May 25, 2006

Full and Fair by What Measure?:
Identifying the International Law Regulating
Military Commission Procedure

David Glazier
Associate Professor Designate,
Loyola Law School Los Angeles

Research Fellow and Lecturer
Center for National Security Law
University of Virginia School of Law
Introduction

Even before the fourth jetliner hijacked on September 11, 2001 had crashed in the Pennsylvania countryside, President George W. Bush told members of his administration that America was “at war.”\(^1\) Past U.S. presidents have “declared” a number of metaphorical wars, including those on “poverty,”\(^2\) “crime,”\(^3\) and “drugs.”\(^4\) Indeed, President Bush himself called for a “war on illiteracy” the very day before 9/11.\(^5\) So when he told the American public the next evening that he would use “the full resources of our intelligence and law enforcement communities to find those responsible [for the attacks] and to bring them justice,”\(^6\) it seemed that his concurrent use of the term “war on terror”\(^7\) was metaphorically intended as well.

But this “war” would prove to be different. On September 12, 2001 the United Nations Security Council termed the attacks “a threat to international peace and security” and affirmed the “inherent right of individual or collective self-defence” under the U.N. Charter,\(^8\) implying that military force might lawfully be used in response. The North Atlantic Treaty Organization (NATO) went further. Meeting that same day, NATO’s North Atlantic Council agreed that “[i]f it is determined this attack was directed from abroad against the United States, it shall be

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7. Id. While some sources prefer the term “war on terrorism,” the White House consistently uses “war on terror.”
regarded as an action covered by Article 5 of the Washington Treaty.”

Twenty days later NATO’s Secretary General declared that “clear and compelling” information had “conclusively” demonstrated the international nature of the 9/11 events which would therefore be considered as an armed attack against all member states. On October 9, 2001 NATO announced the first ever deployment of Alliance military forces under Article 5; five airborne early warning aircraft (AWACS) were headed for the United States while the Standing Naval Forces Mediterranean was being sent from Spain to the eastern portion of that sea.

Meanwhile, even more importantly, the U.S. Congress had enacted the Authorization for the Use of Military Force (AUMF), giving its assent to 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.

The most obvious manifestation of this “war on terror” has been the employment of American military forces against al Qaeda and the Taliban regime which sheltered it in Afghanistan. But making the formal paradigm shift from treating terrorist attacks as criminal acts to acts of war had significant legal ramifications as well.

As Curtis Bradley and Jack Goldsmith highlight, other obvious results from invoking the war paradigm include the legal authority to exercise what the Supreme Court described as “the ‘fundamental incident[s] of waging war.’” Among the most important of these powers

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exercised in the war on terror have been authority to detain enemy combatants for the duration of hostilities and to subject those charged with violation of the law of war to military trial.\textsuperscript{14} The latter power is particularly significant, permitting both the use of military tribunals as the trial forum and the prosecution of criminal offenses defined by the full scope of the law of war, not just those specified in current U.S. criminal statutes. But as Ryan Goodman and Derek Jinks note in reply, invocation of the legal advantages of the law of war (or Law of Armed Conflict, the term they prefer) is not a one-way street. Actions justified by the international law governing war must also be bound by those rules as well,\textsuperscript{15} something that seems to be overlooked in practice today.

A unique, and particularly perplexing, challenge of the “war on terror” is identifying specifically which rules out of the complex set of treaties and customary international law norms comprising the overall corpus juris of the law of war\textsuperscript{16} apply to this new conflict. Previously, war had been formally characterized as either “international” or “non-international” armed conflict. International armed conflict was understood to consist of contests between individual, or groups of, nation states. Non-international armed conflict included struggles between a nation state and armed groups that were seeking independence or the overthrow of the existing regime within its own territory.\textsuperscript{17} The war on terror, however, displays unique characteristics, failing to fit readily into either of these categories. The Bush Administration has seemingly taken

\textsuperscript{14} See Bradley & Goldsmith, supra note 13.
\textsuperscript{16} Adam Roberts and Richard Guelff, for example, produce 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. \textit{See ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR} (3d ed. 2004).
\textsuperscript{17} See, e.g., Common Article 2 of the four Geneva Conventions of August 12, 1949 (defining the international conflicts in which the Conventions apply) and Common Article 3 of those Conventions (defining minimum protections applicable to participants in non-international armed conflict).
advantage of this ambiguity in efforts aimed at avoiding the application of any specific
governing international standards to the conduct of its treatment of detainees.  

A prime example has been the initial attempts to try Guantanamo detainees by military
commissions for violations of the law of war. While there is a long history of military
commission use for this purpose, both the U.S. government and previous war crimes tribunals
have acknowledged the applicability of customary international law to their conduct. But while
the President has mandated that these commissions provide a “full and fair” trial, observers at
the Guantanamo tribunals note the apparent failure to apply any overarching legal standards
beyond the limited Department of Defense rules currently established for these tribunals,
resulting in trial procedures essentially made up as they proceed. Even military judges
assigned as commission presiding officers seem unable to articulate the legal regimes governing
their tribunals.

Identification and application of the correct international law standards is ultimately

18 See, e.g., Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, Gen. Counsel to the
DOD, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), available at
http://msnbc.msn.com/id/5025040/site/newsweek/.
19 See, e.g., David Glazier, Precedents Lost: The Neglected History of the Military Commission, 46 VA. J. INT`L L. 5
(2005).
20 See, e.g., Respondent’s Answer to Petitions at 28–29, Ex parte Quirin, 317 U.S. 1, in 39 LANDMARK BRIEFS AND ARGUMENTS OF
THE SUPREME COURT OF THE UNITED STATES 379, 429–30 (1975)
21 See Glazier, supra note 19 at 77-78.
22 George W. Bush, Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the
War Against Terrorism, 3 C.F.R. 918, 918 (2002).
24 See Joshua Pantesco, Guantanamo military judge unsure of what laws govern detainee trial, Jurist, Apr. 4, 2006 at

widespread condemnation of the proceedings at home and abroad. If the United States is serious
about applying the rule of law, it should also require the invalidation of trial results failing to comport with applicable legal standards by either the review authorities established by the Department of Defense Military Commission Order No. 1\textsuperscript{25} or the limited judicial appellate review established by the 2005 Detainee Treatment Act.\textsuperscript{26} Failure to comply with international law provisions governing trials also constitutes a war crime based upon both Geneva Convention language as well as the customary law of war based decisions of a number of post-World War II war crimes tribunals\textsuperscript{27} Such violations potentially subject military commission participants, including trail panel members, prosecutors, and supervising authorities, to trial themselves by any U.S. or foreign courts which manage to establish the requisite jurisdiction.

This article seeks to identify and evaluate the international law provisions that logically might be applicable to governing military commission procedures. Since the applicability of some 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. Part II will then 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. Part III will expand the consideration of binding treaty law to consider international human rights treaties outside the traditional boundaries of the law of war but that might nevertheless remain in force during periods of armed conflict. Part IV will then examine potential customary law of war sources, including language in the Additional Geneva Protocols of 1949 which the United States has not ratified but which could be binding if considered to be declaratory of customary international law.

\textsuperscript{25} Department of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens I the War Against Terrorism, Aug. 31, 2005.
\textsuperscript{27} See, e.g., Glazier \textit{supra} note 19 at 78.
I. The Legal Characterization of the War on Terror

Efforts to determine the proper legal classification of the “war on terror” are complicated by the inconsistent and often ambiguous nomenclature used to identify the conflict. First of all, “terrorism” is literally a means of warfare whereas a war is a conflict between political entities; it would make no more sense to wage a literal war on “terror” than one 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.”28 On the six month anniversary of the 9/11 attacks, however, he gave a speech on the South Lawn of the White House talking about a second expanded phase in the conflict, requiring international cooperation to defeat more ambiguous “terror networks of global reach.”29 By August 2002, as the Administration began to build a case for invading Iraq and deposing Saddam Hussein, Secretary of Defense Donald Rumsfeld spoke of the “global war on terrorism” while standing by the President’s side at his Texas ranch.30 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, and several days he later he said that “you can’t distinguish between al Qaeda and Saddam Hussein when you talk about the war on terror.”\textsuperscript{31} In early 2006 there are suggestions the Administration may be trying to ambiguously rename the conflict “the long war,”\textsuperscript{32} 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.\textsuperscript{33}

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,”\textsuperscript{34} or harbored those who did.\textsuperscript{35} The AUMF language could have authorized U.S. combat operations in Iraq if a clear linkage was established between that country and the 9/11 attacks. But even while highlighting contacts between al Qaeda and Iraq, President Bush has chosen his words carefully and stopped just short of making definitive claims of direct Iraqi involvement in 9/11. In an October 7, 2002 speech seeking support for war against Iraq the President said, for example:

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 al Qaeda members in bomb-making and poisons and deadly gases. And we know that after

34 AUMF, \textit{supra} note 12.
35 Id.
September the 11th, Saddam Hussein’s regime gleefully celebrated the terrorist attacks on America.\(^{36}\)

Ultimately the President sought, and received, separate congressional authorization for the Iraq invasion,\(^{37}\) 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\(^{38}\) 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) of subsection 2(a)(1) of this order. . . \(^{39}\)

Reading this directive together with the more restrictive language of the AUMF would indicate that the government’s legal view of the “enemy” in the war on terror currently consists of al Qaeda and the remnants of the Taliban regime that harbored Osama bin Laden and his al Qaeda training camps from 1996 until he was driven into hiding by the U.S. intervention (Operation Enduring Freedom).\(^{40}\) It could also include individuals who provided support to al Qaeda, and could ultimately include other affiliated groups, although at this point publicly available information does not seem to specifically identify any other qualifying organizations. So a more


\(^{37}\) See, e.g., BOB WOODWARD, PLAN OF ATTACK 201-04 (2004)


\(^{39}\) Id.

\(^{40}\) See 9/11 Report, supra note 1 at 63-
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 military commission order necessarily raise questions about how the enemy can legally be defined in a modern war. Or put more directly, is there a basis in international law for the characterization of groups and individuals, rather than a nation or nations, as the enemy in an armed conflict? Traditionally war was considered exclusively the province of state actors; Jean Jacques Rousseau declared in 1763 that:

War is something that occurs not between man and man, but between States. The individuals who become involved in it are enemies only by accident. They fight not as men or even as citizens, but as soldiers; not as members of this or that national group, but as its defenders. A State can have as its enemies only other States, not men at all, seeing that there can be no true relationship between things of a different nature.41

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.42 This change is typically considered to have undergone even more rapid evolution since the middle of the twentieth century, as human rights considerations gained significant traction in international law development and the law of war expanded to incorporate broader international humanitarian perspectives.43

It is particularly hard for Americans to credibly argue that actual 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’

43 See, e.g., ROBERTS & GUELFF, supra note 16 at 419-20, 481-83.
independence had been recognized by foreign powers, and the U.S. government later applied these laws during conflict with Indian tribes to which it did not accord full sovereign rights. In 1820 the Supreme Court upheld the application of the law of war to conflict between Spain and the self-proclaimed Venezuela republic even though the independence of the latter was not recognized by the U.S. government. Even more importantly, the seminal event in the codification of the modern law of war, the publication of the Lieber Code, issued to the Union Army as General Orders No. 100 during the Civil War, was undertaken to facilitate U.S. compliance with the law of war even though the North never recognized the Confederacy as having any lawful status at all. But 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 as a lawful belligerent.

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 provide justification for departures from past practice, whether that might be treating terrorist attacks as acts of war vice crimes, or even avoidance of legal norms against torture. 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; what made 9/11 different

44 George Washington clearly believed that he had authority under customary international law, or the “law of nations,” as commonly termed in that era, to execute regular British military personnel for spying on the colonial forces, for example. See Glazier, supra note 19 at 18-20.
was not intent, but simply better execution. The 1993 World Trade Center bombing, for instance, was intended to collapse the North Tower onto the South structure, bringing both down immediately; if successful it might have resulted in the death of a very substantial portion of the approximately 50,000 persons working in the buildings as well as some of the 200,000 or so daily visitors to the site. 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.

