International Law Restricting Drone Use Is Part of the Law of the United States

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> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. … Hilton v. Guyot, 159 U. S. 113, 159 U. S. 163-164, 159 U. S. 214-215.
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> --Paquette Habana, 175 U.S. 677 (1900)

> The Supreme Court's precedents tell us: The "law of war" referenced in 10 U.S.C. § 821 [the Uniform Code of Military Justice] is the international law of war.
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> --Hamdan II, 696 F.3d at 1248 (2012)

The international law of war determines the legality of any use of military force by the United States. U.S. Predator and Reaper drones launch Hellfire missiles, a weapon originally designed to kill tanks. A Hellfire missile attack is a use of military force. Thus, all drone attacks are governed by the international law of war. U.S. drone attacks since 2002 have violated fundamental rules of international law. International law is part of the law of the United States as the Supreme Court has clearly stated in various cases over the decades. Its clearest statement, quoted above, came in the case of the *Paquette Habana*. That finding has never been overruled. When a court, therefore, determines that international law is the proper law to resolve an issue in a case or controversy, it is the duty of that court to apply international law.

This statement begins with a brief discussion of attack drones and their operation. The main point of this discussion is to explain why the use of attack drones constitutes the use of military force. The U.S. first used attack drone attacks in the Afghanistan war, then began attacks outside Afghanistan, including in areas where international law prohibits the use of military force. By 2002, U.S. drone use was in breach of fundamental international law. The last part of the statement will discuss the place of international law in the U.S. legal system, and the duty of all courts to apply it "as often as questions of right depending upon it are duly presented for their determination".

I. Attack Drones as Weapons of War

Unmanned aerial vehicle (UAVs) were developed at the end of World War II. Nicknamed "drones", the U.S. military was using them with a camera for reconnaissance purposes in the Vietnam War, the Gulf War, and the Balkans Wars of the 1990s.[1] By 2001, the U.S. Air Force had weaponized the Predator Drone by attaching two Hellfire missiles and using the cameras and sensors for targeting. Hellfire missile were originally developed by Lockheed Martin to destroy tanks. The current version of the Hellfire weighs over 100 pounds and costs over $100,000.[2] The current generation of drones is called the Reaper. It is reported to be able to carry up to 16 Hellfire missiles or four 500-pound bombs.[3] Plainly, these are weapons of war. When we hear of police departments or businesses acquiring drones, it is not for purposes of launching Hellfire missiles or dropping bombs.

II. The International Law of War and Drone Attacks

A. Afghanistan

Drones have been used since the U.S. and United Kingdom began military operations in Afghanistan on October 7, 2001. In the first weeks, drones were used solely for reconnaissance. Then in November 2001, the U.S. used a Predator drone to target and kill an individual associated with al Qaeda in a building near Kabul.[4] By December 2001, the Taliban and their al Qaeda associates had fled Kabul and no longer controlled Afghanistan. At that point, the nature of the conflict in Afghanistan changed. It was no longer an international armed conflict between two sovereign states in which the U.S. and United Kingdom based their legal justification for the use force on the right of self-defense in United Nations Charter Article 51.[5] The war in Afghanistan became a civil war or non-international armed conflict from the time Mr. Karzai assumed authority.[6] President Karzai has invited the United States and other states to assist his government in ending the insurrection aimed at overthrowing him. The fact that the U.S. military presence in Afghanistan is based on the invitation of Afghanistan's elected leader has been underscored in recent months by the inability to reach a new treaty with the terms for any continued presence of

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[1] *See* Mary Ellen O'Connell, *The International Law of Drones*, ASIL INSIGHTS (vol. 14, issue 37), Nov. 12, 2010, http://www.asil.org/insights/volume/14/issue/37/international-law-drones.

[2] *Rockets Galore: Cheap Smart Weapons*, THE ECONOMIST, p. 85 (Sept. 29, 2012).

[3] Winslow Wheeler, *The MQ-9's Cost and Performance*, Feb. 28, 2012, TIME, http://nation.time.com/2012/02/28/2-the-mq-9s-cost-and-performance/.

[4] *See* Mary Ellen O'Connell, *Unlawful Killing with Combat Drones*, *in* SHOOTING TO KILL: SOCIO-LEGAL PERSPECTIVES ON THE USE OF LETHAL FORCE 263 (Simon Bronitt, et al eds., 2012).

