

03-2235(L),

03-2438(CON)

IN THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSE PADILLA, DONNA R. NEWMAN,
as Next Friend of Jose Padilla
Petitioner-Appellee/Cross-Appellant,

-against-

DONALD RUMSFELD,
Respondent-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICI CURIAE* EXPERTS ON THE LAW OF WAR
IN SUPPORT OF PETITIONER-APPELLEE/ CROSS-APPELLANT JOSE
PADILLA AND PARTIAL AFFIRMANCE AND PARTIAL REVERSAL**

ALLISON MARSTON DANNER
Assistant Professor of Law
Vanderbilt University Law School
131 21st Avenue South
Nashville, Tennessee 37203-1181
(615) 322-6762
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST AND IDENTITY OF AMICI CURIAE AND CONSENT TO FILE	vi
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. The Government Misapplies International Humanitarian Law to the War Against Terrorism.....	4
II. Padilla is Not a Combatant Under the Law of War	9
A. Padilla is not a Combatant in the International Armed Conflict in Afghanistan.....	10
B. Consistent U.S. Practice in Past Armed Conflicts Does Not Support the Treatment of Padilla as a Combatant.....	16
III. International and Domestic Law Provide no Support for the Characterization of Padilla as a Combatant in any other Armed Conflict.....	19
IV. The “War on Terror” Does not Constitute an Armed Conflict Under IHL	22
V. Conclusion	27

TABLE OF AUTHORITIES

CASES

<i>Cramer v. United States</i> , 325 U.S. 1 (1945)	3, 18 n.21
<i>Ex Parte Milligan</i> , 71 U.S. (4 Wall.) 2 (1866)	17, 22, 18 n.20
<i>Ex Parte Quirin</i> , 317 U.S. 1 (1942)	1, 2, 17, 21, 18 n.20
<i>Hamdi v. Rumsfeld</i> , 2003 U.S. App. LEXIS 13719 (July 9, 2003), __ F.3d __ (2003)	3
<i>In re Territo</i> , 156 F.2d 142 (9th Cir. 1946)	18
<i>Padilla v. Bush</i> , 233 F.Supp. 2d 564 (S.D.N.Y. 2002)	19
<i>The Prize Cases</i> , 67 U.S. 638 (1862).	27 n.34
<i>United States v. Fricke</i> , 259 F. 673 (S.D.N.Y. 1919)	17
<i>United States v. Haupt</i> , 136 F.2d 661 (7th Cir. 1943)	3, 18 n.21
<i>United States v. Paquete Habana</i> , 175 U.S. 677 (1903)	6
<i>United States v. Robinson</i> , 259 F. 685 (S.D.N.Y. 1919)	17
<i>United States ex rel. Wessels v. McDonald</i> , 256 F. 754 (E.D.N.Y. 1920)....	17

STATUTES

Fed. R. App. P. 29(a)	vi
-----------------------------	----

TREATIES

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167	24 n.29
---	---------

Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31	5
Geneva Convention [II] for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.....	5
Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 1351	2, 5, 11 n.12, 21 n.23, 25 n.31, 27 n.35
Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287	5, 8, 8 n.8, 9 n.10, 13 n.16, 21 n.24
Hague Convention [IV] Respecting the Laws and Customs of War on Land and Regulations Annexed Thereto, Oct. 18, 1907, 36 Stat. 2277	1, 8 n.8, 9 n.10
International Convention Against the Taking of Hostages, Dec. 17, 1979, 98 Stat. 2186, 1316 U.N.T.S. 206.....	24 n.29
International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 116 Stat. 724, 39 I.L.M. 270	24 n.29
International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 116 Stat. 721, 37 I.L.M. 249	24 n.29
Protocol Additional [I] to the Geneva Conventions of Aug. 12, 1949, and Relating to the Victims of International Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391	2, 8, 11, 8 n.8, 9 n.10, 11 n. 12, 12 n.13, 13 n. 16, 27 n.35
Protocol Additional [II] to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609	20, 23 n.28

Reservation by the United Kingdom to Protocol Additional I23

International Committee of the Red Cross, States Parties and Signatories by
Treaties, Geneva Conventions of 12 August, 1949 6 n.6

OTHER AUTHORITIES

Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel,
Civilian Internees and Other Detainees (1997) 27 n.35

DEP'T OF THE ARMY, LAW OF WAR DESKBOOK; OPERATIONAL LAW
HANDBOOK 11 (T. Johnson, ed., 2003).....7

DEP'T OF THE ARMY, LAW OF WAR WORKSHOP DESKBOOK (Brian J. Bill, ed.,
2000)7

DEP'T. OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10
(1956)4, 5, 6, 7, 4 n.3, 8 nn.8 & 9, 13 n.16, 27 nn.34 & 35

HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED
CONFLICT (1992) 19, 23 nn.27 & 28

ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS (C. Pilloud, et al.
eds,1987)..... 12 n.14

