

COMMITTEE ON INTERNATIONAL HUMANITARIAN LAW
of the
American Branch of the
International Law Association

March 20, 2018

The Honorable Jennifer Gillian Newstead
Legal Adviser
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Dear Ms. Newstead:

We congratulate you on your confirmation as Legal Adviser. The Office of the Legal Adviser enjoys a longstanding reputation as a major influence on the development of international legal norms, and we look forward to supporting you as you continue this important work.

As members of the Committee on International Humanitarian Law (IHL) of the American Branch of the International Law Association (ABILA),¹ we recognize that you face numerous, onerous challenges. We are particularly aware that one of your foundational tasks will be to reaffirm the United States' commitment to policymaking bounded by the norms with which our Committee is concerned. Members of our Committee consider that there are a number of specific areas where restatements of America's commitment to international legal norms could advance those objectives, particularly in relation to armed conflict.

We have identified three areas in particular:

- i) treaty actions in the areas of IHL;**
- ii) detention during armed conflict; and**
- iii) the use of force during armed conflict.**

It is not our goal to provide you with a lengthy brief on these topics but merely to articulate positions that we believe are consistent with contemporary international legal thought and would assist you as the United States reaffirms human rights leadership around the globe.

I. TREATY ACTIONS IN SUPPORT OF ENGAGEMENT IN IHL

The Obama Administration pressed the Senate to provide advice and consent so that the United States could ratify a number of treaties in our Committee's areas of concern. However, to date, the United States' failure to ratify these treaties places the U.S. in a position as an outlier on a number of major instruments in IHL, creating unnecessary uncertainties as to the scope and nature of obligations related to U.S. military operations and interoperability challenges in relation to coalition operations. We therefore encourage the United States to act promptly to ratify these treaties.

¹ This communication is submitted on behalf of the Committee on International Humanitarian Law of the American Branch of the International Law Association (ABILA). It does not necessarily represent the view of all of the Committee's members, nor does it represent the official position of the ABILA or the International Law Association as a whole.

Instruments in IHL/the Law of Armed Conflict

With respect to IHL, and without prejudice to any other treaties to which the United States is not yet party, we would urge the Trump Administration to consider the following:

- *Reprioritize the 1977 Additional Protocol II to the Geneva Conventions.* Additional Protocol II provides basic rules for combatants in the event of non-international armed conflict, rules which the United States has long considered reflective of customary norms already binding on all states. Three previous Presidents have requested Senate advice and consent to enable ratification of this treaty, including President Reagan following the initial Department of Defense review. The previous administration conducted another extensive interagency review that concluded that United States military practice is already consistent with the Protocol's provisions. In this light, continued failure to ratify this treaty is inexplicable. Ratification would advance U.S. interests in ensuring that non-international armed conflict be governed by fundamental, humane norms of international law.
- *Move forward a ratification transmittal package for the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.* This treaty also largely codifies customary international humanitarian law with respect to cultural property and updates the 1954 Convention to ensure its consistency with norms adopted since the updating of the 1949 Geneva Conventions by the 1977 Additional Protocols and the Convention on Conventional Weapons. To date, no serious objections to this protocol have been advanced. Particularly at a time when the United States and its allies are engaged in combat in places rich with historic and religious meaning, acceding to the Second Protocol would help demonstrate American commitment to the distinction between military objectives and civilian objects in armed conflict.
- *Initiate a review of the 1977 Additional Protocol I to the Geneva Conventions.* The alleged problems with Additional Protocol I are well-known and relate to the fact that it was perceived to give additional rights to members of national liberation movements and other organized armed groups that would not have been recognized under the Third Geneva Convention of 1949. Previous administrations have concluded that many of the rules codified in Additional Protocol I reflect customary IHL or are otherwise general principles consistently complied with by U.S. armed forces. As a result, key guidance for United States military forces typically draws on the language of this instrument, to which 163 States are now party. Most of the significant concerns with the Protocol deal with issues of irregular forces waging the kinds of insurgent warfare to which the United States has sadly become accustomed since 2001. Given the United States' experience with application of a variety of IHL norms during this period, we think that it is in the interest of the United States and U.S. armed forces to conduct a comprehensive review of Additional Protocol I, focusing as much as possible on those norms previously considered problematic, in order to facilitate assessment of the merits of moving forward with the ratification process. We would encourage any such review identify the small number of articles the U.S. believes should be subject to reservation or understanding instead of perpetuating the outright rejection of a treaty that is generally respected in U.S. practice. Such a move would engender very strong support internationally as you attempt to proceed with reaffirming leadership in this area of international law, and would contribute to more effective coalition operations.

