the commission, to select the panel that will review convictions and sentences, and to make the final decision in any case. The US State Department repeatedly criticized states such as Burma, China, Russia, Sudan, Turkey, Egypt, Nigeria and Malaysia for the use of military tribunals to try civilians. Indeed, the State Department's annual Country Reports on Human Rights Practices monitor and evaluate other states in relation to the extent to which they guarantee the right to a "fair public trial," which is defined to include many of the due process rights omitted by the 13 November military order.

The order violates many of the protections contained in Articles 82 to 108 of Geneva III, which apply to the detention and trial of POWs. These provisions require *inter alia* that POWs be tried by the same courts and according to the same procedure, be sentenced to the same penalties for the same acts, and have the same right of appeal as members of the armed forces of the detaining power. This requires the United States to provide POWs the same rights accorded to its own forces under the Uniform Code of Military Justice. Article 105 further provides for the rights of defense, including the right to counsel of the accused's choice; the right to confer privately with counsel; the right to call witnesses; and the right to an interpreter. "Protected persons," on the other hand, are entitled to the protection of Articles 71 to 76 of Geneva IV. This includes the right to a regular trial; the right to counsel of the accused's choice, who must be allowed to visit freely and be provided with the necessary facilities for preparing the defense; the right to call witnesses; the right to an interpreter; the right of appeal "provided for by the laws applied by the court," the right to be visited by delegates of the protecting power (a neutral state appointed to
monitor compliance with the Geneva Conventions); and the right to be detained and serve sentences in the occupied territory.

Any person who does not benefit from greater protection under these provisions is entitled to the protection of Article 75 of Additional Protocol I (at least to the extent that it is customary law in relation to the United States and Afghanistan). Article 75(4) requires that proceedings be conducted before an "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure." Those principles are deemed to include a range of procedural rights such as the provision of "all necessary rights and means of defense"; the right to be presumed innocent; freedom from compelled self-incrimination; and the right to be advised of remedies. Article 75(4) also prohibits *ex post facto* application of criminal law and requires respect for the principle of *non bis in idem* (trying the same person a second time for the same offence).^{42}

A number of these violations were remedied on 21 March 2002, when the secretary of defense issued rules and regulations under Section 6 of the military order.^{43} The rules provide for the appointment of military defense lawyers with the possibility of hiring civilian lawyers of the defendant's own choosing (although at his or her own cost); the proof of guilt beyond a reasonable doubt; the right to call witnesses; and the presumption of innocence. A limited right of appeal is also now provided to a three-member review panel comprising military officers appointed by the secretary of defense (but which may also include civilians temporarily commissioned as military officers by the president). While these rules bring the proposed commissions more closely in line with the relevant provisions of Geneva III, several deficiencies remain. Any evidence which has "probative value to a reasonable person" is admissible as is secret evidence and anonymous witnesses. Thus, while under the Uniform Code of Military Justice courts martial follow strict rules of evidence, in the military commissions hearsay evidence will be admissible. This is not a violation of international humanitarian law *per se* (the Geneva Conventions do not prohibit hearsay evidence), but it does provide a lesser evidential standard than under US military law. The right to appeal to a three-member review panel does not accord with Article 106 of Geneva III, which guarantees that POWs be accorded the same appeal rights as US soldiers (who have the right of appeal to the civilian courts after they

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^{42} Note also that Geneva IV, Art. 146, mirrored in all four Conventions, requires that any person prosecuted for violations of the Geneva Conventions, irrespective of their status under humanitarian law, must be provided with "safeguards of proper trial and defense, which shall not be less favorable than" those provided for in, Arts 105 and following of Geneva III. These include the same rights of defense and appeal as those accorded to POWs. If a POW or protected person is wilfully deprived of these rights of a fair and regular trial, the persons responsible for such a failure will themselves have committed a grave breach of the Geneva Conventions. See Geneva III, Art. 130; Geneva IV, Art. 147.

^{43} US Department of Defence, Military Commissions Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 21 March 2002.
exhaust their remedies within the military justice system). This has particular relevance to the imposition of the death penalty. Finally, the independence and impartiality of the proposed commissions remains in doubt. It is the president or the secretary of defense who ultimately decides who is tried, appoints the members of the commissions, selects the panels that will review convictions and sentences, and makes final decisions in individual cases. Given the broad scope of persons subject to the president’s order, the ambiguity surrounding which offenses may be tried before the commissions and the prospect of indefinite detention (even following acquittal before a military commission), it is clear that the proposed military commissions do not accord with either the spirit or the letter of international humanitarian law.