ICRC COMMENTARY TO THE IV GENEVA CONVENTION (Jean S. Pictet ed.,
1958) 8 n.8

Instructions for the Government of Armies of the United States in the Field
(April 24, 1863) 22 n.25

Jennifer Elsea, *Presidential Authority to Detain Enemy Combatants*, 33
PRESIDENTIAL STUD. Q. (forthcoming Sept. 2003). 16, 19, 18 n.20

Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged
Combatants,"* 85 INT'L REV. RED CROSS. 45 (2003).....21

L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT
(2d ed. 2000) 13 n.15, 23 n.26

LOUIS FISHER, NAZI SABOTEURS ON TRIAL (2003)	3, 18
MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR (International Committee of the Red Cross 1999).....	5
Phil Hirshkorn, et al., <i>Blowback</i> , <i>Jane's Intelligence Rev.</i> , vol. 13, no. 8 (Aug. 1, 2001)	24 n.30
Presidential Order Transferring Jose Padilla to Enemy Combatant Status (June 9, 2002).....	14
Robert K. Goldman, <i>International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts</i> , 9 AM. U. J. INT'L. L. & POL'Y 49 (1993)	13 n.15
Unclassified Decl. Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, <i>Padilla v. Bush</i> (Aug. 27, 2002).....	14
U.S. Official Lauds Colombian Efforts to Combat Narco-Terrorism - Simons says measures are succeeding, urges continued support, State Department Press Releases and Documents (June 3, 2003).....	26 n.32

INTEREST AND IDENTITY OF AMICI CURIAE AND CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a), both parties to this case, namely Donna R. Newman, Esq., Attorney for Petitioner-Appellee Jose Padilla, and Eric Bruce, Attorney for Respondent-Appellants United States of America, George W. Bush, Donald H. Rumsfeld and M.A. Marr, Commander, have consented to the filing of this brief by *amici curiae*, the Experts on the Law of War.

Amici curiae are experts on the international law of war, also called international humanitarian law.

Judge Patricia McGowan Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1979 to 1999, and as Chief Judge from 1986 to 1991. She also served from 1999 to 2001 as a Justice on the International Criminal Tribunal for the Former Yugoslavia, a court which has criminal jurisdiction over grave breaches of the 1949 Geneva Conventions as well as other violations of the laws and customs of war.

Payam Akhavan served as a Legal Advisor to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

Mary Cheh is Elyse Zenoff Research Professor of Law at George Washington Law School and is a Member of the National Institute of Military Justice's Board of Directors. She is also a Member of the Rules Advisory

Committee of the U.S. Court of Appeals for the Armed Forces and served as a member of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice.

Stephen Saltzburg is the General Counsel for the National Institute of Military Justice and a professor of law at George Washington Law School.

Marco Sassòli is a professor of international law at the University of Québec and served as the deputy head of the legal division of the International Committee of the Red Cross, the international body charged with implementing the Geneva Conventions.

Minna Schrag is a former senior trial attorney in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

They file this brief to correct certain misconceptions regarding the scope and applicability of the law of war that arise from the Government's assertions in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government relies on precedents and standards allegedly provided by the “law of war” to justify its treatment of Padilla. By this phrase, the Government is referring to the international law of armed conflict, a body of law that comprises the international treaties governing armed conflict (principally the Geneva Conventions and the Hague Conventions) and the customary rules regarding such conflicts followed by nations out of a sense of legal obligation. *See Ex Parte Quirin*, 317 U.S. 1, 27-28 (1942) (“From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals”).

The Government, however, cannot justify its treatment of Padilla by invoking this body of law. Because Padilla is not a “combatant” in an “armed conflict” as those terms are used in the law of war, this highly specialized branch of international law does not control his case. The Government has every right to treat Padilla as an accused terrorist and criminal defendant, but it may not— by the force of its own rhetoric surrounding the “war on terror”—convert him into a combatant in an international armed conflict in order to justify his detention without trial.

Under the law of war, “combatants” are defined principally as “members of the armed forces of a Party to a conflict,” Protocol I Additional to the Geneva Conventions of 12 August 12, and Relating to the Victims of International Conflicts [hereinafter Additional Protocol I];¹ *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(2) [hereinafter Third Geneva Convention] (further defining those combatants entitled to prisoner of war status to include certain members of militias). Persons who are not members of the armed forces of a Party to a conflict and who are not on the actual field of battle wielding weapons have not traditionally been treated as combatants, lawful or unlawful. Instead, to the extent they have conspired to engage in violent acts, they have been treated as criminals under the domestic law of the captor.