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

> [d]espite 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. . . . the al Qaeda network has long sought weapons of 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. . . .

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 . . .

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53 Bradley & Goldsmith, supra note 13 at 2068.
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 actors does not seem to have been based on a belief that it was legally impermissible to do so, but rather 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 twentieth century, international law generally had nothing to say about how governments acted within their own territory in internal matters. So by avoiding the implication of those protections accorded in the law of war, governments were unfettered by international constraint 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 to limit the scope of those treaty provisions that would apply to domestic disturbances. Thus the second Additional Geneva Protocol of 1977 covering victims of non-international armed conflicts comprises just fifteen substantive articles while its international counterpart, Protocol I, includes some eighty such articles. Application of the second protocol is further limited by the terms of its first article to conflicts between governments and:

Organized 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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54 See, e.g., ROBERTS & GUELFF, supra note 16 at 481-82.
57 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 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.\textsuperscript{58}

The United States, by contrast, philosophically committed to the rule of law and already constitutionally committed to provide 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.\textsuperscript{59} This is reflected in the official Department of Defense 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.\textsuperscript{60}

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 operations.”\textsuperscript{61}

Taken together, the weight of this history and practice clearly suggests 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 have often sought not to do so simply reflects pragmatic self-interested concerns that they had more to gain by avoiding the constraints such invocation involved than by realizing the benefits of belligerency. For the United States the

\textsuperscript{58} Protocol II, art. 1, supra note 55 at XXX.
\textsuperscript{60} Department of Defense Directive 2311.01E, para. 3.1, May 9, 2006 at 2.
\textsuperscript{61} Id. para 4.1.
situation is quite different today. 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 militate in favor of the application of the law of the war to this conflict. 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 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.\(^{62}\) It would seem a bit absurd if the United States could lawfully engage in a war with Andorra, the Holy See, or Nauru, none of which has anything more than a ceremonial palace guard,\(^{63}\) simply because they are formally nation-states, but could not invoke belligerent rights in confronting a transnational organization of the potency demonstrated by al Qaeda. 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 concurrently disregarding otherwise 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, as already seen the law of war does differentiate between those provisions applicable to international wars and the lesser set of mandatory rules governing internal armed conflict.\(^{64}\) U.S. national leaders thus have the authority to overrule past American

\(^{62}\) See, e.g., 9/11 Report, supra note 1 at 66-67 (summarizing estimates of al Qaeda strength).


\(^{64}\) A clear example was the Vietnam War; the United States recognized South Vietnam as the only lawful Vietnamese government, yet nevertheless insisted on treating the war as an international armed conflict and
military practice and direct adherence in any particular conflict scenario to only those provisions whose application is mandated by international law. Any serious consideration of the law of war applying to a particular conflict must therefore endeavor to define its geographic scope in support of determining whether the hostilities are 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 Afghanistan, 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. U.S. and coalition navies have conducted a significant maritime interdiction effort on the high seas against the movement of terrorists and their assets. While this operation is certainly not as dramatic, or visible, as the air and ground combat operations drawing world public attention, it is nevertheless just as much a belligerent act, depending on the international law of war for its legitimacy. U.S. combat strikes against individual al Qaeda figures have occurred in several countries outside Afghanistan including Pakistan and Yemen. At least four of the first ten individuals charged with violations of the law of war and facing trial by the

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67 See Ondolf Rojahn, Ships, Visit and Search, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 409 (2000).

Guantanamo military commissions, alleged bombmaker Ghassan Abdullah al Sharbi,\(^69\) alleged explosives trainer Sufyian Barhoumi,\(^70\) alleged bomb manual author Jabran Said bin al Qahtani,\(^71\) and alleged Jose Padilla cohort Binyam Ahmed Muhammad\(^72\) 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,\(^73\) March 2004 Madrid train bombings\(^74\) and the July 2005 London subway attacks.\(^75\)

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 by any reasonable definition be much broader than just Afghanistan. Combined with the fact that al Qaeda and the Taliban are clearly not U.S. groups, it seems clear that the WAQT must logically transcend the limits of an internal armed conflict. Because the term “international” is commonly defined as “existing between or among nations,”\(^76\) and has specific meaning in the 1949 Geneva Conventions as well that may not specifically fit the war on terror\(^77\) which is being contested in significant part against the non-state al Qaeda organization, it would be most accurate to term the WAQT as a “transnational”\(^78\) conflict. While there may be room for debate as to how much of the law of war applicable to “international”

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\(^69\) Military Commission charge sheet, U.S. v. al Sharbi,
\(^70\) Military Commission charge sheet, U.S. v. Barhoumi
\(^71\) Military Commission charge sheet, U.S. v. al Qahtani
\(^72\) Military Commission charge sheet, U.S. v. Muhammad
\(^74\) BBC, Threat video in Spain flat ruble, Apr. 9, 2004 a http://news.bbc.co.uk/1/hi.world/europe/3613775.stm.
\(^76\) WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1181 (1976).
\(^77\) See Part II.A.2. infra.
\(^78\) See WEBSTERS supra note 76 at 2430, defining “transnational” as “extending or going beyond national boundaries.”
armed conflict is binding upon the WAQT, it would be illogical to hold that applicable law would be constrained 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\textsuperscript{79} are undoubtedly the best known component of the overall corpus juris of the law of war, comprising what the International Committee of the Red Cross calls the “core of international humanitarian law.”\textsuperscript{80} For several reasons, they 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 the protection of persons who either did “not take part in the fighting . . . and those who can no longer fight.”\textsuperscript{81} Certainly individuals detained by an opposing party in a conflict fall into that latter category. Second, the Conventions are essentially universal in their application, having been ratified or acceded to by 192 nations,\textsuperscript{82} one more than the number of United Nations members.\textsuperscript{83} Third, the application of at least the Third Convention relating to Prisoners of War (POWs) has already been raised in U.S. federal courts as a bar to current military commission procedures and formed the basis in part for the District Court for the District of Columbia’s 1994 decision staying the military commission process.\textsuperscript{84}

Although much less well known or discussed, the Fourth Convention concerning protections of civilians in war time is also potentially applicable to the trial of detainees, particularly if the


\textsuperscript{80} ICRC, The Geneva Conventions: the core of international humanitarian law at http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList104/578438309B69EB59C1256EA90026A03C

\textsuperscript{81} Id.

\textsuperscript{82} ICRC, States party to the Geneva Conventions and their Additional Protocols, Dec. 4, 2005.

\textsuperscript{83} United Nations. List of Member States, Feb. 24, 2005 at http://www.un.org/Overview/unmember.html. Only one U.N. member, Nauru, is not a party to the Geneva Conventions; two Convention parties, the Cook Islands and the Holy See, are not members of the U.N. Compare ICRC supra note 82 and United Nations List, supra this note.

\textsuperscript{84} Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004)
government is correct in denying them military status qualifying for protection under the Third
Convention.\textsuperscript{85}

This part will consider each of these two treaties in turn, considering first what impact its
application would have on the military commission process and then evaluating the arguments
for and against its application. It will also consider the possible application of Common Article
3 of all four Conventions, which provides a series of minimum guarantees applicable to non-
international armed conflicts,\textsuperscript{86} because its invocation has been suggested during judicial
consideration of the Guantanamo military commissions as well.

\textbf{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),\textsuperscript{87} the Third Geneva Convention
(Geneva III) contains a total of 143 articles describing in significant detail both who qualifies for
treatment as a prisoner of war and how they must treated. Of note up front, article 5 makes clear
that “the 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.”\textsuperscript{88} All of the subsequent rules for treatment and protections
accorded to prisoners are thus formally dependent upon those covered meeting the specific
criteria the treaty itself established for POWs.

\textbf{1. Provisions relevant to the trial of prisoners of war}

While Geneva III clearly permits POWs to be tried either by courts-martial or by civilian
courts exercising statutory jurisdiction, it does not permit their trial by the current military

\textsuperscript{85} See Kantwill & Watts, supra note 64 at 705-06.
\textsuperscript{86} See, e.g., JEAN DE PREUX, COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS
OF WAR 27-44 (1960).
\textsuperscript{87} Geneva III, supra note 79, art. 17, 6 U.S.T. xxxx, 75 U.N.T.S. xxx
\textsuperscript{88} Id., art. 5, 6 U.S.T. xxxx, 75 U.N.T.S. xxx.
commissions. Geneva III provides a very explicit statement of how POWs may be tried, declaring 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. . . .” Article 84 makes clear that military courts are the expected forum for trying POWs, but trial by civil court is permitted for those offenses which the laws of the Detaining Power would expressly permit its own service personnel to be tried by them for. 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.” That article’s requirements include right to representation by counsel of choice who can freely visit and consult in private with the accused, right to interview and call witnesses, and “necessary facilities to prepare the defence.” Related treaty articles provide further enumeration of the minimum rights that must be accorded, including a requirement that a crime be defined at the time it is committed and the same right of appeal as service members of the detaining power.

If applicable to those charged in the WAQT, Geneva III would surely 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 both military-unique and conventional “common law” criminal offenses. The statutorily mandated procedures followed by courts-martial are detailed in the Uniform of Code of Military Justice (UCMJ) (articles 37-54) and further amplified in the

89 Id., art. 102, 6 U.S.T. xxxx, 75 U.N.T.S. xxx
90 Id., art. 84, 6 U.S.T. xxxx, 75 U.N.T.S. xxx
91 Id.
92 Id., art. 105, 6 U.S.T. xxxx, 75 U.N.T.S. xxx
93 Id., art. 99, 6 U.S.T. xxxx, 75 U.N.T.S. xxx
94 Id., art. 106, 6 U.S.T. xxxx, 75 U.N.T.S. xxx
Manual for Courts-Martial\textsuperscript{97} which is promulgated by the executive branch under authority delegated by Congress.\textsuperscript{98} The statutory authority for trying military offenses clearly includes within military jurisdiction “[p]risoners of war in custody of the armed forces.”\textsuperscript{99} It also includes “[p]ersons within an area leased by or otherwise reserved or acquired for use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, and the Virgin Islands.”\textsuperscript{100} The U.S. Naval Station at Guantanamo Bay falls within that definition. Furthermore, 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 military tribunal and may adjudge any punishment permitted by the law of war.”\textsuperscript{101}

Service members may also be tried by any U.S. state or federal court which establish 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.”\textsuperscript{102} Geneva III would thus permit the trial of POWs by these tribunals as well. Given generally strict territorial limits on state criminal jurisdiction, detainees are most logically candidates for trial in regular federal Article III courts.