Apart from its obligations under humanitarian law, the United States is also bound by norms of conventional and customary human rights law. In 1992, the United States ratified the International Covenant on Civil and Political Rights (ICCPR), which requires state parties to respect and ensure to “all individuals within its territory and subject to its jurisdiction” the rights recognized in the covenant.44 The ICCPR applies at all times – in times of war and peace – although states may derogate from certain provisions in a time of “public emergency which threatens the life of the nation” but only to the extent “strictly required by the exigencies of the situation.” Any state wishing to avail itself of this right of derogation must immediately inform the UN Secretary-General.45

44. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN GA Res. 2200 A (XXI) on 16 December 1966, entered into force on 23 March 1976 in accordance with Art. 49 (“ICCPR”), Art. 2. For a discussion of the obligations imposed on States Parties by Art. 2 of the Covenant, see Oscar Schachter, “The Obligation to Implement the Covenant in Domestic Law” in Louis Henkin, ed., The International Bill of Rights: The Covenant on Civil and Political Rights, New York: Columbia University Press, 1981, pp. 311-331. One question that has arisen is whether the obligations of the US under the Covenant extend to its activities in Guantánamo Bay at all, i.e., whether the holding of “battlefield detainees” at the military base in Cuba may be considered as being “within [US] territory and subject to its jurisdiction.” See, e.g., Thomas Buergenthal, “To Respect and Ensure: State Obligations and Permissible Derogations” in Ibid., pp. 72, 73-5 (arguing that the phrase “within its territory and subject to its jurisdiction” in Art. 2(1) of the Covenant should be read as a disjunctive conjunction and that a State Party that “denies to an individual subject to its jurisdiction the rights guaranteed in the Covenant violates its obligations even if the individual is not within its territory at the time the violation is committed”). See also Cyprus v. Turkey, 18 YB Eur. Conv. Human Rights (1975) p. 83 (Commission holding that States Parties to the European Convention on Human Rights are “bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad)” [my emphasis]. ICCPR, Art. 4.

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On 14 September 2001 the president proclaimed a national emergency, but the United States has not officially sought to exercise its right of derogation under Article 4 of the Covenant. Accordingly, human rights scholars and NGOs have argued that the president's 13 November military order providing for the detention of certain individuals and the establishment of military commissions is in violation of various provisions of the ICCPR. The vague scope of Section 2, which seeks to define a broad class of persons who may be subject to detention for involvement in acts of "international terrorism," arguably violates the right to security and liberty of the person and the prohibition on arbitrary arrest and detention. The denial of minimum due process rights to the Guantánamo detainees, including the right of habeas corpus, the right to challenge the lawfulness of their detention in a civilian court and the entitlement to trial within a reasonable time, also arguably violate the ICCPR. Finally, the failure to specify those criminal acts encompassed by the term "international terrorism" may place the United States in violation of the covenant's non-derogable prohibition on the imposition of "ex-post facto laws." This issue

46 Proclamation 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks.
47 ICCPR, Art. 9(1).
48 Art. 9(3)-(4). While Art. 9 may be subject to lawful derogation, the US has not sought to rely on any such right and these obligations must therefore be held to be in full force and effect. Furthermore, the Human Rights Committee has stated that even in times of national emergency, the right to habeas corpus and judicial review of detention cannot be suspended: see General Comment No. 29, States of Emergency (Art. 4), 31 August 2001. Under the US Constitution, habeas corpus may only be suspended in the case of "rebellion" or "invasion," and only then by Congress (although this appears only to apply to persons held on US territory). In Rasul and Odah (see supra n. 40) it was held that in relation to petitions for writs of habeas corpus on behalf of aliens detained by the US at Guantánamo Bay, the Supreme Court's ruling in Johnson v. Eisentrager, 399 US 763 (1950) was controlling and barred the Court's consideration of the merits of these two cases. Johnson v. Eisentrager involved a petition for writs of habeas corpus filed by 21 German nationals captured in China for engaging in espionage against the US following the surrender of Germany, but before the surrender of Japan, at the end of World War II. A US military commission sitting in China convicted the prisoners for violations of the laws of war and repatriated them to a US prison in Germany. Justice Robert Jackson, in an opinion for a divided Supreme Court, held that no court was able to extend the writ of habeas corpus to aliens held outside the sovereign territory of the US (p. 778). The position was different in relation to "citizens" (both in US territory and abroad) and "friendly aliens" lawfully present or seeking residence within US territorial jurisdiction. But both enemy and friendly aliens captured incident to war have no right to habeas corpus (p. 776). This decision leaves at least two areas of uncertainty: first in relation to "enemy combatants" who may be US citizens held outside of US territory and second in relation to enemy combatants who are aliens but who are present in US territory. In Rasul and Odah, the Court held that Guantánamo Bay was not within the sovereign territory of the US simply because it exercises "jurisdiction and control over that facility" (p. 28).
49 Art. 15.
may become especially relevant if it is sought to convict individuals for international crimes solely on the basis of membership in a terrorist organization such as al-Qaeda without proof of any direct involvement in specific acts.

Further questions have been raised regarding the fairness of future trials conducted by military commissions, especially given the likelihood of imposition of the death penalty. The ICCPR requires a "fair and public hearing by a competent, independent and impartial tribunal established by law." This includes the presumption of innocence, the right to be informed of charges, the right to adequate time for the preparation of a defense, the right to legal assistance of one's own choosing, and the right to examine witnesses. Whether the commissions, which remain wholly subject to the discretion of the executive, will satisfy these standards, remains the subject of controversy. The Covenant also guarantees that anyone convicted of a crime shall have the right to his or her conviction and sentence being reviewed "by a higher tribunal according to law." Whether the military review board established by the rules issued by the secretary of defense satisfies this obligation is similarly an open question. Given that Geneva III guarantees final appeals to the civilian courts for POWs interred by the United States, it would be incongruous for the ICCPR – which applies to states parties at all times, not just during war – to establish a lower standard.

