The Customary International Law of War and Combatant Status: Does the Current Executive Branch Policy Determination on Unlawful Combatant Status for Terrorists Run Afoul of International Law, or Is It Just Poor Public Relations?

Joshua E. Kastenberg

University of New Mexico

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The Customary International Law of War and Combatant Status: Does the Current Executive Branch Policy Determination on Unlawful Combatant Status for Terrorists Run Afoul of International Law, or Is It Just Poor Public Relations?

Josh Kastenberg*

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On September 11, 2001, more than 3,000 citizens, residents, and visitors in the United States were killed by the actions of an Islamic-based terrorist organization.¹

* Major Joshua E. Kastenberg, USAF/JAG, BA UCLA, MA Purdue University, JD Marquette University (honors), LLM Georgetown University Law School (with highest honors), is the deputy staff judge advocate for the 52d Fighter Wing, Spandahlem Air Base, Germany. In this capacity he serves as an international and criminal law advisor to the United States and NATO forces in Europe. The views expressed in this article are his, and do not necessarily reflect those of the United States Air Force or the Department of Defense. Major Kastenberg wishes to thank Elizabeth, Allenby, and Clementine Kastenberg for their love, insight, and continued support.

¹ See, e.g., Sean D. Murphy, Terrorists Attacks on the World Trade Center and Pentagon, 96 Am. J. Int'l L. 237, 240 (2002); see also Ruth Wedgewood, Al Qaeda, Terrorism, and Military Commissions, 96 Am. J. Int'l L. 328, 328 (2002); Major Timothy C. MacDonnell, Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional
More than any event since World War II, this act convulsed traditional views on individual rights, both under international and domestic law. As a result, the executive’s authority to determine combatant status was scrutinized by the legal community, civil rights groups, and international interests. Indeed, law reviews published a virtual plethora of articles criticizing both presidential authority and the military commission scheme. Some of this criticism stemmed from a lack of understanding of the sources of law for determining combatant status. The law of war regarding combatant status determinations is largely premised on traditional interstate warfare norms. Problematic to combating terrorism is that often, the participants are stateless persons who owe their allegiance to a belief rather than a government. Additionally, terrorist groups often employ universally condemned methods of warfare, such as the specific targeting of civilians. This is particularly


It appears clear that the Executive Order encompasses a range of possible defendants that exceed any reasonable interpretation of war criminals under the law of war. For example, the President asserts the authority to try members of Al-Qaeda or those who harbor members – neither of which is a clear violation of the law of war.

Id. at 751. Professor Turley’s article is a virtual condemnation on the military justice system where he argues military commissions are the most egregious form of a “pocket republic.” Id. at 765-66. He does, however, acknowledge that “[c]ustomary international law is considered a part of the laws of the United States.” Id. at 756. As noted in this article, the laws of war are clearly found in customary international law. For further criticisms see Stephen R. McAllister et al., Life After 9/11: Issues Affecting the Courts and the Nation, 51 U. KAN. L. REV. 219, 219 (2003); Stephen I. Vladeck, A Small Problem of Precedent: 18 U.S.C. § 4001(A) and the Detention of U.S. Citizen “Enemy Combatants,” 112 YALE L.J. 961,961-62 (2003).

4. For an example of criticism of the use of military commissions, particularly criticism against the current administration, see Michal R. Belknap, A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective, 38 CAL. W. L. REV. 433, 434, 479-80 (2002). Professor Belknap, admittedly, has a firm understanding of the history behind the domestic use military commissions. He does not, however, apply the principle that persons who violate the laws and customs of war are subject to punishment as unlawful combatants in a forum other than federal courts.


6. Id. at 51.

7. Id.
true in the case of Islamic or other religious-based terrorist organizations. Yet, membership in extremist organizations is also regularly entangled with state sponsorship. The relationship between al-Qaeda and the former Taliban government in Afghanistan illustrates a working relationship between the state and a group of individuals whose core belief system included the killing of United States citizens. This belief system was embodied in a religious directive or fatwa.

This paper reviews the domestic and international law basis for the executive authority to determine combatant status, and analyzes the legality of contemporary practice. It also accepts, as a definition for unlawful combatants: "persons violating the traditional laws and customs of war." Unlawful combatants do not meet the traditional captured combatant (prisoner of war) protections embodied in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter Geneva Convention III).

8. Id.
9. Id. at 52.
Like conventional terrorist organizations, Al-Qa’ida purports to operate on behalf of an oppressed people and has some specific objectives. Bin Laden’s original cause celebre, was to drive U.S. forces out of Saudi Arabia. As noted in Section III(B)(3), his 1996 “Declaration of War” was a call for war against U.S. forces in that country.


11. See, e.g., Interview by John Miller with Osama Bin Laden, in Afghanistan (May 28, 1998) at http://abcnews.go/com/sections/world/DailyNews/miller_binladen_980609.html. During this meeting, bin Laden explained his fatwa as: “We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwa.” Id.

12. “Persons captured during wartime are often referred to as ‘enemy combatants.’ While the designation of . . . [an individual] . . . as an ‘enemy combatant’ has aroused controversy, the term is one that has been used by the Supreme Court many times.” Hamdi v. Rumsfeld, 316 F.3d 450, 463 n.3 (4th Cir. 2003) (citing Madsen v. Kinsella, 343 U.S. 341, 355 (1952); In re Yamashita, 327 U.S. 1, 7 (1946)).

13. See, e.g., Quirin v. Cox, 317 U.S. 1, 30-31 n.10 (1942) where the Court labeled Nazi saboteurs who had entered the United States clandestinely as “unlawful belligerents,” having forfeited their prisoner-of-war status by removing their uniforms, surreptitiously entering the United States, and committing acts of sabotage. Id. at 35.

Part I of this paper examines the historic views of combatant status among sovereigns. It also addresses the evolutionary purpose of the law of armed conflict in designating combatants versus non-combatants. Much of this section is comprised of what has become considered as customary international law. Finally, this section reviews the 1949 Geneva Convention III, discussing combatant designation.

Part II discusses the origins and core philosophy (or theology) of modern religious-based terrorism. An understanding of this core philosophy is important to judge the administration’s designation of unlawful combatant status toward not only al-Qaeda, but other like-minded groups.

Part III analyzes the contemporary domestic practice of determining combatant status. Included in this section is an evaluative review of executive policy. Judicial oversight of executive determinations is analyzed in four salient cases. The first case, *Ex parte Quirin*, is analyzed for its use of customary international law, as well as its impact on both subsequent case law and the administration’s designation authority. This paper acknowledges that the efficacy of *Quirin* has come under attack by some members of the legal community. However, in the absence of contrary or limiting case law, *Quirin* appears to remain good law. The second case, *United States v. Noriega*, occurred in the context of a conventional war. Yet the court’s interpretation of Noriega’s combatant status under the Geneva Convention III provides guidance to further analyze the administration’s decision making. The paper then evaluates *Hamdi v. Rumsfeld* and *Padilla v. Bush*, and analyzes the legal efficacy of both the executive’s combatant designation decisions and corresponding judicial response.

Part IV reviews the United States’ position in a comparative framework against the practices of other signatories to the Geneva Convention. Both Israeli and British
determinations of combatant status are analyzed in this comparison. Moreover, this comparative analysis is conducted in recognition of the importance of customary international law.

Finally, the paper concludes with the assessment that, to date, the current administration has correctly identified al-Qaeda members as unlawful combatants, not subject to the complete protection of the Geneva Convention III. However, the administration has made a poor case to the legal community for this identification. A greater public recognition of customary international law would have strengthened the administration’s case. This is not to suggest that customary international law confers greater authority to the President than what is enumerated in the Constitution. Indeed, customary international law cannot confer to the President any authority he does not already possess through the Constitution. It should be noted that throughout this paper, the uncodified law of war is considered part of customary international law. Thus, the terms are used interchangeably. Finally, the wider implications of the administration’s authority to designate individuals as “unlawful combatants” is very important, as it affects other religious-based terrorist groups and their support networks.

I. THE HISTORY AND PURPOSE OF THE LAW OF WAR ON COMBATANT DESIGNATION

Customary international law is defined as “the common practice of states.” This becomes important in analyzing presidential authority and practice in designating combatant status. While this type of law lacks codification and is subject to wider interpretation than statute-based law, it remains an important source from which to judge the validity of combatant designation. Indeed, customary international law is part of the law of the United States.21


22. The charter to the International Court of Justice defines customary international law as, “the evidence of a general practice accepted as law.” U.N. CHARTER art. 38, para. 1 (b). Customary international law has also been defined as, over varying periods of time certain international practices have been found to be reasonable and wise in the conduct of foreign relations, in considerable measure the result of a balancing of interests. See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 & cmts. b, c. Such practices have attained the stature of accepted principles or norms and are recognized as international law or practice. Id. Accordingly, there are in the field of international law, public and private, certain well recognized principles or norms. Id.

Customary international law has also been described as uniformities in state behavior rather than formal writings. BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 102 (2d ed. 1990). See also Michael Byers, Terrorism, the Use of Force and International Law After 11 September, 51 INT’L & COMP. L.Q. 401,405 (2002).

law becomes an even more important tool where combatant designation is challenged from both the domestic and international legal community. Ultimately, when courts review combatant designation in specific cases, they may turn to customary international law for guidance.\(^{24}\) Although its use was a common feature in World War II era cases (and before), it has more recently received less attention.\(^{25}\) However, customary international law does not exist in a vacuum. To understand, and ultimately to apply, this unique type of law, an overview of its evolution is critical.

The fact that civilian populations were victims during warfare is nothing new to history. Indeed, ancient history is replete with instances of cities sacked and peoples decimated.\(^{26}\) In the Old Testament, there are conditions where enemy cities were destroyed and people enslaved.\(^{27}\) In western warfare, some of the earliest instances of fighting saw whole populations considered as combatant.\(^{28}\) This consideration, widely accepted by sovereigns and scholars alike, led to the decimation of societies.\(^{29}\)

For instance, in popular literature such as Homer's *Iliad*, the sack of Troy included...
the slaughter of males of all ages. In the First Crusade (1099-1103), the Crusaders, representatives of a greater Christian mission, sacked Jerusalem and several other cities, slaughtering the inhabitants regardless of age, gender, or religion. However, during this entire time, an emerging notion of necessity should have served to limit non-combatant suffering.

With the rise of Western Europe, the designation between combatants and non-combatants usually differed only between theology and practice. For example, during the Thirty Years War (1618-1648), Central Europe became depopulated as towns and villages were sacked by both Catholic and Protestant forces. Yet, over half a millennium earlier, sovereigns and soldiers alike were instructed to distinguish between combatants and non-combatants. For example, Saint Augustine outlined the duties of a Christian soldier as, “in waging war, cherish the spirit of the peacemaker, that, by conquering those whom you attack, you may lead them back to the advantages of peace.” The Thirty Years War was, in many respects, a watershed in the development of international law.