[5] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001) and Letter from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/947 (2001).

[6] *See President Hamid Karzai*, THE EMBASSY OF AFGHANISTAN, WASHINGTON D.C., http://www.embassyofafghanistan.org/president.html.

U.S. troops in Afghanistan after the end of 2014.

Respecting the law applicable to the conduct of civil war, the rules are complex, especially with respect to detaining enemy fighters. With respect to the targeting of enemy fighters with lethal force, however, the rules are more straightforward. Four principal rules apply. They are part of customary international law. Indeed, the International Court of Justice ruled in 2012 that the rules providing civilian protection in time of armed conflict are part of the body of peremptory rules, *jus cogens* or higher norms that allow no derogation.[7] The four targeting rules are: distinction, necessity, proportionality and humanity.

The most important rule respecting the conduct of armed conflict may well be the rule of distinction. Under international law, civilians may not be intentionally targeted. Only members of a state's armed forces during armed conflict or persons taking a direct part the in hostilities of an armed conflict may be targeted. In the ICRC study of customary international humanitarian law, distinction is the first rule:

> Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.[8]

This rule is supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Conventions:

> Article 43(2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
>
> Article 51(3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.[9]

Persons with a right to take direct part in hostilities are lawful combatants; those without a right to do so are unlawful combatants.[10] The ICRC Guidance on Direct Participation in Hostilities

[7] The International Court of Justice reasonably posited this proposition for purposes of ruling on a question of sovereign immunity. *See* Jurisdictional Immunities of the State (Germany v. Italy) 2008 ICJ 99, 140 (Application of Germany)(Dec. 28).

[8] I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (Jean-Maie Henckaerts and Louise Doswald-Beck eds., 2005.)

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3 (1979). *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977, 1125 U.N.T.S. 609 (1979).

[10] Knut Dörmann, *The legal situation of "unlawful/unprivileged combatants"*, 85 INT'L REV. RED CROSS 45, 46 (2003). "[U]nlawful/unprivileged combatant/belligerent" is "understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy."

emphasizes that where a person's status is uncertain, international humanitarian law gives a presumption to civilian status:

> [I]n case of doubt as to whether a [sic] specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict. Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances.[11]

Even when a drone operator is reasonably certain in the circumstances that his or her target is not a civilian, the United States is obligated to take all feasible precautions to minimize injury to civilians that might occur as an incident of targeting a combatant. Little information is available as to whether the U.S. takes *any* precautions when carrying out drone strikes.

In addition to distinction, the U.S. must also respect the principles of necessity, proportionality and humanity in carrying out drone attacks. "Necessity" refers to military necessity, and the obligation that force is used only if necessary to accomplish a reasonable military objective.[12] "Proportionality" prohibits that "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated."[13] These limitations on permissible force extend to both the quantity of force used and the geographic scope of its use.

A principle that provides context for all decisions in armed conflict is the principle of humanity. The principle of humanity supports decisions in favor of sparing life and avoiding destruction in close cases under either the principles of necessity or proportionality. Again, according the ICRC Guidance, the principles of necessity and humanity are particularly important in situations such as Pakistan:

> In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already

[11] ICRC Guidance on DPH, at 75-76 (footnotes omitted).

[12] W. Michael Reisman & Douglas Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT'L L. 86, 94-95 (1998).

[13] Additional Protocol I, Art. 51(5). According to Gardam: "The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under chapter VII of the UN Charter. The resort to force in both these situations is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy." Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

> required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.[14]

Yet, when it comes to drone attacks, the U.S. is doing anything but taking precautions to ensure no civilian deaths. A U.S. military drone operator spoke to journalists detailing how targets in Afghanistan are selected for targeting by drones:

> …[T]he NSA often locates drone targets by analyzing the activity of a SIM card, rather than the actual content of the calls. Based on [a former drone operator's] experience, he has come to believe that the drone program amounts to little more than death by unreliable metadata.
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> "People get hung up that there's a targeted list of people," he says. "It's really like we're targeting a cell phone. We're not going after people – we're going after their phones, in the hopes that the person on the other end of that missile is the bad guy."[15]

The United States has not respected international law when it comes to the use of drones to launch Hellfire missiles in Afghanistan.