What is clear is that the holding of prisoners in Cuba rather than on US soil is an attempt to ensure that no individual (or interested state) is able to seek or obtain a legal remedy in a judicial forum. US domestic courts petitioned on habeas corpus grounds by the parents of several Guantánamo detainees have held that they have no jurisdiction in relation to Guantánamo Bay. The United States has not acceded to the Optional Protocol to the ICCPR and it is therefore not possible for any detainee to initiate an individual communication to the UN Human Rights Committee; nor has it recognized the competence of the Committee to receive and consider communications from other states parties alleging violations of the Covenant. The United States has also withdrawn its acceptance of the jurisdiction of the International Court of Justice following the 1986 Nicaragua case, and it is therefore impossible for any...

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51 When on 5 April 2002, it was discovered that a prisoner being held at Guantánamo Bay, Yasser Esam Hamdi, was an American citizen, he was immediately transferred to a military jail in Norfolk, Virginia. As a US citizen and alleged "enemy combatant," it was unclear whether Hamdi retained his right to lodge a petition of habeas corpus in federal court demanding that the government either charge him with a crime or set him free. As this raised the opportunity for challenge to the detention and status of all prisoners being held at Guantánamo – and thus the suspension of habeas corpus in relation to "enemy alien belligerents" in general – Hamdi was immediately removed: see Katherine Seelye, "US Moves Taliban Prisoner Born in America to Virginia," New York Times, 5 April 2002.

52 Art. 41.
state to bring an action for alleged violations of the ICCPR in the World Court against the United States.\textsuperscript{53}

In conclusion, the 13 November Military Order sets a dangerous precedent by the world's reigning superpower. It sets a differential standard of justice for citizens and non-citizens, seeks to derogate from both constitutional and international standards of due process, and by situating detention facilities outside of the United States, seeks to deny the availability of any judicial fora able to provide effective remedies. This sends a strong message to an increasing number of states such as China, Burma, Colombia, Egypt, Kyrgyzstan, Malaysia, Nigeria, Peru, Russia, Sudan and Turkey as they wage their own wars on terrorism and reverses the consistent and long-standing opposition of the United States to the use of military tribunals in other countries in the name of states of emergency and national security.\textsuperscript{54} It also ignores the availability of other domestic and international alternatives. Various commentators following the events of 11 September have suggested other preferable fora to prosecute and try international terrorists. Anne-Marie Slaughter has suggested that "al-Qaeda should be tried before the world" and has advocated the establishment of an international tribunal to try accused terrorists.\textsuperscript{55} Conversely, Harold Koh has said that "we have the right courts for Bin Laden" and has argued that the United States should try suspected international terrorists in its own federal courts as it has done on numerous prior occasions (including in relation to the 1993 bombing of the World Trade Center and the August 1998 bombings of the US embassies in Tanzania and Kenya).\textsuperscript{56} The confusion of the war and justice paradigms in combating international terrorism, as represented by the move to establish military tribunals, has potentially far-reaching and devastating effects for the international human rights movement, which, over the last half century, has sought to create a culture of rights and respect for human dignity in all parts of the world.

3.3 US violations of international humanitarian law

Third and finally, in its conduct of the war against the Taliban and al-Qaeda in Afghanistan, the United States may itself have committed serious violations of humanitarian law regarding civilian casualties and the use of certain types of weapons. Thus, a further volatile and sensitive issue to be taken into account in considering

\textsuperscript{53} Note, however, that an action could be brought under the Vienna Convention on Consular Relations under the specific jurisdiction clause in Article 1 of the Convention's Optional Protocol.


transitional justice in Afghanistan is the question of future trials or investigations regarding war crimes committed by US forces. In the area of civilian casualties, the guiding principle of humanitarian law is that civilians may not be the direct object of an attack, and civilian status is lost only where individuals take an active part in hostilities (rather than merely on the basis of support or affiliation). The critical presumption is that if there is any doubt regarding whether someone is a combatant or a civilian, he or she must be presumed to be a civilian. The principle of proportionality is also critical here, especially in relation to the volatile issue of "collateral damage." Attacks are prohibited if they cause incidental loss of civilian life, injury to civilians or damage to civilian objects that is excessive in relation to the anticipated concrete and direct military advantage of the attack.

Given the well-known complexities in this area of the law, for present purposes it is sufficient to note that several US military actions conducted in Afghanistan have raised questions regarding conformity with these norms of humanitarian law.

57 See Dieter Fleck, op. cit. n. 36, p. 211 ff. ("neither the civilian population as such, nor individual civilians, shall be attacked, killed, wounded or taken prisoner without sufficient reason:" AP I, Art. 51(2); AP II, Art. 13).