Indeed, in U.S. law, this point was firmly established by *Quirin*, the very case on which the Government relies for most of its arguments. In *Quirin* members of the armed forces of Nazi Germany, who had landed in uniform in the U.S. and then shed their uniforms in a plot to commit acts of sabotage, were treated as “enemy combatants” and tried before a military commission. *Quirin*, 317 U.S. at 21-22. Those persons who aided their plot in the U.S. but who were not themselves members of the German army were not held as “enemy combatants,”

¹ International treaties are referred to herein in an abbreviated form. Complete citations are provided in the Table of Authorities.

but were tried in ordinary civilian courts for crimes such as treason. *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943); LOUIS FISHER, NAZI SABOTEURS ON TRIAL 80-83 (2003). In this case, the Government does not allege that Padilla ever participated directly in combat and claims only that Padilla is “associated” with al Qaeda, much as Haupt and Cramer were associated with the German saboteurs. The Government’s own allegations dictate that Padilla be tried under civilian criminal jurisdiction like the detainees in *Haupt* and *Cramer*, not like the combatants in *Quirin*. *Hamdi v. Rumsfeld*, 2003 U.S. App. LEXIS 13719, *11 (July 9, 2003), ___ F.3d ___ (2003) (Wilkinson, C.J., concurring in the denial of rehearing en banc) (“To compare this battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges.”).

Contrary to the Government’s suggestion, its detention of Padilla as a so-called “unlawful combatant” is not a routine application of the customary law of war. Rather, the Government’s detention dramatically expands the law of war (and correspondingly, the powers of the President as Commander-in-Chief) in unprecedented and illegal directions.

ARGUMENT

I. The Government Misapplies International Humanitarian Law to the War Against Terrorism

International humanitarian law (IHL), sometimes referred to by its older label, the “law of war,”² is the body of international law that regulates the methods, targets, and means of waging armed conflict. *See* DEP’T. OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10, paras. 2-3 (1956) [hereinafter THE LAW OF LAND WARFARE].³ International humanitarian law is a complex body of law. While this brief cannot provide a comprehensive overview of it, even a brief review of IHL—particularly the Geneva Conventions—demonstrates the Government’s misuse of the law of war.

International humanitarian law does not govern a state’s initial decision to use military force. Once armed conflict has begun, however, IHL provides a set of rules that, in their broadest form, prohibit the deliberate targeting of those not directly participating in hostilities and limit the violence and destructiveness of the

² The terms “law of war,” “law of armed conflict,” “international humanitarian law,” and “IHL” are used interchangeably throughout this brief.

³ The Law of Land Warfare “is an official publication of the United States Army.” Originally published in 1956, it is still regarded as an authoritative treatment of the law of war, and although it lacks binding legal force, its provisions are “of evidentiary value insofar as they bear upon questions of custom and practice.” LAW OF LAND WARFARE para. 1.

tactics employed to that level necessary to achieve the aim of the conflict. *See* MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR 67 (International Committee of the Red Cross 1999); THE LAW OF LAND WARFARE para. 3.

International humanitarian law derives from two sources: treaties and customary international law. *See* THE LAW OF LAND WARFARE para. 4. Much of IHL is contained in treaties. For example, the four 1949 Geneva Conventions [hereinafter the Geneva Conventions] that govern the treatment of wounded and sick soldiers (First Geneva Convention), sailors (Second Geneva Convention), prisoners of war (Third Geneva Convention), and civilians (Fourth Geneva Convention) in international armed conflicts are treaties that 191 nations have ratified, including Afghanistan, Iraq, and the United States.⁴ Because treaties are essentially contracts between nations, the Geneva Conventions technically bind only the nations that have ratified them and, according to their explicit language, they principally apply only to armed conflicts between these nations. *See* Geneva Conventions, Common Article 2 (“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two

⁴ Another important series of treaties, beginning in 1907, has been adopted that addresses the means and methods of warfare. These are sometimes referred to collectively as the “Hague Conventions” or “Hague law.”

or more of the High Contracting Parties”).⁵ For example, the Geneva Conventions clearly apply to the recent armed conflicts between the United States and Afghanistan and Iraq, because these nations have ratified the Conventions.⁶

In addition to treaties, IHL is also found in customary international law. *See* THE LAW OF LAND WARFARE para. 6. Customary international law reflects the actual practice of nations developed gradually over time that is followed from a sense of legal obligation. *See United States v. Paquete Habana*, 175 U.S. 677, 711 (1903). Once a rule of customary international law emerges, it binds all nations, except for those states that have specifically and repeatedly objected to the rule. Like the common law, customary international law is not consolidated in any authoritative source, but instead is to be found in many sources, such as judicial decisions interpreting international law, statements by government officials, and scholarly books and articles on international law. *See* THE LAW OF LAND WARFARE para. 6.

⁵ The first few articles of the four 1949 Geneva Conventions are identically worded, and are sometimes referred to as the Common Articles, e.g., Common Article 2 or Common Article 3.

⁶ *See* International Committee of the Red Cross, States Parties and Signatories by Treaties, Geneva Conventions of 12 August, 1949, at <http://www.icrc.org/ihl.nsf> (last visited July 31, 2003).

