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The Law of the Possible in Armed Conflict:

A Comment on *Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness*

Deborah Pearlstein*

The past decade of U.S. counterterrorism policy and practice has aggravated an already vigorous debate about the extent to which domestic or international human rights law (HRL) applies alongside international humanitarian law (IHL) during times of armed conflict. HRL, reflected in domestic legal texts like the U.S. Constitution, and treaties to which the United States is a party, like the International Covenant on Civil and Political Rights (ICCPR), is designed to safeguard a baseline set of individual rights. The laws protect, for example, against arbitrary detention or deprivation of life.¹ IHL, in contrast, has long been described as *lex specialis*, a specific set of rules designed to operate only in times of armed conflict, which IHL contemplates is a state of affairs distinct from ordinary political conditions.² Based centrally on the idea that states of armed conflict are exceptional, IHL permits some conduct—such as killing under certain circumstances—that HRL and other applicable laws prohibit.³

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1. See, e.g., U.S. CONST. amend. V; International Covenant on Civil and Political Rights art. 6(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
2. See generally GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (2010).
3. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (targeting rules); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (targeting provisions).

While it might once have been possible to imagine that IHL simply supplanted HRL during armed conflict, acting as the exclusive body of law governing the conduct of warring parties and occupying forces, the rapid development of HRL after World War II, coupled with the proliferation of non-traditional armed conflicts, have helped drive the development of a consensus view that both bodies of law matter in times of armed conflict.⁴ But the consensus on *how* they matter is far from specific. How do the laws interact? When they can be read as complimentary? In particular, which law should prevail in the event specific rules in application conflict? All of these questions remain the subject of much scholarship and dispute.⁵

Geoffrey Corn and Peter Chickris write against the background of this important discussion, making a valuably provocative and specific case about how best to resolve one issue implicating both bodies of law: Whether detainees held in a non-international armed conflict (NIAC) should be afforded counsel in processes designed to determine their status in detention.⁶ As the authors point out, the right-to-counsel question is especially timely. With a view toward regulating the United States' current engagement in Afghanistan and beyond, the 2012 National Defense Authorization Act (NDAA) provides that an "unprivileged enemy belligerent may . . . be represented by military counsel" at status hearings.⁷ In March of 2012, the U.S. Department of Defense issued a preliminary report anticipating the implementation of the NDAA right-to-counsel provision.⁸ As that report explains, the United States has entered into a Memorandum of Understanding with the government of Afghanistan by which all Afghan nationals held at the main U.S. detention facility at Parwan will be transferred to Afghan custody by September 2012. But that agreement does not appear to apply to the group of third country nationals still held at Parwan.⁹ And the U.S. government leaves open the possibility that the procedures would apply to the kind of long-term detention (lasting beyond the present operations in Afghanistan) that concerns Corn and Chickris.¹⁰ For these reasons alone, issues surrounding both the wisdom and legality of affording long-term NIAC detainees access to military counsel remain of importance.¹¹

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4. See, e.g., Oona A. Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012); Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN L. STUD. 52, 57, 59-61 (2010) (describing pressure since World War II to extend human rights principles to the context of armed conflict); Dan E. Stigall et al., *Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict*, 30 U. PA. J. INT'L L. 1367 (2009).
 5. See, e.g., Hathaway et al., *supra* note 4 (summarizing competing views).
 6. Geoffrey S. Corn & Peter A. Chickris, *Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness: Rethinking the Review Tribunal Representation Model*, 11 SANTA CLARA J. INT'L L. 99 (2012).
 7. *Id.* at 103 (quoting National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1024(b)(2), 125 Stat. 1298, 1565 (2011)).
 8. DEP'T OF DEF., REPORT ON THE PROCEDURES FOR UNPRIVILEGED ENEMY BELLIGERENT STATUS DETERMINATIONS (March 2012) (on file with author).
 9. See *id.* at 2.
 10. See generally *id.*
 11. Indeed, as of this writing, concerns remain about whether the transfer of prisoners from American to Afghan hands has been completed. See Rod Nordland, *Karzai Orders Afghan Forces to Take*