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30. HOMER, THE ILIAD 63 (Samuel Butler trans., 1898).

Some of our men cut off the heads of our enemies; others shot them with arrows, so that they fell from the towers; others tortured them longer by casting them into flames. Piles of heads, hands, and feet were to be seen in the streets of the city. It was necessary to pick one’s way over the bodies of men and horses. But these were small matters compared to what happened at the temple of Solomon... If I tell the truth, it will exceed your powers of belief... men rode in blood... Indeed, it was a just and splendid judgment of God, that his place should be filled with the blood of the unbelievers, when it had suffered so long from their blasphemies.

33. According to noted historian Geoffrey Parker, Central Europe, in the period of the Thirty Years War, suffered greater destruction and death than at any period prior to 1939. GEOFFREY PARKER, THE THIRTY YEARS’ WAR 210, 215 (1987). Grotius and his contemporaries were appalled by what appeared to be limitless suffering and destruction. See also Noone, supra note 32, at 187-88.
34. See, for example, the writings of Francisco de Vitoria (1485-1546), who wrote on the unlawfulness of killing non-combatants in stating, “The deliberate slaughter of the innocent is never lawful itself.” Francisco de Vitoria, Hugo Grotius and the Law of War, in 1 THE LAW OF WAR, A DOCUMENTARY HISTORY 13 (Leon Friedman ed., 1972).
35. Id. at 7.
36. PARKER, supra note 33.
Notably, during this conflict, Hugo Grotius wrote *De Jure Belli Ac Pacis Libri Tres*, which has impacted international law scholarship and application since. Grotius observed an important distinction between combatants and non-combatants, where combatants were subject to the rigors of warfare, and non-combatants should be spared inasmuch as possible. Other writers also developed notions of humanizing war to inflict the least amount of suffering on non-combatant populations.

After the Thirty Years War, the gulf between theories of humanized warfare and the actual state practice widened. However, efforts continued to bridge the gulf between theory and practice. From the nineteenth century on, agreements and treaties were formulated with the design of protecting civilian non-combatant populations. During the United States Civil War, Professor Francis Lieber, professor of law at Columbia University, was asked by President Lincoln to formulate a punitive code of conduct for Union forces. Military necessity was the central limitation in this code, and it expressly protected non-combatants. For example, Articles Nineteen and Twenty-two directly protected non-combatants from bombardment, murder, and arbitrary relocation. The code also vested the President

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37. "In 1625, appalled by the slaughter of the Thirty Years War, Hugo Grotius [1618-1648] explained why he chose to write *De Jure Belli Ac Pacis (The Law of War and Peace)*, the work commonly acknowledged as inaugurating the modern law of nations:"

Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of. I observed that men rush to arms for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.


41. See, e.g., Friedman, *supra* note 34, at 192.

42. Id. at 189, 641.


44. Id. at 6-7.

45. Lieber Code Article 19 reads, in pertinent part “Commanders, whenever admissible,
with approving the sentences of enemy persons prosecuted under martial law. As Commander-in-Chief of the armed forces, the president possesses the authority to determine matters under martial law. However, the Lieber Code is revolutionary in that it appears to be the first document that considered the law of war as a constraint on presidential authority. It is equally significant to the current analysis of the scope of presidential authority to determine combatant status, that President Lincoln adopted the code without removing this constraint.

The treatment and legal definition of lawful combatants began to take form during the nineteenth century. Indeed, the concept of protecting non-combatants and concerns for the treatment of captured combatants became an interwoven part of the law of war. For instance, in the 1874 Brussels Declaration, the law of war was considered to grant prisoners of war specific status rights, regardless of their combatant status. Article XI in the Brussels Declaration distinguished combatants from non-combatants, but claimed, “both shall enjoy the rights of prisoners of war.” Likewise, the declaration placed the onus of welfare and humane treatment of prisoners on the captor-government. This declaration was never ratified, but may be seen as an addition to customary international law.

During this same period, even popular literature condemned the practice of killing civilians who took part in fighting to protect their property. For instance, in La Debacle (The Downfall), Emile Zola writes of Bavarian tyranny where soldiers from that state’s army executed French civilians who were fighting alongside regular armed forces in the defense of their town during the 1870 war. But neither Zola,

inform the enemy of their intention to bombard a place, so that the non-combatants and especially the women and children, may be removed before the bombardment commences.” *Id.* at 6.

Lieber Code, Article 22 reads, in pertinent part:

The distinction between a private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

*Id.* at 7.

46.  *Id.* at 5 (art. 12).


49.  *Id.* at 3, 5.


51.  *Id.* at 29 (art. 11).

52.  *Id.* at 30 (art. 23).


54.  EMILE ZOLA, THE DOWNFALL 276 (1902).
nor the Brussels Declaration expressed a legal exclusion from punishment of combatants who violated the laws of war by targeting civilians.  

Due to concerns regarding technological innovations altering the size and scope of warfare, Czar Nicholas II sought a European Conference to limit the financial expense of armed conflict. In the 1899 Hague Convention, the laws of war governing the treatment of prisoners of war were to be applied to armies, militia, and volunteer corps that fulfilled specific conditions. In order to be entitled to the protections of prisoner of war status, an individual would have to be commanded by a person responsible for his subordinates, have a fixed distinctive emblem recognizable at a distance, carry arms openly, and conduct operations in accordance with the laws and customs of war. The latter category is of particular importance because it implies a loss of formal prisoner of war protection for individuals who, *inter alia*, specifically targeted civilian non-combatants. Article XXV of the Hague Convention is particularly instructive to the present terrorist phenomena. It

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55. *Id.; Declaration of Brussels: Concerning the Laws & Customs of War Adopted by the Conference of Brussels, in 1 THE LAW OF WAR, supra note 34, at 194.*

   The nineteenth century witnessed major incremental change in the technology of land war and more drastic change in naval weaponry. At both the start and the end of the century, the armies' principal weapons were rifles and cannons, but they became quite different with the passage of time. From a flintlock musket that had to be loaded by using a ramrod to tamp the explosive and the projectile down the muzzle, and the armies moved to breech loaders and then to repeating rifles. Cannon, too, evolved from muzzle loaders to breech loaders with a far longer range and heavier projectiles. A new weapon, the machine gun, particularly the model developed by Hiram Maxim in the 1880s, was destined to reshape the face of the battlefield, even though one could say that its effect merely amounted to gathering together enough rifles to send the same number of bullets per minute. Thanks to industrial innovations, far more of these weapons could be produced, to the point of straining the capacity of national economic systems to support the resulting forces. Developments in transportation, particularly the extension of national railroad systems, although designed and used for civilian purposes, also changed the patterns of conducting warfare.

*Id.* at 31.


58. *Id. at 1811-12 (art. I).*

59. *Id.*

60. *See id. at 1812 (art. II). Article II reads:*  
The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article I, shall be regarded as belligerent if they respect the laws and customs of war.

*Id.*
prohibited attacks on undefended buildings and towns. Likewise, Article XXVI proscribed to commanders a warning requirement for such attacks.

In 1907, the signatories to the 1899 Hague Convention met again and formulated a new convention that basically incorporated the tenets of the prior agreement. In the 1907 Hague Convention, the signatories reaffirmed that the laws and customs of war applied to individuals who fulfilled the same status as in the 1899 Agreement. Belligerents were charged with a greater degree of protecting private property than in the prior convention. Additionally, local populations were protected from forcible collection of intelligence. It may be the case that this addition occurred as a result of the conduct of combatants in both the Boer War (1902-1905), and the Russo-Japanese War (1905). Importantly, the 1907 Convention began to place responsibilities on individual combatants. For instance, captured prisoners were to provide, at a minimum, their name and rank. However, there were no changes as to the treatment of prisoners from the 1899 Convention.

61. Id. at 1818. Article XXV reads: “The attack or bombardment of towns, villages, habitations, or buildings which are not defended is prohibited.”
62. See 1899 Hague Convention, 32 Stat. at 1818. Article XXVI reads: “The commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.”
64. Id. at 2295-96 (art. 1).
65. Id. at 2308 (arts. 52 & 53).
66. Id. at 2306. Article 44 reads in full: “A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.”
67. In 1902, Britain and the Dutch inhabitants (Boers) of the Transvaal and Orange Free State engaged in Warfare. See THOMAS PAKENHAM, THE BOER WAR (1979). The war ended with the surrender of the two territories into the British South Africa colony. Id. at 599, 604. However, the Boers were vested with a considerable degree of autonomy. Id. at 611 (granting of self-government). During the war, both sides employed unconventional warfare methods which were later criticized as inhumane. See, e.g., id. at 500 (use of guerilla warfare). With the British, the removal of civilians into internment camps became a focal point for criticism. Id. at 607. The Boer forces too, often failed to distinguish between civilians and military targets. See PAKENHAM, supra, at 601; see also DENEYS REITZ, COMMANDO, A BOER JOURNAL OF THE BOER WAR (1970).
68. In 1904, the Japanese Navy, in a surprise attack, sunk the Russian Pacific Fleet and invaded Port Arthur. See CHRISTOPHER MARTIN, THE RUSSO-JAPANESE WAR 15 (1967). However, despite the Russian loss of a considerable part of its navy, the Japanese army was unable to deliver a decisive defeat and a peace treaty was concluded at Portsmouth under the guidance of the United States. Id. at 228. Neither side accorded prisoners of war humane treatment. See J.N. WESTWOOD, THE ILLUSTRATED HISTORY OF THE RUSSO-JAPANESE WAR 44-45 (1973).
69. See Hague II, supra note 63, at 2298.
70. Id.
71. Id. at 2296-301.
Only seven years after the Convention, World War I (1914-1918) broke out among the European states. The conflict eventually included not only the major, and most of the minor European states, but also the United States and Japan. In practice, treatment of non-combatants differed from the aspirations for humanity found in prior agreements and treatises. For instance, German treatment of Belgian and French civilian populations was disproportionate to the occupying needs. Indeed, both sides in the war believed that civilian populations were legitimate strategic targets for victory. The British and German navies were employed in blockades to starve civilian populations of not only raw material, but also foodstuffs. However, it was heavily propagandized German actions in Belgium, such as the execution of a British nurse after a sham trial, which led to a reassessment of the distinction between combatants and non-combatants. Violations of the law of war against civilian populations received some attention in the trials of German officers after the war. However, in what became known as the Leipzig Trials, there was a general failure to successfully criminalize conduct brutalizing civilians. More importantly, in 1929 in Geneva, the major nations involved in the conflict agreed to maintain the requirements of lawful combatant status. Within this agreement was the recognition of militia as lawful combatants. However, in the 1929 Geneva

72. Japan entered World War I in 1914. See Spencer C. Tucker, The Great War: 1914-18 10 (1998). The United States entered the War in April 1917, alleging that Germany had repeatedly violated the laws and customs of war, in part, through its unrestricted submarine warfare. Id. at 131-34.