II. DETENTION IN RELATION TO ARMED CONFLICT

Scope of application of the law of armed conflict

Resort to the law of armed conflict is essential to determine the scope of authority and rules for targeting, detention, detainee treatment and trials, but only where the context is truly armed conflict. Simply put, the scope of legality for killing and deprivation of liberty in war is greater than it is in peacetime. We note that debate within the United States on the scope of armed conflict tends to center on separation-of-powers aspects of domestic law. For example, much debate has swirled around what type of specific authorities the 2001 congressional authorization for the use of military force grants to the executive branch. The outcome of this domestic debate does not, and cannot, determine the scope of the law of armed conflict.

Instead, we caution the Trump Administration to hew to clearly-defined categories of armed conflict, and hence only assert armed conflict-based powers in cases of use of force between two states (as per Common Article 2 of the Geneva Conventions) or in the event organized armed groups engaged in sustained hostilities.² It is important to note that such clear categorization of armed conflict does not preclude use of appropriate force in self-defense; it instead clarifies that the legal framework for such force is not always the law of armed conflict.

The Basis and Scope of the Right to Detain a Combatant or Person Posing an Imperative Threat to Security in Armed Conflict

The Obama Administration inherited many law-of-war detainees and detention issues from the previous administration, but it also faced its own challenges as it engaged in detention operations – often alongside partner forces – in relation to non-state actors like ISIS. Many of the legal challenges have not been resolved, or have been resolved in a manner that is not in keeping with international norms, and we urge this Administration to continue to work with the international community to respect norms where they exist, and to develop new rules as needed.

Since 2001, there has been debate surrounding the legality of U.S. detention operations, immediately in connection with the conflicts in Iraq and Afghanistan. This debate highlights the need for establishing a uniform government practice for such detentions, perhaps through legislation.

We support the position that in an international armed conflict, there are only two categories of persons: combatant and civilian. In a non-international armed conflict, we recognize two general categories: those who belong to a party to the conflict, and civilians. However, we also recognize the current under-development of the law in this area, and urge the Administration to further refine current guidelines, such as those found in the DOD Law of War Manual, as to who constitutes the former. We believe that terms such as “unlawful enemy combatant” or “unprivileged enemy belligerent” are unhelpful, and at times in tension with the United States’ obligations under the law of armed conflict if not based on rigorous and clear standards. We recall in this regard the prescient words of Justice O’Connor in the *Hamdi* case:

...(W)e understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant

² See, e.g., ICTY, *Prosecutor v. Tadić* Judgment, IT-94-1-T, 7 May 1997, paras. 70, 561-568. *Tadić* is not universally accepted, but it is a widely cited source of definition of armed conflict. For other viewpoints, see The International Law Association’s *Final Report on the Meaning of Armed Conflict in International Law*, 2010, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>.

conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.

The application of the *Hamdi* Court's understanding of the "necessary and appropriate force" authorized by Congress in 2001 to justify detention under designations of "unlawful enemy combatant" or "unprivileged enemy belligerent" – designations not considered valid by the ICRC - has since lost legitimacy. Its factual predicate has eroded given the highly sporadic nature of the fighting that has occurred in Afghanistan in the last several years. Simply put, the farther the actual context moves from warfare, the less legitimate analogies to the law governing warfare become.

We believe, in keeping with recent trends in international jurisprudence, that international humanitarian law does not provide grounds and procedures for long-term detention without charge outside the rules of the Third and Fourth Geneva Conventions, in other words, in armed conflict against non-state armed groups. While it is difficult to define the demarcation line of "long-term" detention, the notion of "generational" detention, as the detention regime at Guantanamo was characterized by the U.S. Supreme Court in *Boumediene v. Bush*,³ certainly crosses that line.