The distinction between IHL that derives from treaties and IHL that forms part of customary law is not clear-cut. Some international treaties setting out the law of war largely represent codifications of pre-existing international customary rules, and sometimes treaty rules over time take on the status of customary international law. *See* DEP'T OF ARMY, LAW OF WAR WORKSHOP DESKBOOK 26 (Brian J. Bill, ed., 2000); THE LAW OF LAND WARFARE para. 6. For example, although the United States has not ratified the 1977 Additional Protocols I and II to the Geneva Conventions (which provide further rules for international and non-international armed conflicts, respectively) it recognizes that most of their provisions now constitute customary international law binding on the United States. LAW OF WAR DESKBOOK 32; DEP'T OF ARMY, OPERATIONAL LAW HANDBOOK 11 (T. Johnson, ed., 2003).⁷

The field of IHL is divided into an elaborate body of law regulating international armed conflicts and a less-developed legal doctrine governing non-international armed conflicts (typically civil wars). Once the rules of IHL apply to a situation, the law of war provides a comprehensive framework for the treatment

⁷ To the extent that this brief relies on the Additional Protocols, it relies only on those portions which the U.S. has either explicitly recognized as part of customary international law or to which the U.S. has not objected.

of any individuals caught up in the conflict. As the Commentary to the Fourth Geneva Convention notes:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention *There is no* intermediate status; nobody in enemy hands can be outside the law.⁸

Under IHL, individuals caught up in a conflict must either be classified as combatants or non-combatants, with only combatants being lawful targets for military action. *See, e.g.*, Additional Protocol I art. 48. So long as they are not disarmed or surrendering, combatants may be attacked with lethal force wherever they are found.⁹ Thus, if Padilla (and all other persons who have associated with al Qaeda) truly were “combatants,” the law of war would not only allow them to be held until the end of active hostilities, but also would allow them to be shot in the

⁸ *See* ICRC COMMENTARY TO THE IV GENEVA CONVENTION 51 (Jean S. Pictet ed., 1958) [hereinafter ICRC Commentary to the Fourth Geneva Convention]; Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; LAW OF LAND WARFARE para. 73.

⁹ While it is forbidden “to kill or wound an enemy who, having laid down his arms, or having no longer the means of defense has surrendered at discretion,” Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 23(c) [hereinafter Hague Convention], IHL authorizes attacks on “individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where.” THE LAW OF LAND WARFARE para. 31.

course of the conflict, even at the cost of inflicting potential collateral damage on bystanders.¹⁰

II. Padilla is Not a Combatant Under the Law of War

The Government indiscriminately invokes IHL terminology without reference to its context or relationship to other parts of that law to justify its indefinite detention of Padilla. IHL, however, is a highly technical and complex body of law, following its own internal logic and shaped by history, politics, and military technology. IHL treaties are carefully negotiated, and their language is often abstruse. One cannot pluck a phrase from the law of war and apply it out of context.

Correctly read, the rules of IHL compel the conclusion that Padilla is not a “combatant” in any “armed conflict” (international or non-international) as those terms are defined in IHL. This Court must find the legal principles relevant to his detention, therefore, in domestic constitutional or criminal law and in other bodies of international law (for example, treaties on terrorism or international human rights law).

¹⁰ See Hague Convention art. 23(g); Fourth Geneva Convention art. 53; Additional Protocol I art. 52.

A. Padilla is not a Combatant in the International Armed Conflict in Afghanistan.

IHL is divided into two broad sub-fields: that regulating international armed conflicts and that regulating “non-international armed conflicts.” In order to understand what body of law applies to Padilla’s case, it is important to determine in which kind of conflict Padilla has allegedly served as a combatant. By definition, “an international armed conflict” must involve the armed forces of two or more nation states. By their terms, the Geneva Conventions apply only to international armed conflicts between two or more of the states that have ratified those conventions (the “High Contracting Parties”).¹¹ Because al Qaeda is not a nation state, it cannot, by definition, be a Party to an international armed conflict under IHL. By contrast, “Operation Enduring Freedom” in Afghanistan clearly meets the definition of international armed conflict. It involved fighting between the organized military forces of Afghanistan and the United States (among other countries), both of which are High Contracting Parties to the Geneva Conventions. In both a factual and legal sense, however, Padilla cannot be deemed a

¹¹ The Geneva Conventions also apply to territorial occupations of one of the High Contracting parties and to conflicts between High Contracting Parties and other nations if those nations agree to apply the provisions of the Conventions. Neither of these situations is relevant to this case.

“combatant” in the “international armed conflict” between the United States and Afghanistan.

The Geneva Conventions, and especially Additional Protocol I, prescribe with considerable detail the rights and duties of people caught up in an armed conflict. Additional Protocol I states that “combatants,” who are “members of the armed forces of a Party to a conflict,” art. 43(2), are lawful military targets, while non-combatants are not.¹² This definition deliberately limits the class of people who lawfully may be targeted by opposing military forces. People who are actually in the armed forces are deemed combatants and are generally lawful targets; people who are not in the armed forces are generally not combatants and are generally not lawful targets.

¹² It further defines combatants to include:

“all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a Government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”

Additional Protocol I art. 43(1). Members of disorganized militia groups who are not under a command responsible to a state Party to the conflict are not combatants under this definition. Conversely, civilians are defined as persons who do not fall into one of the categories of persons entitled to prisoner of war status pursuant to article 4 of the Third Geneva Convention and article 43 of Additional Protocol I. *See* Additional Protocol I art. 50.