Perhaps of even greater legal import, under the law governing resort to military force, the only plausible legal basis for the U.S. role in combat in Afghanistan is at the invitation of President Karzai.[16] Afghanistan is a civil war; the U.S. is present at the invitation of the Afghan government. Yet, time and again, the U.S. has ignored President Karzai's clear mandate that no civilian lives be risked. President Karzai accepts the long-standing theory of counter-insurgency warfare that

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[14] ICRC Guidance on DPH, at 80-81.

[15] Jeremy Scahill and Glenn Greenwald, *The NSA's Secret Role in the U.S. Assassination Program*, THE INTERCEPT, Feb. 10, 2014, https://firstlook.org/theintercept/article/2014/10/the-nsas-secret-role/

[16] Force is permitted in exception to United Nations Charter Article 2(4) if and only if three conditions are met:

1. Security Council authorization per UN Charter Arts. 39-42;
2. Self-defense, including collective self-defense, "if a[] [significant] armed attack occurs" per UN Charter Art. 51, or
3. Possibly with an invitation from a government seeking to end a civil war, as in Afghanistan today.

See, generally, Mary Ellen O'Connell, *The Prohibition of Force*, *in* THE RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW (N. White and C. Henderson eds. 2013).

civilian deaths prolong such conflicts.[17] By now, President Karzai wants an end to air strikes because of the risk to civilians[18] and has banned Afghanistan's troops from requesting NATO airstrikes because of the danger.[19] Every U.S. drone attack that risks civilian lives—and that is every U.S. drone strike—is in defiance of Afghanistan's own strategy for success in ending its civil war and, therefore, violates international law on resort to force.

B. Beyond Afghanistan

American officials have also claimed the right to kill terrorism suspects far from the armed conflict in Afghanistan.[20] In 2002, the U.S. killed six men in a passenger vehicle in rural Yemen. One was a 23-year old American from Lackawanna, New York. In 2004, drone strikes began in Pakistan, and in 2006 in Somalia. The United States has never been attacked by these states. For the most part, the U.S. has not even been invited by national leaders to join in suppressing insurgencies, as in the case of Afghanistan. Rather, the U.S. has tried to defend drone attacks on attenuated arguments of self-defense.

Both the Bush and Obama administrations have acknowledged that the U.S. is governed by international law when it uses military force abroad, including drone attacks. For example, State Department Legal Adviser and former dean of the Yale Law School, Harold Koh, has stated that "*U.S. targeting practices... comply with all applicable law, including the laws of war*"[21] and that "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[22] President Obama said much the same in 2013 at a speech at the National Defense University. Other than the correct acknowledgement that international law applies, the rest of the argument is weak with respect to compliance with international law. To reconcile its legal position with its acts, the Obama administration, in particular, has put forward argument after argument to persuade the world that it is acting lawfully. The very fact that so many arguments are being tried, indicates the attempts to persuade have not succeeded. U.S. drone attacks beyond armed conflict zones are widely viewed as unlawful under international law.

[17] See U.S. Army Field Manual 3-24/MCWP 3-33.5, C1, Washington, D.C., 2 June 2014.
[18] *Karzai Demands End to US Air Strikes as Condition for Afghanistan Security Deal*, theguardian.com, Jan. 19, 2014 http://www.theguardian.com/world/2014/jan/19/karzai-us-afghanistan-air-strikes.
[19] *Karzai signs ban on NATO Airstrikes*, AL JAZEERA, Feb. 19, 2013, http://www.aljazeera.com/news/asia/2013/02/201321942516224619.html.
[20] This part draws on Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343 (2010). See also, Christine Gray, *Targeted Killings: Recent US Attempts to Create a Legal Framework*, 66 J. CURR. LEG. PROBS. 75 (2013).
[21] Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting ASIL, Mar. 25, 2010, Washington, D.C., at 10, http://www.state.gov/s/l/releases/remarks/139119.htm (visited May 21, 2010)(emphasis in the original.)
[22] *Id.*

