

Hamdan and the Law of War: The Applicability of the Geneva Conventions to the “Global War on Terrorism”

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Do the Geneva Conventions apply to the GWOT? The Conventions apply only in certain specified circumstances—those that track closely the traditional concept of “war.” The basic idea, put crudely for the moment, is that the Conventions apply in time of war, “armed conflict” or military occupation. More specifically, the Conventions apply in full in “all cases of declared war or of 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,” or in “any cases of partial or total occupation of the territory of a High Contracting Party.”¹ In these circumstances, the

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1. For example, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 [hereinafter GPW]. I directly analyze only the 1949 Geneva Conventions—and not the two Protocols concluded in 1977. There are several reasons for this emphasis: (1) the United States is not party to the Protocols; (2) many of the most important innovations in the Protocols pertained to the development of so-called Hague law regulating the means of methods of warfare, rather than the treatment of individuals made subject to the authority of the enemy—and, as such, much of what is changed by the Protocols is beyond the substantive scope of the book; and (3) most of the 1977 innovations to Geneva law proper are best discussed within the framework of an analysis organized around the 1949 Conventions—in part because these

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Conventions govern the conduct of states party to them in their “mutual relations.” In addition, some rules apply in “armed conflicts not of an international character.”²

Before addressing the GWOT directly, it is important to note that the Geneva Conventions formalized two important developments concerning when the laws of war apply: (1) the laws of war now govern *de facto* as well as *de jure* warfare; and (2) the laws of war now govern non-international as well as international armed conflict. Both developments were revolutionary—and both are crucial to the points I develop in this Chapter.

First, the Conventions apply to any “armed conflict” between states irrespective of whether either state has formally declared war.³ Prior to the drafting of the Geneva Conventions, the applicability of the “law of war” was delimited by formal acts of state such as a declaration of war or a formal “recognition of belligerency.” Why this is so is important, and is not obvious. Traditionally, a “state of war” meant the complete rupture of legal relations between the belligerent states. In these circumstances, the “laws of war” completely displaced the “laws of peace” (normal law). Most treaties were suspended, as were normal diplomatic relations. Therefore, rules regarding the treatment of war victims—precursors to the Geneva Conventions—were only one, comparatively insignificant, legal consequence of war. Remarkably detailed rules governed the relations between warring states, as well as the relations between belligerents and neutral states. “War” was, in this sense, a special case of inter-state belligerency, and many varieties of organized hostilities would not trigger the application of the “laws of war.” In this context, formal declarations of war were considered a condition precedent to the displacement of the “laws of peace.”

The Geneva Conventions substantially revised this formalistic approach. The treaties are instead applicable during all “armed conflicts” *irrespective of whether the states involved formally recognize a state of war*. The Conventions are triggered by certain objective conditions. This shift was thought necessary in view of other changes in international law and politics that made formal recognition of a state of war increasingly rare. The problem was that, by the mid-twentieth century, the existence of a “state of war” no longer played an important role in international law—so states had

aspects of the Protocols sought only to clarify or extend some aspect of the 1949 Conventions. That said, I do discuss some of the most important developments in the Protocols to the extent that these developments help explain salient features of the 1949 Conventions.

2. For example, GPW, *supra* note 1, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136.

3. For example, GPW, *supra* note 1, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

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no incentive to declare war—and international law prohibited “war” except in narrow circumstances—providing states with an disincentive to declare war. In the wake of World War II, it was clear that the applicability of humanitarian rules, such as those embodied in the Geneva Conventions, should not turn on whether the belligerents formally recognized a state of war.

Second, the Geneva Conventions, in Article 3 (common to the four conventions),⁴ explicitly regulate non-international armed conflicts—that is, conflict between states and nonstate armed groups.⁵ Prior to the Conventions, no international agreements purported to regulate such conflicts.⁶ These conflicts—even when involving sustained, organized, and intense violence—were exclusively governed by domestic law. Indeed, any interference by another state in such matters would have been deemed an unlawful intrusion into the internal affairs of the state and might have been considered an act of war.⁷ This regulatory gap nevertheless persisted until the end of World War II. The atrocities perpetrated by the Nazi regime before and during World War II clearly demonstrated that internal matters presented grave threats to humanitarian principles. The Spanish Civil War, which broke out in 1936, also made clear that the “recognition of belligerency” doctrine inadequately regulated non-international armed conflicts.⁸ Against the backdrop of these events and the general humanitarian trajectory of the laws of war, the Geneva Conventions enacted a limited scheme that made some elementary

4. The provision is referred to as “Common Article 3” because the third article of each of the four Geneva Conventions is identical—it is “common” to all the treaties.