When a civilian, however, is actually found wielding arms in the zone of combat, he may be treated as a lawful target of attack—but only insofar and as long as he takes a “*direct* part in hostilities.”¹³ A civilian does not become a combatant because the opposing commander suspects he might, at some point in the future, plot to engage in violent acts.¹⁴ If the rule were otherwise, large parts of the civilian population of a country at war would become lawful targets for attack. Shooting a gun on a battlefield constitutes taking a “direct part in hostilities.” Carrying a gun towards the battlefield with the imminent intent to engage in combat might also amount to taking a direct part in hostilities. By contrast, supporting the enemy cause off the battlefield, conspiring with the enemy, contemplating taking part in battle in the future, or sympathizing with the enemy

¹³ Additional Protocol I art. 51(3) (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a *direct* part in hostilities.”) (emphasis added).

¹⁴ *See* ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS 619 (C. Pilloud, et al. eds, 1987) (noting that there is “a clear distinction between *direct* participation in hostilities and participation in the war effort,” for large portions of the civilian population may indirectly support the war effort and should not by virtue of that become targets) (emphasis added) [hereinafter ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS].

does not constitute taking a direct part in hostilities under the law of war, although those acts may be punishable under domestic criminal law.¹⁵

A person with civilian status who participates *directly* in hostilities would be violating the laws of war, and in the Government's nomenclature would be labeled an "illegal combatant."¹⁶ "Illegal combatant" or "unlawful combatant" is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges

¹⁵ See Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM U. J. INT'L. L. & POL'Y 49, 70 (1993) ("[A] civilian can be considered to participate directly in hostilities when he actually takes part in fighting, whether singly or as a member of a group. Such participation . . . would also include acting as a member of a weapons crew or providing target information for weapons systems 'intended for *immediate use against the enemy*, such as artillery spotters or members of ground observer teams.'") (citation omitted) (emphasis in source); ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS, at 516 ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."); L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 107 (2d ed. 2000).

¹⁶ A civilian who directly participated in hostilities could only be treated as a combatant in the sense that he would become a lawful target of attack for the duration of his participation in combat; in all other senses he would remain a civilian protected by the Fourth Geneva Convention. Fourth Geneva Convention art. 4; *THE LAW OF LAND WARFARE* para. 73. The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person based on his unlawful participation in hostilities, provided that procedural safeguards were observed. See Fourth Geneva Convention arts. 42, 43, 78; Additional Protocol I art. 75(4).

accorded to combatants, the most important of which are prisoner of war status and immunity from prosecution for merely engaging in combat. The phrase “unlawful combatants” actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status) and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with).¹⁷

Because Padilla is neither alleged to be a member of a regular armed force nor alleged to have participated directly in any battle, he cannot be categorized as a combatant—lawful or unlawful. The Government does not claim that Padilla participated directly in hostilities in Afghanistan. Indeed, there is no allegation that Padilla played *any* role, direct or indirect, in the conflict between the United States and the armed forces of Afghanistan’s Taliban Government. Neither the President’s designation of Padilla as an enemy combatant nor the Mobbs Declaration even mentions the conflict in Afghanistan. Presidential Order Transferring Jose Padilla to Enemy Combatant Status para 4 (June 9, 2002); Unclassified Decl. Michael H. Mobbs, Special Advisor to the Under Secretary of

¹⁷ As such persons retain their civilian status, it is arguably improper to refer to them as combatants at all. The *Quirin* Court’s use of the phrase “illegal combatants,” rather than the categories and terminology of the Geneva Conventions, reflects the fact that *Quirin* predates the 1949 Conventions. Its analysis of IHL must therefore be read in conjunction with the subsequent, authoritative Geneva Conventions.

Defense for Policy at 1, *Padilla v. Bush* (Aug. 27, 2002). Nor is there any allegation that Padilla is a member of any “organized armed forces, groups and units which are under a command responsible to [the Taliban Government] for the conduct or its subordinates.”¹⁸

Members of the Taliban armed forces would properly be considered combatants in the conflict in Afghanistan. Similarly, members of groups associated with the Taliban, such as al Qaeda, who fought on the battlefield in Afghanistan and who served under a command responsible to Taliban officials could also be classified as combatants in that conflict. In addition, any other individuals who fought on the battlefield could be treated as combatants during their actual participation in the fighting. Padilla does not fall into any of these categories and therefore cannot be considered a combatant in the conflict in Afghanistan.

The Government contends that Padilla should be deemed a combatant in the Afghanistan conflict based on his alleged association with al Qaeda. If the Court accepts that view, however, then it is implicitly ratifying the position that *any* person ever “associated” with al Qaeda, at any place in the world, and presumably

¹⁸ In terms of the conflict in Afghanistan, the relevant “Party” is the Taliban Government, which at the time of the hostilities was the de facto government of Afghanistan.

at any time, is also automatically a combatant in the armed conflict *in Afghanistan*. Yet the Government offers no support and no limiting principles for this breathtakingly broad—and doctrinally untenable—proposition. The Government’s position constitutes a dramatic extension of the law of war to persons never connected to this armed conflict.