58 See Horst Fischer, "The Principle of Proportionality," available at www.crimesofwar.org. A closely related issue is the targeting of objects. Under AP I, Art. 52, military objectives are limited to those objects, which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction offers a definite military advantage. This raises difficult questions in relation to objects with dual military and civilian uses such as bridges, roads, power installations and communications networks. For example, the lawfulness of targeting the Belgrade television tower during the NATO strikes in the Former Yugoslavia during the Kosovo conflict has been questioned by legal experts and is currently subject to a legal challenge in the European Court of Human Rights. (Bankovic case). Such questions are sure to arise in the context of the US-led strikes in Afghanistan (for example, in relation to the bombing of Red Cross and other food storage facilities in Kabul and the targeting of the civilian infrastructure noted below).

59 Most casualties are believed to have resulted from "collateral damage" due to the US bombing of heavily populated metropolitan areas where military installations and other strategic targets were also located. In isolated cases, it appears that bombs were dropped on hospitals, schools, mosques and groups of fleeing refugees: see, e.g., Marc W. Herold, A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting, (2002), available online at www.cursor.org/stories/civilian_deaths.htm (suggesting that the US targeted civilian infrastructure, including the Kajaki dam and other power stations, radio stations, the Kabul telephone exchange, the Al Jazeera Kabul office, trucks and buses containing refugees, and numerous civilian trucks carrying fuel and oil). There have also been reports of US strikes on a Red Cross warehouse in Kabul (which was allegedly being used by the Taliban for supplies) and a Red Crescent clinic in Kandahar on 31 October 2001 killing 15-25 civilians. Note, however, that there is disagreement over the numbers of civilian casualties and that the figures suggested by Herold (3,000 to 3,500) have been challenged as being excessive: see Joshua Muravchik, "Racking Up Afghan Casualties," Wall Street Journal Europe, 21 August 2002, p. A8 (arguing that the figure of over 3,500 civilian casualties is unsubstantiated).
While many deaths were likely the result of lawful collateral damage, several incidents have sparked controversy. In particular, on 1 July 2002, a team of American military experts was sent to the province of Uruzgan in central Afghanistan to investigate the circumstances under which US aircraft bombed an Afghan wedding celebration, killing an estimated 48 civilians and wounding 117.\textsuperscript{60} In late November 2001, questions were also raised by Amnesty International and other NGOs regarding the uprising and killings that occurred in the Qalai Janghi fort outside Mazar-i-Sharif.\textsuperscript{61} These and related incidents have led Afghan leaders to voice serious concerns about US military tactics in their ongoing war on terrorism.\textsuperscript{62}

The second area of concern is the use of certain types of weapons. The United States has employed its full arsenal of conventional weapons in Afghanistan. In January 2002, after coalition forces provided the UN Mine Action Programme (MAPA) with a list of 103 sites where cluster bombs were used, the UN began clearing an estimated 25,000 unexploded cluster bomb units (CBU) dropped in Afghanistan by US warplanes.\textsuperscript{63} This raises questions under conventional and customary

\textsuperscript{60} See Pentagon Team to Examine Bomb Error, BBC News, 8 July 2002 (noting that the US had acknowledged that there were civilian deaths when an AC-130 attack helicopter raided villages 250 miles south-west of Kabul). See also David Usborne, “UN keeps damming report on Afghan massacre secret,” Independent, 31 July 2002 (noting in relation to the 1 July wedding party incident that the UN no longer intended to release a report written by a UN fact-finding team that included allegations that the US had under-reported civilian casualties and removed evidence from the site suggesting a “cover-up”).

\textsuperscript{61} Justin Huggler, “How our Afghan allies applied the Geneva Convention: Prisoners massacred, the dead plundered for boots, guns and even gold teeth,” Independent, 29 November 2001 (noting that Amnesty International had demanded a full inquiry into why “hundreds of prisoners of war who should have been protected under the Geneva Convention were slaughtered”). General Abdul Rashid Dostum, currently the Transitional Afghan deputy Defence Minister, was in command of the Northern Alliance forces during this incident.

\textsuperscript{62} “Mounting Concern over Civilian Casualties,” UN IRIN, 7 January 2002 (noting concerns by both Hamid Karzai and Lakhdar Brahimi following reports that 52 civilians in the eastern province of Paktia were killed in a coalition strike).

\textsuperscript{63} From a total of 103 sub-munitions strikes, 78 were struck by a total of 1,210 CBUs equaling a total of 244,420 sub-munitions. See “UN to Clear Coalition Cluster Bombs,” UN IRIN, 2 January 2002. According to MAPA, Afghanistan is one of the most heavily mined countries in the world with 732 million square kilometers of its territory littered with mines and unexploded ordnance. During the US-led strikes initiated on 7 October 2001, Physicians for Human Rights called on the US to impose a moratorium on the deployment of cluster bombs and antipersonnel mines, saying that they had caused high civilian casualties in Kosovo and risked doing the same in Afghanistan. See also Human Rights Watch Report, “Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan,” 18 December 2002 (arguing that the US did not take all feasible precautions to avoid civilian casualties as required by international humanitarian law when it used cluster bombs in or near populated areas; problems included lack of accu-
humanitarian law, which prohibit the waging of war in a manner that causes unnecessary suffering, especially in relation to weapons that are either cruel or excessive in the nature and degree of suffering they cause or are incapable of distinguishing combatants from civilians. While the use of cluster bombs and similar weapons (including anti-personnel mines) remains unsettled under international law, these are questions that should be investigated and confronted in any future comprehensive process of transitional justice in Afghanistan.

