

# HAS 'GENEVA' SURVIVED THE WAR ON TERROR?

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2 APRIL 2019



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*By its terms, **Geneva** applies to conflicts involving “High Contracting Parties,” which can only be states. Moreover, it assumes the existence of “regular” armed forces fighting on behalf of states. However, the **war against terrorism** ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires **new thinking** in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.*

– George W. Bush, White House Memorandum of February 7, 2002.

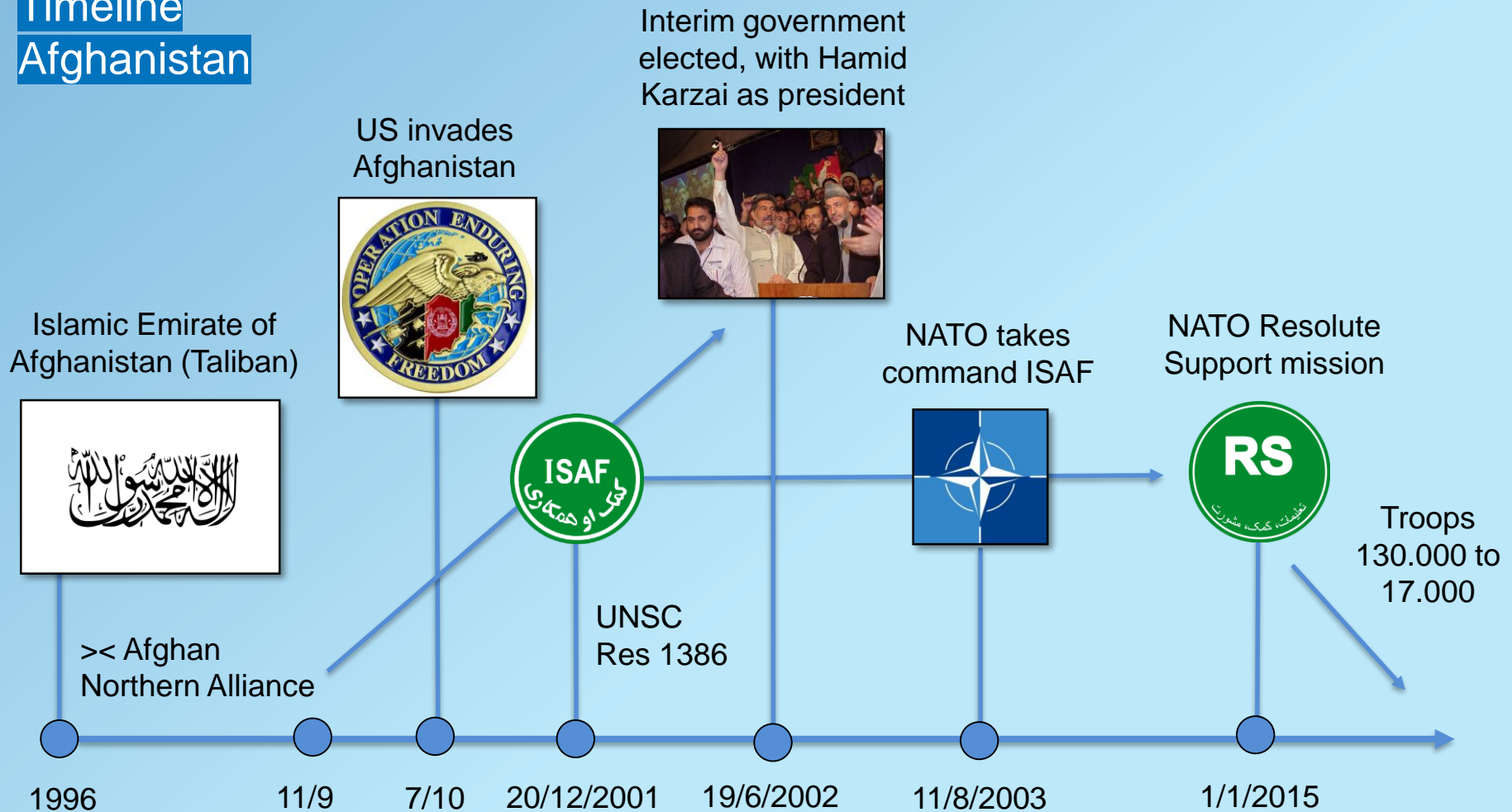


# Overview

1. Qualification of the conflict(s)
2. Detention
3. Targeted killings (drones)
4. Prosecution of crimes



# Timeline Afghanistan



# 1. Qualification of the conflict(s)

**Bush administration** – Memorandum 7 February 2002:

- [...] none of the provisions of Geneva apply to our conflict with **al Qaeda** in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva. [...] the provisions of Geneva will apply to our present conflict with the **Taliban**.
- **Common Article 3** of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to “armed conflict not of an international character.”