B. Consistent U.S. Practice in Past Armed Conflicts Does Not Support the Treatment of Padilla as a Combatant

The Government’s treatment of Padilla also runs afoul of the consistent past practice of the United States, which in turn is indicative of the customary law of war. A careful examination of United States practice dating from the time of the Civil War reveals that only those individuals who are members of conventionally organized armed forces or who are found actively engaging in combat on the battlefield have been considered combatants who need not be tried in civilian courts. See Jennifer Elsea, *Presidential Authority to Detain Enemy Combatants*, 33 PRESIDENTIAL STUD. Q. (forthcoming Sept. 2003), available at <http://www.nimj.org>.

During the Civil War, the Supreme Court held that an individual accused of conspiring with a secret society to overthrow the U.S. Government, seize U.S. weapons, liberate enemy prisoners of war, and kidnap elected officials, could not constitutionally be held as a prisoner of war or tried by a military commission. *Ex*

Parte Milligan, 71 U.S. (4 Wall.) 2, 15 (1866). Specifically, the Court found that Milligan could not be tried by military commission because “he was not engaged in legal acts of hostility against the government” *Id.* at 131. Nor did the Court accept the Government’s argument that Milligan, who had never been on the battlefield, could be “held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates.” *Id.* at 21. The Court, instead, found that Milligan should be tried and punished by the courts of Indiana. *Id.* at 131.

During World War I, the Government tried in courts-martial several spies who were members of the German army and who had entered the territory of the United States. *See, e.g., United States ex rel. Wessels v. McDonald*, 256 F. 754 (E.D.N.Y. 1920) (upholding military jurisdiction). *Id.*, at 760-61. Significantly, two American citizens who were alleged to have conspired to commit espionage with Wessels were tried, and ultimately acquitted, of treason in federal court—not in courts martial. *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919); *United States v. Robinson*, 259 F. 685 (S.D.N.Y. 1919).

In *Quirin*, the defendants were members of the German Army who had been paid by the German Government, had received instructions from a member of the German High Command, and had been wearing their German army uniforms when they landed in the United States. *Quirin*, 317 U.S. at 7-8. Although the defendants

in *Quirin* were not entitled to treatment as prisoners of war because they had abandoned their uniforms upon entering the country,¹⁹ *id.* at 14, n.12, they clearly remained members of the German armed forces.²⁰ Of the many people associated with the saboteurs' plot in *Quirin*, the only ones who were treated as enemy combatants were members of the German military. Collaborators of the saboteurs and others who conspired with them were tried in federal court. FISCHER, at 82-84.²¹

Four years later, a federal court also upheld the detention of a U.S. citizen as a prisoner of war (and hence, recognized his status as a combatant) who had been inducted into the Italian army and who had been captured on the field of battle, wearing an Italian uniform. *In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946).

None of these cases supports the Government's treatment of Padilla. The Government points to no precedent in United States history for treating an individual who is not a member of a conventionally organized army or who was

¹⁹ It was for this reason that the Court described them as "illegal combatants." *Id.* at 31.

²⁰ In *Quirin*, the Court specifically distinguished *Milligan* on the ground that *Milligan* was not a "part of or associated with the armed forces of the enemy," 317 U.S. at 19, even though *Milligan* had been accused of being a member of a paramilitary organization associated with the Confederate Army. Elsea, *supra*, at 41.

²¹ See, e.g., *Cramer*, 325 U.S. 1; *Haupt*, 136 F.2d 661.

not captured on an active battlefield as a combatant. *See* Elsea at 2 (describing the Government’s definition of “enemy combatant” as “much broader than that which has historically applied during armed conflict and, as applied to [Padilla] appears to be without precedent”).

III. International and Domestic Law Provide no Support for the Characterization of Padilla as a Combatant in any other Armed Conflict

International and domestic law also provide no support for characterizing Padilla as a “combatant” in any other armed conflict. The Government may contend that Padilla’s alleged activities, although not specifically part of the conflict in Afghanistan, are linked to the global U.S. campaign against the al Qaeda network. In its decision of Dec. 4, 2002, the district court appeared to accept that Padilla could be characterized as a participant in an “armed conflict with Al Qaeda.” 233 F. Supp.2d, at 590. As discussed above, such a conflict could not be described an international armed conflict because international armed conflicts must involve at least two nation states. *See* Geneva Conventions Common art. 2; *see also* HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 194 (1992) (defining international armed conflict as “resort *by states* to active and hostile military measures...”) (emphasis added). Accordingly, to the extent the interaction between the U.S. and

al Qaeda is an armed conflict at all, it must be described as a non-international armed conflict, subject to the much less elaborate legal regime regulating such conflicts. Even in the framework of non-international armed conflicts, there is no precedent for treating an individual who is not a member of an organized military force and who has not directly engaged in combat as a “combatant.”

