FULL AND FAIR BY WHAT MEASURE?: IDENTIFYING THE INTERNATIONAL LAW REGULATING MILITARY COMMISSION PROCEDURE

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INTRODUCTION

President Bush's decision to consider the terrorist attacks of September 11, 2001, as an act of war has significant legal ramifications. Endorsed by Congress in the Authorization for the Use of Military Force ("AUMF"),[1] this paradigm shift away from treating terrorism as a crime to treating terrorism as an armed conflict allows the United States to exercise "fundamental incident[s] of waging war."[2] Among these fundamental war powers are the authorities to detain enemy personnel for the duration of hostilities, to subject law of war violators to trials in military tribunals, and to exercise subject matter jurisdiction over the full scope of the law of war, rather than over only those offenses defined in U.S. criminal statutes.[3]

Invocation of the legal advantages of the law of war is not a one-way street, however. Actions justified by that law are bound by it as well.[4] As Justice Kennedy noted in his concurring opinion in *Hamdan v. Rumsfeld* ("*Hamdan III*"), which overruled the initial Guantanamo military commission procedures:

> The Government does not claim to base the charges . . . on a statute; instead it invokes the law of war. That law, as the Court explained in

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[1] Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). The core of this statute authorizes the use of:

> all necessary and appropriate force against those nations, organizations, or persons [the President] 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.

Id. § 2(a).

[2] *See*, *e.g.,* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2083 (2005) (quoting Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640-41 (2004) (plurality opinion)).

[3] *See id.* at 2085 (citing *Hamdi*, 124 S. Ct. at 2640 (plurality opinion)).

[4] *See* Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654-58 (2005).

> *Ex parte Quirin*, derives from "rules and precepts of the law of nations"; it is the body of international law governing armed conflict. If the military commission at issue is illegal under the law of war, then an offender cannot be tried "by the law of war" before that commission.[5]

The transition from treating terrorism as a crime to treating terrorism as an armed conflict poses a unique set of legal challenges. One particularly daunting issue is identifying specifically which rules contained in the myriad of treaties and customary provisions that comprise the corpus juris of the law of war[6] apply to a "war on terror." Traditionally, conflicts have been characterized as either "international" or "non-international," with distinct sets of rules applicable to each. International armed conflicts are fought between nation states, while non-international armed conflicts are contests between a nation state and armed groups seeking independence or regime change within its borders.[7] Combating terrorism, however, has a number of unique characteristics that prevent its inclusion in either category. The Bush Administration seemingly has taken full advantage of these distinctions by re-characterizing terrorism as armed conflict and attempting to avoid the application of international standards to its treatment of detainees.[8]

The conduct of the Guantanamo military commissions prior to *Hamdan III* exemplifies this effort to avoid international law constraints. There is an extensive history of military commission usage to try law of war violations,[9] and in the past, both the U.S. government[10] and tribunal members acknowledged the applicability of international law to their

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[5] Hamdan v. Rumsfeld (*Hamdan III*), 126 S. Ct. 2749, 2802 (2006) (Kennedy, J., concurring in part).

[6] *See, e.g.,* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR (3d ed. 2000), a law of war text compiling treaties and other documents considered to comprise currently effective law, either as binding agreements per se or as declaratory of customary law, together with concise commentary and an index. The third edition runs 765 pages and includes thirty eight separate documents.

[7] *See, e.g.,* Articles 2 and 3 of the Geneva Conventions of August 12, 1949, defining, respectively, the international conflicts in which the Conventions apply and the minimum protections applicable to participants in non-international armed conflict. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 2-3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force with respect to United States of America Feb. 2, 1956).

[8] *See, e.g.,* Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), *available at* http://msnbc.msn.com/id/5025040/site/newsweek/.

[9] *See generally* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (2005).

conduct.[11] In addition, though President Bush mandated that the Guantanamo tribunals provide a "full and fair trial,"[12] observers documented that commissioners essentially made up procedures as the trials proceeded,[13] and that even the presiding officers seemed unable to articulate the legal regimes governing their courts.[14]

The real significance of *Hamdan III* is thus its confirmation that relevant provisions of the law of war apply to the "war on terror" in general, and to military commission governance in particular. The Court held that the Guantanamo commissions violated both the Uniform Code of Military Justice ("UCMJ")[15] and Common Article 3 ("CA3") of the four Geneva Conventions of 1949,[16] but the Court engaged in only rudimentary analysis of the relevant international law issues.[17] Indeed, the Court sidestepped the question of whether the full Conventions were applicable[18] and expressed its critical holding that CA3 applied in a simplistic discussion occupying little more than a single page in a majority opinion that ran forty pages.[19] *Hamdan III* also failed to address whether any international human rights agreements or customary law of war provisions applied to either the "war" itself or to military commission procedure. Nevertheless, it is far from the last word on the subject.

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[10] *See, e.g.*, Brief for the Respondent at 28–29, *Ex parte* Quirin, 317 U.S. 1, *reprinted in* 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 379, 429–30 (1975).

[11] *See* Glazier, *supra* note 9, at 76-78.

[12] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, 920 (2002).

[13] *See, e.g.,* Deborah Pearlstein, Day One: Four Issues of Concern, Aug. 23, 2004, http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day1.

[14] *See* Joshua Pantesco, *Guantanamo Military Judge Unsure of what Laws Govern Detainee Trial*, JURIST, Apr. 4, 2006, http://jurist.law.pitt.edu/paperchase/2006/04/guantanamo-military-judge-unsure-of.php.

[15] The Uniform Code of Military Justice arts. 77-134, 10 U.S.C. §§ 877-934 (2000).

[16] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter Geneva III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

[17] *See Hamdan III*, 126 S. Ct. at 2759, 2779-86, 2793-97.

[18] *Id.* at 2795.

[19] *See id.* at 2795-96. Justice Stevens' opinion for the Court runs from pages 2759-99.

Congress responded to *Hamdan III* by enacting the Military Commissions Act of 2006 ("MCA").[20] By creating a new United States Code chapter specifying, in some detail, military commission procedure, the MCA should resolve the Court's concern that the Guantanamo commissions violated the UCMJ.[21] The MCA also addresses the Court's CA3 concerns, declaring that "[a] military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."[22] The following paragraph then attempts to foreclose reliance on the full Conventions "as a source of rights"[23] for military commission defendants.

Despite this language, as well as additional MCA provisions endeavoring to curtail habeas challenges,[24] further litigation over whether international law rules of war are applicable to military commissions seems inevitable. The MCA itself specifically authorizes appellate review of commission decisions by both the D.C. Circuit Court of Appeals and the Supreme Court.[25] Given *Hamdan*'s highly abbreviated discussion of international law issues and the imprecise standards of CA3, military commission proceedings, on appeal, will likely ask the courts to apply the more rigorous standards embodied in the full Geneva Conventions.[26] Even if the MCA is construed to foreclose further litigation over CA3 or the full Geneva Conventions, there may be room for the potential judicial application of international human rights law ("IHRL") or customary law of war provisions. Regardless, military commission participants themselves could be subject to trial in other forums for the war crime of denying a fair trial if the Guantanamo tribunals fall short of the standards prescribed by international law.[27] Therefore, the importance of identifying the applicable legal standards transcends the question of litigation in U.S. courts.

This article seeks to fill *Hamdan*'s and the MCA's gaps by identifying and evaluating the international law provisions that logically might gov-

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[20] Military Commissions Act of 2006, Pub. L. No. 109-366 (Oct. 17, 2006) (to be codified at 120 Stat. 2600), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:S.+3930:.

[21] *See id.* § 3 (creating Chapter 47A in U.S.C. Title 10 immediately to follow the UCMJ, codified at Chapter 47 of Title 10).

[22] *Id*. § 948b(f).

[23] *Id*. § 948b(g). *See also id.* § 6 (attempting to bar invocation of the Geneva Conventions and the additional protocols in habeas corpus or other civil proceedings to which the United States or U.S. officials are parties).

[24] *Id*. § 948b(g).

[25] *Id*. § 950g.

[26] *See* Geneva I, *supra* note 16; Geneva II, *supra* note 16; Geneva III, *supra* note 16; Geneva IV, *supra* note 16.

[27] *See, e.g.,* David Glazier, Editorial, *Military Commission Act Puts U.S. Troops at Risk of Prosecution*, L.A. DAILY J., Oct. 17, 2006, at 8.

ern military commission procedures in a more systematic manner.[28] First, because the applicability of many law of war provisions, particularly the Geneva Conventions, is facially dependent upon the legal characterization of the armed conflict, Part I will examine the defining characteristics of the current hostilities. Recognizing that the terrorism conflict does not fit particularly well with traditional classifications of either "international" or "non-international" armed conflict, it concludes that this war is instead best defined as "transnational." It will also argue that the Administration's vague and over-inclusive "war on terror" nomenclature should be replaced with the more precise "War Against al Qaeda and the Taliban" ("WAQT").

Part II will consider the potential applicability of law of war provisions contained in treaties binding on the United States, specifically the Third and Fourth Geneva Conventions of 1949. It will consider the arguments both for and against application of the full Conventions, as well as those associated with CA3. While there is considerable basis for finding that the Administration's rejection of the applicability of the full Conventions is supported by the language of the treaties themselves, the case for binding application of CA3 seems weaker than the Court portrayed it in *Hamdan III*. Furthermore, the rather ambiguous language of that article does not lend itself to ready judicial application even though it does have the advantage of being addressed in a current federal criminal statute.

Part III will consider the relationship between binding treaties and international human rights treaties outside the traditional boundaries of the law of war that might nevertheless remain in force during periods of armed conflict.

Finally, Part IV will examine potential customary law of war sources, including language in the Additional Geneva Protocols of 1949,[29] which the United States has not ratified but which could be binding if considered to be declaratory of customary international law. Article 75 of Additional Geneva Protocol I ("Protocol I")[30] should, at the very least, be applicable as a clarifying standard to the WAQT, even given the language of the MCA and the Supreme Court's determination in *Hamdan*

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[28] Although this article, like *Hamdan III*, focuses specifically on military commission procedure, much of the analysis is equally applicable to international norms relevant to other aspects of the war on terror, such as the detention of combatants.

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3-608 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609-99 [hereinafter Protocol II].

[30] Protocol I, *supra* note 29, art. 75.

III that the application of CA3 is mandatory in this conflict.[31] Article 75 provides relatively clear standards by which commission procedures can be judged. Furthermore, CA3 and Article 75 together have sufficient specificity to provide meaningful guidance to those executing and overseeing the conflict. The combination also has "teeth" because the CA3 violations articulated in the MCA remain conventional federal crimes.[32]

I. The Legal Characterization of the War on Terror

The inconsistent and often ambiguous nomenclature used to identify the "war on terror" complicates efforts to determine its proper legal classification. First, "terrorism" literally constitutes a means of warfare, whereas a "war" is a conflict between political entities. It makes no more sense to wage a literal war on "terror" than it would to wage a war on "land warfare" or "submarines" without regard for the political organizations on whose behalf these means of warfare were employed. Putting this semantic conundrum aside, the fundamental issue is identifying both the actual adversary and the geographic scope of the war.

A. *Who is the Enemy in the War on Terror?*

When President Bush first notified Congress of the initiation of hostilities in Afghanistan, in accordance with the requirements of the War Powers Act and the AUMF, he described the operations in fairly straightforward terms as "part of our campaign against terrorism . . . designed to disrupt the use of Afghanistan as a terrorist base of operations."[33] On the six-month anniversary of the 9/11 attacks, however, he spoke publicly of a second expanded phase in the conflict, requiring international cooperation to defeat more ambiguous "terror networks of global reach."[34] By August 2002, as the Administration began to build a

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[31] *Hamdan III*, 126 S. Ct. at 2795-96. Indeed, Justice Stevens and the three others joining his full opinion proposed this solution in *Hamdan III*, but failed to carry a majority. Justice Kennedy, who provided the fifth vote for Justice Stevens' opinion for the Court, thought it unnecessary to reach the issue of Article 75's applicability. *Id.* at 2809 (Kennedy, J. concurring in part).

[32] The War Crimes Act of 1996, as amended in 1997, made any violation of CA3 a federal crime. *See* 18 U.S.C. §§ 2241, 2241(c)(3) (2000). The Military Commissions Act of 2006 amends the War Crimes Act and limits the violations of CA3 which can be prosecuted as federal crimes to nine specific offenses. These include torture, murder, rape, and the taking of hostages. Denial of a fair trial is not included as a violation. Pub. L. No. 109-366, § 6(b) (Oct. 17. 2006) (to be codified at 120 Stat. 2600).

[33] George W. Bush, Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, 2 Pub. papers 1211, 1211-12 (Oct. 9, 2001).

[34] George W. Bush, Remarks on the Six-Month Anniversary of the September 11th Attacks, 1 Pub. papers 374, 376 (Mar. 11, 2002).

case for invading Iraq and deposing Saddam Hussein, Secretary of Defense Donald Rumsfeld spoke of the "global war on terrorism" while standing at the President's side at his Texas ranch.[35] President Bush adopted the "global war" term a month later in a report to Congress updating the status of actions carried out under authority of the AUMF,[36] and several days he later, he added, "[Y]ou can't distinguish between al Qaeda and Saddam Hussein when you talk about the war on terror."[37] In early 2006, there are suggestions that the Administration may be trying to rename the conflict, ambiguously, the "long war,"[38] while a top U.S. general claimed 600,000 U.S. and coalition troops were now in the war, including in that figure military forces in Afghanistan, Iraq, and even the Horn of Africa.[39]

Although the Administration may have sought to blur the distinction between al Qaeda and Iraq as part of its strategy to build political support for the eventual invasion of the latter, from a legal perspective, the two conflicts are quite distinct. The AUMF, providing congressional approval for the war on terror, was clearly limited to "those nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,"[40] or harbored those who did.[41] If the U.S. could have established a clear link between Iraq and the 9/11 attacks, the AUMF language could have authorized U.S. combat operations there. Even while highlighting contacts between al Qaeda and Iraq, however, President Bush chose his words carefully and stopped just short of making definitive claims of direct Iraqi involvement in 9/11. For example, in an October 7, 2002, speech seeking support for war against Iraq, the President said:

> We know that Iraq and the al Qaeda terrorist network share a common enemy – the United States of America. We know that Iraq and al Qaeda have had high-level contacts that go back a decade. Some al Qaeda leaders who fled Afghanistan went to Iraq. These include one very senior al Qaeda leader who received medical treatment in Baghdad this year, and who has been associated with planning for chemical and biological attacks. We've learned that Iraq has trained

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[35] The White House, President Discusses Security and Defense Issues, 2002 W.L. 1924832, *3 (Aug. 21, 2002).

[36] H.R. Doc. No. 107-266, at 1 (2002).

[37] Remarks by President Bush and President Alvaro Uribe of Colombia in Photo Opportunity, 2002 WL 31116550, *2 (Sep. 25, 2002).

[38] Josh White & Ann Scott Tyson, *Rumsfeld Offers Strategies for Current War*, WASH. POST, Feb. 3, 2006, at A8.

[39] Gerry J. Gilmore, *U.S. Not Fighting Alone Against Global Terrorist*, AM. FORCES PRESS SERV., Mar. 17, 2006, *available at* http://www.defenselink.mil/news/Mar2006/20060317_4532.html.

[40] AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

[41] *Id.*

> al Qaeda members in bomb-making and poisons and deadly gases. And we know that after September the 11th, Saddam Hussein's regime gleefully celebrated the terrorist attacks on America.[42]

Ultimately the President sought, and received, separate congressional authorization for the Iraq invasion,[43] so that conflict remains legally distinct from the war on terror even if Administration officials often find it politically expedient to overlook this fact in public discussions.

The most logical definition of the enemy in the war on terror is al Qaeda and the Taliban. The November 2001 presidential directive authorizing the use of military commissions adopted language largely consistent with that of the AUMF, permitting the tribunals to try any individual non-citizen that the President finds reason to believe:

> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) . . . .[44]

Reading this directive together with the more restrictive language of the AUMF suggests that, political rhetoric aside, the government's legal view of the "enemy" in the war on terror consists of al Qaeda and the remnants of the Taliban regime that harbored Osama bin Laden and his al Qaeda training camps from 1996[45] until the U.S. intervention in October, 2001, also known as Operation Enduring Freedom. The enemy could also include individuals who provided support to al Qaeda and could ultimately include other affiliated groups. At this point, however, publicly available information does not seem to identify specifically any other qualifying organizations. Thus, a more accurate description of the conflict than "the war on terror" would be "the War Against al Qaeda and the Taliban" ("WAQT").

B. *Can a War be Fought Against a Non-State Actor?*

The language of both the AUMF and the November 2001 military commission order necessarily raise questions about how the enemy can be legally defined in a modern war. Or, put more directly, is there a basis in international law for the characterization of groups and individuals,

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[42] George W. Bush, Remarks on Iraq, 2002 WL 31244813, *3 (Oct. 7, 2002).

[43] *See, e.g.*, BOB WOODWARD, PLAN OF ATTACK 201-04 (2004).

[44] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 §2(a)(1)(i)-(iii) (2002).

[45] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 63-67 (2004) [hereinafter 9/11 REPORT].

rather than a nation or nations, as the enemy in an armed conflict? Traditionally, war was considered the exclusive province of state actors. In 1762, Jean Jacques Rousseau declared that:

> War is therefore not a concern between man and man but between State and State, in which individuals are only enemies accidentally, not as men, or as citizens, but as soldiers; not as members of a country, but as its defenders. In fine, States can only have other States, and not men, for enemies, because there can be no true relation between things of different natures.[46]

Commentators generally acknowledge that this view had begun to change by the middle of the 19th century as several civil wars resulted in non-state entities receiving at least de facto recognition as belligerents.[47] This change is typically considered to have undergone even more rapid evolution since the middle of the 20th century, as human rights considerations gained significant traction in international law development, and the law of war expanded to incorporate broader international humanitarian perspectives.[48]

Events in the first century of U.S. history make it particularly hard for Americans to argue credibly that official national status is required to be a belligerent. The Founding Fathers clearly expected both sides to follow the law of war in their 18th century revolt against British rule even before the United States' independence had been recognized by foreign powers.[49] The U.S. government later applied these laws during conflicts with Indian tribes to whom it did not accord full sovereign rights.[50] In 1820 the Supreme Court upheld the application of the law of war to a conflict between Spain and the self-proclaimed Venezuelan republic, even though the U.S. government did not recognize the Venezuelan's republic independence.[51] Finally, the seminal event in the codification of the modern law of war was the publication of the Lieber Code, issued to the Union Army as General Orders No. 100 during the Civil War.[52] Drafting the Lieber Code was undertaken to facilitate U.S. compliance with the law of

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[46] J. J. ROUSSEAU, SOCIAL CONTRACT 11 (Charles Frankel ed., Hafner Publishing Co. 1947) (1762).