4 The Effects of US Exceptionalism

Perceiving new threats and modes of armed conflict in its war on terrorism, the United States has failed to comply even with those international obligations to which it has expressly consented. This has served to further expose a long-standing exceptionalist stance toward international law, which has troubling implications not only for the coherence and progressive development of the humanitarian and human rights treaty regimes but also for future efforts to end impunity and bring to justice those suspected of committing atrocities. It is to these two issues that I finally turn.


Koh attributes these developments to the larger phenomenon of a post-World War II legal system placed under increasing stress by the end of the “post-Cold War era” on 11 September. He has suggested that traditional legal dichotomies between “war and peace, public and private, domestic and international, and civil and criminal” have become “muddled” and that we are witnessing a “transition from global optimism [the period from 1989 to 2001] to pessimism [the post-11 September period]” and that this transition may be seen in three areas of the law: the use of force, the rise of the global justice system, and the relationship between civil liberties and national security. Harold Koh, “The Law under Stress after September 11,” Yale L. Rep., 2002, pp. 12, 13-14.
4.1 US unilateralism and international human rights
and humanitarian law treaty regimes

The United States played a major role after World War II in ensuring that one of the
purposes of the newly created United Nations was to achieve international cooperation "in promoting and encouraging respect for human rights and fundamental freedoms" and was influential in the drafting of the Universal Declaration of Human Rights and in transforming the Declaration into two principal human rights covenants. During the Cold War, the United States also played a dominant role in the negotiation of the 1975 Helsinki Final Act (the Helsinki Accords), whereby Communist states assumed political undertakings to respect human rights and fundamental freedoms.

While a champion of civil and political (although not economic and social) rights abroad, however, US post-war foreign policy has had an uneasy relationship with the international human rights movement. Today, the United States is a party to only one of the two principal human rights covenants and to few other multilateral human rights treaties. Some conventions signed by the US president have not been ratified, and even those that have been ratified have been subjected to extensive reservations, understandings and declarations. The basic philosophy has been that international human rights are for "export only." As Henkin has stated,

From the beginning, the international human rights movement was conceived by the United States as designed to improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states). United States participation in the movement was also to serve the cause of human rights in other countries. To that end, the United States promoted and actively engaged in establishing international standards and machinery. It did not strongly favor but it did not resist the move to develop international agreements and international law, but, again, it saw them as designed for other states.66

This realist tendency has not been limited to Cold War politics.67 Since the end of the Cold War, not only has the United States strongly resisted the application of international human rights norms and standards to its domestic legal order, it has gradually diminished its participation in and support for international human rights monitoring and implementation mechanisms.68 Skepticism of multilateralism and

68 In the first six months of its term, the Bush administration repudiated an array of widely supported multilateral treaties including the Kyoto Protocol on global warming, the ABM treaty on missile defense and the militarization of space, and the Biological Weapons Convention prohibiting developing biological weapons. It has also rejected new treaties such as the Small Arms Convention, the Land Mines Convention, and the Rome Statute of the In-
international legal process generally has dominated US foreign policy thinking, and there has been a marked turn toward the adoption of unilateral or bilateral strategies to deal with human rights and humanitarian concerns in other states. Indeed, what I have termed this "new realist" stance in the area of international human rights and humanitarian law has been part of a wider US policy toward international relations generally. On the assumption that international legal process alone is unlikely to affect "rogue states," the underlying concern has been how best to use American power and influence to deal with threats posed to strategic US interests. A common strategy has been to use sanctions and isolation to achieve containment of, and to inflict economic damage on, violator states to pressure them into changing their behavior. Here, too, a feature of this approach has been the invocation of international human rights and humanitarian law standards to condemn the behavior of other states and to justify the use of US domestic mechanisms to enforce those standards while, at the same time, standing largely outside existing international human rights treaty regimes and scrutiny.

I have sought in parts II and III above to illustrate the disastrous implications of this approach for the application of human rights and humanitarian law in the context of a devastated country such as Afghanistan. Contemporary US foreign policy sends a clear signal of preference for an international sphere where politics and power are dominant, and principle and law are only relevant for instrumental reasons that serve other policy considerations. Unless and until a shift in thinking occurs, returning the United States to the position it has held at other points in its history — at the vanguard of the movement to build international norms, laws and institutions — multilateral and regional efforts to promote and protect human rights and humanitarian law will remain unduly ineffective. Such a return would in all likelihood foster a higher degree of political accountability of powerful elites in weak states.