The War Crimes Act of 1996, while stopping well short of creating universal jurisdiction, makes

\begin{itemize}
\item \textsuperscript{97} Manual for Courts-Martial, United States (2005)
\item \textsuperscript{98} UCMJ Article 36, 10 U.S.C. § 836 (2000), which is commonly cited along with article 21 as congressional authorization for conducting military commission trials, provides that:
\begin{itemize}
\item \textsuperscript{(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.
\item \textsuperscript{(b)} All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress
\end{itemize}
\item \textsuperscript{99} 10 U.S.C. §§ 802(a)(9) (2000).
\item \textsuperscript{100} 10 U.S.C. § 802(a)12).
\item \textsuperscript{101} 10 U.S.C. § 818 (2000).
\item \textsuperscript{102} 10 U.S.C. § 814 (2000).
\end{itemize}
the commission of grave breaches of the Geneva Convention as well as specified other law of war violations federal offenses where either the perpetrator or victim is an American. 103 Other potentially applicable federal statutes include a number of laws focused specifically on acts of terrorism, such as a aircraft piracy. 104

The current military commissions fail to measure up to Geneva III’s requirements since the governing commission directive limits them to trying non-citizens only, and their procedures differ significantly from those of courts-martial 105 The military commissions also fall short of some of the Convention’s specific procedural mandates, such as not allowing the accused a free choice of counsel and not providing the same appeals process accorded to U.S. personnel. 106 A finding that Geneva III applies to the WAQT and that detainees qualify as POWs would be extremely significant for several reasons. Since the United States has ratified the treaty, it has the force of law and courts should arguably mandate compliance. (The government does argue, however, and the D.C. Circuit agreed, that the treaty does not create privately enforceable rights.) 107 But even if the courts should refuse to order the tribunals halted, the military would certainly want to do so sua sponte. Acts constituting “grave breaches” of Geneva III are specified in article 130; among these is “willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” 108 The previous 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 violators, “regardless of nationality, and the commission of grave breaches of the Geneva Convention as well as specified other law of war violations federal offenses where either the perpetrator or victim is an American. 103 Other potentially applicable federal statutes include a number of laws focused specifically on acts of terrorism, such as a aircraft piracy. 104

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104 See, e.g., 49 U.S.C. § 46502 (criminalizing aircraft piracy) and 18 U.S.C. § 32 (covering actual or attempted destruction of an aircraft).
108 Geneva III, supra note 79, art. 130, 6 U.S.T. xxxx, 75 U.N.T.S. xxx
before its own courts."\textsuperscript{109} Taken together, the requirements of article 129 call for legislation providing universal jurisdiction over grave breaches, suggesting that an American involved with any trial of a POW failing 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,\textsuperscript{110} 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 \textit{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 which fell outside the statutory authority of U.S. courts-martial under the 1806 Articles of War, an early predecessor of the current UCMJ.\textsuperscript{111} The court-martial and military commission differed fundamentally in jurisdiction, not procedure, from the latter’s Mexican War inception at least through 1942.\textsuperscript{112} During the Civil War military commission jurisdiction was extended by customary practice to cover violations of the law of war, and 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. An 1874 repromulgation of the Articles deleted the mention of military commissions, however, suggesting congressional intent that these trials of servicemen now be restricted to courts-martial.\textsuperscript{113} Although generally overlooked today, three American servicemen were tried by military commission as recently as the Philippine Insurrection of 1899-1902; each case involved deserters who were charged not with that crime,\textsuperscript{109} Id. art. 129, 6 U.S.T. xxxx, 75 U.N.T.S. xxx.\textsuperscript{110} 18 U.S.C. § 2241 (2004)\textsuperscript{111} David Glazier, \textit{Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission}, 89 VA. L. REV. 2005, 2027-34 (2003).\textsuperscript{112} See Glazier, \textit{supra} note 19 at 32-58, 66-72.\textsuperscript{113} See id. at 45-48
which was a statutory violation of the Articles of War, but rather with a law of war offense of unlawfully joining the enemy.\textsuperscript{114} While the Articles of War were amended in 1913 to permit law of war violations to be tried by courts-martial, in 1916 a “savings clause” which is now UCMJ article 21, was enacted providing:

\begin{quote}
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 or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.\textsuperscript{115}
\end{quote}

Without this language, the congressional enactment of statutory court-martial jurisdiction over law of war offenses would logically have stripped the common-law military commission of authority over these crimes, since the Constitution gives Congress power over both military justice and punishing offenses against the law of nations.\textsuperscript{116} 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 could still be tried by a military commission, at least one which reverted to the historic practice of conformity with courts-martial procedure so that the individuals involved were provided all the rights and protections that have been mandated by Congress. Such a commission, which unlike the current Guantanamo tribunals, would differ from a court-martial essentially in nomenclature only, should then have jurisdiction over a POW under a literal reading of Geneva III article 102.

\textbf{2. Geneva III 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 lawfully try a POW, it is clear that the current commissions cannot do so since they exclude Americans from their jurisdiction and fail to comport with procedural mandates of both

\begin{footnotes}
\item[114] See id. at 53-54.
\item[116] See Glazier, supra note 19 at 59-63; U.S. CONST. art. I, § 8, cl. 10, cl. 14.
\end{footnotes}
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 the habeas challenge brought by commission defendant Salim Ahmed Hamdan alleged,\textsuperscript{117} then it is clear that the Guantanamo trials violate international law.

To determine if 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, if they are generally applicable, 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 Convention to the detainees only if both of these questions can be answered in the affirmative.

Each of the four 1949 Conventions contains identical language defining the conflicts to which the agreements apply located in their second article; as a result this text is widely referred to as “common article 2” (CA2).\textsuperscript{118} While the treaties are generically considered to apply to “international 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.”\textsuperscript{119} CA2 then goes on to make the Conventions applicable to any military occupation of a Party’s territory, and further permits a nation which was not previously party to them to nevertheless invoke their protections by accepting and applying their provisions during the conflict.\textsuperscript{120}

\textsuperscript{117} See, e.g., Brief for Appellee at 31-48, Hamdan v. Rumsfeld,415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393)
\textsuperscript{119} Id.
\textsuperscript{120} Id.
Despite this language intended to maximize the Conventions’ application, it can be seen that the factual situation of the WAQT makes their invocation problematic. As the D.C. Circuit noted in its appellate review of Hamdan’s case:

al 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.\(^\text{121}\)

While it is difficult to factually dispute the court’s holding, the Conventions could still be applicable under several other rationales. If the conflict with al Qaeda was a subset of the conflict with Afghanistan, for example, then the Convention should apply because both the U.S. and that nation would both be “High Contracting Parties.” Hamdan has made this argument to the courts, and it does not seem implausible with respect to his case since he was captured in Afghanistan proper.\(^\text{122}\) But the overall conflict with al Qaeda seems to clearly transcend the geographic limits of that state, particularly since several other current military commission defendants were captured elsewhere. It thus seems a bit of strained logic to contend the geographically larger conflict with al Qaeda can be considered a subset of the more constrained fight against Afghanistan’s Taliban. It would actually seem more logical to assume the converse, that the conflict with the Taliban, who harbored al Qaeda in return for technical and financial support,\(^\text{123}\) is a local subset of the larger conflict against the latter organization. Despite the traditional conception of “state sponsored terrorism,” it is probably more accurate to view the Taliban as having been a “terrorism sponsored state.”

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\(^\text{121}\) 415 F.3d 33, 41.
\(^\text{122}\) Brief, supra note 117, at 4, 46.
Alternatively if the United States was an occupying power in Afghanistan, the Convention could apply at least to those within that country since it 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, but seems to have sought to avoid achieving this role in Afghanistan via the strategy of working in conjunction with the Northern Alliance and the prompt establishment of a new Afghan government under President Hamid Karzai. The ICRC argues that at least the Fourth Geneva Convention applies to any area under de facto military occupation, independent of the establishment of governmental institutions. It could be argued that Geneva III might be similarly applicable, although that result would require holding that protection as a prisoner of war would depend not only on classification of the conflict, nationality, and military status of the detainee, but also on precisely where they were captured and detained. This would certainly seem to be both a complex and unprecedented approach.

Another possibility is that provisions of the Convention could be applicable as customary international law rather than treaty law, which could potentially make it applicable to a broader range of international conflicts than just those specified by CA2. The recently completed International Committee of the Red Cross (ICRC) study on customary international law norms governing armed conflict did not attempt to make this determination because they adopted a methodology focused on state practice rather than on treaty analysis. Also, customary international law status likely seemed irrelevant at the time the study was initiated since the virtual universal ratification of the Conventions insured they would apply to any conceivable state versus state conflict. But given the current likelihood of continued international conflict

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124 See Glazier, supra note 47.
125 See discussion Part II.B.2, infra.
126 HENKAERTS & DOSWALD-BECK, supra note 57 at xxx. [auth note to be removed before publication – this is an actual page number, (p.30 of the intro) not an indication that the number still needs to be filled in]
between state and non-state actors, certainly the virtually universal ratification of the Geneva Conventions could argue for the treaties having customary status, and potential applicability as such to non-state entities. Although obviously predating efforts at applying the law of war to counter-terrorism, the U.N. Secretary General reported to the Security Council his opinion that the Geneva Conventions had achieved customary law status in 1993.127

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

Even assuming arguendo that Geneva III provisions as a whole are applicable to the WAQT under one or more of these rationales, it is still necessary to assess whether the individuals facing military commission trials qualify as POWs who would be exempted from such tribunals under the Convention’s provisions. Article 4 of the treaty identifies six categories of individuals qualifying as POWs (and two other groups who should be treated as such);128 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 4.A.(1) specifies that “Members 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.129 Article 4.A.(2) does the same for “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . .”130 This category is specifically subject to the further caveat that these groups must meet four specific conditions, however:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive emblem recognizable at a distance;

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127 ROBERTS & GUELFF, supra note at 196.
130 Id. art. 4.A.(2), 6 U.S.T. 3316, 331X, 75 U.N.T.S. 135, 13X.
(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.\textsuperscript{131}

The final relevant provision of article 4 establishes POW status for “Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power.”\textsuperscript{132}

After receiving legal analyses from the Attorney General, the Departments of Justice and State, and White House counsel, the President determined that Geneva III was not applicable to al Qaeda because, “among other reasons,’ al Qaeda is not a state party to the Conventions.\textsuperscript{133}

His memorandum went on to announce that while Geneva III was applicable to the conflict with Afghanistan (which he determined was legally severable from the fight against al Qaeda), the Taliban nevertheless failed to qualify for POW status because based on “the facts supplied by the Department of Defense,” they were “unlawful combatants.”\textsuperscript{134}

While the President has historically received significant judicial deference on matters related to national security and the conduct of international relations, this blanket attempt to make a blanket determination about the detainees POW status cannot logically be considered to 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 qualify for. This was clearly borne out during the Civil War when a

\textsuperscript{131} Id.
\textsuperscript{132} Id. art. 4.A.(2), 6 U.S.T. 3316, 331X, 75 U.N.T.S. 135, 13X.
\textsuperscript{133} 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 legal 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 64 at 687-701 document the additional participation.
\textsuperscript{134} Bush, supra note 133.
military commission rejected the governments 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.\(^{135}\) Article III courts were called upon to perform similar analyses during U.S. government efforts to prosecute Confederate privateers as pirates.\(^{136}\)

Second, a blanket determination of combatant status, which is necessarily fact specific, is both unprecedented and liable to error. Even while recognizing the Confederacy as a whole as being an unlawful entity, for example, the U.S. government still treated its military units which complied with the law of war as lawful combatants, a point implicitly demonstrated by the Lieber Code’s requirement to distinguish between any units which denied quarter (refused to accept surrender) and those which did not.\(^{137}\) General assumptions made about the nature of the Taliban (or even al Qaeda for that matter) from “facts” provided early in the conflict may well fail to accurately describe the conduct of some groups within those organization who could still be found to operate in conformance with the law of war. It would have been a significant injustice to impute the unlawful German and Japanese aggression of WWII or such horrors as the Holocaust and rape of Nanjing to every one of those countries’ military units and, 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 are believed to fight in a manner contrary to the law of war is tantamount to declaring every individual guilty without benefit of any individualized procedure whatsoever.\(^{138}\)

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\(^{136}\) *See* Weits, *supra* note 48.


\(^{138}\) *See* DE PREAUX, *supra* note 86 at 414-15.
Legally, the burden should be on the government to persuade each individual military commission panel that the accused before it committed during an act during armed conflict that violated international law at the time it was committed and that the perpetrator had no valid claim to belligerent immunity.\(^{139}\)  World War II era war crimes trials decision consistently held that following nationally prescribed rules was not a defense to charges of depriving detained individuals a fair trial under international law.\(^{140}\) So if the President’s determination about combatant status proves incorrect either as a matter of overall legal judgment or because individual circumstances prove different from those underlying the blanket determination, subordinates relying upon it may be liable to punishment for war crimes. And the President’s determination is unlikely to receive any significant deference at all in the case of any international prosecution or foreign political judgment about the validity of the 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. First, these groups could be considered to be “armed forces,” either of a Party to the conflict (art. 4(A)(1), which includes militia or volunteer corps assimilated into those armed forces) or of “a government or an authority not recognized by the Detaining power” (art. 4(A)(3)). (Directly related to this approach, if al Qaeda is an armed force, than an individual such as Hamdan, alleged to be a driver for that organization, could fall under art. 4(A)(4) granting POW status to “[p]ersons who accompany the armed forces without actually being members thereof . . .”).\(^{141}\) Alternatively, either al Qaeda or the Taliban could be found to 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 . . .” (art. 4(A)(2)).