74. Id. at 176-79. German military treatment of Belgian civilians included summary execution for reprisals, sham trials, and destruction of urban centers. Id.

75. See, e.g., id. at 183-85. For the British government's own description of the blockade policy, see British Statement of the Measures Adopted to Intercept the Sea-borne Commerce of Germany, reprinted in 10 Am. J. Int'l L. 87, 87 (Supp. 1916).

76. Heyman, supra note 73, at 198-99.

77. See L.C. Green, Enforcement of the Law in International and Non-International Conflicts—The Way Ahead, 24 Denv. J. Int'l L. & Pol'y 285, 305 (1996). Nurse Cavell, a British national, was executed for her efforts in transporting British troops from behind German lines back to Britain, before a German tribunal. Id. at 305 n.90. The execution was later condemned as an act of judicial murder. Id. at 305. See also, James Wilford Garner, 2 International Law and the World War 97-102, 104-5 (1920).


81. Id.
Convention, militia were subject to the same law of war requirements as regular forces.\footnote{82}

In World War II, the status of civilians as non-combatants fell into doubt as all parties in the conflict followed a policy of targeting civilian populations through air and ground warfare.\footnote{83} Additionally, German, Soviet, and Japanese treatment of non-combatant populations included murder and terrorizing populations into submission.\footnote{84} Prisoner of war conditions during the conflict varied, but German, Soviet, and Japanese treatment of prisoners of war was appalling.\footnote{85} The war also saw an increased use of "underground forces" fighting against German and Japanese occupation.\footnote{86} The treatment of captured "underground forces" was brutal and included severe punishment and execution.\footnote{87} With this added element, it became essential to not only review the treatment of captured "underground" or irregular forces, but also to afford some protection where these forces follow the laws of war.\footnote{88}

As the war ended, allied representatives met in London to conclude a charter detailing the "constitution, jurisdiction and functions of the International Military Tribunal (IMT)," which conducted the Nuremberg trials.\footnote{89} War crimes trials were

\footnote{82} Id. at 2030.

\footnote{83} See, e.g., Secretary General, Report on Human Rights in Armed Conflicts, United Nations, Nov. 20, 1969, pt. IV, in 1 The Law of War, supra note 34, at 707, 710 [hereinafter Secretary General’s Report].

\footnote{84} See, e.g., The Tokyo War Crimes Trial International Military Tribunal for the Far East, in 2 The Law of War, supra note 76, at 1029, 1075; The Nuremberg Judgment, supra note 78, at 950-51.

\footnote{85} See Tokyo War Crimes Trial, supra note 84, at 1075; The Nuremberg Judgment, supra note 78, at 944-45.

\footnote{86} Secretary General’s Report, supra note 83, at 714. The report recognizes guerilla warfare as commonplace in history. Id.

\footnote{87} Id. at 715.

\footnote{88} Id.

\footnote{89} See Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544. On October 7, 1942, it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. See Laurie A. Cohen, Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia, 2 UCLA J. Int’l L. & Foreign Aff. 113, 119-20 (1997). It was not, however, until 20 October 1943, that the actual establishment of the Commission took place. See Dennis J. Mitchell, All is not Fair in War: The Need for a Permanent War Crimes Tribunal, 44 Drake L. Rev. 575, 582 (1996). In the Moscow Declaration of 30 October 1943, the United States, United Kingdom, and Soviet Union issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, the “major criminals whose offenses have no particular geographical location,” would be punished “by the joint decision of the Governments of the Allies.” See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, supra, at 1544.
established, in part, to enforce norms against the brutalizing of non-combatant civilian populations.90

As a result of the treatment of civilian populations during World War II, the majority of states met in Geneva to codify protections to civilian populations.91 This meeting concluded with the signing of the Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV).92 Much of these protections were already present in the 1899 and 1907 Hague Conventions.93 However, the scope of brutality in Nazi and Japanese occupied territory, as well as the introduction of new technologies to the battlefield, necessitated a renewed affirmation of the law of war.94 Of primary importance to this paper, is the continued protection of civilian populations against direct targeting. Article III provides for the humane treatment of non-combatants.95 Encompassed in this Article were, inter alia, the following prohibitions: murder,96 hostage taking,97 outrages upon personal dignity,98 and torture.99

The law of war did not cease to evolve with the 1949 Geneva Conventions. "In 1978, the International Committee of the Red Cross, concerned that ... the four 1949 Geneva Conventions had become too complex as a guiding statement on the laws of armed conflict, condensed the principles into 'Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts.'"100 Principle No. 7 states: "Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor

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92. See id.
93. See Laws and Customs of War on Land (Hague, IV): Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, in 1 THE LAW OF WAR, supra note 34, at 308; Laws and Customs of War on Land (Hague, II): Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, in 1 THE LAW OF WAR, supra note 34, at 221.
95. Geneva IV, supra note 91, at 642 (art. III(1)).
96. Id. at 642 (art. III(1)(a)).
97. Id. at 642 (art. III(1)(b)).
98. Id. at 642 (art. III(1)(c)) (considering humiliating and degrading treatment as an outrage).
99. Id. at 642 (art. III(1)(a)).
civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives." Thus, some twenty-three years before the September 11, 2001 attacks, and prior to the rise of al-Qaeda, Hamas, and Abu-Sayeff, the international community had reached a consensus that direct targeting of civilians was a clear violation of the laws of war.

In 1949 at Geneva, the major participants in World War II, along with other states, met to codify prisoner of war status rights. Inherent in these rights is the designation of lawful combatant status, as well as non-combatant protections. The Geneva Convention (III) provided that its protections extended to members of a state's armed forces, as well as to militias or volunteer corps that form the armed forces. Individuals who operate militarily separate from formal armed forces, such as resistance movements, are also covered by its protections, provided four conditions are met. First, in order to be covered by the Convention's protections, an organization must possess a command structure. The organization also must possess a distinctive emblem that is recognizable from a distance. These organizations must carry their arms openly. Finally, and most importantly, individuals who are members of an armed organization must conduct their operations in accordance with the laws and customs of war. It may very well be the case that this requirement extends to the planning and preparation stage of military operations. These conditions remain, in effect, unchanged to this day.

101. *Id.*
102. *Id.*
105. *Id.* at 138 (art. 4(A)(1)).
106. *Id.* (art. 4(A)(2)(a)-(d)).
107. *Id.* (art. 4(A)(2)(a)). This section reads: "(a) that of being commanded by a person responsible for his subordinates." *Id.*
108. *Id.* (art. 4(A)(2)(b)). Although not an issue pertinent to this paper, the distance requirements have never been formalized.
110. *Id.* (art. 4(A)(2)(d)).
The term "terrorism" is more than two centuries old. Thus, it is problematic to consider all groups labeled as terrorist as conducting similar operations with like-minded goals. There are simply too many organizations, with different goals in mind. However, the general philosophy and aims of terrorism have existed for thousands of years. This philosophy seeks to create political, religious, or social change. Towards the end of the twentieth century, the United States government recognized terrorism as "the biggest threat to our country and the world." The United States Code defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." The Department of Defense (DOD) defines terrorism as "the calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."

Since the latter part of the twentieth century terrorists have moved away from "direct state sponsorship" while maintaining "access to state resources but [are] less and less likely to be under the control of the state itself." Each major world...
religion potentially has a core constituency of possible terrorist groups. However, since World War II, fundamentalist Islamic movements emerged at the forefront of state-sponsored terrorism. For instance, the al-Qaeda organization was recently based in Afghanistan. Likewise, other groups have received sanctuary and backing from states such as Syria, Libya, Iran, and Iraq. For instance, Hizbollah received considerable aid from Syria and Iran. Hamas, too, has received financial and weapons support from not only Syria and Iran, but also from Saudi Arabia. Additionally, the Philippine-based Abu-Sayeff Group (ASG), receives aid from various Arab entities.

perpetrator (or his followers) [sic].

Id. at 122.

118. See, e.g., Edgardo Rotman, The Globalization of Criminal Violence, 10 CORNELL J.L. & PUB. POL’Y 1, 21 (2000). Professor Rotman seems to indicate, however, that such movements are evolving away from state sponsorship, making them even more dangerous to national security.


121. Travalio, supra note 120, at 150 n.19. Hizbollah is also known by different names such as Islamic Jihad, Islamic Jihad for the Liberation of Palestine, Organization of the Oppressed, Revolutionary Justice Organization, and Ansarollah (Partisans of God). See YONAH ALEXANDER, MIDDLE EAST TERRORISM: SELECTED GROUP PROFILES 33 (James Colbert ed., 1994). It is mainly dedicated to the creation of a wholly fundamentalist Shia Islamic state in Lebanon and the destruction of Israel. Id. Hizbollah’s activities range from the murder of Israeli citizens to hostage taking of European and American citizens. DEPT. OF STATE TERRORISM REPORT FOR 2000, supra note 119.

122. See, e.g., DEPT. OF STATE TERRORISM REPORT FOR 2000, supra note 119. Formed in late 1987 as an outgrowth of the Palestinian branch of the Muslim Brotherhood. Various HAMAS elements have used both political and violent means, including terrorism, to pursue the goal of establishing an Islamic Palestinian state in place of Israel. [It is a loosely structured [organization], with some elements working clandestinely and others working openly through mosques and social service institutions to recruit members, raise money, organize activities, and distribute propaganda.

HAMAS activists ... have conducted many attacks—including large-scale suicide bombings—against Israeli civilian and military targets. In the early 1990s, they also targeted suspected Palestinian collaborators and Fatah rivals .... [It r]eceives funding from Palestinian expatriates, Iran, and private benefactors in Saudi Arabia and other moderate Arab states. Some fundraising and propaganda activities take place in Western Europe and North America.

Id.

123. See id.

[ASG e]ngages in bombings, assassinations, kidnappings, and extortion to promote an
At the core of some of these movements is the concept of "Jihad," or holy war. Its model generally is premised on warfare against perceived enemies of Islam. Differences between religious-based terrorism and nationalist-based terrorism are both geographic and target limitations. Additionally, the goals of religious-based terrorism appear to be gross societal change, rather than national self-determination.

Unlike state-centered warfare, terrorism employs secrecy as its core attack strategy. Most terrorist groups, whether religious-based or not, intentionally strike without warning. While the ultimate aim may be to affect policy change, loss of confidence in government leadership, or destruction of social structures, their attacks have increasingly centered on harming civilian non-military targets. In the current phenomena of fundamentalist Islamic terrorist movements, the conventional "laws of war" become an unused guideline, in part, because such laws lack divine inspiration. Thus, international law that wholly applies to state relations may be

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124. See, e.g., id. "In the age of post-colonialism, Muslims have become largely preoccupied with the attempt to remedy a collective feeling of powerlessness and a frustrating sense of political defeat, often by engaging in highly sensationalistic acts of power symbolism." Khaled Abou El Fadl, The Culture of Ugliness in Modern Islam and Reengaging Morality, 2 UCLA J. ISLAMIC & NEAR E. L. 33, 60 (2003).