[47] Eibe H. Riedel, *Recognition of Belligerency*, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 167, 167 (1982).

[48] *See, e.g.*, ROBERTS & GUELFF, *supra* note 6, at 419-20, 481-83.

[49] For example, George Washington clearly believed that he had authority under customary international law, or the "law of nations" as it was commonly called in that era, to execute regular British military personnel for spying on the colonial forces. *See* Glazier, *supra* note 9, at 18-20.

[50] *See, e.g.*, Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV 13, 13-14 (1990).

[51] The Josefa Segunda, 18 U.S. (5 Wheat.) 338, 357-58 (1820).

[52] David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 147, 151-58 (2005).

war, even though the Union never recognized the Confederacy as having any lawful status.[53] By implementing various elements of international conflict rules, such as its blockade of the Confederate coast, the U.S. again established clear precedent that the law of war could be applicable even where one side failed to meet traditional criteria qualifying as a lawful belligerent.[54]

It has become quite popular among pundits to assert that the events of 9/11 "changed everything," implying that the horrific scale of the human casualties and physical destruction on that day provided justification for departures from past practices, whether that might be treating terrorist attacks as acts of war instead of as crimes, or even avoiding legal norms prohibiting torture.[55] This approach is somewhat ironic given that previous terrorist plots against the United States had been intended to cause more harm than the 9/11 attacks achieved;[56] 9/11 was simply better executed. The 1993 World Trade Center bombing was intended to collapse the North Tower onto the South structure, bringing both down immediately.[57] If successful, it would have deprived the occupants of the evacuation time available on 9/11 and resulted in the death of 250,000 people.[58] Yet traditional domestic and international law enforcement agencies and processes apparently proved capable of identifying, apprehending, trying, and convicting the responsible perpetrators, six of whom are now serving sentences amounting to life without possibility of parole.[59]

What *does* make 9/11 different is the demonstrated nature and capabilities of the adversary. Professors Curtis Bradley and Jack Goldsmith note that:

> Despite its novel features, the post-September 11 war on terrorism possesses more characteristics of a traditional war than some commentators have acknowledged. Al Qaeda declared war against the United States and attacked U.S. military and diplomatic facilities numerous times prior to September 11. On the basis of these attacks and related threats, the Clinton Administration concluded in the 1990s—as a prerequisite to participation in efforts to kill Osama bin Laden—that the United States was in an armed conflict with al Qaeda . . . . [T]he al Qaeda network has long sought weapons of

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[53] *Id.*

[54] *See* MARK A. WEITZ, THE CONFEDERACY ON TRIAL 5-7 (2005).

[55] *See, e.g.*, Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 201-205 (2003).

[56] *See generally* RICHARD A. CLARKE, AGAINST ALL ENEMIES (2004).

[57] *See, e.g.*, Russ Baker, *I Am a Terrorist and Proud of It*, THE WEEKEND AUSTRALIAN, Nov. 3, 2001, at M36; Sharon Walsh, *Trade Center Bomber Gets 240 Years in Solitary Confinement*, SOUTH FLORIDA SUN-SENTINEL, Jan. 9, 1998, at 1A.

[58] *See* 9/11 REPORT, *supra* note 45, at 72; Walsh, *supra* note 57.

[59] *See* 9/11 REPORT, *supra* note 45, at 71-72; *see also* Anti-Defamation League, The Joint Terrorism Task Force: The World Trade Center Bombing, http://www.adl.org/learn/jttf/wtcb_jttf.asp (last visited Nov. 11, 2006).

> mass destruction, and has long stated its intention to use them against the United States. Its goals, moreover, are political in nature, unlike typical criminal enterprises. . . .
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> In addition, the AUMF was enacted against an international law backdrop that focuses not on "war," but rather on "armed attacks" and "armed conflicts" – concepts that are not limited to state actors. The United Nations Charter recognizes the right of states to use force in self-defense in response to an "armed attack." The Charter does not specify that the attack must come from another state. . . .[60]

It is these distinctions, not the magnitude of the destruction on September 11th, that logically form the legal justification for engaging in a war on terror.

Historically, failure to extend belligerent status to non-state adversaries does not seem to have been based on a belief that it was legally impermissible to do so but rather on the rational calculus of state actors that it was not in their interest to do so. Until the development of international human rights law in the latter half of the 20th century, international law generally was silent on how governments should act within their own territory in internal matters. By avoiding the invocation of those protections accorded in the law of war, governments were left unfettered by international legal constraints in their response to internal unrest. This concern was reflected during the drafting of post-World War II law of war treaties, as many nations sought to carve out comparatively large areas in which they could respond to internal unrest without invoking international conflict norms, and simultaneously limit the scope of those treaty provisions that would apply to domestic disturbances.[61] The need to accommodate these concerns helped propel the drafting of the second Additional Geneva Protocol of 1977 ("Protocol II"), which applies to victims of non-international armed conflicts. Protocol II is limited to just 15 substantive articles,[62] while, its international counterpart, Protocol I,[63] included more than 80 articles.[64] Furthermore, by the terms of its first article, application of Protocol II is further limited to conflicts between governments and:

> [O]rganized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

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[60] Bradley & Goldsmith, *supra* note 2, at 2068.

[61] *See, e.g.*, ROBERTS & GUELFF, *supra* note 6, at 481-82.

[62] Protocol II, *supra* note 29.

[63] Protocol I, *supra* note 29.

[64] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxix (2005).

> This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[65]

The United States, by contrast, philosophically committed to the rule of law and already constitutionally committed to providing significant legal protections to those it prosecutes for engaging in criminal conduct, has typically sought to avoid fine distinctions in the application of the law of war. Hays Parks, probably the U.S. government's leading expert on, and proponent of, the law of war, has stressed that the key to compliance with the law of war is not technical lawyering or finely grained application of conflict norms but rather the development of a military ethos of respect for the law.[66] This is reflected in the official Department of Defense ("DoD") Directive on the subject, which defines the law of war as:

> That part of international law that regulates the conduct of armed hostilities. It is often called the "law of armed conflict." The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.[67]

The directive then requires that all members of "DoD Components comply with the law of war during all armed conflicts, *however such conflicts are characterized*, and in all other military operations."[68]

Taken together, the weight of this history and practice suggests that there is no legal bar to defining a conflict with a non-state actor as a "war" and invoking the application of law of war provisions to its conduct. The fact that many states often have sought not to do so simply reflects pragmatic self-interested concerns that they had more to gain by avoiding the constraints such an invocation would involve. For the United States today, the situation may be quite different. The size and capability of the al Qaeda organization, its geographic dispersion, and the difficulties inherent in conducting counter-terrorism operations strictly in accordance with domestic and international criminal law all suggest application of the law of war to this conflict may be a rational policy choice. Credible intelligence information in the public domain about the exact composition, strength, and capabilities of al Qaeda is extremely limited, but it seems generally accepted by informed discussants that somewhere between 10,000 and 20,000 persons have received military or terrorist

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[65] Protocol II, *supra* note 29, art. 1, §§ 1-2.

[66] *See* W. Hays Parks, *The United States Military and the Law of War: Inculcating an Ethos*, 69, No. 4 SOC. RES. 981, 981-982 (2002).

[67] Dep't of Def. Directive 2311.01E, para. 3.1 (May 9, 2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/231101_050906/231101p.pdf.

[68] *Id.* para. 4.1 (emphasis added).

training in the group's camps, that the organization has secret cells active in as many as sixty countries around the world, and that it can count on hundreds, if not thousands, of active members to fight on its behalf.[69] It would seem a bit absurd if the United States could engage in a lawful war with Andorra,[70] the Holy See,[71] or Nauru,[72] none of which has anything more than a ceremonial palace guard, simply because they are nation-states, yet could not invoke law of war rights in confronting a transnational organization of al Qaeda's potency. But what would not be logically or legally justified in any type of conflict would be the selective application of perceived benefits of the law of war while disregarding binding provisions because their application might be inconvenient.

C. *What is the Geographic Scope of the Conflict?*

Although the United States military, as a matter of policy, has generally sought to avoid applying these distinctions, the law of war differentiates between those provisions applicable to international wars and the less extensive set of mandatory rules governing internal armed conflicts.[73] United States national leaders thus have clear authority to overrule past American military practices and direct the military to conform only to the international law provisions specifically applicable to the hostilities at hand. Any legal analysis of the law of war that applies to a particular conflict must therefore endeavor to define the conflict's geographic scope in support of determining whether it is properly characterized as internal or not.

While most of the actual military operations to date in the WAQT, as legally defined by the AUMF, have taken place in land-locked Afghani-

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[69] *See,* 9/11 REPORT, *supra* note 45, at 66-67 (summarizing estimates of al Qaeda strength); Robert Windrem, *Osama Bin Laden: FAQ*, MSNBC, Jan. 12, 2004, http://msnbc.msn.com/id/3907198 (last visited Sept. 28, 2006).

[70] *See, e.g.*, CIA, THE WORLD FACTBOOK – ANDORRA, *available at* http://www.cia.gov/cia/publications/factbook/print/an.html.

[71] *See, e.g.*, CIA, THE WORLD FACTBOOK – HOLY SEE (VATICAN CITY), *available at* http://www.cia.gov/cia/publications/factbook/print/vt.html.

[72] *See, e.g.*, CIA, THE WORLD FACTBOOK – NAURU, *available at* http://www.cia.gov/cia/publications/factbook/print/nr.html.

[73] For example, in the Vietnam War, the United States recognized South Vietnam as the only lawful Vietnamese government, yet nevertheless treated the war as an international armed conflict and demanded that North Vietnam act in accordance with the Geneva Conventions, while refusing it diplomatic recognition. *See, e.g.*, GEORGE S. PRUGH, VIETNAM STUDIES LAW AT WAR: VIETNAM 1964-1973, 61-63 (1975). *But see* Lt. Col. Paul E. Kantwill & Maj. Sean Watts, *Hostile Protected Persons, or "Extra-Conventional Persons:" How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L. J. 681, 722-24 (2005) (describing how determining whether a conflict is international or non-international is the necessary first step in an Army judge advocate's law of war analysis).

stan, the scope of the conflict seems necessarily to be substantially broader than the borders of that country. Al Qaeda is known to have been headquartered in Sudan for several years in the early 1990s, and its senior leadership has apparently relocated to rural tribal regions of Pakistan in the wake of the U.S. intervention in Afghanistan.[74] U.S. and coalition navies have conducted a significant maritime interdiction effort on the high seas against the movement of terrorists and their assets.[75] While this operation is certainly not as dramatic, or visible, as the air and ground combat operations drawing world attention, it is nevertheless just as much a belligerent act, and depends on the international law of war for its legitimacy.[76] U.S. combat strikes against individual al Qaeda figures have occurred in several countries outside Afghanistan, including Pakistan and Yemen.[77] At least four of the first ten individuals charged with violations of the law of war and facing a Guantanamo military commission proceeding, alleged bomb-maker Ghassan Abdullah al Sharbi,[78] alleged explosives trainer Sufyian Barhoumi,[79] alleged bomb manual author Jabran Said bin al Qahtani,[80] and alleged Jose Padilla cohort Binyam Ahmed Muhammad,[81] were captured in Pakistan. Although positive confirmation still may be lacking, al Qaeda itself has sought to assert that it, too, is conducting hostilities on a broad geographic scale, claiming involvement in such post-9/11 events as the October 2002 Bali nightclub blasts,[82] the March 2004 Madrid train bombings,[83] and the July 2005

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74 *See* 9/11 REPORT, *supra* note 45, at 62; Windrem, *supra* note 69.

75 *See* Warships IFR Special Correspondents, *Pakistan Steps Up to the Plate*, WARSHIPS INT'L FLEET REV., Feb. 2005, *available at* http://www.warshipsifr.com/terrorism_special15.html.

76 *See* Ondolf Rojahn, *Ships, Visit and Search*, 4 ENCYCLOPEDIA OF PUB. INT'L LAW 409, 409 (1982).

77 The White House, *Record of Achievement – Waging and Winning the War on Terror*, http://www.whitehouse.gov/infocus/achievement/chap1.html (last visited Nov. 13, 2006).

78 Military Commission Charge Sheet, U.S. v. Al Sharbi, *available at* http://www.defenselink.mil/news/Nov2005/d20051104sharbi.pdf.

79 Military Commission Charge Sheet, U.S. v. Barhoumi, *available at* http://www.defenselink.mil/news/Nov2005/d20051104barhoumi.pdf.

80 Military Commission Charge Sheet, U.S. v. Al Qahtani, *available at* http://www.defenselink.mil/news/Nov2005/d20051104qahtani.pdf.

81 Military Commission Charge Sheet, U.S. v. Muhammad, *available at*http://www.defenselink.mil/news/Nov2005/d20051104muhammad.pdf.

82 CNN.com, Al Qaeda Admits Bali Blasts on Web (Nov. 8, 2002), http://archives.cnn.com/2002/WORLD/asiapcf/southeast/11/07/bali.bombings.qaeda (last visited Nov. 13, 2006) (also available on Lexis).

83 *Threat Video in Spain Flat Rubble*, BBC NEWS, Apr. 9, 2004, http://news.bbc.co.uk/2/hi/europe/3613775.stm (last visited Nov. 13, 2006).

London subway attacks.[84]

Although the Administration's use of the phrase "global war on terror" may be intended more for political advantage than legal precision, the facts suggest that the scope of the WAQT, even if not truly "global," must be, by any reasonable definition, much broader than just Afghanistan. Furthermore, al Qaeda and the Taliban clearly are neither domestic groups nor state-like organizations, so the WAQT logically transcends the limits of an internal armed conflict. Because the term "international" is commonly defined as "existing between or among nations,"[85] and also has a specific meaning in the 1949 Geneva Conventions that may not specifically fit the war on terror,[86] the WAQT may more accurately be called a "transnational"[87] conflict. While there may be room for debate as to how much of the "international" armed conflict law of war is binding upon the WAQT, it would be illogical to constrain applicable law to limits established for internal armed conflicts.

II. Application of the Geneva Conventions to the War on al Qaeda and the Taliban

The four Geneva Conventions of 1949[88] are undoubtedly the best known components of the overall corpus juris of the law of war, comprising what the International Committee of the Red Cross ("ICRC") calls the "core of international humanitarian law."[89] For several reasons, the four Geneva Conventions form a logical starting point for any effort to identify potential procedural constraints on the conduct of trials under the law of war. First, their very focus is on the protection of persons who did "not take part in the fighting . . . and those who can no longer fight."[90] Individuals detained by an opposing party in a conflict certainly fall into the latter category. Second, the Geneva Conventions have achieved a universal status unique among modern treaties, having been ratified or

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[84] CNN.com, CIA: Bomber Tape 'Appears Genuine' (Sept. 2, 2005), http://www.cnn.com/2005/WORLD/europe/09/02/london.tape.cia/index.html (last visited Nov. 13, 2006).

[85] Webster's 3d New International Dictionary 1181 (1976).

[86] *See* discussion *infra* Part II.A.2.

[87] *See* Webster's 3d New International Dictionary, *supra* note 85, at 2430 (defining "transnational" as "extending or going beyond national boundaries").

[88] Geneva I, *supra* note 16; Geneva II, *supra* note 16; Geneva III, *supra* note 16; Geneva IV, *supra* note 16.

[89] Int'l Comm. of the Red Cross, The Geneva Conventions: The Core of International Humanitarian Law (Mar. 6, 2004), http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList104/578438309B69EB59C1256EA90026A03C (last visited Nov. 13, 2006).

[90] *Id.*

acceded to by 194 nations,[91] two more than the number of United Nations members.[92]

Third, the application of at least the Third Geneva Convention ("Geneva III"), relating to Prisoners of War ("POWs"), has already been raised as a bar to current U.S. military commission procedures in the Federal District Court for the District of Columbia's decision in *Hamdan v. Rumsfeld* ("*Hamdan I*").[93] Although much less well known or discussed, the Fourth Convention ("Geneva IV"), concerning protections of civilians in war time, is also potentially applicable to the trial of detainees, particularly if the government is correct in denying the detainees the military status that qualifies them for protection under Geneva III.[94]

This part will consider Geneva III and IV, first discussing what impact their application would have on the military commission process and then evaluating the arguments for and against their application. It will also consider the application of CA3, the common article to all four Conventions, which provides a series of minimum guarantees in non-international armed conflicts.[95] The D.C. Circuit Court of Appeals, in a concurring opinion in *Hamdan v. Rumsfeld* ("*Hamdan II*"),[96] advocated application of CA3, and the Supreme Court ultimately endorsed its application upon review of the same case.[97]

A. *The Third Geneva Convention of 1949 on Treatment of Prisoners of War*

Undoubtedly best known for its rule about the information POWs must provide to their captor ("name, rank, serial number," in popular formulation),[98] the Third Geneva Convention consists of 143 articles describing in significant detail both who qualifies for treatment as a prisoner of war and how POWs must be treated. Of note, Article 5 states that "[t]he

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[91] Int'l Comm. Of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 21, 2006), http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList104/578438309B69EB59C1256EA90026A03C (last visited Nov. 13, 2006).

[92] United Nations, List of Member States, http://www.un.org/Overview/unmember.html (last visited Nov. 10, 2006). Two Convention parties, the Cook Islands and the Holy See, are not members of the U.N. *Compare* Int'l Comm. of the Red Cross, States Party to the Main Treaties (Nov. 13, 2006), http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf and United Nations, *supra*.

[93] Hamdan v. Rumsfeld (*Hamdan I*), 344 F. Supp. 2d 152, 173 (D.D.C. 2004).

[94] *See* Kantwill & Watts, *supra* note 73, at 705-06.

[95] *See*, *e.g.*, JEAN DE PREUX, COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 27-44 (A.P. de Heney, trans., Jean S. Pictet, ed. 1960).