Corn and Chickris' proposed solution—that belligerents in NIAC be afforded counsel as a matter of policy, but not as a matter of right—is their attempt to reconcile competing interests of which they are acutely aware. They acknowledge the concern of military practitioners—that recognizing the applicability of even some HRL rules in even one kind of armed conflict will, through the development of customary international law, come to constrain armed conflict operations in other settings where such constraints have been thought neither historically required nor practically applicable.¹² Yet drawing on the historical interests in fundamental fairness animating the counsel rights in the U.S. Constitution, as well as on the strategic interests in accuracy they see as essential to effective counterterrorism, the authors seek to bolster detention procedures in NIAC settings in order to reduce risks of arbitrariness.¹³

Their article is a helpfully concrete contribution to the debate about the relationship between HRL and IHL. Particularly in the face of remarkable reluctance by some U.S. courts to acknowledge arguments that additional legal process may in some circumstances advance, not hinder, executive interests, the policy case in favor of counsel for long-term detainees is compelling. It is especially so coming from, in Corn's case, a retired Lt. Colonel with twenty-two years of military service, including his tenure as the Army's senior law of war expert in the Office of the Judge Advocate General. Yet in the end, the authors' claims prove too much about the state of the law to defend their policy-only case. The logical import of their argument is that there are not only legal principles supporting a right to counsel in this setting that may be drawn from, for example, U.S. constitutional law, there is law itself. Put differently, the *policy* reasons that the authors give for why military counsel *may be* usefully, and practicably, provided squarely advance the *legal* argument that counsel *must be* provided. By the article's own terms then, it may not be possible to split the policy interest from the legal atom. The remainder of these remarks elaborates.

Detention Policy and Law

The authors elect to draw on both policy interests and legal principles in advancing their case that counsel is appropriate in particular NIAC detention settings. On policy grounds alone, the authors highlight a set of potential benefits they expect to flow from the availability of legal representation in long-term NIAC detention regimes: better fact-finding through a more adversarial process, a more developed factual record to aid subsequent review, improved accuracy and efficiency in detention determinations for the military, and enhanced credibility of the detention regime (and therefore the U.S. counterterrorism mission) overall.¹⁴ On this last benefit: As the then-Commander of NATO forces in Afghanistan, U.S. General Stanley McChrystal, explained in his pivotal strategy report in 2009, “the Afghan people see U.S.

Control of American-Built Prison, N.Y. TIMES (Nov. 19, 2012), http://www.nytimes.com/2012/11/20/world/asia/karzai-orders-takeover-of-afghan-prison.html?_r=0.

12. Corn & Chickris, *supra* note 6, at 165.

13. *See generally id.*

14. *Id.*

detention operations as secretive and lacking in due process.”¹⁵ Because detention operations could thus become “a strategic liability,” the United States faces a “critical” need “to conduct all detentions [sic] operations in this country in accordance with international and national law.”¹⁶ McChrystal went on to recommend the course of action that is now coming to pass, namely, the turnover of detention operations to the Afghans.¹⁷

Correspondingly, the authors address and reject the likelihood that practical challenges—such as inadequate military resources or personnel—pose a serious obstacle to the inclusion of counsel in the process.¹⁸

Military lawyers, or JAGs, are a finite resource in any operational context. Furthermore, the emphasis on rule of law and legally compliant operations has imposed a greater demand on these lawyers today than ever before, a burden that will almost certainly become even more demanding in the future. As a result, imposing an additional requirement on this finite pool of lawyers should not be done casually.