125. See, e.g., DEPT. OF STATE TERRORISM REPORT FOR 2000, supra note 119.

126. See, e.g., Rotman, supra note 118, at 21. Professor Rotman writes:

The menace of international terrorism is multiform. First, there is a traditional state-sponsored terrorism, which is a form of global organized crime, also characterized as socio-political organized crime. Although this form of terrorism continues to pose a significant threat, there is a new breed of freelance terrorists who constitute an even more frightening possibility. They are not sponsored by any particular state, and are loosely affiliated with extremist and violent ideologies. These terrorists have proven to be all the more dangerous precisely because of their lack of organization and the difficulties associated with identifying them.

Id.

127. See id. at 21, 23; see also Davis Brown, Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses, 11 CARDOZO J. INT’L & COMP. L. 1, 51 (2003).

128. See, e.g., Travajo, supra note 120, at 165, 173, 181-82.

129. Id.

130. Id. at 181-84.

131. See, e.g., El Fadl, supra note 124, at 67. El Fadl writes:

With the deconstruction of the traditional institutions of religious authority emerged organizations such as the Jihad, al-Qa’ida, and the Taliban, who were influenced by the
difficult to apply to terrorist non-state actors. Likewise, conventional international law protections may be inapplicable to state governments which harbor or assist terrorist operations. Indeed, it has been argued that terrorists constitute *hostis humani generis*, or "enemy of the human race." While this term emerged in the Eighteenth Century in relation to pirates, certain practices, universally condemned under international law, are now found under the term as well. Likewise, a growing body of law and scholarship considers terrorism as a *jus cogens* violation.

Religious-based terrorists, such as al-Qaeda, have shown a preference for terms normally associated with warfare. The use of these terms evidences an aim of establishing a moral equivalency of their actions, such as crashing airlines into buildings, with that of battlefield actions taken by opposing armies. However, unlike the actions of opposing armies, religious-based terrorists have intentionally targeted civilians and civilian related infrastructure. "The age of terrorism is a new era in international relations, where the traditional tools of power politics will be less important than in the past." For instance, Professor Audrey Cronin writes,

resistance paradigms of national liberation and anti-colonialist ideologies, but also who anchored themselves in a religious orientation that is distinctively puritan, supremacist, and thoroughly opportunistic in nature. This theology is the by-product of the emergence and eventual primacy of a synchronistic orientation that unites Wahhabism and Salafism in modern Islam. Puritan orientations, such as the Wahhabis, imagine that God's perfection and immutability are fully attainable by human beings in this lifetime.

*Id.* at 67-68.


133. See Blum & Steinhardt, *supra* note 132, at 60-61. For instance torture, hostage taking, forced labor (a modern variant of slavery), and summary execution are now condemned as *jus cogens* violations. The targeting of civilians is proscribed under several treaties as well as universally condemned, making that action *jus cogens*. Persons involved in any of these activities may be seen as "an enemy of mankind." *Id.* at 60.

134. See, e.g., Smith v. Socialist People’s Libyan Arab Jamahiriya, 101 F.3d 239 (2nd Cir. 1996). The court in *Smith* defined *jus cogens* norms as:

*Jus cogens* norms . . . do not depend on the consent of individual states, but are universally binding by their very nature. Therefore, no explicit consent is required for a state to accept them; the very fact that it is a state implies acceptance. Also implied is that when a state violates such a norm, it is not entitled to immunity.


135. *Cronin, supra* note 117, at 123.

136. *Id.* at 123-24.

137. *Id.* at 125.

138. *Id.*
While we have obviously not seen the last of inter-state war, war between organised states will no longer be the main driving force that it has been in the last 400 years or so. Ideology will be; and the underlying legitimacy of the ideology will provide the centre of gravity for each side. \(^{139}\)

This ideology is best observed in the statements of al-Qaeda. These statements include: "to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it"\(^{140}\) and, "every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it."\(^{141}\) Furthermore, the Hamas charter provides as a commandment, a Quaranic interpretation to kill non-believers who govern over Muslims, whether under democratic institutions or otherwise.\(^{142}\)

The importance in defining religious-based terrorism is not simply that its tenets of warfare are distinct from traditional conventional warfare between states, but these tenets are inherently illegal. Yet, the law of war applies to non-state actors.\(^{143}\) Understanding the context of modern religious-based terrorism is important to the classification of combatants because of its methods of warfare and core philosophy. Essentially, individuals belonging to organizations such as al-Qaeda, Abu Sayeff,

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139. Id.


141. Id.


There is no solution to the Palestinian problem except by Jihad . . . . In order to face the usurpation of Palestine by the Jews, we have no escape from raising the banner of Jihad . . . . We must imprint on the minds of generations of Muslims that the Palestinian problem is a religious one, to be dealt with on this premise . . . . I swear by that who holds in His Hands the Soul of Muhammad! I indeed wish to go to war for the sake of Allah! I will assault and kill; assault and kill, assault and kill.

Id. "Hamas is the acronym for the Islamic Resistance Movement, Harakat Muqawama Islamiyya, meaning, literally, 'enthusiasm,' 'zeal,' 'fanaticism.'" Id. at 275, n.37.

Hamas, and Hizbollah, have eschewed the law of war to the point that while they are clearly combatants, their very behavior, as reflected by their philosophy, has rendered them unlawful combatants.

III. CONTEMPORARY PRACTICE AND PARAMETERS: DOMESTIC JUDICIAL INTERPRETATION OF INTERNATIONAL LAW

A study in salient domestic case law is important in understanding the presidential authority to determine combatant status. The Geneva Convention on Prisoners of War sets guidelines and confers some basic rights to combatants. Case law also serves as a parameter to executive authority. Additionally, the administration’s policy of determining combatant status is found in Hamdi and Padilla. Before analyzing current case law, both a review of Quirin, and recently legislated executive authority is important, as each places presidential combatant designation decisions in their lawful context. Additionally, Noriega is analyzed, because along with Quirin, customary international law is subsumed and adopted into their holdings.

A. Ex parte Quirin

In Ex parte Quirin, the Supreme Court acknowledged that both the President and Congress have authority to create military commissions. "Ex Parte Quirin involved the trial of eight German soldiers who infiltrated the United States in 1942 with the intent to sabotage war facilities." Shortly after their arrival on United States territory, they were apprehended by Federal Bureau of Investigation (FBI) agents. After their capture, the soldiers were prosecuted in a military commission, created by presidential order. At the same time President Franklin Roosevelt promulgated the military commission, he announced:

144. See Hamdi III, 316 F.3d at 475.
145. See Padilla I, 233 F. Supp. 2d at 592.
147. See Quirin, 317 U.S. at 30-31; Noriega, 746 F. Supp. at 1519.
149. MacDonnell, supra note 1, at 22. All eight captured Germans were born in Germany. See Quirin, 317 U.S. at 20. One of the Germans, Herbert Haupt became a United States citizen during his youth by virtue of his parents naturalization. Id. All eight had resided in the United States but returned to Germany between 1933 and 1941. Id.
150. Quirin, 317 U.S. at 21. The eight Germans were joined by another individual named George Dasch. Id. After being transported by submarine to the Florida coast, four individuals landed and changed into civilian clothes. Id. They traveled to Jacksonville, and then split up. Id.
151. Id. at 22; see also MacDonnell, supra note 1, 22-23. The presidential order was promulgated by Franklin D. Roosevelt, after the capture of the eight soldiers. See Quirin, 317 U.S. at 22.
All persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States. . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.  

While the main issue in Quirin dealt with presidential authority to create a military commission, commensurate with this issue was the concept of the unlawful combatant designation. As noted above, prior to the Geneva Convention III, prisoners of war were, in theory, safeguarded by the 1929 Geneva Convention and the two Hague Conventions. However, these agreements did not provide procedural hearings for non-combatants or unlawful combatants. The law of war assumed that state captors could deal with such persons as they saw fit. Because of the long use of military commissions in United States history, President Roosevelt did not depart from that tradition of prosecuting unlawful combatants through the commission process. The Court in Quirin upheld the President’s authority to order commissions for saboteurs. Thus, the Court set an important precedent by allowing the president to designate persons as unlawful combatants, solely by virtue of executive authority, once Congress has authorized the president to conduct war as the Commander-in-Chief. However, it must be noted that this authority does not encompass a power to punish individuals. Rather, the authority to designate an individual as an unlawful combatant makes the individual subject to the military

152. Quirin, 317 U.S. at 22-23.
153. See id.
155. Id.
156. See, e.g., MacDonnell, supra note 1, at 26-31 (tracing the history of military commissions in United States jurisprudence).

From the earliest moments of U.S. history to World War II, the United States has applied customary international law to define the jurisdiction of military commissions. Therefore the expansion of the “theater of operations” illustrates that American military commission jurisdiction, and thus the jurisdictional limitations imposed by customary international law, have evolved over time with the changing nature of warfare.

Id. at 30.

157. Quirin, 317 U.S. at 27-28; see also In re Yamashita 327 U.S. 1, 4 (1946).
158. Quirin, 317 U.S. at 28. The Court concluded that where the President executes a military action authorized by Congress, he is permitted to create military commissions incident to the execution of that military operation. Id.; see also MacDonnell, supra note 1, at 23.
commission process, should punitive measure be warranted.\textsuperscript{160} Below, it is noted that detention of prisoners of war, including unlawful combatants, is not punitive, but rather is a function of national security.\textsuperscript{161}

The Court also relied a great deal on the traditional law of war, not only as found in statutes such as the Articles of War, but in the uncodified customary international law.\textsuperscript{162} For instance, the Court looked to the Revolutionary War spying trial of Major John Andre for guidance.\textsuperscript{163} Likewise, the Court analyzed several Civil War spy trials adjudicated before military commissions.\textsuperscript{164} Through its historic review, the Court found the existence of a universal agreement where the practice of the law of war distinguished between armed forces and citizenry.\textsuperscript{165} The laws of war, in practice, also distinguished between lawful and unlawful combatants.\textsuperscript{166} The Court reasoned that lawful combatants were subject to capture and detention as prisoners of war, while unlawful combatants were subject to capture, detention, and trial and

\begin{enumerate}
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} See infra p. 63.
  \item \textsuperscript{162} See generally id. at 27-28.
  \item \textsuperscript{163} Id. at 31 n.9 (citing to Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780). On September 29, 1780, Major Andre, a British officer, was prosecuted for spying. \textit{Id.} He had been apprehended while in disguise and under an assumed name, within the vicinity of the Continental Army. \textit{Id.} His purpose was to obtain intelligence and persuade General Benedict Arnold to defect. \textit{Id.} at 31-32. He was subsequently prosecuted and found guilty of spying. \textit{Id.} His sentence of death was carried out under General Washington's order. \textit{Id.} See also Major David A. Anderson, \textit{Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty}, 127 Mil. L. Rev. 1, 2-3 (1990). For a more detailed history of Major Andre's trial and execution, see, for example, ROBERT MCCONNELL HATCH, MAJOR JOHN ANDRE: A GALLANT IN SPY'S CLOTHING (1986).
  \item \textsuperscript{164} Quirin, 317 U.S. at 32-33 n.10. The Court cited to several Civil War cases including the prosecution of John Y. Beale for violating "the laws and customs of war." \textit{Id.} Particularly pertinent to the present situation, Beale, a commissioned officer in the Confederate Navy, entered the United States in civilian disguise. \textit{Id.} He, along with several associates seized possession of a merchant vessel on Lake Erie, conducted spying operations in New York, and attempted to derail a train in New York. \textit{Id.} (citing Dept. of the East, G.O. No. 14, Feb. 14, 1865). The train derailment is instructive to the present situation because it involved civilian targets.
  