[96] Hamdan v. Rumsfeld (*Hamdan II*), 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring).

[97] *Hamdan III*, 126 S. Ct. at 2795.

[98] *See* Geneva III, *supra* note 16, art. 17.

present Convention shall apply to the persons referred to in Article 4 (defining who qualifies as a prisoner of war) from the time they fall into the power of the enemy and until their final release and repatriation."[99] The rules for treatment and protections accorded to prisoners under Geneva III are thus formally dependent upon meeting the specific criteria the treaty establishes for POWs.

1. Provisions relevant to the trial of prisoners of war

While Geneva III permits POWs to be tried either by courts-martial or by civilian courts exercising statutory jurisdiction, it does not permit POWs to be tried by the Guantanamo military commissions, either as they were originally structured or as improved by the MCA. Geneva III provides a very explicit declaration that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power . . . ."[100] Article 84 makes clear that military courts are the expected forums for trying POWs, but that trial by civil courts is permitted for offenses for which the laws of the Detaining Power would expressly permit its own service personnel to be tried.[101] Any court trying a POW must "offer the essential guarantees of independence and impartiality as generally recognized" and must "afford the accused the rights and means of defence provided for in Article 105."[102] Article 105 requirements include the right to representation by counsel of choice, who can freely visit and consult in private with the accused, the right to interview and call witnesses, and "necessary facilities to prepare the defence."[103] Other minimum treaty rights guaranteed to POWs include a requirement that crimes not be defined retroactively,[104] and that prisoners be afforded the same right of appeal as the Detaining Power's service members.[105]

If applicable to those charged in the WAQT, Geneva III would allow detainees to be tried by the federal government by courts-martial, which have jurisdiction over U.S. military personnel for a comprehensive range of criminal offenses, including those offenses unique to the military as well as conventional "common law" crimes.[106] The statutorily mandated procedures followed by courts-martial are detailed in Articles 37 to 54 of the Uniform of Code of Military Justice ("UCMJ")[107] and further ampli-

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[99] *Id.* art. 5.
[100] *Id.* art. 102.
[101] *Id.* art. 84.
[102] *Id.*
[103] *Id.* art. 105.
[104] *Id.* art. 99.
[105] *Id.* art. 106.
[106] The Uniform Code of Military Justice, §§ 877-934.
[107] *Id.* §§ 837-54.

fied in the Manual for Courts-Martial,[108] which is promulgated by the executive branch under authority delegated by Congress.[109] The UCMJ clearly includes within military jurisdiction any "[p]risoners of war in custody of the armed forces."[110] It also includes "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands."[111] The U.S. Naval Station at Guantanamo Bay falls within this definition. Furthermore, UCMJ Article 18 explicitly defines the jurisdiction of general courts-martial as including "jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[112]

Service members may also be tried by any state or federal court that establishes personal and subject matter jurisdiction over them, with UCMJ Article 14 specifically providing that "a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial."[113] Geneva III would thus permit the trial of POWs by these tribunals as well. Given generally strict territorial limits on state criminal jurisdiction, detainees most logically qualify as candidates for trial in regular Article III federal courts. The War Crimes Act of 1996 stops well short of creating universal jurisdiction, but, where either the perpetrator or victim is an American, the War Crimes Act of 1996 does make the commission of grave breaches of the Geneva Convention, as well as certain other law of war violations, federal offenses.[114] (The MCA limits the scope of CA3 violations that are incorporated into the War Crimes Act but it does not alter the treatment of

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[108] JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES (2005).

[109] The Uniform Code of Military Justice, Article 36, which commonly is cited along with Article 21 as congressional authorization for conducting military commission trials, provides that:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

The Uniform Code of Military Justice, § 836.

[110] *Id.* § 802(a)(9).

[111] *Id.* § 802(a)(12).

[112] *Id.* § 818.

[113] *Id.* § 814(a).

[114] 18 U.S.C. § 2441 (2000).

grave breaches of the 1949 Conventions.[115]) Other potentially applicable federal statutes include a number of laws focused specifically on acts of terrorism, such as aircraft piracy.[116]

The current military commissions fail to measure up to Geneva III's requirements because the governing commission directive limits the commissions to trying non-citizens only.[117] Additionally, some departures from courts-martial procedures previously criticized by the courts have now been statutorily authorized by the MCA.[118] The military commissions also fall short of some of Geneva III's specific procedural mandates by not allowing the accused a free choice of counsel and by not providing the same appeals process accorded to U.S. personnel.[119]

A finding that Geneva III applies to the WAQT and that detainees qualify as POWs would be significant for several reasons. First, because the United States has ratified the treaty, it has the force of law, and courts would arguably mandate compliance. (The government argues, however, and the D.C. Circuit agrees, that the treaty does not create privately enforceable rights.[120] Congress endorsed the Administration's view in the MCA,[121] but this is one of the provisions of the new legislation most likely to be challenged in the courts.) Even if the courts refuse to halt the tribunals, the military should want to do so sua sponte if the Conventions apply. Article 130 of Geneva III specifies which acts constitute "grave breaches," including "wilfully [sic] depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention."[122] In addition, Article 129 requires parties to the treaty to enact "legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention" and creates a positive obligation to search for and prosecute

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[115] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b) (Oct. 17, 2006) (to be codified at 120 Stat. 2600).

[116] *See, e.g.*, 49 U.S.C. § 46502 (2000) (criminalizing aircraft piracy); 18 U.S.C. § 32 (2000) (criminalizing actual or attempted destruction of an aircraft).

[117] *See Hamdan I*, 344 F. Supp. 2d at 158.

[118] *See id.* at 160, 166-73 (criticizing various aspects of military commission procedure); *supra* text accompanying notes 21-22. Remaining areas of potential concern about military commissions conducted under the Military Commissions Act of 2006 include admission of hearsay evidence and evidence obtained through coercive interrogation techniques. *See* Military Commissions Act of 2006 §§ 948r, 949a.

[119] *See* Dep't of Def., Military Commission Order No. 1, 5-6, 15 (Aug. 31, 2005) [hereinafter MCO] (regarding the "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism"); Military Commissions Act of 2006 §§ 949c–949g.

[120] *See Hamdan II*, 344 F.3d at 38-40.

[121] Military Commissions Act of 2006 § 948b(g) .

[122] Geneva III, *supra* note 16, art. 130.

violators, "regardless of their nationality, before its own courts."[123] Taken together, these articles suggest that Americans involved with POW trials that fail to meet Geneva III standards could be prosecuted in any country in which they might find themselves. And, of course, under the War Crimes Act of 1996,[124] they can (and under the literal terms of the treaty, must) be prosecuted in U.S. federal courts as well.

An interesting, but purely academic, question at this point is whether POWs can be tried by *any* U.S. military commission. That is, could a commission be structured in such a way that it would comply with Geneva III's mandates even if the current tribunals do not? The original purpose of the military commission was to try American servicemen for common law offenses that fell outside the statutory authority of U.S. courts-martial under the 1806 Articles of War, an early predecessor of the current UCMJ.[125] The court-martial and military commission differed fundamentally in jurisdiction, but not procedure, from the UCMJ's inception during the Mexican War through at least 1942.[126] During the Civil War, customary practice extended military commission jurisdiction to include violations of the law of war.[127] Then in 1862, Congress expanded the Articles of War to permit either courts-martial or military commissions to try servicemen for common law offenses committed during wartime.[128] An 1874 re-promulgation of the Articles deleted the mention of military commissions, however, suggesting that Congress intended for these trials of servicemen be restricted to courts-martial.[129] Although generally overlooked today, three American servicemen were tried by military commission as recently as the Philippine Insurrection of 1899-1902; each case involved a deserter who was charged not with that crime, which was a statutory violation of the Articles of War, but rather with a law of war offense of unlawfully joining the enemy.[130] While the Articles of War were amended in 1913 to permit courts-martial to try law of war violations, in 1916 a "savings clause," which is now UCMJ Article 21, was enacted providing:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders

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123 *Id.* art. 129.

124 18 U.S.C. § 2441 (2000).

125 David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2027-34 (2003).

126 *See* Glazier, *supra* note 9, at 31-58, 66-72.

127 *See id.* at 39, 45-46.

128 An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, § 30, 12 Stat. 731, 736 (1863).

129 *See* Glazier, *supra* note 9, at 45-48.

130 *See id.* at 53-54.

> or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[131]

Without this language, the congressional enactment of statutory court-martial jurisdiction over law of war offenses would have stripped the common law military commission of authority over these crimes because the Constitution gives Congress power over both military justice and punishment of offenses against the law of nations.[132] But, with this language, concurrent military commission jurisdiction is preserved over those offenses for which it traditionally existed. This suggests that U.S. service personnel still could be tried by a military commission, at least by one that has reverted to the historic practice of conformity with courts-martial procedure, where the individuals involved are provided all rights and protections mandated by Congress. Such a commission, unlike the current Guantanamo tribunals, would differ from a court-martial essentially in nomenclature only, and would then have jurisdiction over a POW under a literal reading of Geneva III, Article 102.

2. Geneva III's Applicability to the War on al Qaeda and the Taliban

Despite the theoretical conclusion that a military commission could be convened in such a way as to try a POW lawfully, it is clear that the current commissions do not pass muster because they exclude Americans from their jurisdiction and fail to comport with procedural mandates of both the UCMJ and Geneva III. The critical question thus becomes whether or not Geneva III is applicable to detainees in the WAQT. If it is, as commission defendant Salim Ahmed Hamdan alleged in his habeas challenge,[133] then it would be clear that the Guantanamo trials violate international law.

Determining whether Geneva III is applicable to WAQT detainees requires a two-part analysis. First, are the Geneva Conventions, as a whole, applicable to the WAQT? Second, do the Guantanamo detainees specifically qualify as persons protected under the language of the treaty? The government is obligated to apply the full scope of the Conventions to the detainees only if both of these questions are answered in the affirmative.

The second article of each of the four 1949 Geneva Conventions contains identical language defining the conflicts to which the agreements apply; as a result this text is widely referred to as "Common Article 2" (CA2).[134] While the treaties are generically considered to apply to inter-

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[131] 10 U.S.C. § 821 (2000).

[132] *See* U.S. CONST. art. I, § 8, cls. 10, 14; Glazier, *supra* note 9, at 59-63.

[133] *See* Brief for the Appellee at 31-48, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. Dec. 29, 2004) (No. 04-5393).

[134] *See* Geneva I, *supra* note 16, art. 2; Geneva II, *supra* note 16, art. 2; Geneva III, *supra* note 16, art. 2; Geneva IV, *supra* note 16, art. 2.

national armed conflict, CA2 provides more specific criteria for their application. The article begins by making clear that its provisions apply not only to formally declared wars but to "any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[135] CA2 then goes on to make the Conventions applicable to any military occupation of a Party's territory, and CA2 further enables a nation not a party to the Convention to invoke the Convention's protections by accepting and applying its provisions during the conflict.[136]

Despite this language, which was intended to maximize the Conventions' application, the WAQT situation makes their invocation problematic. As the D.C. Circuit noted in its appellate review of Hamdan's case:

> [A]l Qaeda is not a state and it was not a "High Contracting Party." There is an exception, set forth in the last paragraph of Common Article 2, when one of the "Powers" in a conflict is not a signatory but the other is. Then the signatory nation is bound to adhere to the Convention so long as the opposing Power "accepts and applies the provisions thereof." Even if al Qaeda could be considered a Power, which we doubt, no one claims that al Qaeda has accepted and applied the provisions of the Convention.[137]

While it is difficult to dispute the court's holding factually, the Conventions may still apply under several other rationales. If the conflict with al Qaeda were considered a subset of the conflict with Afghanistan, for example, then the Convention would apply because both the U.S. and Afghanistan are "High Contracting Parties."[138] Hamdan made this argument to the courts, and it carries some weight because he was captured within the boundaries of Afghanistan.[139] The overall conflict with al Qaeda, however, seems to transcend the geographic limits of that state, especially as several other current military commission defendants were captured elsewhere.[140] It thus seems somewhat logically strained to contend that the larger geographic conflict with al Qaeda should be considered a subset of the more constrained fight against Afghanistan's Taliban. It would seem more coherent to assume the converse, that the conflict with the Taliban, who harbored al Qaeda in return for technical and

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[135] Geneva I, *supra* note 16, art. 2; Geneva II, *supra* note 16, art. 2; Geneva III, *supra* note 16, art. 2; Geneva IV, *supra* note 16, art. 2.

[136] Geneva I, *supra* note 16, art. 2; Geneva II, *supra* note 16, art. 2; Geneva III, *supra* note 16, art. 2; Geneva IV, *supra* note 16, art. 2.

[137] *Hamdan II*, 415 F.3d at 41.

[138] *See* Geneva I, *supra* note 16, art. 2; Geneva II, *supra* note 16, art. 2; Geneva III, *supra* note 16, art. 2; Geneva IV, *supra* note 16, art. 2.

[139] Brief for the Appellee, *supra* note 133, at 4, 46-47.

[140] *See* sources cited *supra* notes 78-81.

financial support,[141] was a local subset of the larger conflict against al Qaeda. Despite the traditional conception of "state sponsored terrorism," it could be more accurate to view the Taliban as having been a "terrorism sponsored state."[142]

Alternatively, if the United States were considered an occupying power in Afghanistan, the Conventions would be applicable to actors within the borders because the U.S. presence would be an occupation of the territory of a party to the conflict. The U.S. was clearly an occupier in Iraq under the tenure of the Coalition Provisional Authority there,[143] but the U.S. seems to have avoided achieving this status in Afghanistan by working promptly with the Northern Alliance to establish a new Afghan government under President Hamid Karzai. The ICRC argues that at least Geneva IV applies to any area under de facto military occupation, independent of the establishment of governmental institutions.[144] Geneva III might similarly be applicable, although this would require that POW protections depend not only on the classification of the conflict, and the nationality and military status of the detainee, but also on the place where the POWs were physically captured and detained. This would be a complex and unprecedented approach.

Still, provisions of the Convention could be applicable as customary international law rather than treaty law, which could potentially make the Convention applicable to a broader range of international conflicts than just those specified by CA2. The ICRC's recently completed study on customary international law norms governing armed conflict did not analyze this possibility because the ICRC adopted a methodology focused on state practice rather than on treaty analysis.[145] Also, at the commencement of the study, customary international law status likely seemed irrelevant because the virtually universal ratification of the Conventions insured that they would apply to any conceivable state versus state con-

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[141] *See, e.g.*, 9/11 REPORT, *supra* note 45, at 66-67; James Dunnigan, *Al Qaeda Without Al Qaeda*, STRATEGY PAGE, Oct. 18, 2004, http://www.strategypage.com/dls/articles/2004101822.asp (last visited Nov. 14, 2006); Laura Hayes & Borgna Brunner, *The Taliban*, INFOPLEASE, http://www.infoplease.com/spot/taliban.html (last visited Nov. 14, 2006).

[142] This is not intended to suggest that al Qaeda was the primary financial backer of the Taliban; most sources assign that role to Pakistan. *See, e.g.*, HUMAN RIGHTS WATCH, AFGHANISTAN: CRISIS OF IMPUNITY: THE ROLE OF PAKISTAN, RUSSIA AND IRAN IN FUELING THE CIVIL WAR 23 (2001). This is particularly ironic given the Administration's current identification of Pakistan as a key ally in the war on terror. *See, e.g.*, U.S. Dep't of State's Bureau of Int'l Info. Programs, Pakistan Key Partner in War on Terror, Defense Department Says (Mar. 5, 2006), http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=March&x=20060305120909niremydolem0.7841455, (last visited Nov. 14, 2006).

[143] *See* Glazier, *supra* note 52, at 189-90.

[144] *See* discussion *infra* Part II.B.2.

[145] HENCKAERTS & DOSWALD-BECK, *supra* note 64, at xxx.

flict.[146] But given the current likelihood of continued international conflict between state and non-state actors, the virtually universal ratification of the Geneva Conventions could support its customary international law status and potential application to non-state entities. Nevertheless, predating these efforts, the U.N. Secretary General reported to the Security Council his opinion that the Geneva Conventions had achieved customary law status in 1993.[147]

3. Do WAQT detainees qualify as Prisoners of War under Geneva III?

Even assuming, arguendo, that Geneva III as a whole is applicable to the WAQT under one or more of these rationales, it is still necessary to assess whether the individuals facing military commissions qualify as POWs and would be exempted from such proceedings. Article 4 of the Geneva III identifies six categories of individuals who qualify as POWs (and two other groups who should be treated as such);[148] the first three of these are potentially relevant to the determination of whether al Qaeda and Taliban fighters should merit this status, while the fourth could apply to persons in adjunct roles, such as Hamdan. Article 4A(1) specifies that "[m]embers of the armed forces of a Party to the conflict, as well as members of militia or volunteer corps forming part of such armed forces" shall be POWs if they fall into enemy hands.[149] Article 4A(2) stipulates the same for "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . ."[150] This category is specifically subject to the further caveat that these groups must meet four specific conditions:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.[151]

The final relevant provision of Article 4 establishes POW status for "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."[152]

After receiving legal analyses from the Attorney General, the Departments of Justice and State, and White House counsel, the President deter-

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146 ROBERTS & GUELFF, *supra* note 6, at 196.
147 *Id.*
148 Geneva III, *supra* note 16, art. 4.
149 *Id.* art. 4A(1).
150 *Id.* art. 4A(2).
151 *Id.*
152 *Id.* art. 4A(3).

mined that Geneva III was not applicable to al Qaeda because, "among other reasons, al Qaeda is not a High Contracting Party to Geneva."[153] The President's memorandum then announced that while Geneva III *was* applicable to the conflict with Afghanistan (which was distinguished from the fight against al Qaeda), the Taliban detainees nevertheless failed to qualify for POW status because "[b]ased on the facts supplied by the Department of Defense," they were "unlawful combatants."[154]

While the President historically has received significant judicial deference on matters related to national security and international relations, this blanket determination on the detainees' POW status cannot be the definitive answer for several reasons.