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\(^{139}\) See Glazier, supra note 19 at 80.

\(^{140}\) Id. at 75.

\(^{141}\) See, e.g., Reply Brief for the Petitioner, Hamdan v. Rumsfeld, at 27.
latter provision goes on to then express four well-known compliance criteria including having a
responsible commander, distinctive uniforms or emblems, carrying arms openly, and following
the law of war. Neither 4(A)(1) or (2) explicitly requires that these forces belong to a Party to
the Conventions, using the term “Party to the conflict” instead, although this may be implied by
the capitalization of the word “Party.” But 4(A)(3) makes no requirement that forces even
belong to a recognized state, so that formulation at least clearly cannot require Convention
participation to apply.

Although the United States never recognized the Taliban or, of course, al Qaeda, as a
legitimate government, the fact that it considers that it can lawfully conduct a belligerency
against each of these groups should logically make them either “parties” to the conflict, or
alternatively, at least “an authority not recognized by the Detaining Power.” The key question
then becomes whether the Taliban and al Qaeda fighters can qualify as “members of regular
armed forces” of those entities per article 4(A)(1) or 4(A)(3), or persons accompanying the
armed forces under 4(A)(4).

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

142 Geneva III, supra note 79., art. 4(A)(3), 6 U.S.T. 3316, 331X, 75 U.N.T.S. 135, 13X. 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 86 at 61-62.
While this interpretation is colorable based on the facial language of the treaty, it is contrary to both the history of international law and 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.” The Code established, at least implicitly, criteria for lawful military forces which included being under formal command, wear of a distinctive uniform, and adherence to basic mandates of the law of war.

The criteria of article 4(A)(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 a vessel enjoying rights accorded to a “warship” to 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.

Once again this language provides evidence that having formal status as a member of “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 as well, noting that it was considered unnecessary for the four criteria of article 4(A)(2) to be included in 4(A)(3) because such conformance was among the “material characteristics” of “regular armed forces.”

143 See, e.g., General Orders 100, supra note 137, art. 52.
144 This is implied by a number of articles refering specifically to the responsibilities of military commanders. See, e.g., id., art. 3, 44, 140, 155, 160.
145 Id., art. 63-64, 83.
146 See e.g., id., art. 14-16, 44.
148 DE PREUX, supra note 86 at 62-63.
Despite public perceptions to the contrary, it is not impossible that some elements of al Qaeda comply with these requirements. The common (and surely not unjustified) vision of this group as terrorists, deliberately attacking civilians targets, even using civilian objects, such as commercial airliners as weapons, while hiding incognito among the civilian populations makes finding general non-compliance with the law of war fairly straightforward. But just because the government terms 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 passing through the camps received in general preparation for conflicts such as the Taliban’s fight against the Northern Alliance or the defense of Muslim interests in the Balkans. And there is some evidence, such as videotape scenes CNN broadcast about Osama bin Laden in August 2002, even showing apparent members of al Qaeda wearing uniforms and carrying arms openly.\(^{149}\) It is impossible to tell from such images whether these individuals are under responsible command or fight in accordance with the law of war. But the fact that al 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 wearing distinctive military style vests or matching headgear which could qualify as a “distinctive sign recognizable at a distance;” the photos again certainly show them carrying their arms openly.\(^{150}\)


Finally, Article 5 of Geneva III provides that:

[s]hould any doubt arise to 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.151

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, 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. Those individuals captured under circumstances leaving any ambiguity as to their proper classification who assert entitlement to POW status should be accorded the opportunity to be heard on this question by a “competent tribunal.” The first U.S. court to formally judge Hamdan’s military commission challenge agreed with this point; the District Court stayed his trial pending an appearance before an “Article 5 tribunal.”152 In response to the government’s appeal the D.C. Circuit allowed the trial to go forth because, it ruled, the Geneva Conventions did not create individually enforceable rights. Nevertheless the court considered the possibility that an Army regulation based on Geneva III might mandate such a hearing, but concluded that the military commission itself was a “competent tribunal” before which Hamdan could make his claim.153 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

153 Hamdan, 415 F.3d 33, 43-44.
properly had jurisdiction over the case they were hearing, and Article V contains no specific requirements at all as to the composition or procedure of the forum making the determination.

Additional implicit support for this interpretation can now be found in the language of the 1977 Additional Protocol to the 1949 Conventions covering international armed conflicts (AP1). Section 2 of article 45 of AP1 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 such adjudication should occur before the trial, but that is not required.\textsuperscript{154}

The most significant reason for concern about the military commissions making such decisions may not be the lawfulness per se of such a result. Rather it will be the practical fact that the initial defendants have already been held for four years under conditions of penal imprisonment which will prove to have been significant maltreatment if it is subsequently determined that any 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 will be based.

As a practical matter it seems unlikely that either a U.S. military commission or Article III court is going to find that Geneva III provides procedural protections for detainees in the war on terror. But in the event 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 4(A)(1), (2), or (3) as a Prisoner of War, then it should reach the decision that such individual can not lawfully be tried by the currently composed military commissions.

\textbf{B. The Fourth Geneva Convention of 1949 on the Protection of Civilians}

\textsuperscript{154} Protocol I, \textit{supra} note 56, art. 45 § 2, 1125 U.N.T.S. XXX.
Although often overlooked in the United States,\textsuperscript{155} including no apparent discussion at all in the legal analysis underlying the President’s decision about the application of Geneva provisions to al Qaeda or the Taliban,\textsuperscript{156} the Fourth Geneva Convention of 1949 (Geneva IV), 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 logically be civilians, which would call for the analysis of any protections due them under Geneva IV.

1. \textit{Geneva IV provisions potentially impacting military commission procedures}

It should be noted upfront that holding that these individuals are civilians would not deny the government authority to take protective measures against threats they were considered to pose, but could impose procedural constraints on such measures. The Convention actually even permits incommunicado detention of individuals “detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security” of an occupying power.\textsuperscript{157} But it also include several articles addressing fair trial standards, among them:

(1) Article 67 requires any criminal offenses to have been defined in advance of the conduct proscribed and penalties to be proportionate the offence.\textsuperscript{158}

(2) Article 68 limits the death penalty to “espionage,” “serious acts of sabotage,” or “intentional offenses which have caused the death of one or more persons”\textsuperscript{159}

(3) Article 71 forbids sentencing by other than “competent courts” after “regular trial” and requires written notice to the accused including specification of the penal provisions under which any charge is brought.\textsuperscript{160}

\textsuperscript{155} See Glazier, \textit{supra} note 47 at 188-89.
\textsuperscript{156} Kantwill & Watts, \textit{supra} note 64 at 705-08.
\textsuperscript{157} Geneva IV, \textit{supra} note 79, art. 5, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.
\textsuperscript{158} Id., art. 67, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.
\textsuperscript{159} Id., art. 68, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.
(4) Article 72 guarantees the accused the right to present evidence necessary to their defense and the right to be assisted by qualified counsel “of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence”\(^ {161}\)

While Geneva IV does permit trial of detainees by “properly constituted, non-political military courts,”\(^ {162}\) application of its fair trial provisions would nevertheless make several aspects of the current military commission process highly problematic.

The first of these 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.\(^ {163}\) The detailed DOD directive governing the commissions says they have “jurisdiction over violations of the laws of war and all other offenses triable by military commission.”\(^ {164}\) DOD has issued a supplemental instruction enumerating in some detail charges which may be tried by the commission.\(^ {165}\) This document states that the crimes it identifies “derive from the law of armed conflict” and that since it is “declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.”\(^ {166}\) But the instruction, issued over a year after most of the defendants were already in custody, makes no efforts to link the charges it defines to any identifiable source of international law or to digest prior war crimes trials to show potential precedents. Further, several leading legal scholars dispute the notion that the Anglo-American version of conspiracy as an inchoate offense is even

\(^{160}\) Id., art. 72, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.
\(^ {161}\) Id., art. 68, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.
\(^ {162}\) Id., art. 66, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.
\(^ {164}\) Department of Defense, Military Commission Order No. 1, para. 3.B., Aug. 31, 2005 (hereinafter “MCO”).
\(^ {166}\) Id., para 3.A. at 1-2.
recognized under international law, yet that charge is the only one most of the current military
commission defendants face.\textsuperscript{167}

A second major problem Geneva IV requirements would pose for the current military
commissions is that the tribunals’ restrictions on choice of counsel fail to meet the Convention’s
article 72 standards. Military Commission Order No. 1 makes some provision for representation
by counsel of choice, but close reading reveals this “choice” is limited to military officers
determined to be “available” by the government or U.S. citizens eligible for a government
security clearance and willing to sign an agreement to comply with whatever rules the
government makes.\textsuperscript{168} As a practical matter this severely restricts the available pool from which
choice can made, giving the government effective veto authority, and denies the accused the
opportunity to be represented by counsel of his own nationality, something permitted by virtually
every previous war crimes trial to date. A number of issues have been raised by both defense
team members and outside observers about the serious impact various other commission rules
have had on the ability of defense counsel to prepare a proper defense.\textsuperscript{169}

2. Applicability of Geneva IV to the War on Terror

While the government’s efforts to deny the identified enemy in the war on terror status as
military or militia forces under Geneva III might seem to logically call for their treatment as
civilians, there are several reasons why application of Geneva IV to these individuals is facially
unlikely. First, of course, Geneva IV shares the same Common Article 2 with Geneva III,

\textsuperscript{167} See, e.g., Brief for Petitioner, Hamdan v. Rumsfeld, (U.S. S. Ct. No. 05-184) at 27-30 (2006); Amicus Curiae
No. 05-184) (2006); Charge Sheets \textit{supra} note 163.
\textsuperscript{168} MCO, \textit{supra} note 164, para. 4.C.(3) at 5-6.
defining its applicability to international armed conflicts. It thus must overcome the same initial hurdles as Geneva III does in the definition of the conflict before it could be found to apply.\footnote{See section A.2. of this part \textit{supra}.}

Even if this issue can be overcome, Geneva IV protections relating to fair trial standards did not seem to anticipate the possibility of civilians being taken to a third country by a belligerent, probably because the Convention forbids an occupying power to do this.\footnote{See Geneva IV, \textit{supra} note 79, art. 49, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.} The protections are thus specifically written to apply only to trials in \textquote{occupied territory}\footnote{See id., § III, art. 47-76, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.} or the actual \textquote{national territory of the Detaining Power.}\footnote{See id., § IV, art. 126, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.} While the transfer of detainees to Cuba is clearly contrary to the spirit of the Convention, it is less clear whether these transfers constitute actual breaches of the agreement. Since the United States structured its operations in concert with the indigenous Northern Alliance and rapidly installed a native government under President Karzai, it is plausible to claim that it was never an occupying power. The ICRC, however, asserts that Geneva IV\’s protection apply anytime a nation\’s forces exercise de facto control over any portion of foreign territory, suggesting that the U.S. could be found to be an occupying force in parts of Afghanistan it may have controlled, such as Bagram air base.\footnote{See, e.g., ICRC, Official Statement, Current Challenges to the Law of Occupation, Nov. 21, 2005, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/occupation-statement-211105?opendocument. 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 xx, Rasul v. Bush, 542 U.S. 466 (2004).} This interpretation would mandate the treaty\’s application to those parts of Afghanistan and make the removal of individuals to whom the treaty otherwise applied to Guantanamo a grave breach, and hence a federal crime under the War Crimes Act.\footnote{See 18 U.S.C. § 2441.} A literal reading of the treaty language applying fair trial standards specifically to occupied territory would still seem to facially exclude its
application to events at the leased U.S. naval station in Guantanamo Bay, however, unless a court would hold it to constitute “national territory” of the United States.