  Additionally, the Court reviewed the military commission trial of Captain Robert C. Kennedy, also a Confederate naval officer. \textit{Quirin}, 317 U.S. at 32 n.10. Captain Kennedy entered the United States in disguise, where he attempted to set fire to New York City. \textit{Id.} He also conducted intelligence operations. \textit{Id.} He was convicted for "undertaking to carry on irregular and unlawful warfare," and sentenced to death. \textit{Id.} (citing Dept. of the East, G.O. No. 24, March 20, 1865).
  \item \textsuperscript{165} Quirin, 317 U.S. at 30-31.
  \item \textsuperscript{166} Id. The Court also found, in reviewing the British War Office Manual of Military Law (1920), a list of war crimes including: damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. \textit{Id.} at 36 n.12. Moreover, in its review of international law scholarship, the Court concluded that the following constituted war crimes: persons who pass through the lines for the purpose of destroying bridges, war materials, communication facilities, etc.
  \textit{Id.}
punishment for acts which rendered their belligerency unlawful. A lawful combatant prisoner of war is subject to trial and punishment only for acts committed after capture. An unlawful combatant can be prosecuted for acts which occurred prior to capture and which make the combatant’s status unlawful.

B. Executive Authority and Current Policy

On September 18, 2001, Congress passed Public Law 107-40. This law was in the form of a joint resolution in response to “acts of treacherous violence committed against the United States and its citizens.” The law recognized the danger terrorist acts pose to the nation’s security and foreign policy. It also affirmed presidential authority to deter and prevent “acts of international terrorism against the United States.” The resolution, entitled “Authorization for Use of Military Force,” (the “Joint Resolution”) specifically provided:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

This law was not in contravention of any established constitutional principles. The United States Constitution grants Congress the power to “provide for the common Defence [sic] and general Welfare of the United States.” It also grants the authority “[t]o declare war... and make Rules concerning Captures on Land and Water.” The President is granted the position of Commander-in-Chief of the

167. Id. at 31. The Court recognized these same scholars were unanimous in concluding that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war. Quirin, 317 U.S. at 31.

168. Id.

169. Id. at 31 (citing to Great Britain, War Office, Manual of Military Law, ch. xiv, secs. 445-451; Regolamento di Servizio in Guerra, sec. 133, 3 Leggi e Decreti del Regno d'Italia (1896); 2 Oppenheim, International Law, sec. 254; 7 Moore, Digest of International Law, sec. 1109).


172. See 115 Stat. at 224.

173. Id.

174. Id.


176. U.S. CONST. art. I, § 8, cl. 11.
armed forces (as well as the national guard) when called into service. In *Ex parte Quirin,* the Court found presidential authority extended to "carry[ing] into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war." The President determines the combatant status of prisoners of war under the Constitution. This executive responsibility is not unique to the United States, as sovereigns were traditionally charged with the leadership responsibility for conducting war. However, the combatant designation is subject to judicial review, albeit with considerable deference to the executive designation.

C. Contemporary Case Law

Three recent cases directly bear on the efficacy of the administration's authority to designate members of terrorist groups, such as al-Qaeda, as unlawful combatants. While only one of the cases involves a member of a terrorist group as the appellant, each case sets parameters on presidential authority. It is through these judicial parameters that the administration's unlawful combatant designation for terrorist group members can be further analyzed.

177. See U.S. CONST. art. II, § 2. cl. 1.
178. See generally 317 U.S. at 1.
179. Id. at 26.
180. See id.

[D]uring the Reformation in Europe in the early seventeenth century, at least one commander sought an alternate method for resolving the status of the unlawful belligerent. Gustavus Adolphus is often hailed as the father of modern warfare. As the King of Sweden and the Field Commander of Swedish forces during the Thirty Years War (1618-1648), he introduced myriad new technological and training techniques.

The United States early military traditions were, in many respects, carbon copies of their former colonial masters, the British.

Id. at 42.

182. See, e.g., *Ex parte Milligan,* 71 U.S. 2 (1866) (The Founders "foresaw that troublous times would arise, when rulers and people would ... seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law."). Id.


184. See generally *Hamdi,* 294 F.3d at 598; *Padilla,* 233 F. Supp. 2d at 564; *Noriega,* 808 F. Supp. at 791.

The context of the former Panamanian executive’s criminal trial before a United States District Court is important to this article in that it was the first time a United States court expressly held that significant portions of the Geneva Convention III on prisoner rights were self-executing. In order to appreciate the value of Noriega to the issue of combatant determination and presidential authority, it is important to understand the facts surrounding his apprehension and trial.

"On February 14, 1988, a federal grand jury . . . [indicted] General Manuel Antonio Noriega . . . [for his role] in an international conspiracy to import cocaine . . . [into] the United States." When the indictment was issued, General Noriega was in Panama. However, after United States military forces invaded Panama on December 20, 1989, he was apprehended and brought to Florida for trial.  

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185. See Noriega, 808 F. Supp. at 794. Prior to Noriega, the Circuit Court of Appeals for the District of Columbia, in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), held that portions of the Geneva Convention might be self-executing. *Id.* at 809. However, *Tel-Oren* was a civil case arising from the Alien Tort Statute. *Id.* at 775. Therefore, its applicability to executive determinations is remote.

Additionally, some scholars argue that the International Covenant on Civil and Political Rights (ICCPR) is applicable to combatant designations. See, e.g., Derek Jinks, International Human Rights Law and the War on Terrorism, 31 Denver J. Int’l L. & Pol’y 58 (2002); Jordan J. Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Michigan J. Int’l L. 1 (2001). While the ICCPR is an agreement, it is not a self-executing agreement and has never been judicially viewed as conferring additional rights on an accused. See, e.g., S. Exec. Doc. No. C, 95-2, at VIII (1978) (Letter of Submittal regarding the International Convention on the Elimination of All Forms of Racial Discrimination) ("It is further recommended that a declaration indicate the non-self executing nature of Articles 1 through 7 of the Convention"); S. Exec. Doc. No. E, 95-2, at XV (1978) (Letter of Submittal regarding the International Covenant on Civil and Political Rights) ("The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."). See also Igartua de la Rosa v. United States, 35 F.3d 8, 10 n.1 (1st Cir. 1994); Hawkins v. Comparet – Cassani, 33 F. Supp. 2d 1244, 1256-57 (C.D. Cal. 1999).

186. Noriega, 746 F. Supp. at 1510. Noriega was also indicted for his association in an international conspiracy to import cocaine and cocaine producing materials. *Id.* "Specifically, the indictment charge[d] that General Noriega protected cocaine shipments from Colombia through Panama to the United States," and arranged for the sale of chemicals, necessary to the production of cocaine, to the Colombian based Medellin Cartel. *Id.* He was also charged with harboring fugitives from that cartel, after they fled Colombia. *Id.*

187. *Noriega*, 746 F. Supp. at 1511. It is important to note that Noriega asserted "head of state immunity" as a defense. *Id.* at 1519. Customary international law recognizes that a "head of state is not subject to the jurisdiction of foreign courts, at least as to official acts taken during the ruler’s term in office." *Id.* However, the District Court held that Noriega was never recognized as a ruler by either the United States or the Panamanian Constitution. *Id.* The court recognized that Title VI, Article 170 of the Panamanian Constitution required an elected president and cabinet. *Id.* General Noriega was titled as "Commandante of the Panamanian Defense Forces, but he was never elected to head Panama’s government." *Noriega*, 746 F. Supp. at 1519. Additionally, during the
At trial, Noriega argued he was a prisoner of war in accordance with the Geneva Convention III, and, as a result, the court lacked jurisdiction.\textsuperscript{189} The district court acknowledged that the Geneva Convention defines a prisoner of war as a person who is a member of the armed forces of a party to the conflict.\textsuperscript{190} However, the court did not rule as to whether Noriega was entitled to prisoner of war status.\textsuperscript{191} Instead, the court looked to specific articles within the Geneva Convention III, and determined whether any applied to Noriega.\textsuperscript{192} The court first analyzed Article 82, but concluded it only applied to disciplinary procedures after becoming a prisoner of war.\textsuperscript{193} The court next reviewed Article 84 to determine the appropriate forum for jurisdiction.\textsuperscript{194} The court concluded it possessed appropriate jurisdiction because Noriega was time Noriega was in power, the United States government recognized Eric Arturo Delvalle as president. \textit{Id.}

\textsuperscript{188} \textit{Noriega}, 746 F. Supp. at 1511. It should be noted that on 15 December 1989, Noriega openly declared that “a state of war existed between the Panama and the United States.” \textit{Id.} The following day, “Panamanian troops shot and killed an American soldier, wounded another, and beat a Navy couple.” \textit{Id.} Noriega sought refuge in the Papal Nunciature, but was persuaded through unorthodox means to surrender to American authorities. \textit{Id.} The unorthodox means included music played at high volume. \textit{Id.}

\textsuperscript{189} \textit{Noriega}, 746 F. Supp. at 1511. Noriega also claimed prosecution was barred by the following doctrines: “act of state,” “head of state,” and “diplomatic immunity.” \textit{Id.} at 1519.

\textsuperscript{190} \textit{Id.} at 1525 n.22.

\textsuperscript{191} \textit{Id.} at 1525.

\textsuperscript{192} \textit{Id.} at 1525-28.

\textsuperscript{193} \textit{Id.} at 1525.

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

Geneva Convention Relative to the Treatment of Prisoners of War, \textit{supra} note 104, at art. 82.

\textsuperscript{194} \textit{Noriega}, 746 F. Supp. at 1525-26. Geneva Convention Relative to the Treatment of Prisoners of War, \textit{supra} note 104, art. 84, reads:

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.
charged with federal, rather than military, offenses. \footnote{195} The court further examined Articles 85, 87, and 99, and found Noriega was protected against internationally recognized violations of due process. \footnote{196} The court also reviewed Article 118, but found this article inapplicable to Noriega's case. \footnote{197} Specifically relevant to this article, the court examined Article 22, which details appropriate internment conditions. \footnote{198} However, the district court initially saw the issue in terms of the

\footnote{195} \textit{Noriega}, 746 F. Supp., at 1525-26 (holding that "[u]nder 18 U.S.C § 3231, federal district courts have concurrent jurisdiction with military courts").