In terms of treaty law, non-international armed conflicts are governed by Common Article 3 of the Geneva Conventions and Additional Protocol II, which set out certain minimum standards for humane treatment of opposing parties.²² Unlike the treaty provisions governing international armed conflict, the treaty provisions governing non-international armed conflict do not explicitly define “combatant.” To the extent the law of non-international armed conflict implicitly recognizes a class of persons that may be described as combatants, it only includes persons taking a *direct* part in hostilities. As in international armed conflict, civilians in non-international armed conflicts may not be targets of armed attack “unless and for such time as they take a direct part in hostilities.” Additional Protocol II art. 13(3). Once again, Padilla is not alleged to have engaged in combat or otherwise to have directly participated in hostilities. As noted previously,

²² Such standards include the right to fair trial. *See* Geneva Conventions, Common Article 3.

contemplating committing acts of violence at some undetermined point in the future does not, under IHL, constitute direct participation in hostilities.

Moreover, while the law of *international* armed conflict specifically allows the detention of prisoners of war until the end of hostilities²³ and the internment of alien civilians for imperative reasons of security during the conflict,²⁴ IHL provides no independent authority for detaining anyone in *non-international* armed conflicts, even prisoners of war. Instead, it leaves it up to individual states to provide the authority for detention as a matter of domestic law. Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L. REV. RED CROSS 45, 47 (2003); COMMENTARY TO FOURTH GENEVA CONVENTION, at 44. Thus, if the Government claims that it has the authority to detain Padilla as a combatant in a non-international armed conflict, it must do so on the basis of positive domestic law. It cannot rely on international law or on domestic cases like *Quirin*, which are based on international law.

To the extent there is domestic U.S. law on the status of persons in non-international armed conflict, it is not in the Government’s favor. In the most significant non-international armed conflict in which the United States has

²³ Third Geneva Convention arts. 21, 118.

²⁴ Fourth Geneva Convention art. 42.

participated, the Civil War, the Government granted belligerent status to the regular Confederate Army and treated its soldiers as prisoners of war.²⁵ The Supreme Court also determined that, under the U.S. Constitution, persons like Padilla were to be prosecuted in civilian criminal courts, not held as prisoners of war or prosecuted in front of courts martial. *See Ex Parte Milligan*. Under controlling domestic law, then, Padilla—who has not participated directly in combat and who is not a member of a regularly organized army—is entitled to a criminal trial.

IV. The “War on Terror” Does not Constitute an Armed Conflict Under IHL

As the Government does not allege that Padilla is a member of al Qaeda, this Court need not determine whether all members of al Qaeda should be viewed as members of an “army” for purposes of IHL. This Court should realize, however, that the Government’s assertion that the “war on terror” represents an armed conflict, as that phrase is understood within IHL, is unprecedented, unwarranted, and highly inimical to the careful limitations and underlying principles of this body of law.

²⁵ Instructions for the Government of Armies of the United States in the Field (Lieber Code), April 24, 1863 art. 57.

Terrorist actions by private groups have not customarily been viewed as creating armed conflicts.²⁶ For example, as the United Kingdom stated when it ratified Additional Protocol I: “It is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.” Reservation by the United Kingdom to Art. 1, para. 4 & Art. 96, para. 3 of Additional Protocol 1, *available at* www.icrc.org/ihl.nsf. The British, Spanish, and Peruvian campaigns against the IRA, ETA, and the Shining Path guerillas, respectively, have not been treated as armed conflicts under IHL.²⁷

Moreover, the drafters of the treaty provisions governing non-international armed conflict set a relatively high threshold in order to exclude terrorism and simple criminal violence from the field of application of IHL.²⁸ If an insurgent

²⁶ See GREEN, *supra* at 56 (“[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of “IHL”).

²⁷ HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 318 (1992).

²⁸ See, e.g., *id.*, at 200. Protocol II is limited to

armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such

group, for example, does not possess a “responsible command” or control territory within a state, then the rules of Additional Protocol II do not apply. Moreover, international and regional conventions that address terrorism do not treat it as an act of war, but instead as grounds for criminal, civil, or administrative liability.²⁹

Common sense explains why recognizing the “war on terror” as an armed conflict undermines the traditional protections and limitations of IHL. In a war on terrorism, all of the “combatants” of one side are persons who have taken no direct part in anything resembling traditional combat. In most armed conflicts, membership in the armed forces of a Party provides a straight-forward criterion for detention; no dispute would ordinarily arise about whether a soldier taken prisoner is actually in the opposing army. By contrast, it may be factually quite difficult to determine whether an individual is a member of al Qaeda.³⁰ Allowing the

control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Additional Protocol II, art. 1.

²⁹ These conventions also require State Parties to guarantee fair treatment to those detained on terrorism charges. *See, e.g.*, International Convention for the Suppression of the Financing of Terrorism; International Convention for the Suppression of Terrorist Bombings; International Convention Against the Taking of Hostages; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.