Turning to the two most plausible arguments—a worldwide armed conflict and self-defense—it will quickly be seen why the administration has failed. Under international law the existence of an armed conflict is determined on the basis of certain objective criteria. Before the adoption of the United Nations Charter in 1945 a state could declare a legal state of war even without the firing of a single shot.[23] That is no longer the case. Today, we assess facts to determine the legal state of armed conflict. There must be organized armed fighting of some intensity for armed conflict to exist.[24] It is true that some situations are not clear-cut, but the restrictive rules on the right to resort to military force as well as the importance of respecting human rights, indicate that in such cases, law-abiding states act in conformity with the law prevailing in peace. This does not mean states are left defenseless against terrorism. Peacetime criminal law and law enforcement methods permit the use of lethal force and stringent punishment of terrorists. Moreover, law enforcement methods are far more successful in ending terrorist groups than is military force.[25] Under peacetime law, a person suspected of terrorism has the right to a fair and speedy trial before a regular court. Law enforcement authorities may use lethal force but only when absolutely necessary, a standard that the U.S. does not even attempt with respect to drone attacks. In the three countries where the U.S. has attacked in the absence of any armed conflict involving the U.S., the United States has killed as many as 4276 people, including as many as 211 children.[26] The President's "kill list" has never had more than a few dozen names on it.[27]

Given the weak legal basis for finding a worldwide armed conflict, the Obama administration has also attempted to base drone attacks on the international legal right of self-defense. As discussed above, the United States may use military force in self-defense when it has been the victim of an armed attack or an armed attack is occurring. The response in self-defense may occur only on the territory of a state responsible for the attack as determined under the law of state responsibility. Additionally, the military response must be a last resort; must have a high likelihood of success, and must not cause disproportionate loss of life and property compared to the injury suffered by the defending state.[28] These requirements of the law of self-defense were arguably met in the case of Afghanistan, owing to the 9/11 attacks. They have not been met in any other situation where drone attacks have been used.

II. International Law in U.S. Courts

International law is commonly dated to 1648, the year the Thirty Years War ended in Europe and

[23] *See* International Law Association, Final Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law 8 (June 2010) www.ilahq.org.
[24] *Id.*
[25] *See generally*, Seth G. Jones and Martin C. Libicki, *How Terrorist Groups End, Lesson for Countering al Qa'ida* (Rand Corp. 2008).
[26] The only organization striving for journalistic integrity and publishing drone statistics is The Bureau of Investigative Journalism. The statistics here are from it Website, updated in June 2014, see http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/.
[27] See Jo Becker and Scott Shane, Secret 'Kill List' Proves a Test of Obama's Principles and Will, N.Y. Times, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html.
[28] *See* O'Connell, *The Prohibition of Force*, *supra.*

the Holy Roman Empire was replaced by a number of states that pledged in the Peace of Westphalia to respect each other's independence. The Dutch scholar, theologian and diplomat, Hugo Grotius, had produced a treatise in 1625, titled ON THE LAW OF WAR AND PEACE, that provided a blueprint of how a system of co-equal sovereign states could live in peace under a common body of law. Thus, the system of international law was well established by the time the United States declared itself independent of Great Britain in 1776.[29] In the U.S. Constitution of 1789, some particular governance problems were solved by specific mentions of international law, such as the reference to treaties being the "supreme law of the land." As a general matter, however, international law became part of U.S. law along with other aspects of British law.

In a 1988 decision, the House of Lords explained the place of international law in the British system:

> For up to two and a half centuries it has been generally accepted amongst English judges and jurists that international law forms part of the law of this country, at all events if it can be shown that there is an established rule which, first, is derived from one or more of the recognized sources of international law and, secondly, has already been carried into English law by statute, judicial decision or ancient custom. … [T]he doctrine of incorporation [] holds that the rules of international law from time to time in force are automatically incorporated into the common law and, subject always to statute, are supreme.[30]

Columbia law professor Louis Henkin explained in his classic book, *Foreign Affairs and the Constitution* that this remains the scheme today in the United States. Rules of customary international law, like common law, are incorporated into the law as they emerge. Treaties are somewhat different than in Great Britain. Treaties that require appropriation of money or changes in existing statutes may be considered "non-self-executing." This means Congress needs to act before such treaties can be applied by the courts. Other treaties that are self-executing may be applied directly without legislation, just as rules of customary international law and general principles are. The best-known self-executing treaty today may well be the Convention on Contracts for the International Sale of Goods (CISG).[31]

Whether in the form of a treaty, rule of customary international law or a general principle, when it comes to drone attacks outside the United States, the choice of law sends the courts to the international law reviewed in Part I above. The CISG supplies a helpful example for the issue of finding the proper law to apply to drone attacks. Lawyers and judges constantly make choice of