\footnote{196} \textit{Noriega}, 746 F. Supp. at 1526-27. In reviewing each article, the court found, without considering whether Noriega was a prisoner of war, that each article was inapplicable to the question of jurisdiction. \textit{Id}. Geneva Convention Relative to the Treatment of Prisoners of War, \textit{supra} note 104, art. 85 reads: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." Article 85 confers a state's right to prosecute.

Geneva Convention Relative to the Treatment of Prisoners of War, \textit{supra} note 104, art. 87 reads, in pertinent part: "Prisoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." The district court considered Article 87 as representing the principle of equivalency. See \textit{Noriega}, 746 F. Supp. at 1526. Under this principle, a prisoner of war may not be sentenced to a greater punishment than would an individual in the host nation's armed forces. \textit{Id}.

Geneva Convention Relative to the Treatment of Prisoners of War, \textit{supra} note 104, art. 99 reads:

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

The district court held that Article 99 prescribes jurisdiction over \textit{ex post facto} crimes. \textit{Noriega}, 746 F. Supp. at 1526. Noriega was charged with offenses which had been prohibited well-prior to his indictment. \textit{Id} at 1526-27.

\footnote{197} \textit{Id} at 1527-28.

\footnote{198} \textit{Id} at 1527. Geneva Convention Relative to the Treatment of Prisoners of War, \textit{supra} note 104, art. 22 reads:

Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.

Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.

The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs, provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.
location of Noriega's detention, rather than its applicability to executive authority to determine combatant status. Yet, after Noriega was convicted and sentenced, the district court found itself revisiting the Geneva Convention III.

The issue of applicability of the Geneva Convention III arose in the context of determining whether it was a self-executing document. At sentencing, Noriega raised the issue of prisoner of war status again. He was joined by Human Rights Watch, a non-governmental organization (NGO), in arguing that the court had authority to determine Noriega's status of confinement. In response, the government argued that since the Geneva Convention was not a self-executing document, the court did not possess authority to determine the place or institutional level of confinement. The court agreed with Noriega and Human Rights Watch that the Geneva Convention III is a self-executing document. It acknowledged that the question of when a treaty becomes self-executing is difficult, but adopted the legislation-required test. The court also recognized the government's statement to maintain the standards of the Convention. However, a promise to maintain the Convention's standards, and recognition of the Convention's validity under United States law are not synonymous. In light of this difference, the court saw the issue of self-execution as paramount to interpreting executive authority regarding issues covered within the Convention. The court found the Geneva Convention III

201. Id. at 794.
202. Id. at 793.
203. Id.
204. Id. at 797.
206. Id. at 798.
207. Id. at 795.
208. Id. at 794. The court specifically held,

The government's position provides no assurances that the government will not at some point in the future decide that Noriega is not a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. There appears to be some cause for concern about the government changing its position. After consistently stating that the General has been, and will continue to be, treated as a POW, the Court detected a slight shift in the government's argument at the post sentencing hearing.

Id. at 794 n.5.


In the case of Geneva III, however, it is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations. "It must not
constituted “the law of the land,” because it was a properly ratified treaty requiring no additional implementation.\(^{210}\)

While *Noriega* does not directly address executive authority to determine combatant status, the fact that the court held the Convention as a self-executing document, may create critical limitations as to presidential authority.\(^{211}\) However, the government clearly questioned the enforceability and binding nature of the Geneva Convention III in the United States.\(^{212}\)

2. *Hamdi v. Rumsfeld*: Designation of Unlawful Combatant for Taliban, the Administration’s “No Harm, No Foul” Approach

On December 1, 2001, Yasser Esam Hamdi was apprehended by United States military forces in Afghanistan.\(^{213}\) He was initially transported, along with several hundred other Taliban and al-Qaeda prisoners, to Guantanamo Bay, Cuba.\(^{214}\) Hamdi is a United States citizen who had been fighting in a Taliban unit.\(^{215}\) In April 2002, his United States citizenship was acknowledged and he was transferred to the United States naval prison in Norfolk, Virginia.\(^{216}\) Despite being designated as an enemy combatant by the administration in its exercise of wartime executive authority, Hamdi has not been charged with any offense since his capture.\(^{217}\) As a result of this designation, he was denied access to counsel.\(^{218}\) This denial caused the Federal Public Defender, Frank Dunham, to seek relief before the district court.\(^{219}\)

The district court ordered the government to allow Hamdi “unmonitored access” to counsel.\(^{220}\) However, the Fourth Circuit Court of Appeals remanded when it found the lower court failed to consider adequately the implications of its order.

\(^{210}\) *Id.* at 796 (holding that the Geneva Convention “has been incorporated into the domestic law of the United States. A treaty becomes the ‘supreme law of the land’ upon ratification by the United States Senate”).

\(^{211}\) *Id.* at 794.

\(^{212}\) *Id.* at 796.


\(^{214}\) *Id.*

\(^{215}\) *Id.* At the time of the United States led invasion into Afghanistan, the Taliban constituted the government of that country. *Id.*

\(^{216}\) *Id.*

\(^{217}\) *Hamdi* I, 294 F.3d at 601.

\(^{218}\) See *id.* at 601-02.

\(^{219}\) *Id.* at 601.

mandating access to counsel. On remand to the District Court of the Eastern District of Virginia, the government averred that, "Hamdi's due process rights have not been violated because of the 'historical unavailability of any right to prompt charges or counsel for those held as enemy combatants.'" The district court then reconsidered, and again required the government to provide Hamdi with access to counsel. The Fourth Circuit reversed the lower court's determination, finding great deference should lay with the President and as such Hamdi did not enjoy access to counsel as a national security consideration. Moreover, as he was not held for the primary purpose of criminal detention, the right to counsel was further diminished. Hamdi has not been charged with an offense violating the law of war, or any other crime. The government did not aver that Hamdi was guilty of any law of war violations. The Fourth Circuit also acknowledged the considerable deference the judiciary gives to the executive's decisions consistent with its wartime responsibilities.

On remand to the district court, the issue of combatant status remained unresolved. However, that court recognized the importance of combatant designation. The court delineated the two classes of combatants as lawful and unlawful. It recognized that lawful combatants are afforded the full panoply of rights enumerated in the Geneva Convention I. The court also noted that lawful combatants are provided additional safeguards through administrative regulations.

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225. Hamdi III, 316 F.3d at 463, 476.
227. See generally Hamdi III, 316 F.3d at 278.
228. Id.
229. Hamdi II, 296 F.3d at 281.
230. See id. at 532.
231. Id. at 530.
232. Id. The Court specifically held:

This case represents the delicate balance that must be struck between the Executive's authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States. Due to the uncertainty regarding Hamdi's status whether he was an enemy combatant, was an unlawful enemy combatant, or just a bystander, the legal considerations are further complicated by the protections potentially afforded by the international law of war as expressed in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, to which the United States is a signatory. (Internal citations omitted).

Id.

233. Hamdi, 243 F. Supp. 2d at 530-31. The court further held:

Depending on Hamdi's status, the joint service regulations governing the detention
It recognized that combatants are afforded meaningful judicial review. The court further expressed dissatisfaction with the limited information the government provided pertaining to Hamdi’s status. The information came in the form of a generalized affidavit from the Undersecretary of Defense’s Special Advisor. After reviewing the government’s unlawful combatant designation evidence against Hamdi, the court ordered the government to produce additional facts. It is important to note that the government produced no evidence to prove that Hamdi specifically violated the laws and customs of war, either in its codified form or in customary international law. Had it done so, the designation would have been easier for the administration to defend.

On January 8, 2003, the Fourth Circuit Court of Appeals determined that Hamdi’s status as an enemy combatant did not violate domestic laws. The court recognized that the detention of enemy combatants serves two purposes. First, the court found detention of all enemy combatants prevents the individual from rejoining the enemy. Second, the court concluded that continued detention relieves military commanders of the burdens of prosecuting individuals during a period of armed conflict. The deference paid to the presidential designation must be seen in light of these two purposes.

of captured enemy combatants or others may also be implicated. See Joint Service Regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997) [hereinafter Joint Service Regulation]. These regulations “provide[] policy, procedures, and responsibility for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces.”

Id. 234. See id. at 532-33.
235. Id. at 534. The court held:
The declaration is insufficient to determine whether the screening criteria used by the government in classifying Hamdi and in making the decision to transfer Hamdi to the Norfolk Naval Brig violated his Fifth Amendment rights to the due process of law or violated the law or regulations of the Country.

Id. 236. Hamdi, 243 F. Supp. 2d at 533-34. This affidavit was titled the “Mobbs Declaration” after agent, Michael Mobbs. The court noted that the Mobbs Declaration never titled Hamdi as an illegal combatant, but the term was used consistently in the government’s brief. Id. at 533.
237. Id. at 536.
238. See generally id. at 527.
240. Id. at 465.
241. Id.
242. Id.
Hamdi argued that the Geneva Convention III entitled him to a combatant status hearing. In response, the Fourth Circuit differed from the district court in Noriega and held the Geneva Convention is not self-executing. The court recognized that unlawful combatants are entitled to a hearing before a military tribunal for acts which render their belligerency unlawful only where the government seeks to punish, in addition to detain. However, Hamdi was held for detention rather than punitive purposes. The Fourth Circuit also acknowledged that the designation of unlawful combatant does not require the government to provide a hearing under Article 5 of the Geneva Convention since it is not self-executing in the United States. The court concluded that because the executive is best prepared to exercise military judgment as part of his war powers, the court should accord the combatant designation tremendous deference. This includes accepting the limited information provided to the lower court in support of its position. Finally, Hamdi’s status as an American citizen does not divest the President of the ability to designate individuals as enemy combatants. Hamdi reinforces the presidential authority to designate individuals as enemy combatants. In and of itself, the case does not draw a helpful distinction between lawful and unlawful combatants. To date, there is no specific public or judicial evidence that Hamdi specifically committed acts in violation of the laws of war. However, he was affiliated with the Taliban, (albeit the armed forces of the recognized government of Afghanistan) as opposed to a non-state terrorist group, whose military fought against United States forces in that country. If the executive has the authority to declare Hamdi as an enemy combatant, it certainly has the authority to designate “stateless” individuals belonging to terrorist organizations as enemy combatants. However, it must do so by applying the individual’s affiliation to the terrorist organization, and that group’s operational philosophy, against the aegis of competent international law. Whether Hamdi is or is not an unlawful combatant is open to debate. It is clear, however, that this case reinforces the presidential authority to designate an individual as an enemy combatant.