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). While the language of Geneva IV’s article 4 is a bit convoluted, the 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.\(^{176}\) The second category may be inapplicable to Guantanamo trials since it does not legally qualify as territory under military occupation. If a military commission defendant can be shown to have been removed from parts of Afghanistan under defacto U.S. control, however, defense counsel would certainly want to assert that courts should not allow a nation to avoid Geneva IV’s mandates by the unlawful transfer of a detainee from those areas. With respect to the first category, it is possible to reach a finding that Guantanamo, although leased from Cuba, is de facto U.S. territory – the Supreme Court said something close to this in its Rasul decision.\(^{177}\) But the greater challenge 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, still focused on concepts 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.”\(^ {178}\) The first ten persons facing military commission charges include an Afghan, an Algerian, an Australian, a Canadian, an Ethiopian, two Saudis, a Sudanese, and two

\(^{176}\) Oscar M. Uhler et al., Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 45-46 (1958).


\(^{178}\) See Geneva IV, supra note 79, art. 4, 6 U.S.T. 35xx, 75 U.N.T.S. XXX.
Yemenis,179 and the United States currently has diplomatic relations with all of these nations. According to the letter of the agreement, then, 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.180

C. Common Article 3 to the Geneva Conventions of 1949

Recognizing the difficulties discussed above in finding that the 1949 Geneva Conventions as a whole apply to the WAQT because of the definition of applicable international armed conflicts in Common Article 2, the idea that Common Article 3 (CA3), dealing with non-international armed conflict, might apply instead has gained recent traction.181 The implicit rational is that CA2 and CA3 are essentially inclusive – hostilities failing to meet CA2’s definition of international armed conflict should default to being a non-international one covered by CA3.

CA3 was developed based on long-standing concerns of the International Red Cross that efforts were required for trying to mitigate the human costs of civil wars as well as traditional international armed conflicts.182 It is essentially a stand-alone provision, or “Convention in miniature,” intended to provide a minimum set of humanitarian guidelines applicable to non-

180 Since the United States never recognized the Taliban, it does seem likely that there was no recognized Afghan 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 logically qualify as grave breaches of Geneva IV. 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.
181 See, e.g., Hamdan v. Rumsfeld, 415 F.3d 33, 44 (J. Williams, concurring) (D.C. Cir. 2005)
182 Commentary, supra note 176 at 26-30.
international armed conflicts which definitionally fall outside the scope of the full Geneva accords.\textsuperscript{183}

\section*{1. Common Article 3 provisions potentially impacting military commissions}

Consisting of just 271 words, CA3 endeavors to provide a concise set of measures to minimize the human toll of “armed conflict not of an international character.”\textsuperscript{184} Among its provisions are protections for persons who have surrendered or been rendered \textit{hors de combat} including prohibitions on doing them violence or committing “outrages upon personal dignity, in particular, humiliating and degrading treatment.”\textsuperscript{185} The provision of most direct relevance to military commission use 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.”\textsuperscript{186} The final sentence of CA3 states “The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”\textsuperscript{187}

The last sentence was particularly important in gaining international agreement to CA3. As the U.S. experience from the Civil War highlights, nations invariably consider internal armed opposition to constitute 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 the conflicts without altering the legal nature of the conflict itself, thus permitting the criminal trial of those responsible, as well as any individual combatants who

\textsuperscript{183} Id. at 33-34.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.

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might have violated the law of war in carrying out hostilities.\textsuperscript{188} 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. But if CA3 applies, any such trials should be subject to its “regularly constituted” and “indispensable” “judicial guarantees” provisions and there is a reasonable basis for belief these could invalidate the current military commissions. As Hamdan’s defense team has argued to the Supreme Court in suggesting the application of CA3 as an alternative to the full Geneva III:

> The commission clearly does not comply [\textsuperscript{189} 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 organized 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.\textsuperscript{189}

> It is also likely that the de facto restrictions on the defendant’s ability to employ counsel of choice, as well as denial of the right to be present (unless excluded due to personal misconduct during the trial and the right to hear all evidence against them would be found to be deprivations of the “indispensable judicial guarantees” further mandated by the article.\textsuperscript{190}

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

\textsuperscript{188} See, e.g., DE PREUX, supra note 86 at 43-44.
\textsuperscript{190} See, e.g., Henckaerts & Beck, supra note 57 at 360-61, 366-67.
As was the case with CA2 governing the application of the full Geneva Conventions, there is a significant facial problem with the application of CA3 to the WAQT. In defining non-international armed conflicts, CA3 specifically refers to them as “occurring in the territory of one of the High Contracting Parties. . . .”\(^{191}\) 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 since the al Qaeda leadership still being pursued is generally considered to have fled that nation. This factual situation could be sufficient to support a holding that CA3 also fails to apply to the WAQT.

Further rationalization to contest CA3’s application can be found implied in the language of article 1, section 2 of the Additional Protocol 1 of 1977, which begins “In cases not covered by this Protocol or by other international agreements . . . .”\(^{192}\) If the interpretation that CA2 and CA3 together covered the full scope of armed conflict is correct, i.e., that any conflict falling outside CA2 fell within CA3, then there could be no “cases not covered this Protocol or by other international agreements” for this article to be referring to. So article 1, section 2’s inclusion in the Additional Protocol demonstrates that the ICRC and the nations participating in the conferences resulting in the 1977 supplemental accords recognized CA2 and CA3 were not all-inclusive, suggesting again that the literal reading of CA3’s applicability is correct.

Although not a legal argument per se against its application, as a practical matter the difficulty of judicial application of CA3 standards should counsel against holding it to be the definitive international law standard governing military commission procedure unless no more specific guidelines can realistically be applied. It will be particularly difficult for military

\(^{191}\) Common article 3, supra note 184 (emphasis added).
\(^{192}\) Protocol I, art. 1, supra note 56, 1125 U.N.T.S. XX.
commission participants, working in an understaffed Guantanamo facility, hours by plane away from the nearest law library, to determine for themselves exactly what “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” is. Realistically, it will be hard enough for the D.C. Circuit Court of Appeals to make that determination when called to do so on even the limited review provided by the DTA. Do international standards applicable 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 they 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? It’s not inconceivable that such questions could be tied up in litigation for the natural lives of the current detainees.

Given that there are significant issues calling in to question the facial applicability of either Geneva III, Geneva IV, or Common Article 3 as the definitive international law standard by which military commission procedure can be judged, it is clearly appropriate to examine other potential legal sources. Although the Geneva Conventions were updated through two Additional Protocols in 1977, the United States has not ratified either of these, although it has recognized that some Protocol provisions are now declaratory of customary international law. Since binding written rules logically 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 Protocols.

**Part 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 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,” laying the foundation for modern international human rights law (IHRL).

A. Early Developments in International Human Rights Law

At the time the Geneva Conventions were adopted, the one 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). The UDHR included among its provisions several fair trial standards, including a call for “everyone” to receive a public trial with all “guarantees necessary for his defense” by “an independent and impartial tribunal.” It 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.”

These provisions pose problems for the military commission trials per se at several levels. At the top of this hierarchy are U.S. constitutional challenges to the commissions based on separation of powers issues, which implicitly invoke definitions of independence at the most macro level. More pragmatically, the multiple roles of the DOD Appointing Authority in promulgating commission rules; selecting trial members; having the final say on charges, challenges, and interlocutory decisions impacting those charges; participating in post-trial

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194 U.N. Charter art. 1, para 3.
196 Id. art 11 at 73.
197 Id. art. 10.
198 Id. art. 8.
review, and exercising general oversight of the process strains any plausible definition of “independence.” The ability for the government to close trials, even excluding the defendant and civilian counsel, limitations on choice of counsel, and potential hindrance of attorney-client communication also seem extremely problematic under these standards. And the limited post-trial review provided either by the Military Commission Order or the DTA, as well as the D.C. Circuit’s holding that Geneva III rights are not judicially enforceable, all seem to fall short of the “effective remedy” requirement as well.

It seems unlikely, however, that the UDHR would be invoked either by military commission participants or by U.S. courts as a binding limitation on their procedure. Enacted as a General Assembly Resolution, it falls outside the areas (e.g., UN budget matters and other internal UN functioning) where that body is considered able to bind member states. The Declaration itself is cast in aspirational 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.” It has been suggested that the UDHR may now constitute customary international law, but most scholars seem to caveat this possibility, indicating that it was intended that the Declaration would be enforced through subsequent agreements and legislation.

Given the aspirational status of the UDHR, the individual protections accorded in the four 1949 Geneva Conventions, commonly termed as “international humanitarian law,” (IHL), are

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200 See Departement of Defense, Military Commission Order No. 1, Aug. 31, 2005 at 1-4, 15-16 (detailing Appointing Authority role in various facets of military commission organization and procedure).


202 Hamdan, 415 F.3d 33, 38-40.

203 PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 378 (2004).

204 UDHR, supra note 195, Preamble at 72.

essentially the first “rights” internationally codified in binding agreements in the United Nations era. It is thus logical to consider IHL as 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 optional protocols. Despite these large numbers, however, virtually all these agreements can be discounted from direct application to U.S. conduct in the war on terror. Some are regional accords from which the United States is logically excluded, such as the five conventions and sixteen protocols definitionally restricted to Europe and Africa. The one regional agreement that could apply geographically is the American Convention on Human Rights. But since neither the United States nor Cuba are parties to this accord, there would seem to be no jurisdictional basis for its application to the Guantanamo commissions. Other IHRL agreements are either not yet in force or the United States has elected not to join them, while 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) which, coincidently, is one of two treaties specifically intended to give binding worldwide force to the principles articulated in the UDHR. 

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206 See HERCZEGH, supra note 41 at 56-57.
208 See id.
209 American Convention on Human Rights, Nov. 22, 1969,
211 The Minnesota database page on U.S. participation shows the U.S. has ratified only six of these treaties and another four protocols. See http://www1.umn.edu/humanrts/research/ratification-USA.html. (hereinafter “US Human Rights). 
213 MALANCZUK, supra note 203 at 215. The other is the International Covenant for Economic, Social, and Cultural Rights.
B. The International Covenant on Civil and Political Rights and the WAQT

Completed in December 1966, the ICCPR entered into force in 1976. The United States subsequently signed the agreement October 1977 and ratified it in June of 1992. Article 9 includes several provision related to criminal justice, including prohibition against arbitrary arrest, requirement that the arrested person be “promptly informed of any charges against him,” and the right to a prompt appearance before a judicial official and “trial within a reasonable time.” Article 14, which the United States played a leading role in drafting, contains specific provisions governing fair trial:

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

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214 MALANČUK, supra note 203 at 215.
215 U.S. Human Rights, supra note 211.
216 ICCPR, supra note 212, art. 4 § 1 at xxx.
217 Id., art 4 § 2.
218 Id. art 4 § 3.
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. . . .

As previously noted, the current Guantanamo military commissions fall well short of several of these article 14 requirements, including independence of the tribunal, adequacy of defense facilities, the right to counsel of choice, and the right to be tried in the defendant’s presence. Additionally, the commission processes would seem to clearly fall short of the ICCPR requirement that trials take place “without undue delay.” Since no defendant had actually been tried as of March 2006 even while some have been in captivity more than four years, it would be extremely hard to demonstrate compliance with this speedy trial mandate by any reasonable definition.