[29] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 232 (2d ed. 1996).
[30] The Tin Council Case, [1988] 3 All ER 27, excerpted in MARY ELLEN O'CONNELL, et al, THE INTERNATIONAL LEGAL SYSTEM, CASES AND MATERIALS (6th ed. 2010) 1049, 1056.
[31] United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988).

law decisions.[32] Choice of law is part of the consideration of every legal matter. In most cases the choice is probably obvious and requires no particular effort. A good many issues do require careful consideration, however, and for those we have choice of law rules. Choice of law rules steer us toward the proper law for any particular matter, whether local, national, regional, or international law. If the matter implicates an international boundary, international choice of law rules will guide the choice. Take a typical issue that arises frequently—the choice of law governing a contract between a seller in Indiana, U.S.A. and a buyer in Provence, France. No one would expect the President of France or the President of the United States to declare, as a matter of discretion, what law governs this contract. The answer lies in international law, and, in this case, the international law on choice of law sends us to neither the contract law of Indiana nor the contract law of France. Choice of law sends us to the CISG because France and the United States are parties to the Convention.[33] International law regulates the choice of law and in this case it is the Convention that governs, a treaty under international law.

These basic principles are further demonstrated in the attempts by the executive branch to prosecute detainees at Guantanamo Bay for conspiracy and material support for terrorism as war crimes. No such crimes exist in the international law of war. Here is the analysis in the U.S. Supreme Court's 2006 decision *Hamdan v. Rumsfeld* on conspiracy:

> At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war. Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt.[34]

And here is an excerpt from the Court of Appeals for the D.C. Circuit's 2012 decision on material support for terrorism in *Hamdan II*:

> [][W]hen Hamdan committed the relevant conduct from 1996 to 2001, Section 821 of Title 10 provided that military commissions may try violations of the "law of war." The "law of war" cross-referenced in that statute is the *international* law of

[32] Generally on choice of law, also known as conflicts of law, see DICEY, MORRIS & COLLINS ON THE CONFLICTS OF LAW (Lawrence Collins et al. eds., 14th ed. 2006 & Supp. 2009).

[33] United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* April 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988).

[34] Hamdan v. Rumsfeld, 548 U.S. 557 (2006)(footnotes omitted.)

> war. *See Quirin*, 317 U.S. at 27-30, 35-36. When Hamdan committed the conduct in question, the international law of war proscribed a variety of war crimes, including forms of terrorism. At that time, however, the international law of war did *not* proscribe material support for terrorism as a war crime. Indeed, the Executive Branch acknowledges that the international law of war did not – and still does not – identify material support for terrorism as a war crime. Therefore, the relevant statute at the time of Hamdan's conduct – 10 U.S.C. § 821 – did not proscribe material support for terrorism as a war crime. Because we read the Military Commissions Act not to retroactively punish new crimes, and because material support for terrorism was not a pre-existing war crime under 10 U.S.C. § 821, Hamdan's conviction for material support for terrorism cannot stand. We reverse the judgment of the Court of Military Commission Review and direct that Hamdan's conviction for material support for terrorism be vacated.[35]

The cases above are two examples of the courts applying detailed provisions of customary international law because of the Supreme Court's interpretation that "law of war" in title 10 refers to the international law of war. What these courts have done is open to all courts. Again, according to Henkin:

> International law is law for the United States. As such, it is obligatory upon all whose actions are attributable to the United States under international law: it is binding on Congress, and on the President and the Executive branch: on the states—on state legislatures and state officials, down to the lowest official of city, town or village, on the courts—on the federal courts, from the Supreme Court down to the federal magistrate or administrative judge, and on states courts, from the highest court of appeals to the village magistrate or police court judge. Traditional international law did not ordinarily address the acts of private citizens, but increasingly the law attends to private acts, as in the law against genocide and other gross violations of human rights, on war crimes, on piracy, hijacking and other acts of terrorism, or counterfeiting, even though the law continues to lodge international responsibility for such violations by persons subject to U.S. jurisdiction in the government of the United States. Increasingly, international law requires nation-states to enforce international norms and to punish their violations in national courts.[36]

[35] Hamdan v. USA, 696 F3d 1238 (2012)(footnotes omitted.)
[36] HENKIN, *supra*, at 233.