243. Id. at 468.
244. Hamdi III, 316 F.3d at 468 (quoting Goldstar v. United States, 967 F.2d 965, 968 (4th Cir. 1992)). The Fourth Circuit held, “Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action.” Id.
245. Id. at 469.
246. Id. at 460.
247. Id. at 468.
249. Id. at 473.
250. Id. at 475.
251. See id. at 471.
252. Id. at 459-60.
253. See Hamdi III, 316 F.3d at 471-72.
The administration’s approach to *Hamdi* is troubling. First, as a member of the Taliban’s forces, Hamdi belonged to an armed component of the state. The government has not specifically argued the Taliban failed to *de jure* meet the traditional four criteria for lawful combatants deserving prisoner of war status. Nor has the government alleged Hamdi specifically violated the laws of war. By not contemplating a punitive measure against Hamdi it seems that he is in no worse position than had he been detained as a lawful combatant, with one important exception, namely that Hamdi is being held with the design to obtain intelligence from him.


On May 8, 2002, Jose Padilla was arrested in Chicago on a material witness warrant issued by the District Court for the Southern District of New York. Although he was arrested with the intent that he be brought to testify before a grand jury, the President designated Padilla as an enemy combatant. Shortly after his arrest, Padilla brought suit against the executive branch, alleging unlawful detention. Among the several issues raised by Padilla, was a challenge against the

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254. *See generally id.* at 450.
255. *Id.*
256. *Id.* at 470. *See, e.g.*, Geneva Convention Relative to the Treatment of the Prisoner of War, *supra* note 104, at art. 17. Article 17 reads:

> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.


> It is true that detainees who are classified as POW’s under the Third Geneva Convention are more greatly protected from interrogation than those who are not; specifically, they may not be punished for refusing to reveal anything other than the classic “name, rank, and serial number.” However, contrary to the impressions of some of the Bush Administration’s critics, this does not mean that the “detaining power” may not ask any questions it likes. On the contrary, it may ask away; but it simply may not punish for failure to answer.

*Id.*

258. *Id.* at 568-69. “[O]n June 9, 2002, the government notified the court *ex parte* that it was withdrawing the subpoena” because Padilla had been designated by the president as an enemy combatant. *Id.* at 571. After this arrest, he was taken to the United States Navy Brig in Charleston, South Carolina. *Id.*
259. *Padilla I*, 233 F. Supp. 2d at 569. Padilla specifically brought suit against President
executive’s authority to order his detention based on his enemy combatant designation.\textsuperscript{260} It must be noted that Padilla is a United States citizen by birth.\textsuperscript{261}

The government’s basis for declaring Padilla an enemy combatant rested on several factors. According to government intelligence, during Padilla’s early adulthood, he resided in Egypt, Saudi Arabia, and Afghanistan.\textsuperscript{262} In Afghanistan, he became affiliated with al-Qaeda, where he planned to return to the United States and detonate a dirty bomb.\textsuperscript{263} After his arrest and detention, the Secretary of Defense acknowledged the possibility that Padilla would be prosecuted, but stated the government’s primary interest in detaining Padilla was to obtain intelligence in the hopes of preventing future attacks.\textsuperscript{264}

In determining the lawfulness of Padilla’s detention, the court first analyzed presidential authority to declare Padilla an enemy combatant.\textsuperscript{265} The court noted that all parties in the case accepted the executive’s authority to order the seizure and detention of enemy combatants in a time of war.\textsuperscript{266} However, Padilla asserted that his detention was unlawful for two reasons.\textsuperscript{267} First, the United States had not formally declared war on Afghanistan.\textsuperscript{268} Second, because the conflict included al-
Qaeda as an enemy, the detention of enemy combatants is potentially indefinite, and as a result, unconstitutional. The second argument bears direct relevance to this article, because it "goes to the heart" of what distinguishes an unlawful combatant from a lawful combatant.

The district court noted that non-punitive indefinite commitment has precedent for a variety of acts. The court also noted that "[t]he laws of war draw a fundamental distinction between lawful and unlawful combatants." In its assessment of presidential authority, the court recognized the four criteria listed in the 1907 Hague Convention as well as the Geneva Convention III. The district court accepted that where an individual fails to meet the four criteria, he or she cannot claim prisoner of war status. The court further found that the Geneva Convention III does not afford traditional prisoner of war protections to unlawful combatants. However, simply because an unlawful combatant is not afforded protections and is subject to punishment through the military tribunal process, it does not mean the government must prosecute at any given point and time. Indeed, there is no statutory right to a speedy trial before a military commission. Because both congressional authorization, and courts may not review the level of force selected. Id. (citing Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000)).

Id. at 588.

270. Id. at 590-91 (citing Kansas v. Hendricks, 521 U.S. 346 (1997)). Hendricks involved civil commitment for persons with mental abnormalities who are likely to commit sexually predatory acts. Id. at 591. However, a comparison between the law governing sexually violent criminals prosecuted in domestic criminal courts and unlawful combatants may be difficult to accomplish. See, e.g., Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) (upholding detention of a union official, without charge, during an insurrection).

271. Padilla I, 233 F. Supp. 2d at 592. The court also held: "Lawful combatants may be held as prisoners of war, but are immune from criminal prosecution by their captors for belligerent acts that do not constitute war crimes." Id. (citing United States v. Lindh, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)).

272. Id. at 592.

273. Id.

274. Id. at 592-93.


276. The right to a speedy trial in civilian criminal trials is guaranteed by the Sixth Amendment to the United States Constitution. See, e.g., United States v. Brown, 325 F.3d 1032, 1034 (8th Cir. 2003). The right to a speedy trial under military law is governed by Uniform Code of Military Justice (UCMJ), Article 10. See, e.g., United States v. Cooper, 58 M.J. 54, 57 (C.A.A.F. 2003). An individual usually must be brought to trial within 120 days of being charged or placed in pretrial confinement. Id. at 59. It should be noted that Article 10 is a far more stringent standard in protecting the rights of service members charged under the UCMJ, than the Sixth Amendment is for civilians charged under the United States Code. Compare Uniform Code of Military Justice, 10 U.S.C. § 810 art. 10 (2000), with U.S. CONST. amend. VI.

In international law, there is some recognition that an accused person has a right to a speedy trial. See, e.g., International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, (1976), article 14(3)(e), http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (Dec. 16, 1966) (stating
customary international law and the Geneva Convention III recognize the primary reason for prisoner of war detention is to prevent prisoners from rejoining enemy forces, the only requirement for release occurs at the cessation of hostilities.\textsuperscript{277} The district court, in reviewing international law alongside the executive’s determination of Padilla as an enemy combatant, concluded that he was an unlawful enemy combatant.\textsuperscript{278} This is because the terrorist network Padilla belonged to did not meet the four criteria necessary to confer lawful combatant status.\textsuperscript{279} Once the district court determined Padilla was an unlawful combatant, it confronted the issue as to whether the President has the authority to declare a United States citizen as an unlawful combatant, and consequently detain him without trial.\textsuperscript{280} The district court acknowledged that in \textit{Ex parte Milligan}, the Court held that while the president has the authority to suspend the writ of \textit{habeas corpus}, all other citizen rights remain intact during wartime.\textsuperscript{281} However, as the Court held in \textit{Quirin}, these “other rights” can be suspended where the citizen is an active enemy combatant.\textsuperscript{282} The district court found Padilla’s association with al-Qaeda akin to Haupt’s (the American citizen) saboteur role.\textsuperscript{283} \textit{Quirin}, it may be recalled, adopted a considerable body of customary international law regarding the law of war in determining combatant

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that “[i]n the determination of any criminal charge against him, everyone shall be entitled . . . [t]o be tried without undue delay”). However, as noted above, the ICCPR is not considered a self-executing document. See infra p. 64 and note 244.

\textsuperscript{277} See Padilla I, 233 F. Supp. 2d at 593 (citing ICRC, Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War 547 (1960)).

\textsuperscript{278} Id. at 593.

\textsuperscript{279} Id. (citing Ruth Wedgewood, \textit{Al Qaeda, Terrorism, and Military Commissions}, 96 AM. J. INT’L L. 328, 335 (2002); \textit{Quirin}, 317 U.S. at 31).

\textsuperscript{280} Id. at 593.

\textsuperscript{281} Id. (citing \textit{Ex parte Milligan}, 71 U.S. 2, 121 (1866)).

\textsuperscript{282} See Padilla I, 233 F. Supp. 2d. at 594. (citing \textit{Quirin}, 317 U.S. at 45). In \textit{Quirin}, the Court held:

We construe the Court’s statement as to the inapplicability of the law of war to Milligan’s case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established.

\textit{Quirin}, 317 U.S. 1, 45 (1942).

\textsuperscript{283} See Padilla I, 233 F. Supp. 2d at 594. The district court also relied on Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956) where the Tenth Circuit Court of Appeals held an American citizen may be prosecuted before a military commission where he had entered into the United States to commit hostile acts in aid of German war aims during the war. See Padilla I, 233 F. Supp. 2d at 594.
status.284 Thus, the district court, in relying heavily on Quirin, placed great reliance on customary international law in its interpretation of Padilla’s designation.285

IV. COMPARATIVE LAW FRAMEWORK: ISRAEL & BRITAIN

Although comparative law studies are rarely binding on domestic courts (and certainly not in United States jurisprudence), a brief comparative review is helpful in putting the administration’s policy in context. Customary international law, it must be recalled, has its basis in the practice of the several states.286 The practice becomes more credible to judge against the administration’s unlawful combatant designation when it originates in democracies encountering similar situations. Both Britain and Israel have witnessed their citizenry targeted by groups listed as terrorist organizations by the United States government. Israel has encountered terrorist attacks from Hizbollah,287 and Britain by the Irish Republican Army (IRA)288 and the Continuity Irish Republican Army (CIRA).289 Of less important note, Israel, the United States, and Great Britain have not signed Protocol I of 1977, which was added to the Geneva Convention.290 Protocol I extended, under certain circumstances, protections for non-state combatants who operate militarily within the laws of war.291

286. See The International Court of Justice, June 26, 1945, art. 38 (1)(a), 59 Stat. 1055, 1060.
287. DEPT. OF STATE TERRORISM REPORT FOR 2000, supra note 119.
288. See id. According to the State Department the IRA has engaged in bombings, beatings, assassinations, kidnappings, smuggling, and robberies. Id. Bombings have been conducted against civilian targets including subway and train stations, as well as shopping areas on mainland Britain. Id.
289. Id. According to the State Department the CIRA has engaged in bombings, assassinations, extortion, and robberies. See DEPT. OF STATE TERRORISM REPORT FOR 2000, supra note 119. It has launched attacks against civilian targets in Northern Ireland. Id.
290. See Protocol I, supra note 143.
291. The Geneva Convention extends protections in pertinent part to:
A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
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, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
6. Inhabitants of a non-occupied territory, who on the approach of the enemy
As none of the organizations discussed in this article have conducted operations under the laws of war, the Protocol’s extension of protections hardly applies.