International law establishes procedural requirements applicable to all deprivation of liberty, whether or not in armed conflict, whether or not the individual is criminally charged. For international armed conflict, these standards are reflected in the provisions of the Third and Fourth Geneva Conventions.

Where persons held in relation to a non-international armed conflict are charged, Common Article 3 of the Geneva Conventions requires that trials be conducted consistent with "judicial guarantees recognized as indispensable by civilized peoples." Such guarantees are found in human rights law, including within Article 14 of the International Covenant on Civil and Political Rights (ICCPR), whose provisions parallel those of Article 75 of Additional Protocol I to the Geneva Conventions.⁴

As referenced above, Common Article 3 contains no reference to due process related to denial of liberty outside the context of criminal charge. In this context, emerging international jurisprudence recognizes the applicability of human rights law to such long-term detention, including compliance with the right to judicial review, or habeas corpus, per Article 9.4 of the ICCPR.

We caution against the idea that the United States can create its own rules of international law, whether through practice or legislation. Instead, the United States should pursue long-term detention arrangements with proper deference to the host nation and its laws, to the customary norms reflected in Article 75 of Additional Protocol I establishing fundamental guarantees in international armed conflict, and international human rights law applicable to detention in non-international armed conflict.

³ *Boumediene v. Bush*, 553 U.S. 723 (2008)

⁴ The United States is not a party to the Additional Protocol, but recognizes the customary international legal status of Article 75. See, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights* (supra), Para. 509.

In recognition of the development of the law in this area, the United States has taken the position that human rights law and the law of armed conflict may apply concurrently.⁵ We urge the Administration not to revert to denial of the possibility of any application of human rights standards to armed conflict, a position that is no longer tenable in face of the weight of international jurisprudence to the contrary.

Convention Against Torture (CAT)

In its presentation to the United Nations Committee Against Torture in November 2014, the United States affirmed that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times in all places. This prohibition is grounded in both domestic and international law, and we recognize the great strides that have been made to further strengthen the absolute prohibition against torture by expanding the U.S. government's interpretation of its extraterritorial obligations under CAT, as well as the promulgation of provisions such as Section 1045 of the 2016 FY NDAA. Specifically:

- The United States affirmed that where the text of the CAT provides that obligations apply to a State Party in "any territory under its jurisdiction," those obligations extend to areas outside the sovereign territory of the State that the State Party controls as a governmental authority, including the United States Naval Station at Guantanamo Bay and United States registered ships and aircraft.
- The United States affirmed that a time of war does not suspend operation of the Convention Against Torture, which continues to apply even when a State is engaged in armed conflict.
- The United States reaffirmed the position taken by the George W. Bush Administration in 2006, that the exclusionary rule mandated by Article 15 of the CAT applies as a matter of law to administrative review processes for law of war detainees at Guantanamo, as well as to the military commissions.

In clearly adopting these positions, the United States signaled adherence to an interpretation of the CAT more in line with that of the ratifying Reagan and George H.W. Bush Administrations, as well as that of United States allies and partners across the globe. We urge the Administration to uphold these positions and to reject any policy proposals that would place the United States in danger of violating its domestic and international legal obligations prohibiting mistreatment of wartime detainees, including reactivation of the Central Intelligence Agency's detention and interrogation program.

⁵ While the scope of application of human rights law in situations of armed conflict is contested, the notion that human rights law does apply is well settled in international jurisprudence, and has recently been accepted by the United States. See, e.g., Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 IRRC 860 (2005); For U.S. position, see, *Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, Para. 505: "The United States is mindful that in General Comment 31 (2004) the Committee presented the view that "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." Para. 506: "The United States is also aware of the jurisprudence of the International Court of Justice ("ICJ"), which has found the ICCPR "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," as well as positions taken by other States Parties. With respect to the application of the Covenant and the international law of armed conflict (also referred to as international humanitarian law or "IHL"), the United States has not taken the position that the Covenant does not apply "in time of war." Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application. . ." Para. 507: "In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing." Available at <https://www.state.gov/j/drl/rls/179781.htm#ii>. See also the below section regarding the application of the Convention Against Torture during armed conflict.