First, tribunals applying customary international law, and particularly the common law of war, must determine for themselves what the applicable rules of law are and what protections, if any, the defendants may claim. This procedure was borne out during the Civil War when a military commission rejected the government's efforts to punish blockade runners, finding that jurisdiction over that offense was limited to *in rem* actions against the seized vessel and that there was no *in personam* criminal jurisdiction over the crew.[155] U.S. Article III courts were called upon to perform similar analyses during the government's efforts to prosecute Confederate privateers as pirates.[156]

Second, a blanket determination of combatant status, which is necessarily fact specific, is both unprecedented and liable to error. For example, even while recognizing the Confederacy to be an unlawful entity, the U.S. government complied with the law of war and treated Confederate military units as lawful combatants.[157] The Lieber Code implicitly demonstrates this point by distinguishing between units that denied quarter and those that accepted surrender.[158] General assumptions made about the

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[153] George W. Bush, Memorandum for the Vice President et al. (Feb. 7, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf. While the memo acknowledged reliance on legal opinions from the Attorney General and Justice Department (but only "facts" from the Department of Defense), other sources, e.g., Kantwill & Watts, *supra* note 73, at 687-701, document the additional participation by the State Department and White House counsel.

[154] Bush, *supra* note 153.

[155] *See, e.g.*, Letter from Judge Advocate L.C. Turner to Inspector General James A. Hardie (June 4, 1864), *in* 7 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II 194–95 (1894).

[156] *See* Weitz, *supra* note 54, at 7.

[157] *See* General Order No. 100, Instructions for the Government of Armies of the United States in the Field, arts. 60, 62, 66 (Apr. 24, 1863), *available at* http://galenet.galegroup.com/servlet/MOML?dd=0&locID=bost84371&d1=19003146000&srchtp=a&c=1&an=19003146000&d2=2&docNum=F3702425902&h2=1&af=RN&d6=2&ste=10&dc=tiPG&stp=Author&d4=0.33&d5=d6&ae=F102425901.

[158] *Id.*

nature of the Taliban (or even al Qaeda for that matter) from "facts"[159] provided early in the conflict may fail to describe accurately the conduct of some groups within those organizations that could still be found to operate in conformance with the law of war. Similarly, in World War II, it would have been a significant injustice to impute the unlawful horrors of the Holocaust and "Rape of Nanjing" to every German and Japanese military unit; of course, no such effort was ever made. Conducting hostilities in a manner violating the law of war constitutes a war crime; a blanket determination that an entire group fails to qualify for POW status because they fight in a manner contrary to the law of war is tantamount to declaring every individual guilty without benefit of any individualized procedure whatsoever.[160]

The burden should be on the government to persuade each individual military commission panel that the accused committed an act during armed conflict that violated international law, and that the perpetrator had no valid claims to belligerent immunity.[161] Decisions from World War II-era war crimes trials consistently held that conformity with national rules was not a defense to charges of depriving detained individuals a fair trial under international law.[162] Therefore, if the President's determination on combatant status proves incorrect, either as a matter of overall legal judgment or because of differing individual circumstances, subordinates relying upon the determination may be liable to punishment for war crimes. And the President's determination is unlikely to receive any significant deference in international prosecution or in foreign political judgments on the validity of U.S. conduct. For all these reasons, it is important to conduct a de novo assessment of POW eligibility.

There are two basic formulations under which members of al Qaeda or the Taliban could be found to qualify for POW status under Article 4 of Geneva III. First, these groups could be considered "armed forces," either of a Party to the conflict[163] or of "a government or an authority not recognized by the Detaining power."[164] Similarly, if al Qaeda is an "armed force," then an individual such as Hamdan, alleged to be a driver for that organization, could qualify under Article 4A(4), which grants POW status to "[p]ersons who accompany the armed forces without actually being members thereof . . . ."[165]

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159 Bush, *supra* note 153.

160 *See* DE PREUX, *supra* note 95, at 414-15.

161 *See* Glazier, *supra* note 9, at 80.

162 *Id*. at 75.

163 Geneva III, *supra* note 16, art. 4A(1) (including militia or volunteer corps assimilated into those armed forces).

164 *Id.* art. 4A(3).

165 *See, e.g*., Reply Brief for the Petitioner at 27, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (Mar. 15, 2006) (No. 05-184).

Alternatively, either al Qaeda or the Taliban could be "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . ."[166] This latter provision then expresses four well-known compliance criteria, including having a responsible commander, having distinctive uniforms or emblems, carrying arms openly, and following the law of war.[167] Neither 4A(1) nor (2) explicitly requires that these forces belong to a Party to the Conventions, instead using the term "Party to the conflict," although Convention ratification may be implied by the capitalization of the word "Party." But 4A(3) does not require that forces belong to a recognized state, so that formulation may apply without Convention participation.

Although the United States never recognized the Taliban or al Qaeda as a legitimate government, the U.S. considers itself lawfully able to conduct belligerency against each of these groups. Logically, this position should make them either "parties" to the conflict, or alternatively, at least "an authority not recognized by the Detaining Power."[168] The key question then becomes whether the Taliban and al Qaeda fighters can qualify as "[m]embers of regular armed forces" of those entities per Geneva III Article 4A(1) or 4A(3), or "[p]ersons who accompany the armed forces" under 4A(4).

A curious feature of Article 4 is that it defines the specific criteria required to qualify for POW status only for members of the less formal groups (militia, volunteer corps, and resistance movements), previously noted as the four requirements set forth in 4A(2)(a)-(d). A structural argument can thus be made that these rules do not apply to members of "armed forces" and that Taliban or al Qaeda fighters need only convince a court or tribunal that they should be considered members of an "armed force" and, therefore, if the conflict qualifies under the Convention in the first place, they must be accorded POW status.

While this interpretation is colorable based on the facial language of the treaty, it is contrary to the history of international law, the law of war in general, and the development of Article 4 in particular. As an examination of the Lieber Code quickly reveals, the modern law of war has long recognized and addressed the need to separate lawful combatants from such elements as "bandits" or "brigands."[169] The Code established, at least implicitly, criteria for lawful military forces, which included being

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166 Geneva III, *supra* note 16, art. 4A(2).

167 *Id.*

168 Geneva III, *supra* note 16, art. 4A(3). This article was drafted based on the experiences of World War II, and was intended to apply to groups such as the Free French under Charles De Gaulle who continued to fight the Germans after the capitulation of the French regime recognized by Germany. DE PREUX, *supra* note 95, at 61-63.

169 *See, e.g.*, Gen. Order No. 100, *supra* note 157, art. 52.

under formal command,[170] wearing of a distinctive uniform,[171] and adhering to basic mandates of the law of war.[172]

The criteria of Article 4A(2) can also be found in other international law sources, such as the definition of "warship." The 1982 U.N. Convention on the Law of the Sea requires that a vessel, to enjoy rights accorded to a "warship," be:

> [A] ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.[173]

Once again, this language provides evidence that having formal status as a member of the "armed forces" under international law is not just a semantic designation but requires conformance with established principles of law. The commentary on Geneva III plainly indicates that the drafters intended this interpretation, noting that it was considered unnecessary for the four criteria of Article 4A(2) to be included in 4A(3) because such conformance was among the "material characteristics" of "regular armed forces."[174]

Despite public perceptions to the contrary, it is not impossible that some elements of al Qaeda comply with these requirements. The common and justified vision of this group—terrorists who deliberately attack civilian targets using civilian objects, such as commercial airliners, as weapons and hide incognito among the civilian population—makes finding general non-compliance with the law of war fairly straightforward. But simply because the government calls the facilities where fighters receive their military training "terrorist camps," for example, does not make them such. It is quite plausible that there is nothing inherently violative of the law of war in the military training the majority of the fighters receive at the camps in general preparation for conflicts such as the Taliban's fight against the Northern Alliance or the defense of Muslim interests in the Balkans. Furthermore, there is some evidence, such as videotape scenes that CNN broadcast about Osama bin Laden in August 2002, showing some members of al Qaeda wearing uniforms and openly carrying arms.[175] It is impossible to tell from these images whether the

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[170] This is implied by a number of articles referring specifically to the responsibilities of military commanders. *See*, *e.g.*, *id*. arts. 3, 44, 140, 155.

[171] *Id*. arts. 63-64, 83.

[172] *See e.g.*, *id*. arts. 14-16, 44.

[173] United Nations Convention on the Law of the Sea art. 29, Dec. 10, 1982, 1833 U.N.T.S. 397.

[174] DE PREUX, *supra* note 95, at 62-63.

[175] *See, e.g.*, Nic Robertson, Tapes Shed New Light on bin Laden's Network, Aug. 19, 2002, http://archives.cnn.com/2002/US/08/18/terror.tape.main/index.html (last

individuals are under responsible command or would fight in accordance with the law of war, but the fact that both al Qaeda leadership and its operational terrorist cells engage in practices undermining their claim to POW status is insufficient foundation to assert that *no* part of the organization, such as forces defending its facilities in Afghanistan, could be so entitled. Likewise, some photos of the Taliban appear to show personnel carrying their arms openly and wearing distinctive military style vests or matching headgear which could qualify as a "distinctive sign recognizable at a distance."[176]

Finally, Article 5 of Geneva III provides that:

> 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.[177]

Given that there is at least a colorable argument that the Geneva Conventions are legally applicable to the conflicts against al Qaeda and the Taliban,[178] and that some fighters or persons accompanying these organizations could be in compliance with the requirements of Article 4, this is likely to be the single provision of Geneva III most likely to apply to the war on terror. Individuals who are captured under circumstances creating ambiguity as to their proper classification and who assert entitlement to POW status should be accorded the opportunity to be heard on this question by a "competent tribunal."[179] The first U.S. court to judge formally Hamdan's military commission challenge agreed with this point; the District Court stayed his trial pending an appearance before an Article 5 tribunal.[180] In response to the government's appeal, the D.C. Circuit allowed the trial to proceed on grounds that the Geneva Conventions did not create individually enforceable rights.[181] Nevertheless, the court considered the possibility that an Army regulation based on Geneva III might mandate such a hearing but ultimately concluded that the military commission itself was a "competent tribunal" before which Hamdan

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visited Nov. 16, 2006). In August 2002, CNN obtained an archive of 64 video tapes relating to al Qaeda. *See* Nic Robertson, Previously Unseen Tape Shows bin Laden's Declaration of War, Aug. 20, 2002, http://archives.cnn.com/2002/US/08/19/terror.tape.main/index.html. CNN.com has archived the tapes and related stories at http://www.cnn.com/SPECIALS/2002/terror.tapes/index.html (last visited Sept. 30, 2006).

176 *See, e.g.*, *id.*

177 Geneva III, *supra* note 16, art. 5.

178 *See* discussion *supra* Part II.A.2.

179 Geneva III, *supra* note 16, art. 5.

180 *Hamdan I*, 344 F. Supp. 2d at 160-65.

181 *Hamdan II*, 415 F.3d at 39.

could make his claim.[182] While this result is disconcerting to those concerned by the overall fairness of the military commission process, it is not without precedent. Recall that Civil War military commissions and Article III courts were required to pass judgment about whether they had proper jurisdiction over the case they were hearing.[183] Furthermore, Article 5 contains no specific requirements as to the composition or procedure of the forum making the determination.[184]

Additional implicit support for this interpretation can now be found in the language of the Additional Protocol I to the Geneva Convention, which covers international armed conflicts.[185] Paragraph 2 of Article 45 of Protocol I says that an individual who has not been granted POW status but is being tried for a wartime offense can assert his claim to be a POW; ideally, but not necessarily, such adjudication should occur before the trial.[186]

The most significant reason to be concerned about the Guantanamo military commissions making such decisions may not be the lawfulness per se of such a result. Rather, it is the fact that the defendants have already been held for four years under conditions comparable to penal imprisonment, which will prove to be significant maltreatment if it is subsequently determined that any defendant qualified for more lenient POW status. Also, there must be concern that coercive interrogation procedures will have resulted in some false admissions upon which subsequent decisions were—and will continue to be—based.

As a practical matter it seems unlikely that either a U.S. military commission or Article III court will find that Geneva III provides procedural protections for detainees in the war on terror. In the event, however, that such a tribunal should hold both that the Geneva Conventions apply to the WAQT and that the detainee before it qualifies under the criteria of Article 4A(1), (2), or (3) as a POW, then it should reach the conclusion that the individual cannot be tried lawfully by the military commissions as they are currently composed.

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[182] *Hamdan II*, 415 F.3d at 43 (quoting Army Regulation 190-8, which includes a provision that "implements international law, both customary and codified, relating to [enemy prisoners of war], [retained personnel], [civilian internees], and [other detainees] which includes those persons held during military operations other than war").

[183] *See* discussion *supra* text accompanying notes 155-56.

[184] Geneva III, *supra* note 16, art. 5.

[185] *See* Protocol I, *supra* note 29, art. 1.

[186] *Id.* art. 45, para. 2.

B. *The Fourth Geneva Convention of 1949 on the Protection of Civilians*

Although often overlooked in the United States,[187] including the President's apparent failure to discuss its application to al Qaeda or the Taliban,[188] the fourth Geneva Convention presented in 1949, Relative to the Protection of Civilian Persons in Time of War, could potentially be applicable to detainees in the WAQT. If the Administration is correct in its determination that al Qaeda and Taliban fighters are not members of regular armed forces or militia qualifying for protection under Geneva III, they could be considered civilians, which would call for the analysis of any protections due them under Geneva IV.

1. Geneva IV Provisions Potentially Impacting Military Commission Procedures

First, it is important to establish that categorizing these individuals as civilians would not deny the government its authority to take protective measures against any potential threats the individuals posed; rather, treating these individuals as civilians would simply impose procedural constraints. Geneva IV actually permits incommunicado detention of an individual "detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power."[189] But Geneva IV also includes several articles addressing fair trial standards, among them:

- Article 67 requires any criminal offenses to have been defined in advance of the conduct proscribed and penalties to be "proportionate the offence."[190]
- Article 68 limits the death penalty to "espionage," "serious acts of sabotage," or "intentional offences which have caused the death of one or more persons."[191]
- Article 71 requires sentencing by "competent courts" after "regular trial," and requires the provision of written notice to the accused, including specification of the penal provisions under which any charge is brought.[192]
- Article 72 guarantees accused defendants the "right to present evidence necessary to their defence," and the right to be assisted by qualified counsel "of their own choice, who shall be able to

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187 *See* Glazier, *supra* note 52, at 188-89.

188 Kantwill & Watts, *supra* note 73, at 705-08.

189 Geneva IV, *supra* note 16, art. 5.

190 *Id.* art. 67.

191 *Id.* art. 68.

192 *Id.* art. 71.

> visit them freely and shall enjoy the necessary facilities for preparing the defence."[193]

While Geneva IV permits trials of detainees by "properly constituted, non-political military courts,"[194] application of the treaty's fair trial provisions would nevertheless make several aspects of the current military commission process highly problematic.

The first problem is the way defendants are being charged. The ten charge sheets made public to date specify crimes, mostly conspiracy, but include no statement whatsoever as to the legal source of these charges.[195] The detailed Department of Defense directive governing the commissions provides that commissions have "jurisdiction over violations of the laws of war and all other offenses triable by military commission."[196] The Department of Defense also issued a supplemental instruction enumerating in some detail charges which may be tried by the commission.[197] The crimes detailed within the document "derive from the law of armed conflict," and, because the document itself is "declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date."[198] The instruction, however, issued over a year after most of the defendants were already in custody, makes no effort to link the charges it defines to any identifiable source of international law or to review prior war crimes trials in an effort to extract potential precedents.[199] Furthermore, some leading legal scholars, as well as the Supreme Court's *Hamdan III* plurality, dispute the notion that the Anglo-American version of conspiracy as an inchoate offense is recognized under international law.[200] Yet that charge is the only one that most of the current military commission defendants face.[201]

A second major complication that Geneva IV would pose for the current military commissions concerns the tribunals' restrictions on choice of counsel, which would seem to violate the Convention's Article 72 standards. The Department of Defense's military commission guidelines make some provision for representation by counsel of choice, but close reading reveals that this "choice" is limited to military officers deter-

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193 *Id.* art. 72.

194 *Id.* art. 66.

195 *See* sources cited *supra* notes 78-81.

196 MCO, *supra* note 119, para. 3B.

197 Dep't of Def., Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, Apr. 30, 2003.

198 *Id.* para 3A.

199 *See, e.g.*, *id.* para. 4.

200 *See Hamdan III*, 126 S. Ct. at 2779-85; *see, e.g.*, Brief for the Petitioner at 27-30, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184); Brief for Specialists in Conspiracy and International Law as Amicus Curiae Supporting Petitioner at 6-13, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184).

201 *See* sources cited *supra* notes 78-81.

mined to be "available" by the government or U.S. citizens who must be both eligible for a government security clearance and willing to sign an agreement to comply with whatever rules the government makes.[202] Practically, this severely restricts the available pool from which a defendant can choose counsel, gives the government effective veto authority, and denies the accused the opportunity to be represented by counsel of his own nationality, a benefit permitted by virtually every previous war crimes trial to date. Both defense team members and outside observers have raised a number of issues concerning the serious impact various other commission rules have had on the ability of defense counsel to prepare a proper defense.[203]

2. Applicability of Geneva IV to the War on Terror

The government's efforts to deny classifying the identified enemy in the war on terror as military or militia forces under Geneva III might call for their treatment as civilians. However, there are several reasons why application of Geneva IV to these individuals is facially unlikely.

First, Geneva IV shares Common Article 2 with Geneva III, thus restricting its applicability to international armed conflicts. It must therefore overcome the same initial hurdles as Geneva III in defining the conflict before it can be found to apply.[204]

Second, even if this issue can be overcome, Geneva IV protections relating to fair trial standards apparently did not anticipate the possibility of civilians being taken to a third country by a belligerent, probably because the Convention forbids an occupying power from doing so.[205] The protections, consequently, are specifically written to apply only to trials in "occupied territories"[206] or in the actual "national territory of the Detaining Power."[207] While the transfer of detainees to Cuba is contrary to the spirit of the Convention, it is less clear whether these transfers constitute actual breaches of the agreement. In fact, the United States structured its operations in concert with the indigenous Northern Alliance and rapidly installed a native government under President Karzai, suggesting the U.S. plausibly may claim that it was never an occupying power. The ICRC, however, asserts that Geneva IV's protections apply whenever a nation's forces exercise de facto control over any portion of a

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[202] MCO, *supra* note 119, para. 4C(3).

[203] *See, e.g.,* Human Rights Watch, Briefing Paper on U.S. Military Commission (June 25, 2003), *available at* http://hrw.org/backgrounder/usa/military-commissions.pdf.