. . . However, this responsibility will provide a valuable opportunity for these lawyers to engage in a function that hones core advocacy and operational competencies. It may also be logical to leverage the already existing military trial defense services to assume this duty, perhaps with augmentation from reserve component activated on a rotational basis to represent detainees. Like all missions in the military, once it is prioritized there is simply no question it will be effectively accomplished.¹⁹

Given the salience of such interests, the authors could readily have elected to rest their case on the policy argument alone. Instead, their central argument draws on the lessons of U.S. constitutional law and, in particular, the protection of individual rights. As they put it: “[Z]ealous representation is an essential safeguard to protect the interests of individuals subjected to incarceration. . . . [It] represents something so closely related to due process as to be nearly inseparable.”²⁰ The article thus discusses in some detail how both Fifth and Sixth Amendment jurisprudence protect the right to counsel, not only in criminal trials, but also in settings such as pretrial detention and immigration proceedings.²¹

Given the importance of the individual interest they identify, what, then, is the authors’ argument for why these constitutional rights do not apply as a matter of law for detainees held by the United States in Afghanistan? To this question, the article offers little response. In Sixth Amendment terms, the answer is perhaps straightforward enough; the Amendment by its terms of course only guarantees defendants a right to counsel “[i]n all criminal prosecutions,”²² which NIAC detentions are manifestly not. In contrast, the Supreme Court’s Fifth Amendment jurisprudence, which the authors cite favorably, is not as plainly inapposite. As the authors understand, the Court has made clear that the requirements of

15. Commander’s Initial Assessment, *enclosed in* Letter from Gen. Stanley A. McChrystal, Commander, Afghanistan/Int’l Sec. Assistance Forces, to Robert M. Gates, U.S. Sec’y of Def., Annex at F-1 (Aug. 30, 2009), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf.

16. *Id.*

17. *Id.* Annex at F-4.

18. Corn & Chickris, *supra* note 6, at 166.

19. *Id.*

20. *Id.* at 135, 138.

21. *Id.*

22. U.S. CONST. amend. VI.

procedural due process must be evaluated not only in the context of criminal or punitive proceedings per se, but in any circumstances where the government affects the deprivation of liberty.²³ “[I]t is the risk of incarceration, and not necessarily the punitive purpose for the incarceration, that implicates the critical importance of zealous representation.”²⁴

The more promising argument against the legal attachment of a Fifth Amendment right to counsel under these circumstances—one unmentioned in the article—turns on the question of the Constitution’s extraterritorial application. As the D.C. Circuit concluded in the 2010 case *Al Maqaleh v. Gates*, the Constitution does not extend to Afghanistan to afford detainees held at the U.S. military base at Parwan a right to seek a writ of habeas corpus in U.S. federal court.²⁵ The holding was based on an application of the standard for assessing extraterritorial application of the Constitution set forth by the Supreme Court two years earlier in *Boumediene v. Bush*.²⁶ As the *Boumediene* Court explained, the extraterritorial scope of the constitutional habeas right depends on a set of factors: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”²⁷

To be sure, the question of “practical obstacles” is only one of several factors identified as relevant to the constitutional inquiry set forth in *Boumediene*.²⁸ But in rejecting the extension of habeas to U.S.-held detainees in Afghanistan, it was this factor—the “practical obstacles” in affording such review—that the *Al Maqaleh* court found most persuasive. While acknowledging that at least two of the detainee-petitioners in that case had been picked up far outside Afghan borders (one, notably, in Thailand), and only came to be in the Afghan theater because the U.S. government brought them there, the court concluded that the “practical obstacles inherent in resolving the prisoner’s entitlement to the writ” while petitioners were detained in an active theater of war weighed against recognizing an extraterritorial constitutional right to habeas.²⁹

Curiously, the *Al Maqaleh* court declined to explain in any detail the specific “practical obstacles” it foresaw. Rather, the D.C. Circuit panel rested its analysis heavily on a passage from the Supreme Court’s 1950 decision in *Johnson v. Eisentrager*, in which the Supreme Court refused to allow U.S. military detainees held in Germany (following their war crimes convictions in China) to seek habeas in U.S. courts.³⁰ In particular, the *Al Maqaleh* court quoted in block the following passage from *Eisentrager* in support of its conclusion that habeas was impractical:

23. “Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (O’Connor, J.) (plurality opinion) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); see also *id.* at 539 (concluding that Hamdi “unquestionably has the right to access to counsel in connection with the proceedings on remand”).