Today, the possibility as a matter of practicality of ensuring international accountability for outside military forces, internal warring factions or terrorist groups for gross violations of human rights and humanitarian law is minimal. In the case of humanitarian law, while states are under a duty to punish certain crimes under their domestic law, there is no effective transnational means by which to hold states to these obligations. Given the strongly unilateralist stance of the Bush administration toward the International Criminal Court and international justice more generally,

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69 Rome Statute of the International Criminal Court, Adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/9, 17 July 1998. The Rome Statute was approved on 17 July 1998 by a vote of 120 states in favor and seven opposed. The US voted against approval, as did China, Israel and four other states that did not declare themselves publicly. On US rejec-
any proposals for an ad hoc tribunal to prosecute war crimes and other atrocities committed during the last 23 years of Afghan wars would almost certainly be vetoed (especially if such a tribunal were to have jurisdiction over individual violations of humanitarian law alleged to have been committed by U.S. and allied forces). Thus, the only remaining realistic possibility may be the creation, with international assistance, of a special court – perhaps linked to a complementary truth commission – along similar lines to the Special Court and Truth and Reconciliation Commission currently being established in Sierra Leone.

In the case of human rights, external monitoring bodies such as the UN Human Rights Committee have only weak enforcement powers, and states on the whole have jealously sought to shield their sovereignty from external scrutiny. While these weaknesses cannot be attributed solely to the effects of US foreign policy, there is little doubt that the actions of the world’s sole superpower in maintaining such a strongly unilateralist and exceptionalist stance toward an international order based on international law and institutions has done much to ensure the continuing ineffectiveness of these treaty regimes.

What this means in the context of Afghanistan is that the enforcement of human rights and humanitarian norms will depend primarily on two factors – the identity of the perpetrators and the nationality of the victims – and even then will occur only if the United States seeks to launch prosecutions under its domestic law (in either civilian courts or before a military tribunal) or before an international ad hoc tribunal with a sharply limited mandate. For example, despite the well-documented deaths of Afghan civilians described above, the only prosecution of US forces to date for violations of international humanitarian law has involved a “friendly fire” incident involving two US pilots, which resulted in the death of several Canadian ground forces. Similarly, most, if any, trials that are likely to occur in relation to

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70 Note that allegations of war crimes by NATO forces were raised during the Kosovar war although no indictments were issued by the ICTY.

71 The Special Court for Sierra Leone is charged with bringing to justice those who bear the greatest responsibility for serious violations of international humanitarian law and certain violations of Sierra Leonean law. The Truth and Reconciliation Commission will seek to establish an impartial historical record of the conflict and promote reconciliation. Both new institutions are intended to perform “complementary roles;” however, they are experiencing serious funding shortfalls that are adversely affecting their establishment. See Planning Mission Report, Annex to UN Doc. S/2002/246, 8 March 2002. See also Human Rights Watch Policy Paper on the Interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission, 18 April 2002.
violations perpetrated by combatants in the post-11 September armed conflict in Afghanistan will be before US military commissions.

4.2 Transitional justice in Afghanistan

Following the collapse of the Taliban regime in November 2001, various Afghan forces (fully rearmed and refinanced by the United States and operating as ground proxy forces throughout the country) committed serious violations of international humanitarian and human rights law. The UN and other agencies have reported the killings of hundreds of Taliban prisoners who were sealed in truck containers and suffocated while being transferred by Northern Alliance forces to the Sheberghan prison near Mazar-i-Sharif. They were later buried in mass graves near Dasht-e-Leili. At the same time, in the security vacuum created by the International Security Assistance Force (ISAF) being restricted to Kabul, ethnic Pashtuns throughout northern Afghanistan were targeted for reprisals for their association with the Taliban and faced widespread abuses, including killings, sexual violence, beatings, extortion and looting. The three main ethnically-based parties and their militias in northern Afghanistan that formerly comprised the Northern Alliance (and which are now well-represented in the transitional government) have been implicated in these violations – the mainly ethnic Uzbek Junbish-i-Milly-yi Islami of General Abdul Rashid Dostum, the mainly ethnic Tajik Jamiat-e-Islami led in Mazar-i-Sharif by Ustad Atta Mohammad and the ethnic Hazara Hizb-i-Wahdat led in the north by

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72 See Pamela Constable, “Afghans Condemn Killings of Taliban – Investigation into Deaths is Uncertain,” Washington Post, 22 August 2002, p. A10 (noting that while the Afghan government has condemned the killings it has not carried out any investigations); Babak Dehghanpisheh, John Barry and Roy Gutman, “The Death Convoy of Afghanistan,” Newsweek, 26 August 2002 (noting that General Abdul Rashid Dostum was in charge of the militia forces accused of committing the abuses and continues to run the region in the north of the country near Mazar-i-Sharif, making any government investigation of the deaths unlikely); “Dead on Arrival – A War Crime in Afghanistan,” Economist, 24 August 2002, p. 34 (noting mounting pressure on “local and international authorities to uncover the truth,” including whether US forces in the area at the time had knowledge of the use of containers to transport detainees).