**US Supreme Court**, Hamdan v Rumsfeld, 548 US 557 (2006):

- The term “conflict not of an international character” is used here in contradistinction to a conflict between nations [and] bears its literal meaning. [...] Common Article 3, then, is applicable [to the conflict with al Qaeda].



# 1. Qualification of the conflict(s)

## Obama administration

- Memorandum 13 March 2009: The laws of war have evolved primarily in the context of [IACs] between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, **novel type of armed conflict** against armed groups such as al-Qaida and the Taliban.
- Report 5 December 2016: Because the United States is currently engaged in hostilities against only non-State actors, the applicable international legal regime governing these U.S. military operations is the law of armed conflict covering **non-international armed conflicts**.

## Trump administration – Report 12 March 2018:

- *Afghanistan*: The United States remains in **an armed conflict**, including in Afghanistan and against al Qa'ida, ISIS, the Taliban, and the Taliban Haqqani Network, and active hostilities are ongoing.





# 1. Qualification of the conflict(s)

## Geneva

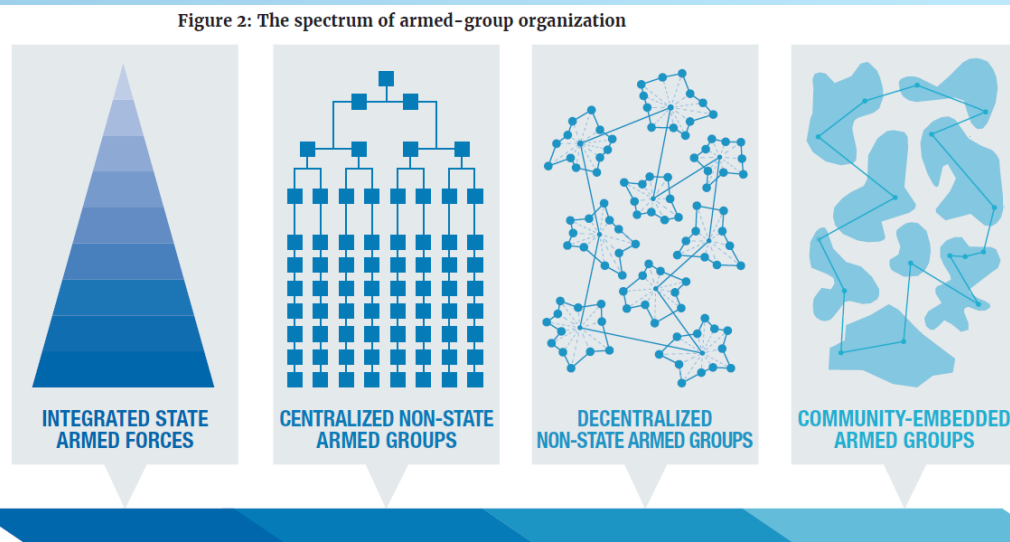
Until June 2002:

- **Taliban** is de facto government of Afghanistan: IAC;
- **al Qaeda**: either same IAC (view ICRC), or separate NIAC.

June 2002 onwards:

- NIAC between Afghan government and NATO-led ISAF v Taliban/al-Qaeda.

Figure 2: The spectrum of armed-group organization



## America's War on al-Qaeda

Since Congress authorized military action on Sept. 18, 2001, the war on AQ has grown from actions in Afghanistan to a far-flung campaign in at least 7 countries.

- October 2001**: Afghanistan (Taliban, al-Qaeda)
- November 2002**: Yemen (al-Qaeda, later AQ in the Arabian Peninsula)
- October 2004**: Iraq (AQ-Iraq, predecessor to the Islamic State)
- January 2007**: Somalia (al-Qaeda, later spun off as al-Shebab)
- October 2013**: Libya (U.S. special forces nabbed an AQ operative in Tripoli; airstrikes on IS in Libya would begin in November 2015)
- September 2014**: Syria (al-Qaeda's "Khorasan Group" and ISIS)

**Total AQ fighters**: official estimates over the past four years have ranged from 75,000 to 91,000

Data: Counterextremism Project; Bureau of Investigative Journalism; Stanford University's Mapping Militant Organizations



D

## 2. Detention

**Bush administration** – Memorandum 7 February 2002:

- The Taliban detainees are **unlawful combatants** and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

**Obama administration** – Respondents' Memorandum 13 March 2009:

- It is well settled that individuals who are part of private armed groups are **not immune from military detention** simply because they fall outside the scope of [Art 4 GC III] [...] other principles of the law of war make clear that individuals falling outside Article 4 may be detainable in armed conflict. Otherwise, the United States could not militarily detain enemy forces except in limited circumstances, contrary to the plain language of the AUMF and the law-of-war principle of military necessity.