The obvious question is whether the ICCPR, an international human rights instrument, is applicable to the U.S. conduct of the WAQT. The issue of the treaty’s application in time of war is not a new one, however, having already been addressed by the International Court of Justice which held that it generally remains effective. That decision did acknowledge the concept of *lex specialis*—that more specific legal provisions take precedence over the more general, and

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220 Id., art 14 at xxx.

that the ICCPR would thus have to be interpreted in a manner consistent with the law of war.\textsuperscript{222} This should mean, for example, that Geneva Convention standards, as specialized law of war provisions, would inform the application of the ICCPR to armed conflict, and that trials conforming to Geneva III rules should likely be found adequate in wartime. This could be particularly important for the United States since Anglo-American style courts-martial have been held by both Canada’s highest court and the European Court of Human Rights (ECHR) to fail to qualify as “independent and impartial.”\textsuperscript{223} The Canadian decision was based on that country’s 1982 Charter of Rights and Freedoms,\textsuperscript{224} and the ECHR’s on the European Convention on Human Rights,\textsuperscript{225} neither of which are directly applicable to the United States. But both documents adopt the “independent and impartial” language originated in the UDHR\textsuperscript{226} and subsequently incorporated in the ICCPR, to which the United States is a party.

This same terminology also appears in Geneva III art. 84, which governs the limited situations in which POWs can be subject to civil, rather than military trial. A literal reading of the article could apply these criteria to courts-martial for POWs as well. But the history behind the 1949 Convention indicates a strong desire to mandate equivalent legal treatment of POWs and the detaining nation’s over service personnel, overturning WWII-era practice and the U.S.

\textsuperscript{222} Id.
\textsuperscript{223} The Canadian decision, \textit{R. v. Généreux} [1992] 1 S.C.R. 259 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. Problems the Canadian court found with courts-martial included relevant to the military commission 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 300-310. 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, (1997) E.H.R.R. 221, 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.
\textsuperscript{224} Id. at 294-310.
\textsuperscript{226} See art. 11(d) of 1982 Canadian Charter of Rights and Freedoms; art. 6(1) of the European Convention, \textit{supra} note 225.
Supreme Court’s Ex parte Yamashita decision\textsuperscript{227} sanctioning a lower standard for trials of enemy prisoners.\textsuperscript{228} Given this dynamic, it seems unlikely that any tribunal should or would read “independent and impartial” in art. 84 to require a higher standard of treatment for enemy detainees than for American soldiers.

The situation is quite different when the ICCPR is being interpreted rather than Geneva III, however. Since the ICCPR is intended, inter alia, to raise the international bar for criminal trials, reading it to allow lower military trial standards than those already been improper in Canada and Europe would undercut its value as a universal protector of human rights. A particular irony of the Bush Administration’s effort to avoid implication of the Geneva Conventions in what it calls the war on terror is that it could inadvertently invoke a higher international standard by which any military trials of suspected terrorists would be judged.

That being said, there are, however, two distinct legal means by which the United States might avoid application of the ICCPR to military trials in the WAQT other than through the application of more specialized agreements such as Geneva III or IV. The first is to challenge the facial applicability of the treaty to the Guantanamo commissions. Article 2(1) of the ICCPR declares that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .”\textsuperscript{229} This wording lends itself to two interpretations; either a Party is obligated to respect the rights of persons within it territory and subject to its jurisdiction anywhere else as well, or a Party is only obligated to respect the rights of persons who are simultaneously both (1) within its territory and (2) subject to its jurisdiction. Given that anyone within a State’s

\textsuperscript{227} 327 U.S. 1 (1946)
\textsuperscript{228} See, e.g., LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 209-10 (describing Geneva III requirements that POWs be tried as same tribunal as detaining nation’s personnel and linking independence and impartiality requirement specifically with trial by civil tribunal).
\textsuperscript{229} ICCPR, supra note 212, art. 4 § 1 at xxx.
territory is generally already subject to its jurisdiction, and that the Covenant implements the UDHR whose language describes all the rights it enunciates in universal terms, applying to all humans regardless of location, the first reading is the more persuasive. Not surprisingly, this is the interpretation accorded article 21 by both leading commentary and the U.N. Human Rights Committee.\textsuperscript{230} And in actual state practice, the international community, including the United States, strongly condemned Iraq for human rights violations during its occupation of Kuwait. Since the whole legitimacy of Operation Desert Storm was founded on the United Nations’ rejection of Iraq’s claim Kuwait was its territory, this criticism thus had to be founded on the legal conclusion that human rights standards had extra-territorial application.\textsuperscript{231} (Interestingly Iraq actually ratified the ICCPR in 1971,\textsuperscript{232} two decades before the U.S., so it was clearly obligated to comply with its mandates).

Perhaps equally unsurprising, however, the United States has more recently argued for the restrictive interpretation\textsuperscript{233} and at least one Circuit Court has endorsed this view, declaring that the Covenant does not constrain government acts outside its own territory.\textsuperscript{234} That 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.\textsuperscript{235} Based on the Supreme Court’s decision in Rasul that the United States has sufficient control over Guantanamo that detainees there have standing to bring habeas challenges

\begin{itemize}
\item \textsuperscript{230} Frederick Kirgis, Alleged Secret Detentions of Terrorism Suspects, 10 ASIL Insight Iss. 3 Feb.14, 2006.
\item \textsuperscript{231} See Henkaerts & Doswald-Beck, supra note 57 at 305.
\item \textsuperscript{232} See University of Minnesota, Human Rights Library, Ratification of International Human Rights Treaties—Iraq at http://www1.umn.edu/humanrts/research/ratification-iraq.html
\item \textsuperscript{234} U.S. v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002). Interestingly 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. So strictly speaking comments about the ICCPR’s relevance to U.S. conduct should only be dicta.
\item \textsuperscript{235} 296 F.3d at 1283.
\end{itemize}
to their detentions,\textsuperscript{236} however, it is not implausible that it could also find that the ICCPR binds U.S. conduct there even if the Covenant is not otherwise applicable to foreign territory.

Although some scholars, such as Jordan Paust, argue that the ICCPR is categorically binding on the military commissions,\textsuperscript{237} the Covenant itself provides an “out” by which the government could proactively avoid its application. The ICCPR text specifically provides for flexibility in its implementation during time of war or national emergency via the terms of its article 4:

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 I 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.\textsuperscript{238}

The United States has not yet made the requisite declarations to invoke any permitted derogations, but there is nothing logically stopping it from doing so. It could conceivably even wait until after a court had found the Covenant applied and still lawfully do so. The significant provisions which the military commissions appear to violate are in ICCPR articles 9 and 14, neither of which is included in the list of articles exempt from derogation.

\textsuperscript{236} 542 U.S. at 480-84.
\textsuperscript{238} ICCPR, supra note 212, art. 4 at xxx.
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,” there is clear precedent for holding that it is. The UN Human Rights Committee has sought to establish stringent standards for derogation, an effort supported by the unofficial “Siracusa Principles” developed by international law experts in 1985.239 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, including six that specifically cited “terrorism” as the threat requiring that step.240 The United Kingdom has previously declared formal derogation from the ICCPR for the instability in Northern Ireland and, even more on point, announced another in December 2001 in response to the 9/11 attacks even though no part of those events took place within its territory.241 Since there does not seem to have been any significant international objection to the most recent British derogation, it is hard to see how the United States, as the actual locus of those attacks and presumably the target of choice for follow-on strikes, would not be on at least as strong ground in doing likewise.

It is important to note one caveat in the ICCPR language authorizing derogation, the explicit requirement that such measures must “not [be] inconsistent with their other obligations under international law.”242 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, specifically including the law of war since it seems likely that

242 ICCPR, supra note 212, art. 4(1) at xxx
many, if not most derogations, for national security reasons will occur during time of conflict.\textsuperscript{243}

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 often amorphous nature of customary international law, a key challenge confronting its application to real world situations is finding declaratory sources for the governing rules that have sufficient credibility as to persuade political and judicial decision makers of their validity. There are at least three potential sources that might illuminate the customary legal standards that should govern current military commission procedure: previous trials based upon the common law of war, the work of leading commentators, and treaty language which even if not formally binding per se 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**

Military commission use has always been justified by the United States as part of the “common law” of war.\textsuperscript{244} As true of any common law field, past judicial decisions should play a central role in identifying currently applicable law. This is not to say, however, as the Administration apparently wants to in basing the 2001 military commission order on Franklin Roosevelt’s 1942 directives,\textsuperscript{245} that a commission can lawfully be conducted today based on procedures used in times past. If that were true England could still use the Star Chamber and U.S. State courts would be free to ignore all of the procedural mandates resulting from the

\textsuperscript{243} See ABA ICCPR, supra note 219 at 21.

application of key provisions of the Bill of Rights via the incorporation doctrine. But given the consistent trend of applying greater protections for individual rights in both domestic and international tribunals, 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 with an eye as to what were considered to be floors on procedural due process, not their ceilings which may well have been rendered obsolete by evolving international standards of justice. So, 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\textsuperscript{245} provides clear precedent demonstrating that defendants must be allowed access to all evidence against them. Other elements of the procedural floors generally accorded during post-WWII tribunals that are logically still applicable and at issue in the Guantanamo proceedings include the right of the accused to be present throughout their trial and the right to defense by counsel of choice or to conduct their own defense.\textsuperscript{246}

Even more important than the procedures followed by past military tribunals are the substantive decisions they handed down. A number of post-WWII trials dealt specifically with charges that defendants had denied the fair trials mandated by the law of war either to captured service personnel or to persons considered to be unlawful belligerents. Since a significant number of Axis personnel were convicted and punished for these offenses, surely the United States today cannot lawfully apply procedures failing to meet the standards that it and its allies determined were the absolute minimum standard below which the conduct of any trial

\textsuperscript{246} UNITED NATIONS WAR CRIMES COMMISSION (UNWCC), 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 191-93 (1949).
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, 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. This view subsequently gained general acceptance among America’s allies, as a result post-WWII era decisions finding criminal liability over trials for pre-capture conduct had to be based on customary international law norms, not the Convention. So even if the Bush 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.

One common conclusion of the WWII era tribunals that should be of significant concern to participants in the current Guantanamo commission process was that compliance with national law was no defense to charges of providing an unfair trial. This determination accorded the claimed defense that trial participants were just following their own law equivalent status to claims of following superior orders at the time—it was at best a mitigating factor to be taken into account during sentencing. This holding was essentially universally applied; it was reached in trials of both German and Japanese defendants and by both American and allied tribunals. Carrying out military commission trials based on presidential and DOD directives thus will constitute war crimes on the part of accountable participants if the specified procedures fall short of minimum international standards.

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247 Convention relative to the Treatment of Prisoners of War, July 27, 1929, art 63.
250 See, e.g., UNWCC, 5 Law Reports supra note 249 at 22-23 (discussing results of a U.S. trial in Japan as well as U.S. trials in Germany and French and Czech law applicable to war crimes trials).
A case tried by Australian authorities on Rabaul seems particularly relevant to the Guantánamo trials. The Rabaul victims were civilian inhabitants who the Allies acknowledged engaged in unlawful activity against the occupying Japanese forces, including stealing weapons and food, blowing up a fuel dump, and attacking a soldier and a civilian, and were thus war criminals liable to capital punishment.\textsuperscript{251} Although all the natives had plead guilty, and Japanese military law permitted a summary trial under the circumstances, the Australian trial panel nevertheless convicted two Japanese for their role in denying a fair trial, which it held at a minimum must include among other provisions knowledge by the defendants of the evidence against them.\textsuperscript{252}

This result seems to be consistent with other cases documented by the United Nations War Crimes Commission. The trial panel in one of the major post-Nuremburg trials conducted by the United States, for example, the so-called “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 [ ] 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 the accused to know the evidence against them . . . .