A. Israel: Anon v. Minister of Defense

"On April 20, 2000, in Anon. v. Minister of Defense, an expanded bench of the Supreme Court of Israel delivered a judgment that may be regarded as" Israel’s recognition that democratic principles should not constitute a "suicide pact." Israel has long had to balance the customary international law and codified rights of prisoners of war against the demands of national security. Anon involved the lengthy detention of Lebanese citizens accused of terrorist activities. These individuals were arrested by members of the Israeli Defense Forces (IDF) between spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva Convention Relative to the Treatment of Prisoners of War, supra note 104, at art. 4(A)(2)-(3).


[T]he Supreme Court approved administrative detention of Lebanese held as tracking cards for getting an Israeli pilot presumably in the hands of a terrorist organisation. Reading the Supreme Court’s majority decision on preventive detention causes frustration, even despair. If the state can keep human beings as hostages, then human dignity and liberty are deprived of their meaning and become hollow; even worse, they become a method of disguise and deception, since they create an appearance contrary to their real sense or non-sense. The use of rhetoric is quite astonishing. For example, the principle that a democracy must not commit suicide for the sake of proving its vitality is recognised. It is difficult to escape the feeling that the necessity to justify the unjustifiable encouraged Orwellian speech [sic].

Id.

293. See Gross, supra note 292, at 726-27 (citing Further Hearing). The court stated:

There is no choice in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the other. Human rights cannot become a pretext for denying public and State security. A balance is needed—a sensitive and difficult balance—between the freedom and dignity of the individual and State and public security.

Id.

294. Id. at 723.
1986 and 1987. Some of these citizens were prosecuted in Israeli courts, as opposed to military commissions, for terrorist activities. However, after serving their sentences, they continued to be detained in Israel in accordance with the Israeli detention law.

Initially, the petitioners challenged their continued detention before the District Court for the District of Tel Aviv. That court approved the government’s assignment of further detention. The court recognized that Israeli law permitted such detentions when under a state of emergency. On appeal to the Israeli Supreme Court, the Israeli government sought continued detention for two purposes. First, the government argued that continued detention was necessary to ensure national security. The court agreed with this argument. Second, the Israeli government wished to use these individuals as “bargaining chips” to obtain

295. Id. The individuals detained appear to be involved in the Hizbollah (alt. spellings Hizballah and Hizbulah) organization. Id. at 724.
296. See Gross, supra note 292, at 723.
297. Id.
298. Id.
299. Id. (citing Administrative Appeal).
300. Id. (citing Emergency Powers (Detention) Law 1979, Sefer Hachukkim 76 [hereinafter Administrative Detention Law]).
301. See Gross, supra note 292, at 723 (citing Further Hearing). Gross points out:

Section 20 of [Israel’s] Basic Law: the Judiciary provides that the decision of a court shall guide other courts, whereas the judgments of the Supreme Court shall bind all lower courts. The Supreme Court itself is not bound by its own precedents. Nonetheless, it is not customary, and even rare, for the Supreme Court to overturn its own earlier decision, unless there are special reasons for doing so.

Id. at 784 n.15.
302. Id. at 723.
303. Id. at 724. The district court specifically held:

There is no truth in the contention that no danger would arise if the detained Lebanese were to be released. The petitioners, as Hizbullah fighters, have tied their fate to Israel’s fight against the Hizbullah. In this, the matter of the petitioners is distinguishable from the matter of the demolition of the homes of terrorists, something which once came frequently before this Court. Indeed, it is one of our supreme values that every person is responsible for his own wrong and is punished for his own sin. For this reason I was even of the opinion—in a dissenting judgment—that a military commander was not vested with the right to demolish a home in which the family members of a terrorist murderer resided, even if that terrorist lived in that house ... but it is precisely because of this reasoning that each person is responsible for his own wrong, that the case of the petitioners differs from the case of the families of terrorists; the petitioners—as enemy fighters, and unlike the families of the terrorists—have knowingly and deliberately tied their fate to the fate of the war.

Id. For an overview of Israeli military law, see, e.g., Menachem Finkelstein & Yifat Tomer, The Israeli Military Legal System—Overview of the Current Situation and a Glimpse into the Future, 52 A.F.L. REV. 137 (2002).
intelligence as to the whereabouts of their captured combatants.\textsuperscript{304} The Israeli Supreme Court appeared troubled by this second argument.\textsuperscript{305} One Justice acknowledged that as Hizbollah members, the detainees had divested themselves of some international law protections such as the Convention Against Taking Hostages.\textsuperscript{306}

To the present analysis, it is important to note the Israeli Supreme Court recognized the detainees as unlawful combatants. Specifically, the Court held:

It is sufficient that, in respect of [the petitioners], the provisions are not met of Article 4(2)(d) of the Third Geneva Convention, which provides that one of the conditions which must be met in order to satisfy the definition of "prisoners of war" is: "that of conducting their operations in accordance with the laws and customs of war."\textsuperscript{307}

Thus, the Israeli Supreme Court recognized the importance of customary international law in defining lawful combatant status.\textsuperscript{308}

\textbf{B. Britain: Definition of Terrorism}

Part 20 of the British Prevention of Terrorism Act of 1989 (Temporary Provisions) states that: "terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the

\textsuperscript{304} Gross, supra note 292, at 723.
\textsuperscript{305} Id. at 727. Chief Justice Barak reasoned:

\texttt{Administrative detention violates the freedom of the individual. When the detention is carried out in circumstances in which the detainee provides a 'bargaining chip,' this comprises a serious infringement of human dignity, as the detainee is perceived as a means of achieving an objective and not as an objective in himself. In these circumstances, the detention infringes the autonomy of will, and the concept that a person is the master of himself and responsible for the outcome of his actions. The detention of the appellants is nothing other than a situation in which the key to a person's prison is not held by him but by others. This is a difficult situation.}

\texttt{Id.}
\textsuperscript{306} Id. at 734. Judge Kedmi stated:

\texttt{One who joins a terrorist organization cannot claim to be innocent and argue that he does not bear personal responsibility for the conduct of his leaders, in so far as relates to the shroud of secrecy imposed on the fate of our navigator; and he will not be allowed to argue that he should be treated as an innocent civilian seeking peace who has been uprooted from his family and held behind lock and key without being guilty.}

\texttt{Id.; see also International Convention Against the Taking of Hostages, Jun. 3, 1983, 1316 U.N.T.S. 206.}
\textsuperscript{307} Gross, supra note 292, at 735 (quoting judgment of Justice Barak).
\textsuperscript{308} Id.
public in fear.\textsuperscript{309} In 1984, Britain listed the IRA, among other groups, as terrorists.\textsuperscript{310} These acts were in response to the fact that between 1971 and 1975, more than 1,100 people were killed and 11,500 injured in Britain as a direct result of terrorist activities.\textsuperscript{311} It is clear that British law does not contemplate providing persons belonging to terrorist organizations, who violate the laws of war by targeting civilians, Geneva Convention III status. Indeed, Britain has sidestepped the issue by criminalizing acts of terrorism.\textsuperscript{312} In part, this may have occurred because Britain is subject to the jurisdiction of the European Court of Human Rights.\textsuperscript{313} According to that court, British methods of interrogation violated humanitarian norms.\textsuperscript{314} Britain has interned IRA members, notably, prior to 1974.\textsuperscript{315} However, after that date, British laws criminalized terrorist acts directed against civilians, and captured IRA terrorists were brought to trial.\textsuperscript{316} Since that time, Britain has not created any special courts to adjudicate IRA members committing terrorist acts against British interests.\textsuperscript{317} Likewise, "the 1980's did witness a move towards political recognition."\textsuperscript{318}

It should be noted, however, that none of the terrorist groups originating from Northern Ireland have sought the complete destruction of Britain, or have exhorted their members to murder vast numbers of British citizens.\textsuperscript{319} Certainly, British citizens have been killed by both the IRA and CIRA.\textsuperscript{320} Yet, to date, no acts of mass murder, on the scale of the September 11 attacks have occurred. The reasons for a lack of mass murder may be debatable, but it is likely the IRA and CIRA, among others, have recognized some validity to the law of war. Their overall aim is the removal of British presence from Ireland, not a theological conquest. Britain could

\textsuperscript{310} Id.
\textsuperscript{312} Id.
\textsuperscript{313} Professor Gross cites to the case, Republic of Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. H. R. Rep. 25 (1978) [hereinafter The Ireland Case].
\textsuperscript{314} Id. (citing The Ireland Case).
\textsuperscript{316} Id. at 232 (citing Brian Gormally et al., Criminal Justice in a Divided Society: Northern Ireland Prisons, in 17 Crime and Justice 51, 59-61 (Michael Tonry ed., 1993)).
\textsuperscript{317} Id.
\textsuperscript{318} Id. at 232-33.
\textsuperscript{319} Dept. of State Terrorism Report for 2000, supra note 119.
\textsuperscript{320} Id.
have detained IRA and CIRA members who violated the laws of war by declaring them as unlawful combatants. However, to do so would have created additional legal and political ramifications.

V. CONCLUSION

Presidential authority to determine combatant status is inherent both within customary international law and the Unites States Constitution. Indeed, customary international law is subsumed into United States law. If the Geneva Convention III is determined not to be a self-executing document, an understanding of the law of war becomes even more critical. For example, should a person be brought before a military commission, it will fall to the commission to determine whether a person is an unlawful combatant, and whether that person violated any laws of war. Customary international law is also important if the Geneva Convention III is determined to be self-executing. If that is the case, then just as in Quirin, courts will undoubtedly utilize the law of war to determine whether a detainee is an unlawful combatant, and subsequently, whether the military commission has proper jurisdiction.

That the social and political opinions within the United States have changed since Quirin does not necessarily mean the law of war has changed. Undoubtedly, there will be academics, elected officials, and members of the general population who disagree with the administration’s approach. Certainly, the administration’s declaration of Hamdi as an unlawful combatant is open to debate. Indeed, it may fall to the commissions to determine whether members of the Taliban’s army are unlawful combatants. Yet, to date, the administration has not divested any lawful combatant of a right guaranteed under the Geneva Convention III. Nor has the administration labeled a person as an unlawful combatant and sought punitive measures without a formal hearing. While the exercising of executive authority in wartime may be understandably frightening to some, to date, the President has not exceeded the scope of his authority under customary international law, or under the Constitution.

321. See Goldsmith & Sunstein, supra note 17, at 281. Goldstein and Sunstein aptly write:
It is not possible to account for the different reactions to the Roosevelt and Bush Orders without emphasizing large social and related legal changes within the last sixty years. President Roosevelt acted before Vietnam, before revelations of Hoover’s domestic espionage, and before Watergate. To say the least, this was a time when the press, Congress, and intellectuals had a much higher regard for the Executive branch and the Military.

Id.