[204] *See* discussion *supra* Part A.2.

[205] *See* Geneva IV, *supra* note 16, art. 49.

[206] *See id.* arts. 47-78.

[207] *See id.* art. 126 ("The provisions of Articles 71 to 76 inclusive shall apply, by analogy, to proceedings against internees who are in the national territory of the Detaining Power.").

foreign territory.[208] Thus, the U.S. may have been an occupying force in parts of Afghanistan it did control, such as Bagram air base.[209] This latter interpretation would mandate Geneva IV's application to those parts of Afghanistan and render the removal of individuals from there to Guantanamo a grave breach of the treaty and a federal crime under the War Crimes Act.[210] However, a literal reading of the treaty language specifically applying fair trial standards to occupied territories[211] still facially excludes its application to events at the leased U.S. naval station in Guantanamo Bay, unless a court should hold it to constitute "national territory" of the United States.[212]

Finally, Geneva IV protections for civilians explicitly extend to those civilians qualifying as "protected persons" under the terms of the treaty's Article 4 (just as Geneva III provisions apply to persons qualifying as POWs under Article 4 of that convention).[213] While the language of Geneva IV's Article 4 is a bit convoluted, the official Commentary explains that the treaty essentially protects two classes of persons: (1) enemy nationals in the territory of a party to the conflict; and (2) anyone not a national of the occupying power in territory under foreign military occupation.[214] The Guantanamo trials may not fit under the second category because the base does not legally qualify as a territory under military occupation. If a military commission defendant, however, can show that he has been removed from parts of Afghanistan under de facto U.S. control, then the defendant could assert that courts should not allow a nation to avoid Geneva IV's mandates via the unlawful transfer of a detainee from those areas. With respect to the first category described in the Commentary, it is possible to reach a finding that Guantanamo, although leased from Cuba, is de facto U.S. territory—the Supreme Court found something close to this in its decision in *Rasul v. Bush*.[215]

The greater challenge in finding that Geneva IV applies is that the enemy in the conflict as defined to date, al Qaeda and the Taliban, are groups, rather than nations per se. Geneva IV, focusing on the concept

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[208] *See* Int'l. Comm. of the Red Cross, Current Challenges to the Law of Occupation (Nov. 21, 2005), http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/occupation-statement-211105?opendocument (last visited Nov. 16, 2006).

[209] *See id.* The U.S. government acknowledged it still had control over Bagram in its 2004 brief to the Supreme Court in the detainee habeas cases. Brief for the Respondents at 44, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

[210] *See* 18 U.S.C. § 2441 (2000).

[211] *See, e.g.*, Geneva IV, *supra* note 16, arts. 67, 68, 71, 72.

[212] *See id.* art. 126.

[213] *See* discussion *supra* Part II.A.3.

[214] OSCAR M. UHLER ET AL., COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 45-46 (1958).

[215] Rasul v. Bush, 542 U.S. 466, 480-84 (2004) ("[T]he United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base . . . .") (internal quotes omitted).

of international belligerents as nation-states, excludes from the category of protected persons those who are nationals of states with "normal diplomatic representation in the State in whose hands they are."[216] The first ten persons facing military commission charges[217] include an Afghan,[218] an Algerian,[219] an Australian,[220] a Canadian,[221] an Ethiopian,[222] two Saudis,[223] a Sudanese,[224] and two Yemenis,[225] all nations with which the United States currently has normal diplomatic relations. Therefore, according to the letter of Geneva IV, these individuals cannot qualify as protected persons under the treaty, and its mandates are inapplicable to their trials if the basis for Geneva IV's application would have been their presence in U.S. territory.[226]

C. *Common Article 3 to the Geneva Conventions of 1949*

The difficulties in finding that the Geneva Conventions as a whole apply to the WAQT because of CA2's specific definition of international armed conflict gives traction to the idea that Common Article 3, addressing non-international armed conflict, should apply instead.[227] The implicit rationale is that CA2 and CA3 are essentially all inclusive—hostilities failing to meet CA2's definition of international armed conflict should default to being non-international and covered by CA3. This

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[216] *See* Geneva IV, *supra* note 16, art. 4.

[217] *See* sources cited *supra* notes 78-81.

[218] *See* Will Dunham, *US Brings Charges Against 10th Guantanamo Prisoner*, REUTERS NEWS, Jan. 20, 2006.

[219] *See* sources cited *supra* notes 78-81.

[220] *See* CNN.com, Tribunal Developing More Gitmo Cases (Aug. 27, 2004), http://www.cnn.com/2004/LAW/08/27/gitmo.hearings/index.html.

[221] *See* Neil A. Lewis, *Canadian Was Abused at Guantanamo, Lawyers Say*, N.Y. TIMES, Feb. 10, 2005, at A4.

[222] *See* CNN.com, Pentagon IDs Suspected Terror Accomplice (Dec. 10, 2005), http://www.cnn.com/2005/LAW/12/09/padilla.accomplice (last visited Sept. 24, 2006).

[223] *See* sources cited *supra* notes 78-81.

[224] *See* CBS News, Ibrahim Ahmed Mahmoud al Qosi, http://www.cbsnews.com/elements/2004/08/24/in_depth_us/whoswho638066_0_2_person.shtml (last visited Sept. 24, 2006).

[225] *See* CNN.com, *supra* note 220; CNN.com, Al Qaeda Man Faces Tribunal (Aug. 26, 2004), http://www.cnn.com/2004/LAW/08/26/gitmo.hearings/index.html.

[226] Since the United States never recognized the Taliban, it is likely that Afghanistan did not have a recognized government at the time of the U.S. intervention in November 2001, and thus, Afghan nationals would qualify as protected persons in the interim until the Karzai government received formal recognition. Transfers of such individuals out of the country from areas under de facto U.S. control would thus be "grave breaches" of Geneva IV. *See* Geneva IV, *supra* note 16, art. 147. If any of these individuals were subsequently executed as a result of a military commission sentence, it would arguably make those U.S. officials involved in the transfer liable to capital punishment under the War Crimes Act.

[227] *See, e.g.*, *Hamdan II*, 415 F.3d at 44 (Williams, J., concurring).

approach has now borne fruit with the Supreme Court's holding in *Hamdan III* that CA3 does in fact apply.[228] Justice Stevens' opinion rather sparsely explains that "international" should be read literally to mean "between nations" so that any conflict involving a non-state actor, whether a traditional rebel group or a transnational organization such as al Qaeda, should be included within the article's protections.[229] While this view is certainly consistent with the underlying purposes of the Article, it nevertheless seems hard to reconcile with the facial language.

1. Common Article 3 Provisions Potentially Impacting Military Commissions

CA3 was developed based on the ICRC's long-standing concerns that efforts were required to mitigate the human costs of civil wars and international armed conflicts.[230] It is essentially a stand-alone provision, or "Convention in miniature," intended to provide a minimum set of humanitarian guidelines applicable to non-international armed conflicts which necessarily fall outside the scope of the full Geneva accords.[231]

Consisting of just 263 words, CA3 endeavors to provide a concise set of measures to minimize the human toll of "armed conflict not of an international character."[232] Among its provisions are protections for persons who have surrendered or been disabled (or "*hors de combat*"), such as prohibitions on doing them violence or committing "outrages upon personal dignity, in particular, humiliating and degrading treatment."[233] The provision of most direct relevance to military commissions specifically forbids "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[234] The final sentence of CA3 states, "[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict."[235]

This last sentence was particularly important in gaining international agreement to CA3.[236] As the U.S. experience from the Civil War high-

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[228] *Hamdan III*, 126 S. Ct. at 2795-96.

[229] *Id.*

[230] UHLER, *supra* note 214, at 26-30.

[231] *Id.* at 34.

[232] *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art. 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art. 3.

[233] *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art. 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art. 3.

[234] *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art. 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art. 3.

[235] *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art. 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art. 3.

[236] *See, e.g.*, UHLER, *supra* note 214, at 43-44.

lights, nations invariably consider internal armed opposition as constituting criminal conduct and reserve the right to prosecute those responsible under domestic law. This provision acknowledges that international law protections can be extended to those caught up in such conflicts without altering the legal nature of the conflict itself, thus permitting the criminal prosecution of those responsible, as well as any individual combatants who might have violated the laws of war in carrying out hostilities.[237] This approach seems suited to the WAQT, where the U.S. seeks application of law of war principles, such as the authority to employ military force against terrorists and to detain individuals for the duration of hostilities, but also clearly wishes to hold al Qaeda leaders and those committing acts of terror criminally accountable for their conduct. If CA3 applies, however, any such trials should be subject to the Common Article's "regularly constituted" and "indispensable" "judicial guarantees" provisions, and there is a reasonable basis for belief these requirements could invalidate the current military commissions.[238] As Hamdan's defense team argued to the Supreme Court in suggesting that CA3 apply as an alternative to the full Geneva III:

> The commission clearly does not comply [ ] because it is not a "regularly constituted court." As the ICRC's definitive recent work explains, a "court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country." The "court must be able to perform its functions independently of any other branch of the government, especially the executive."
>
> Instead, the commission is an *ad hoc* tribunal fatally compromised by command influence, lack of independence and impartiality, and lack of competence to adjudicate the complex issues of domestic and international law. The rules for trial change arbitrarily—and even changed after the Petition for Certiorari was filed. It is not regularly constituted; its defects cannot be cured without a complete structural overhaul and fixed rules.[239]

De facto restrictions on the defendant's ability to employ counsel of choice, denial of the right to be present (unless excluded due to personal misconduct during the trial), and the right to hear all evidence against him are all aspects of the initial commission process that could be deprivations of the indispensable judicial guarantees mandated by CA3.[240] The Supreme Court majority in *Hamdan III* did not reach this issue, however. The Court simply concluded that the court-martial was a "regularly

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[237] *Id.*

[238] *See* Geneva I, *supra* note 16, art. 3(1)(d); Geneva II, *supra* note 16, art. 3(1)(d); Geneva III, *supra* note 16, art. 3(1)(d); Geneva IV, *supra* note 16, art. 3(1)(d).

[239] Brief for the Petitioner, *supra* note 2010, at 48 (citations omitted) (quoting HENCKAERTS & BECK, *supra* note 64, at 355-56).

[240] *See, e.g.*, HENCKAERTS & BECK, *supra* note 64, at 360-61, 366-67.

constituted" military tribunal and that, to be valid, a military commission must either conform to court-martial procedure or there must be "some practical need" that explains any deviation from such practice.[241] Since the Administration has not justified the need for any such deviation, the Court held, the current commissions violate CA3's mandates.[242]

2. Application of Common Article 3 to the War Against al Qaeda and the Taliban

Although ignored by the Supreme Court in *Hamdan III*, there is a significant problem with the application of CA3 to the WAQT, just as there is with CA2 governing the application of the full Geneva Conventions. CA3 specifically defines non-international armed conflicts as "occurring in the territory of ONE of the High Contracting Parties."[243] While a significant portion, if not the majority, of the WAQT as contested to date has taken place in Afghanistan, the territory of "one" of the Geneva Convention Parties, the overall scope of the conflict is necessarily much broader, particularly because what is left of the al Qaeda leadership is considered to have fled that nation. This fact could be sufficient to support a holding that CA3 also fails to apply to the WAQT.

Further rationalization against CA3's application can be found by implication in the language of Protocol 1, Article 1, Section 2, which begins, "[i]n cases not covered by this Protocol or by other international agreements . . . ."[244] If the correct interpretation is that CA2 and CA3 together covered the full scope of armed conflict, then there would be no "cases not covered by this Protocol or by other international agreements" to which this article refers. Therefore, Article 1, Section 2's inclusion in Protocol I may indicate that the ICRC and the nations participating in the conferences that produced the supplemental 1977 accords recognized that CA2 and CA3 were not all-inclusive, suggesting again that the literal reading of CA3's applicability is correct.

Although not a per se legal argument against its application, as a practical matter and unless no other specific guidelines can be realistically applied, the difficulty of judicial application of CA3 standards should counsel against holding it to be the definitive international law standard governing military commission procedures. It will be particularly difficult for military commission participants, working in an understaffed Guantanamo facility several hours' flight away from the nearest law library, to determine for themselves exactly what comprises "a regularly constituted court affording all the judicial guarantees which are recognized as indis-

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241 *Hamdan III*, 126 S. Ct. at 2797.

242 *Id.* at 2797-98.

243 *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art. 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art. 3 (emphasis added).

244 Protocol I, *supra* note 29, art. 1, § 2.

pensable by civilized peoples."[245] Do international standards in existence when the Conventions were drafted in 1949 apply, or is this an area, similar to Eighth Amendment jurisprudence, where "evolving" standards apply? Which of the many subsequent international human rights agreements provide relevant evidence of minimum judicial standards? Must these standards be of worldwide applicability or are regional agreements at least evidentiary of such norms? Which foreign statutes and court decisions are relevant, and how much persuasive weight should they be given?

Congress purported to answer these questions through a unilateral declaration in the MCA that military commissions conforming to the statute met CA3's "regularly constituted" requirement.[246] It is far from certain, however, that federal courts reviewing military commission trials will cede definitive treaty interpretation authority to the political branches. Moreover, it behooves commission participants themselves to ensure that their tribunals conform to international law itself, not merely the congressional interpretation of that law. The failure to provide a fair trial is clearly established as a war crime,[247] and, under international law, compliance with national law is not a defense.[248] So *if* CA3 is the applicable international standard, the commissions need to conform to CA3 and not just to the MCA.

Given that there are significant issues calling into question the applicability of Geneva III, Geneva IV, and Common Article 3 as the definitive international law standard by which military commission procedures may be judged, it is appropriate to examine other potential legal sources. Although the Geneva Conventions were updated through two Additional Protocols in 1977,[249] the United States has not ratified either, although it has recognized that many provisions are now declaratory of customary international law. Since treaty rules lend themselves to more ready application than customary norms, Part III will examine potentially binding international human rights accords before Part IV turns to consider customary law of war sources, including potentially relevant provisions of the two Additional Protocols.

III. International Human Rights Law

The Geneva Conventions of 1949 were adopted in an era of transition in international law. Before World War II, international rules generally

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[245] *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art. 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art. 3.

[246] Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b(f) (Oct. 17, 2006) (to be codified at 120 Stat. 2600).

[247] *See, e.g*, Yoram Dinstein, The Conduct of Hostilities Under the International Law of Armed Conflict 230 (2004).

[248] *Id.* at 250.

[249] Protocol I, *supra* note 29; Protocol II, *supra* note 29.

dealt with rights and obligations of states, with little emphasis on the treatment of individuals, particularly within a state's own territory. In 1945, however, the United Nations charter identified one of the fundamental purposes of that organization as "encouraging respect for human rights and for fundamental freedoms,"[250] laying the foundation for modern international human rights law ("IHRL"). Although IHRL is mentioned only in passing in a single *Hamdan III* footnote,[251] its application to military commissions must be considered in any comprehensive approach to the issue.

A. *Early Developments in International Human Rights Law*

At the time the Geneva Conventions were adopted the only significant IHRL development that had taken place since the 1945 U.N. Charter was the General Assembly's 1948 adoption of the Universal Declaration of Human Rights ("UDHR").[252] The UDHR included among its provisions several fair trial standards, including a call for "[e]veryone" to receive a public trial with "all the guarantees necessary for his defence"[253] by "an independent and impartial tribunal."[254] The UDHR further required that individuals have "an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[255]

These provisions pose problems for the military commission trials at several levels. At the top of this hierarchy of problems are U.S. constitutional challenges to the commissions based on separation of powers issues,[256] which implicitly invoke definitions of independence at the most macro level. More pragmatically, the multiple roles of the Department of Defense Appointing Authority, as established in the Military Commission Order, strain any plausible definition of "independence."[257] These roles include promulgating commission rules,[258] selecting trial members,[259] having the final say on charges[260] and interlocutory decisions impacting those charges,[261] participating in post-trial review,[262] and exercising gen-

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[250] U.N. Charter art. 1, para. 3.

[251] *See Hamdan III*, 126 S. Ct. at 2797 n.66.

[252] G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

[253] *Id*. art. 11.

[254] *Id*. art. 10.

[255] *Id*. art. 8.

[256] *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

[257] *See* MCO, *supra* note 119 (detailing Appointing Authority role in various facets of military commission organization and procedure).

[258] *Id.* para. 7A.

[259] *Id.* para. 4.

[260] *Id.* para. 6A.

[261] *Id.* para. 4.

eral oversight of the entire process.[263] While the MCA offers the potential for significant improvement in these areas, it still grants considerable latitude to the Secretary of Defense to promulgate detailed rules, and it remains to be seen how many of these conflicts will be favorably resolved in the ultimate regulations.[264] MCA provisions purporting to deny suits based on the Geneva Conventions[265] and restricting habeas challenges[266] may well be held to violate the UDHR's mandate for effective remedies in national courts.

It seems unlikely, however, that military commission participants or U.S. courts would invoke the UDHR as a binding limitation on their procedure. Enacted as a General Assembly Resolution, the UDHR falls outside the scope of the General Assembly's power to bind member states (e.g., U.N. budget matters and other internal U.N. functioning are similarly outside the General Assembly's power to bind).[267] The Declaration itself is cast in aspiring rather than normative terms, calling on nations to "strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance. . . ."[268] Some scholars suggest that the UDHR may now constitute customary international law, but most scholars seem to qualify this possibility because the Declaration was intended to be enforced through subsequent agreements and legislation.[269]

Given the aspirational status of the UDHR, the individual protections accorded in the four 1949 Geneva Conventions, commonly termed "international humanitarian law," ("IHL"), are essentially the first "rights" internationally codified in binding agreements in the United Nations era. Thus, IHL may be considered a subset of both the law of war and of IHRL.

IHRL itself has undergone dramatic expansion since the adoption of the UDHR. Currently, this field consists of at least thirty conventions in force or open for signature, with more than twenty-five supplementary or

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[262] *Id.* para. 6H.

[263] *See id.*

[264] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948j, 949a (Oct. 17, 2006) (to be codified at 120 Stat. 2600) (authorizing the Secretary of Defense to establish procedures for the appointment of commission judges, and to promulgate procedural rules for the commissions).

[265] *See id*. § 948b(g).

[266] *See id.* § 7.