# 2. Detention

## Geneva – IAC: Prisoners of War

### Art 4 GC III

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:

- 1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. **Taliban?**
- 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, fulfil the following conditions: **Taliban? al-Qaeda?**
  - 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.



# 2. Detention

## *Status*

- Art 5 GC III: Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their **status** has been **determined** by a **competent tribunal**.
- Art 43(2) AP I: members of the armed forces of a Party to a conflict [...] are combatants, [...], they have the **right to participate directly in hostilities**.

## *Treatment*

- Art 13 GC III: Prisoners of war must at all times be **humanely treated**.

Of course, our values as a Nation, values that we share with many nations in the world, call for us to **treat detainees humanely**, including those who are **not legally entitled** to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the **principles of Geneva**.

George W. Bush, White House Memorandum of February 7, 2002.



Guantánamo Bay (Cuba) – Reuters

## 2. Detention

- Art 118 GC III: Prisoners of war shall be **released** and repatriated without delay after the cessation of active hostilities.
- Art 126 GC III: Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be [...]. The delegates of the **[ICRC]** shall enjoy the same prerogatives.

### US troops in Afghanistan

Thousands



Source: US Department of Defense

BBC



ICRC

INTERNATIONAL COMMITTEE OF  
THE RED CROSS

WHO WE ARE

WHAT WE DO

WHERE WE WORK

WAR & LAW

SUPPORT US

### ICRC visits Guantanamo for hundredth time

Video | 11 FEBRUARY 2014

On 7 February 2014, the ICRC completed its 100th visit to the United States detention facility at Guantanamo Bay Cuba, where its delegates have been monitoring the detainees' living conditions since 2002 in order to ensure that they are held and treated in accordance with international standards. Interview with Patricia Danzi, the ICRC's head of operations for the Americas region.

# 2. Detention

## IAC: (Protected) Civilians

Military Commissions Act of 2006: The term ‘unlawful enemy combatant’ means [...] a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the [US] or its co-belligerents who is **not a lawful enemy combatant** (including a person who is part of the Taliban, al Qaeda, or associated forces).

*Tertium non datur*: if not (lawful) combatants, **civilians**.

- Can be punished for acts of DPH, but cannot be targeted unless they DPH;
- Art 49 GC IV: forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited.
- Can be interned ‘for imperative reasons of security’ (Art 78 GC IV), but must be released as soon as such reasons no longer exist, and in any case ‘as soon as possible after the close of hostilities’ (Art 132-133 GC IV).





# 2. Detention

## NIAC

ICRC, 'Internment in Armed Conflict: Basic Rules and Challenges', 2014:

- **Legal basis** for internment:
  - One view: would have to be explicit, as IHL cannot provide this implicitly;
  - ICRC: both customary and treaty IHL contain an inherent power to intern.
- **Additional authority** related to the grounds for internment and the process required.

Authorization for the Use of Military Force (AUMF), Pub L 107-40 (2001);

- US Supreme Court, *Hamdi v. Rumsfeld*, 542 US 507 (2004): we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict.

### SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—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.

# 3. Targeted Killings (drones)

## Obama

Presidential Policy Guidance on Procedures for **Approving** Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (PPG), 22 May 2013.

Standards and Procedures for the **Use of Force** in Counterterrorism Operations Outside the United States and Areas of Active Hostilities', 23 May 2013.

Executive Order No 13732, United States Policy on Pre- and Post-Strike Measures to Address **Civilian Casualties** in U.S. Operations Involving the Use of Force, 81 Fed Reg 44483, 1 July 2016.





# 3. Targeted Killings (drones)

Standards and Procedures for the Use of Force:

*First, there must be a **legal basis** for using lethal force [...].*

*Second, the United States will use lethal force only against a target that poses a **continuing, imminent threat** to US persons. [...]*

*Third, the **following criteria** must be met before lethal action may be taken:*

- (1) Near certainty that the terrorist target is present;*
- (2) Near certainty that non-combatants will not be injured or killed;*
- (3) An assessment that capture is not feasible at the time of the operation;*
- (4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to US persons; and*
- (5) An assessment that no other reasonable alternatives exist to effectively address the threat to US persons.*



# 3. Targeted Killings (drones)

## Trump

Reportedly **relaxed** Obama's policy mainly in two respects:

- Abolishing the requirement that target poses a continuing, imminent threat to US persons, to allow the targeting of lower-level terrorists (eg foot soldiers);
- Relaxing the high-level vetting requirements of Obama's PPG.