III. USE OF FORCE IN RELATION TO ARMED CONFLICT

Targeting and Use of Force

When the United States is engaged in an armed conflict, respect for the rules of IHL regarding the conduct of hostilities is essential. We acknowledge the challenges in identifying legitimate military targets posed by the proliferation of non-state armed groups, especially in situations where it may be difficult to distinguish them from the civilian population. This difficulty, however, is all the more reason to respect the basic principles of distinction, proportionality and precautions when using force in the context of an armed conflict.

Given the immense challenges of modern asymmetric warfare, IHL's requirement for precautionary measures in targeting cannot be over-emphasized. If measures can be taken that allow successful prosecution of the target, but simultaneously provide better protection of civilians than alternatives, those measures are ipso facto required by the principle of precautions.⁶ The choice of means and methods is also important. Hence the use of cyber attacks, unmanned and autonomous weapons, or explosives in populated areas must comply with all relevant IHL rules. In this regard, we encourage the U.S. to continue the positive trend of emphasizing precautionary measures as reflected in the 2016 revision to the DOD law of War Manual.

Civilian casualty estimates

We are cognizant of the fact that care must be taken to contextualize targeting events when discussing civilian casualties, as the infliction of civilian casualties is not a conclusive indication that an attack was conducted in violation of IHL. Nonetheless, while civilian casualties may be permissible in armed conflict so long as they are not the result of directing an attack against civilians (other than those directly participating in hostilities) or civilian property, or are the unavoidable and proportional consequence of an otherwise lawful attack, transparency regarding civilian casualties is consistent with democratic accountability and should be regarded as an important objective of this Administration.

Additional Protocol I of 1977, much of which reflects customary IHL, obligates state parties to ensure that civilians enjoy general protection from military operations, to take "constant care" to spare civilians and civilian property from the dangers arising from military operations, and to observe precautions in attacks to mitigate the risk of civilian casualties. At present, the U.S. Department of Defense publishes no statistics, estimates, or assessments of legality of the number of civilian casualties resulting from its operations in "areas of active hostilities," making it difficult to accurately assess the legality of U.S. military operations on affected civilian populations and contributing to the dangerous expedient of relying solely on attack effects as reported by third parties as indicative of IHL compliance. Accordingly, we would encourage the administration to not only assess these statistics internally - which we understand that it currently does - but also to consider greater transparency in this assessment process. This would promote accountability for both United States forces and partner forces, and serve as an example to the rest of the international community of compliance with legal obligations and best practices designed to minimize the risks of military action to civilians.

In addition, we would urge the Administration to consider proposing legislation to establish a fund for compensating incidental civilian victims of U.S. combat operations that would

⁶ See Article 58(c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I), 8 June 1977.

expand upon the *ex gratia* payments currently permitted under the Foreign Claims Act.⁷ Not only would such a measure be consistent with the United States' international legal obligations, it would build goodwill for the United States abroad and help establish the country as a leader in respecting human dignity. It is unconvincing for any country to claim that it limits its foreign military operations to self-defense and humanitarian purposes, while articulating no uniform procedures to ameliorate the injustice caused by incidental killings of civilians and destruction of civilian property. In economic terms, such collateral damage is an "externality" that a fair and efficient system would internalize through a system of compensation.

In closing, let us again congratulate you on your appointment and confirmation as Legal Adviser. We and our Committee stand ready to assist you and your staff should you seek any clarification or further material on these, or other topics touching upon IHL.

Respectfully submitted on behalf of the International Humanitarian Law Committee of the American Branch of the International Law Association,

Aaron Fellmeth, IHL Committee Member
Professor, Sandra Day O'Connor College of Law

Gabor Rona, IHL Committee Member
Visiting Professor of Law, Cardozo School of Law

Ashika Singh, Co-Chair, IHL Committee
Associate, Debevoise & Plimpton LLP

Rachel VanLandingham, IHL Committee Member
Associate Professor of Law, Southwestern Law School

⁷ The Foreign Claims Act (FCA) is limited to "negligent or wrongful act[s]" and expressly excludes direct or indirect harm caused by combat activities. See US Dep't of Army, Reg. 27-20, Claims, Feb. 8, 2008, ¶ 10-3(a).