[267] *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 378 (7th rev. ed. 1997) ("[A]s regards . . . questions of human rights[ ], the General Assembly has no power to take binding decisions, nor does it have the power to take enforcement action; it can only make recommendations.").

[268] UDHR, *supra* note 252, pmbl.

[269] *See, e.g.*, MALANCZUK, *supra* note 267, at 213.

optional protocols.[270] Despite these large numbers, however, virtually none of these agreements apply to U.S. conduct in the war on terror. Some of these international agreements are regional accords from which the United States is excluded, such as the five conventions and sixteen protocols limited in their application, by definition, to Europe and Africa.[271] The one regional agreement that could apply to the U.S. is the American Convention on Human Rights,[272] but because neither the United States nor Cuba is a party to this accord there seems to be no jurisdictional basis for its application to the Guantanamo commissions.[273] Other IHRL agreements are either not yet in force or the United States has elected not to join them,[274] and most of those that are binding are simply irrelevant to the issue of military tribunals. The single treaty that is logically relevant in terms of both subject matter and U.S. ratification is the International Covenant on Civil and Political Rights ("ICCPR"),[275] which, coincidently, is one of two treaties specifically intended to give binding force worldwide to the principles articulated in the UDHR.[276]

B. *The International Covenant on Civil and Political Rights and the WAQT*

Completed in December 1966, the ICCPR entered into force in 1976.[277] The United States subsequently signed the agreement in October 1977 and ratified it in June 1992.[278] Article 9 of the agreement includes several provisions related to criminal justice, including a prohibition against arbitrary arrest,[279] a requirement that an arrested person be

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[270] *See, e.g.*, University of Minnesota Human Rights Library, International Human Rights Instruments, http://www1.umn.edu/humanrts/instree/ainstls1.htm (last visited Nov. 16, 2006). These numbers do not include agreements classified as Law of Armed Conflict, Terrorism, or U.N. Activities in the database.

[271] *See id*.

[272] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

[273] Inter-American Commission on Human Rights, American Convention on Human Rights Signatures and Current Status of Ratifications, http://www.cidh.org/Basicos/basic4.htm (last visited Sept. 22, 2006). The United States has signed but not ratified the Convention.

[274] The Minnesota database page on U.S. participation indicates that the U.S. has ratified only six of these treaties and another four protocols. *See* University of Minnesota Human Rights Library, Ratification of International Human Rights Treaties – USA, http://www1.umn.edu/humanrts/research/ratification-USA.html (last visited Nov. 16, 2006) [hereinafter U.S. Human Rights].

[275] The International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 383, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

[276] MALANCZUK, *supra* note 267, at 215. The other treaty is the International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[277] MALANCZUK, *supra* note 267, at 215.

[278] U.S. Human Rights, *supra* note 274.

[279] ICCPR, *supra* note 275, art. 9, § 1.

"promptly informed of any charges against him,"[280] and a right to a prompt appearance before a judicial official and "trial within a reasonable time."[281] Article 14, in which the United States played a leading role drafting,[282] contains specific provisions governing fair trials:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society . . . .
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (g) Not to be compelled to testify against himself or to confess guilt.[283]

As previously noted, the current Guantanamo military commissions may fall short of several of these Article 14 requirements, including independence of the tribunal, adequacy of defense facilities, and the right to

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[280] *Id.* art. 9, § 2.

[281] *Id.* art. 9, § 3.

[282] AMERICAN BAR ASSOCIATION, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS LEGAL IMPLEMENTATION INDEX 24 (2003), *available at* http://www.abanet.org/ceeli/publications/iccpr_index.pdf [hereinafter ABA ICCPR].

[283] ICCPR, *supra* note 275, art. 14, §§ 1-3.

counsel of choice.[284] Additionally, the commission processes fall short of the ICCPR requirement that trials take place "without undue delay."[285] Since no defendant has been tried as of August 2006, even though some have been in captivity almost five years, it is difficult to demonstrate compliance with the speedy trial mandate by any reasonable definition.

The obvious question, then, is whether the ICCPR, an international human rights instrument, is applicable to U.S. conduct in the WAQT. The question is not necessarily a novel one. The International Court of Justice already addressed the issue in an advisory opinion, and it held that the ICCPR generally remains effective in times of war.[286] The opinion acknowledged the concept of *lex specialis*—specific legal provisions supersede general legal provisions—and the Court thus decided that the ICCPR would have to be interpreted in a manner consistent with the law of war.[287] This should mean, for example, that Geneva Convention standards, as specialized law of war provisions, inform the application of the ICCPR to armed conflict and that trials conforming to Geneva III rules would likely be found adequate in wartime. Since both Canada's highest court and the European Court of Human Rights ("ECHR") have held that Anglo-American style courts-martial fail to qualify as "independent and impartial,"[288] this could be particularly important for the United States.[289] The Canadian decision was based on Canada's 1982 Charter of Rights and Freedoms,[290] and the ECHR based its decision on the Euro-

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[284] *See* discussion, *supra* Part II.B.1.

[285] ICCPR, *supra* note 275, art. 14, § 3(c).

[286] *See, e.g.*, David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L 171, 185-86 (citing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226).

[287] *Id.*

[288] ICCPR, *supra* note 275, art. 14, § 1.

[289] The Canadian decision, R. v. Généreux, [1992] 1 S.C.R. 259 (Can.), was based on language in article 11(d) of the Canadian Charter of Rights and Freedom, which uses the same "independent and impartial" wording of the UDHR and ICCPR. *See id.* at 295. The problems the Canadian court found with respect to courts-martial that are relevant to the military commissions include appointment of the presiding officer (or judge) by an official given supervisory responsibility over military justice, lack of fixed term for the judge, and trial panel appointment by the individual convening the court. *Id.* at 300-10. Because British services, unlike those of the United States, retain separate military justice statutes, the ECHR has actually heard a series of cases on this issue. The seminal decision was Findlay v. United Kingdom, App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997) (Commission Report), which held in part that allowing the same individual (the convening authority) to make the decision to prosecute, appoint the court, and review the trial results fatally compromised the "independence" of the tribunal, violating article 6 of the European Convention on Human Rights. *Id.* at 245-46.

[290] *See Généreux*, 1 S.C.R. at 294-310.

pean Convention on Human Rights.[291] Neither document is directly applicable to the United States, but both documents adopt the "independent and impartial" language originating in the UDHR[292] and later incorporated in the ICCPR, to which the United States is a party.

The "independent and impartial" terminology also appears in Geneva III, Article 84, which governs the limited situations in which POWs can be subject to civil, rather than military trial.[293] A literal reading of the article could apply these criteria to courts-martial for POWs, as well. However, the history of Geneva III reveals the drafters' strong desire to mandate that POWs and service personnel receive the same legal treatment, in contravention to WWII-era practice[294] and the U.S. Supreme Court's *ex parte* decision in *In re Yamashita*[295] sanctioning a lower standard for trials of enemy prisoners. Given this dynamic, it seems unlikely that any tribunal should or would read "independent and impartial" in Article 84 to require a higher standard of treatment for enemy detainees than for American soldiers.

The ICCPR does, however, differ from Geneva III. Because the ICCPR is intended, *inter alia*, to raise the international bar for criminal trials, reading it to allow lower military trial standards already declared too low in Canada and Europe would undercut the ICCPR's value as a universal protection for human rights. Ironically, therefore, the Bush Administration's effort not to implicate the Geneva Conventions in the "war on terror" inadvertently could invoke a higher international standard by which to judge military trials of suspected terrorists.

However, other than using more specialized agreements such as Geneva III or IV, there are two distinct legal means by which the United States may avoid application of the ICCPR to military trials in the WAQT. The first is to challenge the facial applicability of the treaty to the Guantanamo commissions. Article 2(1) of the ICCPR declares that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction*

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[291] *See Findlay*, 24 Eur. H.R. Rep. at 266; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur. T.S. No. 5 [hereinafter European Convention].

[292] *See* 1982 Canadian Charter of Rights and Freedoms art. 11(d); European Convention, *supra* note 291, art. 6(1).

[293] Geneva III, *supra* note 16, art. 84 ("In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality . . . .").

[294] *See, e.g.*, L. C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 201-05 (Manchester Univ. Press 1993) (describing Geneva III requirements that POWs be tried by same tribunal as that which would try detaining nation's personnel and linking independence and impartiality requirement specifically with trial by civil tribunal).

[295] *In re* Yamashita, 327 U.S. 1 (1946).

the rights recognized in the present Covenant . . . ."[296] This wording lends itself to two interpretations: either a Party is obligated to respect the rights of persons within its territory *and* those subject to its jurisdiction anywhere else, or a Party is obligated only to respect the rights of persons who are both within its territory *and* subject to its jurisdiction. Given that anyone within a State's territory is generally subject to its jurisdiction and that the Covenant implements the UDHR language describing rights in universal terms regardless of location, the former interpretation is more persuasive than the latter. Not surprisingly, this is the interpretation of ICCPR Article 2(1) adopted both by leading commentators and the U.N. Human Rights Committee.[297] Furthermore, during the Iraqi occupation of Kuwait, the international community, including the United States, strongly condemned Iraq for human rights violations. This criticism had to be founded on the assumption that human rights standards had extra-territorial application because the legitimacy of Operation Desert Storm was founded on the United Nations' rejection of Iraq's claim that Kuwait was its territory.[298] (Interestingly, Iraq ratified the ICCPR in 1971,[299] two decades before the U.S., so Iraq certainly was obligated to comply with its mandates.)

Also, not surprisingly, the United States has recently argued for the restrictive interpretation of ICCPR Article 2(1).[300] At least one Circuit Court has endorsed this view, declaring that the ICCPR does not constrain government acts outside its own territory.[301] The court also noted that the United States announced its understanding that the ICCPR was non-self executing at the time of ratification and that Congress has never enacted subsequent implementing legislation.[302] In *Rasul*, the Supreme Court decided that the United States had sufficient control over Guanta-

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[296] ICCPR, *supra* note 275, art. 2, § 1 (emphasis added).

[297] Frederick Kirgis, *Alleged Secret Detentions of Terrorism Suspects*, AM. SOC'Y OF INT'L L INSIGHT, Feb. 14, 2006, http://www.asil.org/insights/2006/02/insights060214.html.

[298] *See* HENCKAERTS & DOSWALD-BECK, *supra* note 64, at 305.

[299] *See* University of Minnesota, Human Rights Library, Ratification of International Human Rights Treaties – Iraq, http://www1.umn.edu/humanrts/research/ratification-iraq.html (last visited Oct. 1, 2006).

[300] *See*, *e.g.*, Brief for the Respondents at 38-39, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334 & 03-343).

[301] U.S. v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002). While stating that the ICCPR lacked extra-territorial application, the court was actually considering whether the treaty required the U.S. to provide redress for other nations' violations of the ICCPR in the process of cooperating with the arrest and rendition of suspects to the United States for trial, not whether actual U.S. extraterritorial violations of the ICCPR violated the agreement. Strictly speaking, therefore, comments about the ICCPR's relevance to U.S. conduct should be considered dicta.

[302] *Id.*

namo for detainees to have standing to bring habeas challenges.[303] Thus, it is not implausible that it could also find that the ICCPR binds U.S. conduct in Guantanamo, even if the ICCPR is not otherwise applicable to foreign territory. This issue does not seem to have been considered in *Hamdan III*, but it certainly could be raised in subsequent litigation.

Although some scholars, such as Professor Jordan Paust, argue that the ICCPR is categorically binding on military commissions,[304] the Covenant includes an "out" by which the government could avoid its application. The ICCPR, in Article 4, explicitly provides for flexibility in its implementation during time of war or national emergency:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.[305]

The U.S. has not yet made the requisite declarations to invoke any permitted derogations, but there is nothing stopping it from doing so. It could also lawfully derogate after a judicial finding that the Covenant applies. The significant provisions which the military commissions appear to violate are ICCPR articles 9 and 14, neither of which is included in the list of articles exempt from derogation.

While one might question whether the threat posed by al Qaeda is significant enough to qualify as a "public emergency which threatens the life of the nation,"[306] there is precedent that it is. The U.N. Human Rights Committee has sought to establish stringent standards for derogation, an effort supported by the unofficial "Siracusa Principles" developed by

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[303] *Rasul*, 542 U.S. at 480-84.

[304] *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L 1, 12 (2002).

[305] ICCPR, *supra* note 275, art. 4, §§ 1-3.

[306] *Id.* at § 1.

international law experts in 1985.[307] But the history of the ICCPR reveals that at least twenty-seven nations, spanning every populated continent except Australia, have declared derogations at one point or another,[308] and six of these nations specifically cited "terrorism" as the threat justifying derogation.[309] The United Kingdom has previously declared a formal derogation from the ICCPR for the instability in Northern Ireland and, even more on point, announced another derogation in December 2001 in response to the 9/11 attacks, even though no part of those events took place within its territory.[310] Since there was no significant international objection to the latest British derogation, there would likely be no objection to derogation by the United States, the locus of the 9/11 attacks.

It is important to note one caveat in the ICCPR language authorizing derogation—an explicit requirement that such measures must "not [be] inconsistent with [State Parties'] other obligations under international law."[311] The significance of this provision is that even when derogating from the ICCPR, states remain fully obligated to comply with any other relevant provisions of treaty or customary international law. These obligations include the law of war because it seems likely that many, if not most, derogations for national security reasons will occur during times of conflict.[312] Having already considered the potential application of the Geneva Conventions in Part II, *supra*, it is now appropriate to consider customary law of war provisions that might be applicable to regulating military commission procedure.

IV. Customary International Law Provisions

Given the amorphous nature of customary international law, a key challenge confronting its application to real world situations is finding declaratory sources for the governing rules which have sufficient credibility to persuade political and judicial decision makers of their validity. There are at least three such sources that potentially may illuminate the customary legal standards that should govern current military commission procedure: (1) previous trials based upon the common law of war; (2) the work of leading commentators; and (3) treaty language that, even

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[307] Edel Hughes, Implementation of ICCPR: Restrictions and Derogations 9-11 (EU-China Human Rights Network Working Paper).

[308] *See, e.g.*, Angelika Siehr, State Practice with Respect to Derogations (EU-China working paper Nov. 2004) 2, *available at* http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0411i/angelika%20siehr-eng.doc.

[309] *See, e.g.*, *id*. *See also* United Nation Treat Collection, Multilateral Treaties Deposited with the Secretary-General – Treaty I-IV (2002), http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm.

[310] *See* United Nations Treaty Collection, *supra* note 309, United Kingdom.

[311] ICCPR, *supra* note 275, art. 4, § 1.

[312] *See* ABA ICCPR, *supra* note 282, at 21.

if not formally binding, might be considered declaratory of customary rules. This Part will consider the application of each of these sources in turn.

A. *Customary International Law As Applied in Post-WWII Tribunals*

The United States has long justified military commission use as part of the "common law" of war.[313] As true of any common law field, past judicial decisions play a central role in identifying currently applicable law. This is not to say, contrary to the Administration's apparent desire to base the 2001 military commission order on Franklin Roosevelt's 1942 directives,[314] that a commission can lawfully be conducted today by simply mimicking procedures used in times past. If that were true, then England could still use the Star Chamber and U.S. state courts would be free to ignore all of the procedural mandates of the Bill of Rights that apply via the incorporation doctrine. Given the consistent trend of applying greater protections for individual rights in both domestic and international tribunals today as compared to the past,[315] however, it is safe to conclude that the converse is true—any procedure failing to pass muster in the past can be safely assumed to remain unlawful today. We should therefore look to the conduct of past trials to determine the floors of procedural due process, not ceilings that may well be obsolete as a result of evolving international standards of justice. For example, action by the Supreme Commander Allied Powers overturning a conviction because the military commission viewed a classified document that the defendant was not permitted to see[316] suggests that defendants today must be allowed access to all evidence against them. Other procedures generally afforded during post-WWII tribunals, and lacking in the Guantanamo proceedings, include the right to be present throughout one's trial, the right to defense by counsel of one's choice, and the right to conduct one's own defense.[317] The MCA has made improvements in these areas, appar-

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[313] *See, e.g.*, *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 249 (1863); S. REP. NO. 64-130, at 40–41 (1916) (featuring testimony of Maj. Gen. Enoch H. Crowder that the military commission is "our common law war court"); HENRY W. HALLECK, INTERNATIONAL LAW 782-85 (San Francisco, Bancroft 1861).

[314] Glazier, *supra* note 125, at 2007.

[315] *See id*. at 2009.

[316] Office of the Judge Advocate Gen., U.S. Army, *United States v. Kato, August 2, 1949 in* REVIEWS OF YOKOHAMA CLASS B AND C WAR CRIMES TRIALS BY THE U.S. EIGHTH ARMY JUDGE ADVOCATE, 1946-1949, 24, *microformed on* Microfilm Publ'n M1112, Roll 5 (1980) (Nat'l Archives & Records Serv.) (Frames 936-952) [hereinafter YOKOHAMA REVIEWS].

[317] 15 UNITED NATIONS WAR CRIMES COMMISSION LAW REPORTS OF TRIALS OF WAR CRIMINALS 191-93 (1949), *reprinted in* 11-15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (London, William S. Hein & Co., Inc. 1997) [hereinafter 15 UNWCC].

ently creating a right to be present and to self-representation, but significant restrictions on employing counsel of choice remain.[318]

Substantive decisions reached by past military tribunals are even more important today than previous tribunals' procedures. A number of post-WWII trials dealt with charges that those in military power denied fair trials, mandated by the law of war, to either captured service personnel or persons considered to be unlawful belligerents.[319] Since a significant number of Axis personnel were convicted of these offenses,[320] the United States cannot now lawfully apply the same procedures that fail to meet the standards that the U.S. itself previously determined were an absolute minimum below which the conduct of a trial constituted a war crime. It is particularly noteworthy that while the 1929 Geneva Convention, Geneva III's immediate predecessor, also called for POWs to be tried by the same tribunals as the detaining nation's own service persons,[321] the United States held, from its earliest trials in 1945, that this provision only applied to post-capture offenses (i.e., crimes committed while a POW).[322] This view subsequently gained general acceptance among America's allies.[323] As a result, post-WWII era decisions finding criminal liability for pre-capture conduct relied on customary international law norms, not the Convention.[324] Therefore, even if the Administration is correct in its assessment that Geneva III does not apply to detainees in the WAQT, these common law standards should be fully applicable.