24. Corn & Chickris, *supra* note 6, at 137.

25. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

26. 553 U.S. 723 (2008).

27. *Id.* at 766.

28. *Id.*

29. *Al Maqaleh*, 605 F.3d at 97.

30. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.³¹

In suggesting that habeas for Parwan would “bring aid and comfort to the enemy” and “diminish the prestige of our commanders” in Afghanistan, the appeals court did not refer to any particular fact or claim in the record before it.³² Neither was it discernibly deferring to some perceived superiority of the Executive’s assessment of the strategic or practical import of allowing the Parwan detainees captured outside Afghanistan to seek a writ of habeas corpus. Instead, the D.C. Circuit seemed to be doing exactly what the *Eisentrager* Court did sixty years earlier—asserting, based on the court’s own impression, that greater legal process would only hamper the strategic cause for which the United States is fighting in (on this occasion) Afghanistan.

The policy case in favor of counsel that Corn and Chickris advance contrasts starkly with the assumptions made by the D.C. Circuit—assumptions central to the legal calculus as to whether U.S.-held detainees are entitled to constitutional protections, like access to military counsel, as a matter of right. By the authors’ terms, the “feasibility” of including military counsel in detention review processes should pose no critical obstacle to incorporating them into detention operations in Afghanistan. Given this, it is unclear whether it is possible for the authors to maintain the case that detainees should have access to counsel as a matter of policy but not as a matter of law.

Viewed from this perspective, it is also less clear why the authors would want to insist on such a distinction. Acknowledging a limited due process right to counsel in this setting has at most modest implications for the broader HRL/IHL debate. A right so limited—access to military counsel, in long-term NIAC detention, only when practicalities allow—imports only a singular procedural protection from the vast array of process guarantees that wholesale application of HRL would afford. Furthermore, advancing their claim in legal terms, on the strength of the policy case, might have an added benefit. At least since *Eisentrager*, the federal courts have at times adopted a paradoxical approach to security-related cases: They deny having the competence to evaluate competing arguments about the practical implications of a legal rule, so instead of considering what particular facts might be available about present circumstances, they rely on judicial instinct alone to guide the necessarily practical elements of the judgment they must make.³³ Faced with serious, competing

31. *Al Maqaleh*, 605 F.3d at 98 (quoting *Eisentrager*, 339 U.S. at 779).

32. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 561 (2006) (rejecting the government’s argument that the application of court martial procedures in trials of terrorist suspects would be “impracticable” as lacking record support).

33. *See Al Maqaleh*, 605 F.3d 84; *see also* *Esmail v. Obama*, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring) (accepting the executive’s use of the “preponderance of the evidence” standard for establishing proof of detainability, but finding the government’s expectation of collecting such evidence unduly burdensome). “[T]here are powerful reasons for the government to

arguments on the details of process implementation, the courts would have at least an opportunity to engage less presumptively, and more meaningfully, on the law of the possible in armed conflict.

Conclusion

Neither the problems surrounding NIAC detention, nor questions about the role of the courts in resolving them, is going away anytime soon. Whether in the conflict in Afghanistan, or in other conflicts between states and non-state groups, the challenge of reconciling HRL and IHL will remain. Delving into the details of rights application in conflict settings, Corn and Chickris' work helps make clear that considerations of fundamental fairness need not be absent from wartime law.

rely on our opinion in *Al-Adahi v. Obama* which persuasively explains that in a habeas corpus proceeding the preponderance of evidence standard that the government assumes binds it, is unnecessary—and moreover, unrealistic.” *Id.* at 1078 (citation omitted). *See also* *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (rejecting position that IHL should inform judicial reading of AUMF).