5. *See, for example*, GPW, *supra* note 1, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136 (making clear that the provision applies to conflicts involving only one state). The provision also governs conflict between two or more nonstate armed groups.

6. *See* LINSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 4 (James Crawford & John S. Bell eds., 2002).

7. *See, for example*, ERIK CASTRÉN, *CIVIL WAR* 175–81 (Veikko Väänänen ed., 1966). There was, in fact, only one circumstance in which the laws of war might govern such a conflict. Under customary international law, the laws of war governed non-international conflicts only if an established state recognized the “belligerency” of the nonstate armed group. This doctrine of “recognition of belligerency,” however, applied to a narrow range of conflicts and was very rarely invoked. James W. Garner, *Recognition of Belligerency*, 32 *AM. J. INT’L L.* 106, 112 (1938).

8. *See* NORMAN J. PADELFOUR, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE* 18–20 (1939).

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humanitarian principles applicable in non-international armed conflicts.

The question then is how best to understand the circumstances in which the Conventions apply.⁹ The central question is whether aspects of the GWOT constitute an “armed conflict.” As mentioned above, there are two types of armed conflict: international and non-international. In international conflicts, two or more states are engaged in mutual hostilities. In non-international armed conflicts, one or more states are engaged in hostilities against one or more nonstate armed groups (or, much less frequently, two or more such groups are fighting one another). Thus, the armed conflict requirement suggests two triggering conditions for the Conventions—both of which are relevant in the GWOT. In this Chapter, I consider each of these triggering conditions and do so in light of the purposes of the Conventions.

The Geneva Conventions exhibit a simple conceptual structure. In certain situations, the Conventions entitle certain categories of individuals to certain rights. Three moving parts comprise this abstract proposition: (1) the rules apply only in certain *situations*; (2) the rules protect specific categories of *persons*; and (3) the rules guarantee each category of persons a certain bundle of *rights*. These issues—situations, persons, rights—must be analyzed separately if the Conventions are to be understood. Consider how often these issues are conflated (or confused) in prevailing debates about the GWOT. For example, the common claim that the Geneva Conventions do not protect terrorists might mean either that the Conventions do not apply at all to military operations directed against terrorist organizations or that individual terrorists do not fall into one of the categories of protected persons. The first variation concerns *when* the Conventions apply and the second concerns *whom* the Conventions protect (when they apply).

The applicability question assumed a central role in the Supreme Court’s 2006 opinion on the legality of military commissions in the GWOT. In *Hamdan v. Rumsfeld*, the Court held that the President lacks authority to proceed with trials by military commissions as contemplated in then-existing military regulations.¹⁰ The Court concluded that no act of Congress expressly authorizes the President to employ commissions as then constituted. In reaching this conclusion,

9. In general, there are two circumstances in which at least some provisions of the Geneva Conventions apply—armed conflicts and occupations. The concept of an “occupation” within the meaning of Geneva law, though important and more complex than might be thought at first blush, is not analyzed in this Article. Simply put, the concept is not central to the analysis of whether any aspects of GWOT are governed by the Conventions.

¹⁰ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

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the Court considered and rejected three possible sources of congressional authorization: the Uniform Code of Military Justice (UCMJ); the Authorization to Use Military Force of 2001 (AUMF); and the Detainee Treatment Act (DTA). Neither the AUMF nor the DTA, according to the Court, expressly authorized the President to conduct trials by military commission. And although the Court acknowledged that the UCMJ authorizes the use of military commissions in some circumstances and in some form, the Court found that two relevant provisions place conditions on this authorization—conditions not satisfied by the then-existing regulations. The Court noted that the UCMJ provision authorizing trials by military commission does so only to the extent permitted by the law of war. The contemplated commissions were inconsistent with at least one applicable aspect of the law of war—Common Article 3 of the Conventions. The Court also held that the contemplated commissions violate the UCMJ in that the President prescribed trial procedures that impermissibly deviate from the procedures employed in ordinary courts-martial. In effect, the Court concluded that the military commissions lacked the power to proceed because their structure and procedures violate the UCMJ and Common Article 3 of the Geneva Conventions.¹¹

The Court's conclusion that the Geneva Conventions apply to the conflict with al Qaeda was, and remains, both terrifically important and controversial.¹² It is important because the Conventions impose meaningful constraints on the conduct of the GWOT—including important limits on the scope of lawful detention, interrogation, and criminal prosecution of enemy combatants. It is controversial for at least two reasons. In one sense, the ruling is controversial simply in virtue of the fact that the Court explicitly rejected the Bush administration's long-standing position that the Conventions do not apply to our conflict with al Qaeda (and other terrorist organizations). More fundamentally, though, the conclusion that the Conven-

¹¹ The Court did not address whether any other aspect of the Geneva Conventions applies to the conflict as a matter of treaty law. Hamdan, 126 S. Ct. at ___.