(vi) the [ ] right to a hearing adequate for a full investigation of [the] case . . . .\textsuperscript{253}

The results of these World War II era cases should be of significant legal importance today, particularly as the Bush Administration has sought to deny the applicability of subsequent

\textsuperscript{251} See UNWCC, 5 Law Reports \textit{supra} note 249 at 25-28
\textsuperscript{252} Id. at 30-31.
\textsuperscript{253} UNWCC, supra note 246 at 165 (summarizing results of the “Justice Trial”).
treaties which could provide clear statements of law in readily accessible form suitable to both
guide executive decision makers and provide substance for judicial scrutiny. Their application is
complicated, however, by systemic shortfalls. As ad hoc tribunals, these proceedings were
conducted under a wide range of governing directives and procedural rules.\footnote{254}

An even more problematic result from this ad hoc stature is the resulting absence of any
coherent system of trial reporting. Unlike other traditional areas of common law application,
there are no published reporters, comprehensive digests, or online databases that can be
consulted to support authoritative research into past decisions. The single most useful effort in
this regard are the fifteen volumes published by the United Nations War Crimes Commission
between 1947 and 1949, but while the Commission received reports on 1,911 cases these
volumes detail the results of only eighty-nine!\footnote{255} To put this number in context, the United
States alone tried more than 3,000 persons for war crimes after WWII,\footnote{256} while the total scope of
Japanese prosecutions by all countries in the Pacific Theater saw more than 2,200 individual
trials judging more than 5,500 defendants.\footnote{257} It thus appears that the primary issue with
application of precedential trial results to the modern military commissions is simply one of
practicality rather than any legal consideration. Where results of these previous tribunals are
called to a modern military commission’s attention, particularly decisions which resulted in the
imprisonment or even execution of German and Japanese officials, they are logically disregarded
only at the tribunal member’s peril.

\textbf{B. Commentary on Modern Customary Law of War Provisions}

\footnote{254}{See, e.g., Philip R. Piccigallo, The Japanese on Trial 34-35, 75, 124-25.}
\footnote{255}{UNWCC, supra note 246 at xvi (1949). An additional 93 cases are cited in passing but are not reported in any
detail.}
\footnote{256}{The U.S. Army tried 1,672 German defendants, Frank M. Buscher, The U.S. War Crimes Trial Program in
Germany 51 (1989) and the U.S. services jointly tried 1,409 Japanese. Piccigallo, supra note 254 at 48.}
\footnote{257}{Piccigallo, supra note 254 at 263-65.}
International law scholars, as well as the Statute of the International Court of Justice, typically cite sources of international law as including 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 . . . .”

This same view was expressed even earlier by the U.S. Supreme Court in its seminal decision on the application of customary international as a rule of decision in federal courts, 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.

Such authoritative commentary should logically 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 Hague Convention (II) with Respect to the Laws and Customs of War on Land to issue instructions to their armies on the “laws and customs of war on land.” 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. Sadly, although the United States was the leading player in efforts to codify the law of war with General Orders No. 100 of 1863 (the “Lieber Code”) marking the initial

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258 See, e.g., MALANZUK, supra note at 36 (quoting Article 38(1) of the Statute of the International Court of Justice).
259 The Paquete Habana, 175 U.S. 677, 700 (1900).
effort of any military to issue such guidance to its forces,\textsuperscript{262} it has failed to keep pace with modern developments. The current edition of FM 27-10 dates to 1956, with only a single set of rather modest changes entered in 1976.\textsuperscript{263} It thus fails to address any element of the 1977 Additional Geneva Protocols as well as the significant number of subsequent developments in the law of war such as the 1980 UN Convention on Certain Conventional Weapons.\textsuperscript{264} Perhaps even more problematic for the purposes of identifying customary norms, 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.\textsuperscript{265}

The United Kingdom is much more up to date, having issued a comprehensive military manual applicable to all its armed forces in 2004.\textsuperscript{266} This work does make a substantial effort to incorporate customary law provisions and includes among its cited references several dozen significant war crimes cases ranging from WWI through the recent conflict in Yugoslavia and the United States’ prosecution of General Noriega.\textsuperscript{267} The manual also incorporates a modest subchapter on the prosecution of war crimes, including those it determines are defined by customary law of provisions.\textsuperscript{268} Although extremely comprehensive and likely to enjoy significant credibility with U.S. decision makers given the close ties and common heritage shared by the two nations’ militaries, a key challenge with its direct application is that the manual specifically incorporates the U.K.’s ratification of both Additional Geneva Protocols of

\textsuperscript{262} See, e.g., HENCKAERTS & DOSWALD-BECK, supra note 57 at xxv.
\textsuperscript{263} See, FM 27-10, supra note 261, Change No. 1 at 1-5.
\textsuperscript{264} See, e.g., ROBERTS & GUELFF, supra note 16 at 408-732 (covering law of war developments since 1976).
\textsuperscript{265} See, FM 27-10, supra note 261 at i.
\textsuperscript{266} UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, § 4.6 (2004).
\textsuperscript{267} See id. at xii-xv.
\textsuperscript{268} See id. at 423-47.
1977 into its discussion. 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, something the U.K. manual had no reason to address.

While there are some relatively recent treatises on the law of war by civilian scholars, those attempting comprehensive coverage are generally the work of foreign authors and typically accept the provisions of the Additional Protocols as enforceable treaty law. All 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. They are thus of rather limited value in a situation where a nation goes to significant legal effort 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. 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 armed conflict fell well short of those for international wars, the ICRC was asked by a conference of the national relief organizations to undertake what is essentially a restatement of the customary law of war. Volume I of the study presents customary provisions of the law of war in the form of 161 rules supported by extensive footnotes documenting support for their status as law, while the two larger books comprising Volume II provide comprehensive discussion of supporting state

\[^{269}\text{See id. at vii-viii.}\]
\[^{270}\text{See, e.g., LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2000).}\]
\[^{271}\text{HENKAERTS & DOSWALD-BECK, supra note 57.}\]
\[^{272}\text{Id. at x-xi.}\]
practice reinforcing the legal status of the rules.\textsuperscript{273} 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 for the latter.\textsuperscript{274} While there may be colorable arguments that some customary law of war provisions apply strictly to international armed conflict and might not be applicable to 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 provides simply, “No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.”\textsuperscript{275} More helpfully, this rule is then further developed in the accompanying text. Elements subsequently identified as components of a fair trial most problematic for the current military commissions are:

(1) Trial by an independent, impartial, and regularly constituted court. It specifically finds that “[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.”\textsuperscript{276}

(2) Right to defend oneself or to be assisted by a lawyer of one’s own choice.\textsuperscript{277}

(3) Right of the accused to communicate freely with counsel.\textsuperscript{278}

(4) Right to trial without undue delay.\textsuperscript{279}

\textsuperscript{273} See id.
\textsuperscript{275} Id. at 352
\textsuperscript{276} Id. at 354-55.
\textsuperscript{277} Id. at 360-61.
\textsuperscript{278} Id. at 363.
\textsuperscript{279} Id. at 363-64.
(5) Right to be present at trial unless unless excluded due to own disruptive conduct, the defendant is notified and elects not to appear, or an appellate review is considering only matters of law (the right to appear is maintained for any appellate review involving questions of fact and law).  

(6) Right not to be compelled to testify against themselves or confess guilt; any evidence obtained through torture or other compulsion must be inadmissible.

Supporting discussion for the two immediately following rules, 101 and 102, addressing the requirement that crimes be defined prior to their commission and that there be no convictions other than on the basis of individual criminal responsibility, seem to also call into question the application of the conspiracy charges levied against most of the first ten defendants.

Overall the application of these customary norms would call for 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 or war and civilian internees, etc. It has a larger, essentially self-assigned mission found in its governing statute to "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof," and the customary law study clearly falls within this role. The Bush Administration is certainly likely to challenge any effort to give the study any more weight than as simply a

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280 Id. at 366-67
281 Id. at 367-68. While the U.S. government announced just before the Supreme Court held oral arguments in the Hamdan case challenging the validity of the military commissions that it would exclude evidence obtained via torture, the new instruction poses no restriction on confessios obtained by any form of coercion less than actual or threatened acts of torture per se. See Department of Defense, Military Commission Instruction No. 10, Mar. 24, 2006.
282 HENKAERTS & DOSWALD-BECK, supra note 57, at 371-74.
284 Assembly of the International Committee of the Red Cross, Statutes of the International Committee of the Red Cross, June 24, 1998, art. 4 § 1(g).
single work of commentary 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. It is likely to share the view articulated by Kenneth Anderson, for example, that the study endeavors to fully codify all major provisions of API, rather than just those which essentially all nations acknowledge.\footnote{Kenneth Anderson, My initial reactions to the ICRC Customary International Humanitarian Law Study, Nov. 14, 2005 at http://kennethandersonlawofwar.blogspot.com/2005/11/my-initial-reactions-to-icrc-customary.html.} And it is likely to be a matter of special affront to U.S. decision makers that the study’s methodology grants essentially equivalent weight to the declared positions of virtually no nations with no special weight given to those which actually engage in armed conflict, such as the United States.\footnote{See id.}

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 make the ICRC effort all the more important, it is probably too much to expect that either executive or judicial branch decision makers will acknowledge it as any more than potential 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 might be held to be binding on U.S. actions in the WAQT.

Although the U.S. has not ratified the Additional Geneva Protocols of 1977, it did participate 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 a better chance of being found to govern military commission procedure than the ICRC’s customary law study.

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

When the Geneva Conventions were adopted in 1949, human rights law was still in its infancy and the Second World War, a traditional conflict between state actors, was obviously the common experience underlying the drafting process. Within a few decades, however, the
prevalent forms of conflict seemed to be wars which could be characterized as “non-international” under the Geneva regime, often involving guerilla organizations, and human rights law had become much more developed although distinct from the law of war.\textsuperscript{287} 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 the supplemental accords which became the two Additional Geneva Protocols of 1977.\textsuperscript{288}

1. Potentially relevant provisions of Additional Protocol I

Additional Protocol I (API) governs international armed conflict, and while retaining the basic definition contained in CA2 of the 1949 Conventions, expands it 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. . . .”\textsuperscript{289} Obviously recognizing these conflicts might invoke the same concerns that led nations to seek to avoid invoking international armed conflict protections to internal events, API article 4 provided that application of the Convention “shall not affect the legal status of the Parties to the conflict.”\textsuperscript{290}

There are two significant new provisions in API that could provide definitive procedural mandates for the military commissions. First, in acknowledging the growing significance of guerilla movements, Article 44 updates the definition of combatants to eliminate the requirement for a distinctive emblem as long as they distinguish themselves from civilians by carrying arms openly during attacks and pre-attack deployments.\textsuperscript{291} Section 4 of that article goes further, declaring that even a combatant failing to meet these relaxed qualifications for lawful belligerency:

\textsuperscript{287} ROBERTS & GUELFF, supra note 16 at 420-21.
\textsuperscript{288} Id. at 419-22.
\textsuperscript{289} Protocol I, supra note 56, art. 1, §§ 3-4, 1125 U.N.T.S. xx.
\textsuperscript{290} Id., art 4, 1125 U.N.T.S. xx.
\textsuperscript{291} Id., art 44 § 3, 1125 U.N.T.S. xxx.
shall, 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.\(^\text{292}\)

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.\(^\text{293}\)

The ramification of these provisions for the current military commissions is quite clear; their use would 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.\(^\text{294}\)

There is a second AP1 provision which might also be applicable to governing military commissions procedure. Falling within Section III, “Treatment of Persons in the Power of a Party to the Conflict,” Article 75 provides “fundamental 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 the Conventions or under this Protocol.\(^\text{295}\) This article is particularly important because it logically 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.\(^\text{296}\) And it can apply to persons

\(^{292}\) Id., art 44 § 4, 1125 U.N.T.S. xxx.
\(^{293}\) UK MINISTRY OF DEFENCE, supra note 266, § 4.6.
\(^{294}\) See discussion Part II.A. supra.
\(^{295}\) Protocol I, supra note 56, art. 75, § 1, 1125 U.N.T.S. xxx.
\(^{296}\) See Part II.A. and B. supra.
who are nationals of states with normal diplomatic relations with the detaining power. Section 7 of the article makes it explicitly applicable to war crimes trials.