Another conclusion of WWII-era tribunals of significant concern to current commission officials is that compliance with national law is no defense to charges of providing an unfair trial.[325] The defense that trial participants were faithfully following their own law was held to be at best a mitigating factor to be taken into account during sentencing.[326] This holding was essentially universal; it was reached in trials of both German

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[318] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 949a, 949c (Oct. 17, 2006) (to be codified at 120 Stat. 2600).

[319] *See*, *e.g.*, 5 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 32 (1948), *reprinted in* 1-5 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (William S. Hein & Co., Inc. 1997) [hereinafter 5 UNWCC].

[320] *See id*.

[321] Convention Relative to the Treatment of Prisoners of War art. 63, July 27, 1929, 118 L.N.T.S. 345.

[322] *See In re Yamashita*, 327 U.S. at 20-26; 1 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 23 (1947), *reprinted in* 1-5 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS (William S. Hein & Co., Inc. 1997) [hereinafter 1 UNWCC] (reporting on trial of General Anton Dostler).

[323] 15 UNWCC, *supra* note 317, at 99-100.

[324] *See* 5 UNWCC, *supra* note 319, at 72-73.

[325] 15 UNWCC, *supra* note 317, at 160-61.

[326] *Id*.

and Japanese defendants and by both American and allied tribunals.[327] Carrying out military commission trials based on current U.S. directives will thus constitute war crimes by the participants if the commission's procedures fall short of minimum international standards. Even though the Administration has persuaded Congress to modify the War Crimes Act to reduce the scope of CA3 violations that can be prosecuted in Article III federal courts, its violation should remain prosecutable by any tribunal with jurisdiction over the full law of war, such as courts-martial and military commissions.

A WWII-era case tried by Australian authorities on Rabaul, Papua New Guinea, seems particularly relevant to the Guantanamo trials. The Rabaul victims were civilian inhabitants who engaged in unlawful activities against the occupying Japanese forces, including stealing weapons and food, blowing up a fuel dump, and attacking a soldier and a civilian, and thus were war criminals liable to capital punishment.[328] Although all the natives pleaded guilty and Japanese military law permitted a summary trial under the circumstances, the Australian trial panel nevertheless convicted two Japanese officers for their role in denying the civilians a fair trial, which, at a minimum, should have included notifying the defendants of the evidence against them.[329]

This result is consistent with other cases documented by the United Nations War Crimes Commission. For example, the trial panel in one of the major U.S. post-Nuremburg cases, the "Justice Trial," identified the minimum standards for a lawful trial as including:

> (i) the right of the accused persons to know the charge against them [at] a reasonable time before the opening of the trial . . . ;
> (ii) the right of accused to the full aid of counsel of their own choice . . . ;
> (iii) the right to be tried by an unprejudiced judge . . . ;
> (iv) the right of accused to give or introduce evidence . . . ;
> (v) the right of accused to know the evidence against them . . . ;
> (vi) the [ ] right to a hearing adequate for a full investigation of [the] case . . . .[330]

The results of these WWII-era cases should be of significant legal importance today, particularly as the Administration has sought to deny the applicability of subsequent treaties that could provide clear statements of law in readily accessible form, suitable both to guide executive decision makers and to provide substance for judicial scrutiny.

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[327] *See, e.g.*, 5 UNWCC, *supra* note 319, at 22-23 (discussing results of a U.S. trial in Japan as well as U.S. trials in Germany, and French and Czech laws applicable to war crimes trials).

[328] *See id.* at 25-28.

[329] *Id.* at 30.

[330] 15 UNWCC, *supra* note 317, at 165 (summarizing results of the "Justice Trial").

The application of these cases is complicated, however, by systemic shortfalls. As ad hoc tribunals, these proceedings were conducted under a wide range of governing directives and procedural rules.[331] An even more problematic result from this ad hoc stature is the absence of any coherent system of trial reporting. Unlike other traditional areas of common law, there are no published reporters or online databases that can be consulted to support authoritative research into past decisions. The single most useful effort in this regard is the fifteen volumes published by the United Nations War Crimes Commission ("UNWCC") between 1947 and 1949.[332] While the UNWCC received reports on 1,911 cases, these volumes detail the results of only eighty-nine.[333] To put this number in context, the United States alone tried more than 3,000 persons for war crimes after WWII,[334] and the total scope of Japanese prosecutions by all countries in the Pacific Theater included more than 2,200 individual trials judging more than 5,500 defendants.[335]

Still, the final volume in the UNWCC's series does endeavor to digest the results of the cases detailed in the preceding editions, and the entire set is currently available for purchase in a reprint edition. Therefore, while the holdings in some of the thousands of cases not reported might be too obscure to put modern defendants on notice of proscribed conduct, this certainly should not be true of the UNWCC summarized cases. More importantly, relative to the issue of military commission procedure, it would seem improper to allow the U.S. government to use procedural shortcuts that had previously formed the basis for prosecution simply due to its own failure to publish the results widely. The primary issue with application of WWII-related trial precedent to the modern military commissions is thus one of practicality rather than any legal consideration. When results of these previous tribunals are called to the attention of a modern military commission, particularly decisions that resulted in the imprisonment or even execution of German and Japanese officials, those results should be disregarded only at the tribunal members' peril.

B. *Commentary on Modern Customary Law of War Provisions*

International law scholars, as well as the Statute of the International Court of Justice, typically deem sources of international law to include

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331 *See, e.g.*, PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 34-35, 75, 124-25 (Univ. of Texas Press 1979).

332 *See*, *e.g.*, 15 UNWCC, *supra* note 317; 5 UNWCC, *supra* note 319.

333 15 UNWCC, *supra* note 317, at xvi. An additional ninety-three cases are cited in passing but are not reported in any detail. *Id.*

334 The U.S. Army tried 1,672 German defendants, FRANK M. BUSCHER, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY 51 (Greenwood Press 1989), and the U.S. services jointly tried 1,409 Japanese defendants, PICCIGALLO, *supra* note 331, at 48.

335 PICCIGALLO, *supra* note 331, at 263 n.10.

treaties, customary international practice, general principles of law recognized by civilized nations, judicial decisions, and "the teachings of the most highly qualified publicists of the various nations."[336] The U.S. Supreme Court expressed this same view in its seminal decision on the application of customary international law as a rule of decision in federal courts in *The Paquete Habana*:

> 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. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[337]

Such authoritative commentary should be more commonplace with respect to the law of war than in other areas of law because nations have been obligated since the 1899 adoption of the Convention with Respect to the Laws and Customs of War on Land, negotiated at the second Peace Conference at the Hague, to issue instructions to their armies on the "Laws and Customs of War on Land."[338] These instructions commonly take the form of "military manuals."

For the U.S. Army, this mandate is satisfied in the form of Field Manual 27-10, The Law of Land Warfare.[339] Sadly, although the United States was the leader in efforts to codify the law of war by drafting the Lieber Code in 1863, which marked the initial effort of any military to issue such guidance to its forces,[340] it has failed to keep pace with modern developments. The current edition of FM 27-10 dates to 1956, and it has been amended only slightly—a single set of rather modest changes entered in 1976.[341] It thus fails to address content of the 1977 Additional Geneva Protocols, as well as subsequent developments in the law of war

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[336] *See, e.g.*, MALANCZUK, *supra* note 267, at 36 (quoting Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1053, T.S. 993).

[337] The Paquete Habana, 175 U.S. 677, 700 (1900).

[338] Convention with Respect to the Laws and Customs of War on Land art. 1, July 29, 1899, 32 Stat. 1803.

[339] DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE (1976) [hereinafter FM 27-10].

[340] *See, e.g.*, HENCKAERTS & DOSWALD-BECK, *supra* note 64, at xxv.

[341] *See* FM 27-10, *supra* note 339, Change No. 1 at 1-5.

such as the 1980 U.N. Convention on Certain Conventional Weapons.[342] Perhaps even more problematic, the manual is based almost exclusively on the 1907 Hague and 1949 Geneva Conventions, so it provides no insights into any additional customary norms that might have evolved out of the WWII experience or the evolution of human rights law.[343]

The United Kingdom, after issuing a comprehensive military manual in 2004, is more current.[344] The relatively new manual makes a substantial effort to incorporate customary law provisions and includes references to several dozen significant war crimes cases from WWI through to the recent conflict in Yugoslavia and the United States' prosecution of General Noriega.[345] The manual also includes a subchapter on the prosecution of war crimes, including crimes it determines are defined by provisions of customary law.[346] Although extremely comprehensive and likely to enjoy significant credibility with U.S. decision makers given the close ties shared by the two nations' militaries, a key challenge of the British manual's direct application is that it specifically incorporates the U.K.'s ratification of both Additional Geneva Protocols of 1977 into its discussion.[347] It thus applies as binding treaty law a number of provisions which would either not be mandatory in their application to the United States or else would have to be proven to constitute customary international law, which the U.K. manual had no reason to address.

While there are some relatively recent treatises on the law of war written by civilian scholars, treatises attempting comprehensive coverage are generally the work of foreign authors and typically accept that the provisions of the Additional Protocols are enforceable as treaty law.[348] These sources, whether produced by governments or scholars, seem to assume that the general applicability of the major international agreements governing armed conflict is unquestioned. Thus, they are of rather limited value in a situation where a nation goes to significant legal lengths to avoid the invocation of those treaties, as the United States is doing today.

The most important work focused on this very issue is the recently completed two-volume study on customary international humanitarian law prepared under the auspices of the ICRC.[349] Recognizing both that the Additional Protocols did not enjoy the same universal ratification status as the 1949 Conventions and that codified rules for non-international

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[342] *See, e.g.*, ROBERTS & GUELFF, *supra* note 6, at 408-732 (covering developments in the law of war since 1976).

[343] *See*, FM 27-10, *supra* note 339, at i.

[344] UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004).

[345] *See id.* at xiii-xv.

[346] *See id.* at 425-47.

[347] *See id.* at vii-viii.

[348] *See, e.g.*, GREEN, *supra* note 294.

[349] HENCKAERTS & DOSWALD-BECK, *supra* note 64.

armed conflict fell well short of those for international wars, a conference of national relief organizations asked the ICRC to undertake what is essentially a restatement of the customary law of war.[350] Volume I of the study presents customary provisions of the law of war in the form of 161 rules and extensive footnotes documenting support for their status as law, while the two larger books comprising Volume II provide a comprehensive discussion of supporting state practice reinforcing the legal status of the rules.[351] An important contribution of the study is the identification of "fundamental guarantees" relating to the treatment of civilians and persons *hors de combat*, applicable to both international and internal armed conflict that exceed the more limited treaty protections previously established.[352] While there may be colorable arguments that some customary law of war provisions strictly apply to international armed conflict and, consequently, might not be applicable to a transnational war, it is much more problematic to assert that a customary provision applying to both international and non-international conflicts could somehow be irrelevant to the WAQT.

Among the broadly applicable fundamental guarantees identified by the ICRC study is Rule 100, which simply provides, "[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees."[353] This rule is then further developed in the accompanying text. Elements subsequently identified as components of a fair trial that may be most problematic for the current military commissions are:

- "Trial by an independent, impartial, and regularly constituted court."[354] "A court is regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country."[355]
- "Right to defend oneself or to be assisted by a lawyer of one's own choice."[356]
- "Right of the accused to communicate freely with counsel."[357]
- Right to a "trial without undue delay."[358]

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[350] *See id*. at x-xi.

[351] *See id*.

[352] Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, 87 INT'L REV. OF THE RED CROSS, 175, 195 (2005).

[353] HENCKAERTS & DOSWALD-BECK, *supra* note 64, at 352.

[354] *Id.* at 354.

[355] *Id.* at 354-55.

[356] *Id*. at 360-61.

[357] *Id*. at 363.

[358] *Id*. at 363-64.

- Right to be present at trial unless excluded due to his own disruptive conduct, the defendant is notified and elects not to appear, or an appellate review is considering only matters of law.[359]
- Right not to be compelled to testify against himself or to confess guilt; any evidence obtained through torture or other compulsion must be deemed inadmissible.[360]

The supporting discussion for Rules 101 and 102, which address the requirements that crimes be defined prior to their commission and that there be no convictions other than on the basis of individual criminal responsibility,[361] calls into question the validity of the conspiracy charges levied against most of the first ten Guantanamo commission defendants.

Overall the application of these customary norms would call for a significant overhaul of the current military commission process. The ICRC has a formal legal mandate in the Geneva Conventions, to which the United States is a party, to assist the victims of armed conflict, visit prisoners of war and civilian internees, etc.[362] It has a larger, essentially self-assigned mission found in its governing statute "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof,"[363] and preparation of the customary law study clearly falls within this role. The Bush Administration likely would challenge any effort to give the study any more weight than as simply a single work of commentary, especially given that the portion of the ICRC's mandate formally ratified by nation-states does not give it any special authority with respect to the development of international law. Indeed, the Administration is likely to share the view articulated by Kenneth Anderson, for example, that the study endeavors to fully codify all major provisions of Protocol I rather than just those which nations acknowledge.[364] And it likely would be a matter of special affront to the Administration

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[359] *Id*. at 366-67. There is a right to appear for any appellate review involving questions of fact and law. *Id.*

[360] *Id.* at 367-68. While the U.S. government announced just before oral arguments for *Hamdan III* before the Supreme Court, challenging the validity of the military commissions, that it would exclude evidence obtained via torture, the new instruction poses no restriction on confessions obtained by any form of coercion less than actual or threatened acts of torture per se. *See* Dep't of Def., Military Commission Instruction No. 10, Mar. 24, 2006, *available at* http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf.

[361] HENCKAERTS & DOSWALD-BECK, *supra* note 64, at 371-74.

[362] *See* INT'L COMM. OF THE RED CROSS, ICRC ANNUAL REPORT 2004, 383 (2004).

[363] Statutes of the International Committee of the Red Cross art. 4, § 1(g), 324 INT'L REV. OF THE RED CROSS 538 (1998).

[364] Kenneth Anderson, My Initial Reactions to the ICRC Customary International Humanitarian Law Study (Nov. 14, 2005), http://kennethandersonlawofwar.blogspot.com/2005/11/my-initial-reactions-to-icrc-customary.html (last visited Sept. 24, 2006).

that the study's methodology grants essentially equivalent status to the declared positions of virtually all nations, with no additional weight given to those that actually engage in armed conflict, such as the United States.[365]

Although the U.S. failure over the last several decades to maintain its historic role at the forefront of the development of the law of war arguably makes the ICRC effort all the more important, it is probably too much to expect that either the executive or judicial branch will acknowledge it as anything more than persuasive authority. Despite the study's significant intellectual merits, it is likely that only legal developments in which the United States has had more direct participation will be considered binding on U.S. actions in the WAQT.

Although the U.S. has not ratified the Additional Geneva Protocols of 1977, it participated fully in their development and signed both accords. The application of at least those parts to which the United States has voiced no timely objection might thus offer better grounds for governing military commission procedure than the ICRC's customary law study.

C. *Article 75 of Additional Geneva Protocol I of 1977*

The Second World War, a traditional conflict between state actors, was the common experience underlying the drafting process of the Geneva Conventions, which were adopted in 1949 when human rights law was still in its infancy.[366] Within a few decades, however, "non-international" conflicts, as defined by the Geneva regime, became increasingly prevalent and often involved guerilla organizations.[367] At the same time, human rights law had developed distinctly from the law of war.[368] These evolutionary developments highlighted gaps in the 1949 Conventions, as well as earlier Hague agreements, and led to a series of ICRC and government initiatives to draft supplemental accords which became the two Additional Geneva Protocols of 1977.[369]

1. Potentially relevant provisions of Additional Protocol I

Protocol I sets standards relating to "international armed conflicts" and retains the same basic definition from CA2 of the 1949 Conventions. Notably, Protocol I expands CA2's basic definition to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination. . . ."[370] Recognizing that these types of conflicts might invoke the same concerns that led nations to avoid invoking inter-

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365 *See id*.

366 ROBERTS & GUELFF, *supra* note 6, at 420.

367 *Id.*

368 *Id.* at 420-21.

369 *Id*. at 419-22.

370 Protocol I, *supra* note 29, art. 1, §§ 3-4.

national armed conflict protections to internal events, Protocol I, Article 4 provides that application of the Convention "shall not affect the legal status of the Parties to the conflict."[371]

There are two significant new provisions in Protocol I that could provide definitive procedural mandates for the military commissions. First, acknowledging the growing significance of guerilla movements, Article 44 updates the definition of combatants to eliminate the requirement for a distinctive emblem, so long as combatants distinguish themselves from civilians by carrying arms openly during attacks and pre-attack deployments.[372] Section 4 of that article further declares that even a combatant failing to meet these relaxed qualifications for lawful belligerency:

> [S]hall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.[373]

In other words, as the United Kingdom's official military manual explains:

> The position of a person who takes a direct part in hostilities while failing to comply with the rule of distinction is as follows. If he falls into the power of the enemy while engaged in an attack or a military operation preparatory to an attack, and is not at that time complying with the requirements of the general rule . . . he forfeits his combatant status and may be tried and punished for unlawful participation in hostilities . . . . He must, however, be accorded treatment equivalent to that of a prisoner of war, so that he is entitled, for example, to the protection afforded to prisoners of war at his trial.[374]

The ramification of these provisions for the current military commissions is quite clear; current commissions would be prohibited per se because they fail the standards discussed above as tribunals competent to try the detaining nation's own service personnel, which is the Geneva III requirement for trial of prisoners of war.[375]

There is a second Protocol I provision that also may govern military commission procedure. In Section III, "Treatment of Persons in the Power of a Party to the Conflict," Article 75 provides "[f]undamental guarantees" applicable to *any persons* "who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under

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[371] *Id.* art. 4.

[372] *Id.* art. 44, § 3.

[373] *Id.* art. 44, § 4.

[374] UK MINISTRY OF DEFENCE, *supra* note 344, § 4.6.