³⁰ By all accounts, al Qaeda itself is a network of “cells” of terrorists operating in many countries, and the precise contours of its organization are unclear. Phil

President to condemn to indefinite detention without trial any person anywhere, even a U.S. citizen, whom he alleges to be a “member” of al Qaeda (or any other terrorist group) represents a dramatic extension of the President’s powers in derogation of domestic constitutional rights, without any precedent in the laws of war. Moreover, this expansive new power would come without any time limits. IHL anticipates that armed conflict will, at some point, end and regulates the return from a state of war to normal life.³¹ The “war on terror,” however, will not end until all terrorists (and all those who are considering engaging in future terrorist acts) anywhere in the world are eradicated.

Finally, once the complex rules of IHL are extended to the “war on terrorism” there is little preventing their application to other violent, transnational non-state actors, such as narco-traffickers, organized crime, the illegal arms trade, and other such groups. These groups may be highly organized, capable of inflicting violence on governments or individual citizens, and operate with relative impunity in particular states. For example, as this Administration recently noted, “the illegal drug trade has had a terrible impact on the United States, leading to

Hirshkorn, et al., *Blowback*, *Jane’s Intelligence Rev.*, vol. 13, no. 8 (Aug. 1, 2001), available at <http://www.mwarrior.com/alqaeda.htm>.

³¹ See, e.g., Third Geneva Convention art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

50,000 drug-related deaths yearly -- 19,000 of these directly attributable to drugs. By way of comparison, drugs claim six times as many lives each year in the United States as did the terrorist attacks of September 11, 2001.”³² Nor is there any reason why governments of other nations may not point to U.S practice to justify the detention without trial of all those they deem “terrorists.”

Amici fully acknowledge that al Qaeda’s terrorist actions are dangerous and illegal, and subject to severe punishment under a host of international and domestic laws. The Executive Branch has every right to arrest members and associates of al Qaeda, including Padilla, and charge them with the crimes the Government believes they have committed.³³ If the Executive Branch thinks these tools are inadequate, it may even go to Congress and ask for stouter weapons. What the Government may not do, however, is claim that the customary law of war provides it with an authority, which it otherwise lacks under domestic law, to hold suspected

³² U.S. Official Lauds Colombian Efforts to Combat Narco-Terrorism - Simons says measures are succeeding, urges continued support, State Department Press Releases and Documents (June 3, 2003), *available at* 2003 WL 2048364

³³ Moreover, the fact that the U.S.’s interactions with al Qaeda do not meet the definition of armed conflict does *not* mean that IHL prohibits the use of force against al Qaeda. IHL concerns *jus in bello* and regulates the conduct of the warring parties once a situation reaches the level of an armed conflict; it does not address *jus ad bellum*, or the legality of the decision to use armed force in the first place.

terrorists indefinitely, incommunicado, without charge, without counsel, and without trial. The law of war provides no such authority.

V. Conclusion

The international law justification for Padilla's detention as a combatant is chimerical. If this Court recognizes Padilla as a combatant in an armed conflict—despite his lack of direct participation in combat and his lack of membership in any sort of military force—it will ratify the President's novel attempt to avoid long standing and well-settled domestic restraints.

Furthermore, the Government's attempt to harness international law to justify its extraordinary actions runs afoul of the foundational principles of IHL. The rules of IHL are designed to provide humanitarian limits on nations' behavior in the course of armed conflicts.³⁴ In this case, the Government twists IHL from a shield into a sword: using it to justify the indefinite detention of Padilla and to circumvent domestic legal requirements. Using IHL not as a restraint on the use of force but as a method to access extraordinary domestic powers violates the letter, aims and spirit of IHL.³⁵

³⁴ See THE LAW OF LAND WARFARE para. 2; *Prize Cases*, at 667 (stating “the laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war”).

³⁵ While the Government grasps for the powers the law of war grants, it simultaneously disregards all of the protections that the law of war requires.

The Government's designation and subsequent detention of Padilla as a combatant is an unprecedented and unwarranted distortion of the customary law of war. This centuries-old body of law does not support the Government's position, which, indeed, contravenes its underlying principles and careful limitations. If this Court endorses Padilla's indefinite detention without providing him with the constitutional safeguards to which he is entitled, it will not only weaken our domestic protections but will also do considerable violence to an important body of law that protects soldiers, civilians, and all those caught up in the scourge of war.

For example, the law of war requires that all captured combatants be treated as prisoners of war until a "competent tribunal" determines that they are not entitled to such protection. *See, e.g.*, Third Geneva Convention art. 5; Additional Protocol I art. 45; The Law of Land Warfare para. 73; Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997). And yet the Government has given none of its captives in the "war on terror" hearings before "competent tribunals" and has given none of them the protections of prisoner of war status. Nor has the Government complied with numerous other provisions of IHL that provide protection to wartime detainees. *See* Additional Protocol I art. 75(3) ("*any* person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.") (emphasis added); Geneva Conventions, Common Article 3 (prohibiting the passing of sentences "without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized by civilized peoples").