73 Mohammad Qasim Fahim, the commander-in-chief of the Northern Alliance’s Jamiat forces, became the Defense Minister in the Interim Administration; Yunus Qanooni, who led the Northern Alliance delegation, became the Interior Minister; and Abdullah Abdullah, who retained his position as foreign secretary, became the Foreign Affairs Minister. General Abdul Rashid Dostum, the military governor of Herat and commander of Junbish, initially denounced the Bonn Agreement but was ultimately assigned the post of Deputy Defense Minister. Similarly, Ismail Khan, an ally of Jamiat leader Burhanuddin Rabbani, pledged to recognize the Interim Administration while proclaiming autonomy for five western provinces: see Peter Baker, “Afghan Factions Criticize Accord: Some Leaders Vow to Boycott Regime,” Washington Post, 7 December 2001, cited in Human Rights Watch, Paying for the Taliban’s Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan, vol. 14(2)(C), April 2002, p. 7.
Haji Mohammad Mohaqiq, as well as non-aligned armed Uzbeks, Tajiks and Hazaras seeking to capitalize on the vulnerability of disarmed Pashtun communities. Due to the fact that after 7 October 2001, the conflict in Afghanistan once again became “internationalized,” the rules of humanitarian law applicable to international armed conflicts apply in full to the conduct of these hostilities, and there can be little doubt that these abuses constitute grave breaches of the Geneva Conventions and of customary humanitarian law.

As the situation currently stands there are violators of international humanitarian and human rights law on all sides and in relation to all phases of the armed conflict. Some of these perpetrators are in the custody of the new Afghan authorities; others are in the custody of the US-led military coalition both inside and outside Afghanistan; while still others are either in control of provincial areas or in positions of power in the new Afghan Transitional Government itself. Those in the first category comprise mainly Taliban commanders who allegedly committed war crimes and the most serious human rights abuses. They are being detained by former Northern Alliance officials who have returned to power and who, as in the case of General Abdul Rashid Dostum, are themselves implicated in gross violations of humanitarian and human rights law, and by the United States.

International human rights law has traditionally provided states with wide discretion in implementing international obligations to respect and ensure rights. At the same time, international criminal law has principally focused on the power rather than the duty of states to punish violations committed outside their territorial juris-

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74 See Human Rights Watch, ibid. (noting that in other parts of the north, commanders affiliated with the three major parties have established de facto authority over large areas, marking the return to a virtual monopoly of power by individual warlords).

75 For example, note the standoff between the Afghan Transitional Authority and Padsha Khan Zadran, a warlord in control of significant areas in southeast Afghanistan who rejects the leadership of Hamid Karzai and is seeking a formal position in the central government. Following the December 2001 Bonn process, Zadran was appointed as the governor of Paktika province but another local warlord blocked him from taking office in Gardez. In April 2002, Zadran carried out a revenge rocket attack on Gardez, killing 36 people, including numerous civilians. In a direct affront to Karzai, Zadran now claims effective control of three southeastern provinces which the Transitional Authority has assigned to other regional leaders. See Ian Fisher, “Warlord Pushes for Control of a Corner of Afghanistan: Karzai Warns Armed Response is Possible,” New York Times, 6 August 2002, p. A8.


diction.\textsuperscript{78} In more recent times, however, international law has required states to punish certain human rights crimes -- such as genocide and torture -- committed in their territorial jurisdiction, to investigate violations and to punish the perpetrators.\textsuperscript{79} It is also well established that individual violations of international humanitarian law entail criminal sanctions.\textsuperscript{80} Thus, it is clear that modern international criminal law (which encompasses specific violations of both humanitarian and human rights law) imposes obligations directly on individuals, making them liable to punishment, and imposes duties on states with respect to matters usually left to their discretion. The significance of these developments is that an amnesty law or an exercise of prosecutorial discretion that is valid under domestic law may nevertheless breach a state's international obligations.\textsuperscript{81}

In applying these principles to the last two decades of abuses in Afghanistan, it is clear that under international law the transitional government is under a duty to investigate allegations of war crimes, crimes against humanity, torture, extra-legal executions, disappearances and other serious violations of humanitarian and human rights law and to hold individual wrongdoers responsible. In certain instances, the government may also be required to ensure that individuals whose rights have been violated have an effective remedy before a competent body and that they receive adequate compensation.\textsuperscript{82} The fact that discharging these obligations in the volatile and fragile situation of post-conflict Afghanistan will prove extremely hazardous does not relieve the state of its duties as a matter of international law. A state cannot

\textsuperscript{78} When international criminal law has required states to punish offences committed in their territory, the duty has traditionally applied to crimes committed against foreign nationals. See Orentlicher, 1991, pp. 2551-2555, nn. 63-65.

\textsuperscript{79} While the ICCPR does not specify a duty to punish violations of rights, it is well accepted that a State Party fails in its duty to ensure those rights protecting physical integrity if it does not investigate violations and seek to punish those who are responsible. See, e.g., Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40) Annex V, general comment 7(16), para. 1, UN Doc. E/CN.4/Sub.2/Add.1/963 (1982) (complaints about ill-treatment under Art. 7 of the Covenant must be investigated effectively by competent authorities and those found guilty must be held responsible). In addition, a state's failure to punish repeated or notorious violations breaches the customary obligation to respect fundamental human rights. Ibid, 2552.