Unlike the rather ambiguous “judicial guarantees recognized as indispensable by civilized peoples” standard of CA3, section 4 of API article 75 contains ten specifically enumerated criteria amplifying its general proviso requiring trial by “an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.” Among these guarantees are the right to “all necessary rights and means of defence,” protection against ex-post facto crime definition, protection against self-incrimination, and right to obtain witnesses under the same conditions as the prosecution. The changing 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. But an additional more specific requirement that an accused “shall have the right to [be] tried in his presence” is clearly even more problematic for the current commissions which have already excluded the first defendant from the voir dire of his trial panel.

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,” “corporal punishment,” “outrages upon personal dignity, in particular humiliating

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299 See note 184 supra.
301 Id.
302 See discussion supra Part II.B.(1).
304 Add cite to Hamdan brief to D.C. Cir. Or S. Ct.
305 Protocol I, supra note 56, art. 75, § 2.(a)(ii) at 1125 U.N.T.S. xxx.
306 Id. § 2(a)(iii) at 1125 U.N.T.S. xxx.
and degrading treatment," and “threats to commit any of the foregoing acts.” Even if one accepts at face value claims that the abuses documented at Abu Ghraib were the unsanctioned work of “rogue” soldiers, official documents clearly demonstrate conduct at Guantanamo that fails to comply with these standards.

Given that API contains provisions that would clearly be 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 Additional Protocol I to the WAQT

While the expansion of the definition of international armed conflict in API could potentially overcome some of the arguments made against the applicability of the 1949 Conventions to the WAQT, the case against applying API as treaty law is actually more clear cut. Although the United States signed the Protocol on December 12, 1977, President Reagan subsequently decided not to submit it to the Senate for advice and consent to its ratification, and the United States has never become a party to it. It thus cannot bind the United States as a treaty. Specific U.S. objections to API included its 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.”

Despite these U.S. objections, 163 nations are now formal parties to API, including major U.S. allies in the WAQT such as Australia, Canada, and the United Kingdom, as well as twenty

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307 Id. § 2(b) at 1125 U.N.T.S. xxx.
308 Id. § 2(e) at 1125 U.N.T.S. xxx.
311 Ronald Reagan ltr. To the U.S. Senate, Jan. 29, 1987 (transmitting Additional Protocol II “for the advice and consent of the Senate to ratification”).
312 See id.
four of twenty six NATO member nations (the only non-parties being Turkey and the United States). 313 Except for Israel, India, and Pakistan, virtually every other significant military power, including China, Russia, Japan, and both Koreas are also parties. 314 Nevertheless, even the ICRC acknowledges that disagreement over several API provisions have kept the agreement as a whole from achieving status as customary international law. 315 At the same time, however, it is widely agreed that significant portions of API either already represented customary law at the time the Protocol was adopted or have subsequently achieved that status. 316 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.” 317

Three subsequent statements clarified U.S. understanding of the customary international law status of much of API. The first was a May 1986 memorandum produced by the DOD law of working group 318 and the second was a speech by Department of State Deputy Legal Advisor Michael Matheson as a conference held at American University on Jan. 22, 1987. 319 Both affirmed that article 75 was among the provisions that the United States recognized as declaratory of existing customary international law norms. Perhaps even more importantly, this position was unequivocally confirmed post-9/11 by the Bush Administration’s State Department

314 See ICRC, supra note 313.
317 Reagan, supra note 311.
Legal Advisor, William H. Taft, IV. In a short symposium article published without disclaimer in the Summer 2003 issue of the Yale Journal of International Law, Taft declared “While 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.”

There are suggestions that the U.S. may be attempting to change this view in 2006; at least one Administration official now states that the U.S. is undecided as to whether Article 75 applies to the war on terror. Given that this provision might restrict some of the more egregious U.S. conduct in the war on terror, it’s 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. It may be plausible to argue that some provisions of API should be read to apply only to international armed conflicts as defined by CA2 of the 1949 Conventions (incorporated by reference in paragraph 3 of AP1 article 1). But this approach specifically does not make sense with respect to those AP1 provisions declared to be “fundamental guarantees” which are generally also contained in the Second Additional Protocol governing non-international armed conflict. This logic also calls into question the very 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 conflict does not apply to transnational conflict, what is the legal basis for the Administration’s conduct of the war? It would be meaningless to term a rule as law if it only applied when a nation wanted it to. International law allow nations, commonly termed “persistent objectors,” to

322 See Part IV.D. infra.
exempt themselves from customary rules if they establish a record of objection at the time the norms achieve customary status.  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. The United States can also arguably claim persistent objector status to avoid having to treat persons failing to fully comply with the law of war as POWs. But unlike a treaty from which a nation may be allowed to withdraw, commentators agree that a nation cannot unilaterally exempt itself from a customary norm for which it is not on record as a persistent objector after the provision achieves customary law status. Any effort by the United States to now declare itself free of article 75’s constraints is thus 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 other than non-international armed conflict regardless of whether any specific treaty language mandates its 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 such conflict.

D. Additional Geneva Protocol II of 1977

The second Additional Geneva Protocol (APII) adopted in 1977 supplemented the very minimalist terms of CA3 of the 1949 accords in providing more detailed treatment of international norms applicable to non-international armed conflict. While considerably less

324 Id.
325 Protocol II, supra note 55.
comprehensive than API, it does adopt many of the same “fundamental guarantees” incorporated in that agreement’s article 75 and shares a common heritage with the ICCPR. APII’s article 4, for example, titled “Fundamental guarantees,” incorporates largely verbatim the API prohibitions against violence, outrages upon personal dignity, or threats to any persons “who do not take or have ceased to take part in hostilities.” Article 6, “Penal prosecutions,” then goes on to adopt most of the fair trial standards incorporated in API article 75, including a requirement for trial by “a court offering the essential guarantees of independence and impartiality” as well as verbatim incorporation of the provisions relating to “necessary rights and means of defence” and the “right to be tried in his presence.” Given the inclusion of the “independence” requirement found in the ICCPR but not in API, if applicable to the Guantanamo military commissions, APII would thus seem to even greater challenges to their procedure than API.

Unlike API, the United States has taken no serious objection to any of the provisions of APII and the Reagan Administration submitted it to the Senate for their advice and consent to ratification in 1987. The Senate has never taken action on this treaty, however, so it is not formally binding on the United States. Even if it had been ratified, however, its terms, similar to those of the 1949 Conventions’ CA3 limit its application to conflicts which “take place within the territory of a High Contracting Party,” although it specifies additional requirements that the opposition group must also control territory and be able to implement the Protocol. This would seem to facially exclude its application to the WAQT as treaty law. Probably because the United States government anticipated APII’s ratification, it apparently has not expended even the

326 Id. art. 4, §§ 1-2 at 1125 U.N.T.S. xxx.
327 Id. art. 6, § 2 at 1125 U.N.T.S. xxx. (This specific inclusion of the term “independent,” also found in the ICCPR but omitted from API1 arguably imposes a higher standard than the first Protocol.)
328 Id. art. 4, §§ 1-2 at 1125 U.N.T.S. xxx.
329 Id. art. 4, §§ 1-2 at 1125 U.N.T.S. xxx.
330 Reagan ltr, supra note 311.
331 Protocol II, supra note 55, art. 1, § 1 at 1125 U.N.T.S. xxx.
limited effort given to highlighting the customary status of significant portions of API. As a practical matter it thus seems that APII is unlikely to directly apply to the WAQT as either treaty or customary law, although many of its provisions are in fact the same as those of API’s article 75, reinforcing 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 what it terms a “war on terror” from any significant legal constraints, the Bush Administration has engaged in what law of war scholar and retired Army judge advocate Geoffrey Corn calls “hyper-technical legal analysis,” exploiting ambiguities in existing treaties to deny their applicability. This approach is wholly at odds with America’s long history of faithful application of the law of war whether formally required or not. More importantly from a legal perspective, efforts to avoid application of the law of war to a given conflict are contrary to that law itself.

As a result of the efforts of Fyodor Martens, a leading Russian diplomat and international law scholar who played an integral role in the conduct of the 1874 Brussels Conference and subsequent Hague meetings of 1899 and 1907, a provision which would come to known as the

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333 The seminal event in the modern codification of the law of international armed conflict was the Lieber Code – developed during the American Civil War when by law the U.S. could have refused to apply international norms to its fight against an illegal rebellion. In more modern times, the United States faithfully applied the Geneva Conventions to the Vietnam conflict even though the Viet Cong were basically an indigenous South Vietnamese organization and neither South Vietnam nor the United States recognized North Vietnam as a legitimate government.
“Martens” clause was formulated to address gaps in law of war treaty coverage. As expressed in the body of the 1907 Hague Convention on the Law of Land Warfare, this provision reads:

It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice;

On the other hand the high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Anyone tempted to disregard this provision as outmoded or irrelevant needs to be reminded of two important points. First, although the drafters of the Hague Land Warfare Convention expected any enforcement of its terms to be limited to state to state compensation, the Nuremberg International Military Tribunal held that the accord had achieved the status of customary international law and that its violation subjected individuals to personal criminal liability. Second, while the Hague accord remains a valid statement of customary law to this day, the Martens Clause has been given additional vitality thanks to its subsequent inclusion, at least in part, in other widely ratified law of war agreements, including the 1949 Geneva Conventions, and the 1980 UN Convention on Certain Conventional Weapons in whose preamble the state parties, including the United States, acknowledge that:

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335 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 2 AJIL Supplement 90, preamble at xx (1908).
336 Id., art. 3 at xx.
337 International Military Tribunal, 22 Trial of the Major War Criminals 497 (1948).
338 ROBERTS & GUELFF, supra note 16 at 67-68.
In 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 . . . .”\textsuperscript{340}

Despite this history, it seems quite clear that the U.S. government intends to aggressively defend its claim of broad executive authority to promulgate military commission procedures essentially unchecked by any domestic or international law constraints. It is thus incumbent upon those concerned to see these tribunals conducted in accordance with the rule of law to engage in sufficiently detailed legal analysis to be able to identify appropriate legal standards and articulate a persuasive legal case for their application.

While there are many good reasons why one might wish to see the 1949 Geneva Conventions applied to the WAQT, as a matter of law it seems difficult to reconcile the plain language of the treaties with the factual situation of the war. While a stronger case can be made for the application of the International Convention on Civil and Political Rights, the one Circuit Court decision on record today supports the Administration’s desire to limit its applicability to the United States per se.\textsuperscript{341} Moreover, even if it was held to apply to Guantanamo such a “victory” would likely be short-lived given the significant precedents supporting derogations in dealing with a terrorist threat. One has to predict that the Administration would simply nullify any decision holding the ICCPR applied via a quick announcement of a U.S. derogation from the relevant provisions held to constrain military commission procedures.

Application of the customary law of war to regulate military commissions whose very conduct is justified by resort to the “common law” of war seems both apropos and legally sound.


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The significant body of World War II-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 any comprehensive reporting or digesting of these decisions, beyond the small sampling incorporated in the United Nations War Crimes Commission’s fifteen slim volumes. Nevertheless, standards whose violation can be shown to have resulted in U.S. and allied conviction and punishment of vanquished Axis officials should be definitively regarded as legally binding on American tribunals today. But given the practical difficulties involved in using these trial results to supply contemporary rules of decision, an alternative approach of essentially equal legal merit and greater practicality is the application of article 75 of the 1977 Additional Geneva Protocol I as being declaratory of customary international law. API 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 the U.S. has previously both recognized this article as declaratory of customary international law and failed to take any steps which could now qualify it as a persistent objector, so the case for its application seems compelling.

If a trial is truly to be considered as “full and fair,” it must accord procedural due process meeting internationally accepted standards. When the legal foundation of a tribunal is based upon the international law of war, surely any procedural mandates imposed by that corpus juris must also be faithfully followed. While there are clearly grounds to argue for the application of a more stringent requirements, such as the ICCPR or the UCMJ, to the Guantanamo military commissions, the language of article 75 of the Additional Geneva Protocol I of 1977, applied as declaratory of customary international law, should be the minimum acceptable standard.