[375] See discussion *supra* Part II.A.

the Conventions or under this Protocol."[376] This article is particularly important because it could apply if the Administration is correct in its determination that the Guantanamo detainees are properly excluded from Convention coverage as either prisoners of war under Geneva III or protected civilians under Geneva IV.[377] Furthermore, Article 75 can apply to persons who are nationals of states with normal diplomatic relations with the detaining power.[378] Finally, Section 7 of Article 75 explicitly applies to war crimes trials.[379]

Unlike the rather ambiguous "judicial guarantees which are recognized as indispensable by civilized peoples" standard of CA3,[380] Protocol I, Article 75, Section 4 contains ten specifically enumerated criteria amplifying the general proviso that requires trial by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure."[381] Among these guarantees are the right to "all necessary rights and means of defence,"[382] protection against ex-post facto definition of crimes,[383] protection against self-incrimination,[384] and the right to obtain witnesses under the same conditions as the prosecution.[385] The evolving rules employed at Guantanamo may call into question whether the tribunals are "regularly constituted," and there are serious questions about the validity of the conspiracy charges based on current international law.[386] But an additional, more specific requirement that an accused "shall have the right to be tried in his presence"[387] was clearly even more problematic for the initial commissions, which excluded the first defendant, Hamdan, from the voir dire of his trial panel.[388]

Although not directly relevant to military commissions per se, other provisions of Article 75 are relevant to the overall treatment of detainees, including prohibitions on "torture of all kinds,"[389] "corporal punishment,"[390] "outrages upon personal dignity, in particular humiliating and degrading treatment,"[391] and "[t]hreats to commit any of the foregoing

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[376] Protocol I, *supra* note 29, art. 75, § 1.

[377] *See* discussion *supra* Parts II.A-B.

[378] YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 §§ 3022-24 (1987).

[379] Protocol I, *supra* note 29, art. 75, § 7.

[380] *See* Geneva IV, *supra* note 16, art. 3(1)(d) .

[381] Protocol I, *supra* note 29, art. 75, § 4.

[382] *Id.* art. 75, § 4(a).

[383] *Id.* art. 75, § 4(c).

[384] *Id.* art. 75, § 4(f).

[385] *Id*. art. 75, § 4(g).

[386] *See* discussion *supra* Part II.B.(1).

[387] Protocol I, *supra* note 29, art. 75, § 4(e).

[388] Brief for the Petitioner, *supra* note 200, at 49.

[389] Protocol I, *supra* note 29, art. 75, § 2(a)(ii).

[390] *Id*. § 2(a)(iii).

[391] *Id*. § 2(b).

acts."[392] Even if one accepts at face value the claims that the abuses documented at Abu Ghraib were the unsanctioned work of "rogue soldiers,"[393] other conduct noted in official documents clearly fails to comply with these Article 75 standards.[394]

Given that Protocol I contains provisions that are relevant to both military commission procedure and other key aspects of detainee treatment in the WAQT, it becomes necessary to assess whether or not these rules are legally binding in that setting.

2. Application of Protocol I to the WAQT

While the expansion of the definition of international armed conflict in Protocol I could potentially overcome some of the arguments made against the applicability of the 1949 Conventions to the WAQT, the case against applying Protocol I as treaty law is actually easier to make. The United States signed Protocol I on December 12, 1977, but President Reagan subsequently decided not to submit it to the Senate for advice and ratification,[395] and the United States has never become a party to it.[396] Protocol I thus cannot bind the United States as a treaty. Reagan's objections to Protocol I included the treatment of "wars of national liberation" as international armed conflicts, regardless of the objective characteristics of the conflict, and the removal of the requirement that combatants wear distinctive emblems, which the Reagan Administration believed could "give recognition and protection to terrorist groups."[397]

Despite these U.S. objections, 163 nations are now formal parties to Protocol I, including major U.S. allies in the WAQT such as Australia, Canada, and the United Kingdom, as well as twenty-four of twenty-six NATO member nations (the only non-parties being Turkey and the United States).[398] Except for Israel, India, and Pakistan, virtually every other significant military power, including China, Russia, Japan, and both Koreas, are parties.[399] Nevertheless, even the ICRC acknowledges that disagreement over several Protocol I provisions have kept the agreement

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[392] *Id*. § 2(e).

[393] Nick Childs, *Abu Ghraib Fallout Continues*, BBC NEWS, Jan. 15, 2005, http://news.bbc.co.uk/2/hi/americas/4176643.stm.

[394] *See, e.g*., INTERROGATION LOG, DETAINEE 063, *available at* http://www.time.com/time/2006/log/log.pdf.

[395] Ronald Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 88, 88 (Jan. 29, 1987) (transmitting Protocol II, but not Protocol I, "for the advice and consent of the Senate to ratification").

[396] *See* Int'l Comm. of the Red Cross, *supra* note 91.

[397] *See* Reagan, *supra* note 395, at 89.

[398] *See* Int'l Comm. of the Red Cross, *supra* note 91. A current list of NATO members can be found at http://www.nato.int/structur/countries.htm (last visited Nov. 6, 2006).

[399] *See* Int'l Comm. of the Red Cross, *supra* note 91.

as a whole from achieving status as customary international law.[400] At the same time, however, it is widely agreed that significant portions of Protocol I either already represented customary law at the time the Protocol was adopted or have subsequently achieved that status.[401] Even while informing the Senate of the specific flaws that led him to decide against ratification, President Reagan noted that the "agreement has certain meritorious elements" and indicated that the United States would work with allies "to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law."[402]

Subsequent statements clarified U.S. understanding of the customary international law status of much of Protocol I. The first statement, a May 1986 memorandum produced by the Department of Defense law of war working group,[403] was followed closely by a speech by Department of State Deputy Legal Advisor Michael Matheson at a conference held at American University on January 22, 1987.[404] Both statements affirmed that Article 75 was among the provisions that the United States recognized as declaratory of existing customary international law norms.[405] Even more importantly, the Bush Administration's State Department Legal Advisor, William H. Taft, IV unequivocally confirmed this position post-9/11. In a short symposium article published without disclaimer in the Summer 2003 issue of the Yale Journal of International Law, Taft declared "[w]hile the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which *all persons* in the hands of an enemy are entitled."[406]

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[400] *See*, Official Statement, Int'l Comm. Red Cross, Study on Customary International Humanitarian Law (July 21, 2005), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/customary-law-statement-210705?OpenDocument.

[401] *See, e.g.*, Henckaerts, *supra* note 352, at 187; ROBERTS & GUELFF, *supra* note 6, at 420.

[402] Reagan, *supra* note 395, at 88-89.

[403] Memorandum from the Dep't of Def. on Law of War Working Group (May 8, 1986).

[404] Michael J. Matheson, Remarks at The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *in* 2 AM. U.J. INT'L L. & POLICY 415, 419 (1987).

[405] *See* Memorandum from the Dep't of Def. on Law of War Working Group, *supra* note 403; Matheson, *supra* note 404, at 427-28.

[406] William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L 319, 322 (2003) (emphasis added). In advocating application of Article 75 to the WAQT, the Supreme Court's plurality opinion in *Hamdan III* understated its argument by citing only the Taft article. *Hamdan III*, 126 S. Ct. at 2797.

There are suggestions that the Bush Administration may be attempting to change this view in 2006; at least one official now states that the U.S. is undecided as to whether Article 75 applies to the war on terror.[407] Given that Article 75 may prohibit some of the more egregious U.S. conduct, it is not surprising that an administration which has rigorously sought to avoid the application of any international law constraints to its actions would be reluctant to acknowledge these restrictions. The Administration may plausibly argue that some provisions of Protocol I should be read to apply only to international armed conflicts as defined by CA2 of the 1949 Conventions (incorporated by reference in Protocol I, Article 1, Section 3), but this interpretation does not make sense with respect to those Protocol I provisions declared to be "fundamental guarantees," which are also included in Protocol II governing non-international armed conflict.[408]

This reasoning also calls into question the legal foundation for the application of the law of war to the WAQT and the conduct of military commissions. If customary international law governing international armed conflicts does not apply to transnational conflicts, what is the legal basis for the Administration's conduct of the war? It would be meaningless to call a rule a law if it only applies when a nation wants it to. International law does allow nations, commonly termed "persistent objectors," to exempt themselves from customary rules *if* those nations establish a record of objection at the time the norms achieve customary status.[409] It could thus be found, for example, that the United States did not have to grant "wars of national liberation" blanket status as international armed conflicts since it arguably has an objection on record to this provision dating back at least to 1987. Unlike a treaty from which a nation may be allowed to withdraw, however, commentators agree that a nation cannot unilaterally exempt itself from a customary norm if it is not on record as a persistent objector before the provision achieves customary law status.[410] Any effort by the United States now to declare itself free of Article 75's constraints is several decades too late.

As customary international law, then, the "fundamental guarantees" of Article 75 should apply to anyone in the power of a party to an armed conflict, regardless of whether any specific treaty language mandates its

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[407] Anthony Dworkin, *United States is "Looking at" the Place of Fundamental Guarantees in the War on Terror*, CRIMES OF WAR PROJECT, Mar. 1, 2006, http://www.crimesofwar.org/onnews/news-guarantees.html (quoting John Bellinger, the State Department Legal Adviser, who said that the U.S. was "looking at" whether Article 75 was part of customary law in international armed conflicts).

[408] *See* discussion *infra* Part IV.D.

[409] Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 2 (Oxford Univ. Press, Ian Brownlie & D. W. Bowett, eds. 1985).

[410] *Id.*

application. So long as the United States determines to treat al Qaeda and the Taliban as belligerents, to which it is entitled to apply the benefits of the law of war without geographic restriction, it should also be obligated to comply with any and all customary law of war provisions applicable to armed conflict.

D. *Additional Geneva Protocol II of 1977*

Protocol II supplemented the very minimalist terms of CA3 of the Geneva Conventions, and provided more detailed international rules applicable to non-international armed conflict.[411] While considerably less comprehensive than Protocol I, it does adopt many of the same "fundamental guarantees" incorporated in Article 75, and it shares a common heritage with the ICCPR. Protocol II, Article 4, for example, also titled "Fundamental guarantees," incorporates largely verbatim the Protocol I prohibitions against violence, outrages upon personal dignity, or threats to any persons "who do not take a direct part or who have ceased to take part in hostilities."[412] Article 6, "Penal prosecutions," then adopts most of the fair trial standards incorporated in Protocol I, Article 75, including a requirement for trial by "a court offering the essential guarantees of independence and impartiality"[413] as well as a verbatim incorporation of the provisions relating to "necessary rights and means of defence"[414] and the "right to be tried in his presence."[415] Inclusion of the "independence" requirement for courts, which is found in the ICCPR but not in Protocol I, would pose even greater challenges to Guantanamo military commission procedures than Protocol I if Protocol II were binding.

Unlike Protocol I, the United States has not raised serious objections to any of the provisions of Protocol II. The Reagan Administration submitted it to the Senate for advice and consent to ratification in 1987, where it has languished ever since.[416] Protocol II is thus not formally binding on the United States. Even if it had been ratified, however, its terms, similar to CA3 of the 1949 Geneva Conventions, limit its application to conflicts which "take place in the territory of a High Contracting Party."[417] This would seem to exclude its application to the WAQT as a treaty. Probably because it anticipated Protocol II's ratification (and per-

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411 Protocol II, *supra* note 29.

412 *Id.* art. 4, §§ 1-2.

413 *Id.* art. 6, § 2. The specific inclusion of the term "independent," also found in the ICCPR but omitted from Protocol I, arguably imposes a higher standard than the first Protocol.

414 *Id.* art. 6, § 2(a).

415 *Id.* art. 6, § 2(e).

416 *See* Reagan, *supra* note 395, at 88.

417 Protocol II, *supra* note 29, art. 1, § 1 (specifying additional requirements that the opposition group must also control the territory and be able to implement the Protocol).

haps the remote likelihood of an internal armed conflict in this country), the United States has not expended even limited effort to highlight the customary status of most of Protocol I. As a practical matter, it thus seems that Protocol II is unlikely to apply directly to the WAQT as either treaty or customary law, although many of its provisions are the same as those of Protocol I, Article 75. This reinforces the logic that the latter should be held applicable. It would certainly be a bizarre result if "fundamental guarantees" applying as customary law to both international and non-international conflicts were held inapplicable to a transnational war.

Conclusion

In its efforts to free the "war on terror" from significant legal constraints, the Bush Administration has engaged in what law of war scholar Geoffrey Corn calls "hyper-technical legal analysis" to exploit ambiguities in existing treaties and thus deny their applicability.[418] This approach is wholly at odds with America's long history of faithful application of the law of war, whether formally required or not. Moreover, efforts to avoid application of the law of war to a given conflict are contrary to that law itself.

Thanks to the efforts of Fyodor Martens, a Russian diplomat and international law scholar instrumental in late-19th century efforts to codify the law of war, a provision now known as the "Martens Clause" was formulated to address treaty gaps.[419] As expressed in the preamble of the 1907 Hague Convention on the Law of Land Warfare, this provision reads:

> However, it has been impossible to devise rules at once which will apply to all the circumstances arising in actual practice.
>
> On the other hand, it could not be the intention of the high contracting parties that unforeseen cases should, for want of a written stipulation, be left to the arbitrary judgment of the leaders of armies.
>
> Pending the preparation of a more complete code of the laws of war, the high contracting parties deem it opportune to state that, in the cases not provided for in the rules adopted by them, the inhabitants and the belligerents shall remain under the protection of and subject to the principles of the law of nations, as established by the usages prevailing among civilized nations, by the laws of humanity, and by the demands of public conscience.[420]

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[418] Geoffrey S. Corn, *When the Law of War Becomes Over-Lawyered*, Jurist, Nov. 25, 2005, *available at* http://jurist.law.pitt.edu/forumy/2005/11/when-law-of-war-becomes-over-lawyered.php (last visited Nov. 18, 2006).

[419] *See* Vladimir Pustogarov, *Fyodor Fyodorovich Martens (1845-1909) – A Humanist of Modern Times*, 312 Int'l Rev. of the Red Cross 300, 307-14 (1996).

[420] Second Hague Peace Conference, Convention Regarding the Laws and Customs of Land Warfare, Oct. 18, 1907, 2 Am. J. Int'l L. Supp. 90, 90-91 (1908).

Anyone tempted to disregard this provision as outmoded needs to consider two important points. First, although the Hague drafters expected enforcement to be limited to state-to-state compensation,[421] the Nuremberg Tribunal held that the accord had achieved customary international law status, and as such, its violation constituted a war crime.[422] The Hague Convention remains a valid statement of customary law to this day.[423] Furthermore, the Martens principle has gained additional vitality due to its inclusion in widely ratified agreements, including the 1949 Geneva Conventions[424] and the 1980 U.N. Convention on Certain Conventional Weapons, in whose preamble the parties (including the United States) acknowledge that:

> [I]n cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience . . . ."[425]

Despite this history, it seems clear that the Bush Administration intended to defend its claim of broad executive authority aggressively to promulgate military commission procedures essentially unchecked by any domestic or international law constraints. The Supreme Court's *Hamdan III* decision is thus of major significance, definitively declaring that U.S. statutes, (specifically the Uniform Code of Military Justice) and international law (at a minimum, CA3 of the Geneva Conventions) restrict the President's authority to promulgate military commission procedure. Although the MCA now defines commission procedures that it declares to be in compliance with CA3, *Hamdan III* surely is not going to be the last word on the subject. It is far from clear that the judiciary will yield full authority to interpret treaty provisions to the political branches, but even if it does, *Hamdan III* merely declared that CA3 was a floor on commission procedures; it did not decide the question of whether a higher standard, such as the full 1949 Geneva Conventions, international human rights accords, or customary law of war provisions, might also apply. It is also critical to note that while the MCA can limit the scope of law of war violations that can be prosecuted in U.S. federal courts, it can-

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[421] *Id.* at 93, art. 2.

[422] 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 496 (1948).

[423] ROBERTS & GUELFF, *supra* note 6, at 68.

[424] *See* Geneva III, *supra* note 16, art. 142.

[425] United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 162, 164 (1983). Similar language is also included in Article 1 of Protocol I, which the United States has not ratified. Protocol I, *supra* note 29, art. 1.

not unilaterally redefine what constitutes a war crime. It is thus incumbent upon those responsible for ensuring that these tribunals are conducted in accordance with the rule of law to engage in the detailed legal analysis necessary to identify any other appropriate international standards, and to articulate a persuasive legal case for their application.

While there are good reasons why one might wish to see the 1949 Geneva Conventions applied to the WAQT, it seems difficult to reconcile the plain language of the treaties with the factual situation of the war. A stronger case can be made for the application of the International Convention on Civil and Political Rights, but the one Circuit Court decision on record today supports the Administration's desire to limit its applicability to the United States per se.[426] Moreover, even if the ICCPR was held to apply to Guantanamo, given international precedents supporting derogations when dealing with a terrorist threat, such a result would likely be short-lived. It is thus likely that the Administration could simply nullify a decision holding that the ICCPR applied via a rapid derogation from any provisions held to constrain the commissions.

Application of the customary law of war to regulate military commissions whose very existence is justified by resort to the "common law" of war seems both apropos and legally sound. The significant body of WWII-era jurisprudence should be a persuasive source of the rules to be applied, but its application is significantly complicated by the structural issues posed by the lack of accessible reporting beyond the small sampling incorporated in the United Nations War Crimes Commission's fifteen slim volumes. Nevertheless, the standards upon which the conviction and punishment of vanquished Axis officials was based should definitively be binding on American tribunals today. Alternatively, given the practical difficulties involved in using these trial results to supply contemporary rules of decision, Article 75 of the 1977 Additional Geneva Protocol I is an equally legally meritorious, but more practical, declaration of customary international law. Protocol I, Article 75 is readily accessible, supported by detailed commentary, provides tangible standards by which to judge the tribunals, and is accepted as law by the vast majority of the world's nations. The customary law of war is non-derogable, and credible evidence indicates that the U.S. has both recognized this article as declaratory of customary international law and has failed to take any steps which could now qualify it as a persistent objector. Furthermore, there is nothing in *Hamdan III* to impair its application to the Guantanamo military commissions. In fact, the *Hamdan III* plurality advocated doing exactly that.

If a trial is truly to be considered "full and fair," it must accord procedural due process meeting internationally accepted standards, and, particularly when the legal basis of a tribunal is the international law of war, it must faithfully follow any procedural mandates imposed by that corpus

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[426] *Duarte-Acero*, 296 F.3d at 1283.

juris. While there are colorable arguments for the application of more stringent requirements to the Guantanamo military commissions, such as the ICCPR, the language of Article 75 of the Protocol I, as a declaration of customary international law, should be the minimum acceptable standard.