\textsuperscript{80} Arts. 49, 50, 129 and 146 of Geneva I, II, III and IV respectively enjoin the High Contracting Parties to enact legislation providing "penal sanctions" for grave breaches of the Conventions. Further, common penal provisions of the Conventions confer universal jurisdiction over grave breaches of any Convention making the perpetrators hostes humani generis. The duty to punish or surrender those who have committed grave breaches is not conditioned in any way that suggests any restrictions on jurisdiction. See Michael Bothe, ed., National Implementation of International Humanitarian Law, Dordrecht: Martinus Nijhoff Publishers, 1990, pp. 73-78.


\textsuperscript{82} See ICCPR, Art. 2(3). See also Velasquez Rodriguez case, Inter-American Court of Human Rights (Ser. C) No. 4, para. 174 (1998) (judgment).
evade its duty to punish atrocious crimes merely to appease disaffected military forces, newly returned warlords or to promote national reconciliation. In this respect, the roles of the transitional government and the United States determine the possibility – or lack thereof – of building a stronger state in Afghanistan in the long term.

For reasons related primarily to overriding security concerns in combating international terrorism and "terrorist states," the United States' current approach has troubling implications for future transitional justice policies and institutions in Afghanistan for at least three reasons. First, it will affect the way in which the Afghan authorities interpret and apply the relevant protections and obligations under the Geneva Conventions and human rights treaties. The US category of "unlawful combatants," for example, affects the rights and duties of not only members of the Taliban and al-Qaeda forces but also those of the Northern Alliance and other armed groups. Second, the blanket denial of POW status and the refusal to convene an Article 5 tribunal in cases of doubt affects the status and rights of persons currently being detained by the Afghan authorities. Third, the willingness of the United States to derogate from international standards regarding the rights of prisoners offers a debilitating precedent. Accordingly, the incentives for the Transitional Authority, which has even greater and more pressing security concerns than the United States, to comply with international humanitarian and human rights law in designing a transitional justice policy and rebuilding the Afghan legal system have been gravely damaged by the post-11 September actions of the U.S. government. As Harold Koh has argued, the 13 November Military Order undermines the four basic rule-of-law values higher than vengeance:

holding [Al-Qaeda] accountable for their crimes against humanity; telling the world the truth about those crimes; reaffirming that such acts violate all norms of civilized society; and demonstrating that law-abiding societies, unlike terrorists, respect human rights by channeling retribution into criminal punishment for even the most heinous outlaws.  

83 As Orentlicher notes, the chief argument against a general rule requiring prosecutions is that fragile democracies may not be able to survive the destabilizing effects of politically charged trials. In countries such as Afghanistan, where the military commanders retain substantial power after the transition, efforts to prosecute past violations may provoke rebellions that could weaken the authority of the civilian government. This often leads to calls for democratic consolidation through a policy of reconciliation embodied in an amnesty law covering past violations. See Orentlicher, 1991, pp. 2544-2545. Note that the Restatement (Third) of the Foreign Relations Law of the United States takes the position that a complete failure to punish repeated or notorious violations of rights protected by customary law generates state responsibility for a breach of the law: § 702 and Comment b.

It is difficult to envisage the United States playing a positive leadership role in the creation of an enduring and effective post-Taliban system of justice – essential for creating a higher degree of stability in the long run – while at the same time maintaining on the one hand its exceptionalist stance toward the international rule of law, human rights, and the ongoing struggle for universal justice and on the other its aggressive security policy regarding the use of force.

5 Conclusion

Michael Ignatieff argues that “America’s entire war on terror is an exercise in imperialism” and that its “capacity to shape outcomes in Afghanistan, still less to create a state, is constrained by the way it won the war against the Taliban.” More than any others, these two factors – the effects of US imperialism and overriding security concerns – threaten to undermine international human rights and humanitarian law and attempts to create transitional justice mechanisms in the fraught political and economic conditions of post-Taliban Afghanistan, as well as post-Saddam Hussein Iraq. The lessons of other transitional societies suggest that addressing individual criminal responsibility for serious violations of international humanitarian law and ensuring respect for human rights law is pivotal to the creation of a stable, accountable government subject to the rule of law. Without appropriate legal and political mechanisms to address both past and ongoing atrocities in Afghanistan, these objectives will remain elusive. Humanitarian crises are then likely to reoccur. As the ongoing struggle between competing conceptions of security and humanitarianism unfolds, the Age of Rights must act as a constant reminder of the importance of human dignity in facing the dangers of the Age of Terrorism.

85 Michael Ignatieff, “Nation-Building Lite,” New York Times Magazine, 28 July 2002, pp. 26, 28-29. Ignatieff further suggests (p. 29) that the “winning strategy paired Special Forces teams and air power with local commanders and their militias. When victory came, America thought it had won the war, but the warlords in the Northern Alliance thought they had. Now they dominate the Kabul government and insist that they, rather than the Americans, should shape the peace.”