See also Report 12 March 2018:

- The United States continues, as a matter of policy, to apply **heightened targeting standards**, that are more protective of civilians than are required under the laws of armed conflict. These heightened policy standards are reflected in Presidential and other Executive Branch policies, military orders and rules of engagement, and the training of U.S. personnel. The **classified** annex contains additional information on this topic.



# 3. Targeted Killings (drones)

**Geneva** – Not an issue as such, but expose important issues of IHL (+ HRL).

## 1. Armed conflict

- US: situation of armed conflict → IHL rules on conduct of hostilities apply;
- IHL only applies to situations amounting to IAC/NIAC, not to ‘war on terror’;

*outside situations of armed conflict, [HRL] prohibits almost any counter-terrorism operation that has the infliction of deadly force as its sole or main purpose [...]. The threshold question [...] is not whether a killing is targeted, but whether it takes place within or outside a situation of armed conflict.* (Report of Ben Emmerson, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 18 September 2013)

## 2. Geographical scope of IHL

- US: ‘global’ war → IHL applies anywhere we target al-Qaeda (affiliates);
- IHL applies within territory of parties to the conflict (+ spillover).

*[...] the legal concept of a “global battlefield” [...] does not appear to be supported by the essentially territorial focus of IHL, which on the face of it seems to limit IHL applicability to the territories of the States involved in an armed conflict.* (ICRC, International humanitarian law and the challenges of contemporary armed conflicts, December 2015)



# 3. Targeted Killings (drones)

## 3. Who can be targeted?

- US: Obama: terrorists who pose a 'continuing, imminent threat';
- IHL: in IAC, combatants and civilians who DPH; in NIAC, those who DPH (+ those with a continuous combat function (CCF)).

## 4. Application HRL?

- US: HRL does not apply, as it does not apply extraterritorially;
- HRCttee: 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party';
- Still requires that individual is 'within the power and effective control'; eg, ECtHR requires control over territory or a person.



# 4. Prosecution of crimes

## United States

- Obama, Report of 5 December 2016: Both before and after the September 11th attacks, the Department of Justice successfully prosecuted hundreds of defendants for terrorism and terrorism-related offenses.
- Military Commissions Act of 2006: ‘crimes triable by military commissions’: a list of violations of IHL/war crimes, as well as offences like terrorism, material support for terrorism, wrongfully aiding the enemy and conspiracy.

## Syria/Iraq

- Iraqi courts convict (alleged) members of Islamic State for ‘membership of a terrorist organization’;
- European courts convict foreign fighters for all kinds of indirect terrorist offences (eg, Belgium: participation in the activities of a terrorist group);
- Striking paucity of convictions for war crimes.





# 4. Prosecution of crimes



**Donald J. Trump** ✓  
@realDonaldTrump

The United States is asking Britain, France, Germany and other European allies to take back over 800 ISIS fighters that we captured in Syria and put them on trial. The Caliphate is ready to fall. The alternative is not a good one in that we will be forced to release them.....

[Tweet vertalen](#)

4:51 a.m. · 17 feb. 2019 · [Twitter for iPhone](#)



**Donald J. Trump** ✓  
@realDonaldTrump

...The U.S. does not want to watch as these ISIS fighters permeate Europe, which is where they are expected to go. We do so much, and spend so much - Time for others to step up and do the job that they are so capable of doing. We are pulling back after 100% Caliphate victory!

[Tweet vertalen](#)

5:01 a.m. · 17 feb. 2019 · [Twitter for iPhone](#)


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## Iraq: Flawed Prosecution of ISIS Suspects


Undermines Justice for Victims



### Islamic State group: Syria's Kurds call for international tribunal

27 minutes ago

Syrian civil war



BBC Arabic's Feras Kilani says that losing their last stronghold is unlikely to be the end of Islamic State.

The Kurdish-led administration in northern Syria has called for the creation of an international tribunal to try thousands of suspected members of the Islamic State (IS) group.



# HAS 'GENEVA' SURVIVED THE WAR ON TERROR?

## 1. Qualification of the conflict(s)

- Idea of 'global war on terror' at least legally largely abandoned;
- Still lingers in US policies (eg drone policy) vis-à-vis 'al Qaeda and affiliates'.

## 2. Detention

- IAC: reluctance to grant POW status, but appears to be an issue quite specifically related to situation in Afghanistan (Taliban);
- NIAC: risk of (ab)using IHL by implying authorizations at the cost of HRL.

## 3. Targeted killings (drones)

- Crucial to identify those who can be targeted according to criteria of IHL;
- Danger of extending (geographical scope of) application of IHL to situations that do not amount to an armed conflict.

## 4. Prosecution of crimes

- IHL is losing grip on the qualification of the conduct of non-state armed groups.



Thank you for listening!

Questions?

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