¹² See, e.g., JOHN YOO, WAR BY OTHER MEANS (2006); Julian Ku & John C. Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006); Eric Posner, *Apply the Golden Rule to al Qaeda?*, Wall Street Journal, July 15, 2006, at A9.

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tions apply, in any respect, to the GWOT is controversial because it rests on important, largely undefended assumptions about the scope and character of the law of war. The *Hamdan* opinion itself does little to resolve this deeper controversy. The Court's analysis of the applicability question concerns only whether the GWOT is an "armed conflict not of an international character" within the meaning of Common Article 3—an immensely important issue, but not one that addresses the deeper normative, practical, and conceptual difficulties associated with the GWOT. And, unfortunately, of even this issue is extremely brief—verging on the cursory.¹³

The purpose of this Chapter is to provide some sustained reflection on, and explanation of, the circumstances in which the Conventions apply. The rules under consideration here do not define who is entitled to protection or the level of protection accorded any category of individuals. These rules instead define only the situations in which the substance of the Conventions is potentially applicable. Put differently, these rules address a threshold question: Do the rules of war apply at all to the hostilities in question? If they do not, then no detainee is entitled to any other rights bearing status in the laws of war—irrespective of what they have done or the conditions surrounding their capture. For example, if a U.S. soldier stationed in Germany is arrested and charged with a criminal offense by German authorities, he is not entitled to POW status because the United States and Germany are not engaged in an armed conflict (and the United States does not occupy any part of German territory). The laws of war simply do not apply to the situation in which this hypothetical soldier is captured.

Of course, many object to the suggestion that the laws of war, including the Geneva Conventions, apply to the GWOT. The objection is straightforward and, on many levels, intuitive: The GWOT is not a war. Some suggest that a conflict with a terrorist group is not a "real war." Others deny the applicability of the Conventions by pointing out that the United States has not formally declared war. Still others insist that the idea of a GWOT is incoherent in that war, in the literal and traditional sense, cannot be waged against a phenomenon. To determine whether the Conventions apply to any aspects of GWOT, some conceptual

¹³ The Court found—correctly in my view—that the text and structure of the Conventions support the conclusion that the "not of an international character" language in Common Article 3 references the party structure of the conflict, rather than the territorial scope of the hostilities. This issue is addressed in more detail below. *See infra* text accompanying notes

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organization must be grafted onto the ideas informing these objections.

There are three important reasons to question whether the GWOT is governed by the Conventions. These reasons, pitched at a high level of generality for the moment, are: (1) adverse legal and policy consequences might follow from characterizing the GWOT as a “war” in the legal sense; (2) terrorist organizations like al Qaeda are not states and conflicts with such entities are materially different from inter-state wars and civil wars; and (3) terrorist organizations enjoy no protection under the rules of war because they do not accept or observe these rules themselves. The balance of the Chapter is organized around a more sustained evaluation of each rationale. Focused analysis of these points helps illustrate the finer details of the rules under consideration here. I conclude that the Conventions govern some aspects of the GWOT irrespective of the fact that hostilities are directed in substantial part against nonstate actors, irrespective of the fact that hostilities are not formally declared, irrespective of whether the “war model” of counter-terrorism is advisable, and irrespective of whether the terrorist groups accept or observe the rules of war themselves.

I. COLLATERAL LEGAL AND POLICY CONSEQUENCES

The first reason to question the applicability of the Conventions is that undesirable legal and policy consequences follow from the characterization of the GWOT as a “war” or “armed conflict.” Consider that the Bush administration has adopted several controversial policies based on the premise that the GWOT is a war. For example, the administration characterized the September 11 attacks as “acts of war” triggering the right of self-defense under the United Nations Charter. The President also characterized the attacks as “war crimes,” rendering the perpetrators amenable to prosecution before ad hoc military commissions. In addition, the rights of several hundred detainees are sharply delimited, according to the administration, because they are “enemy combatants”—that is, they took up arms against the United States in time of war. The administration nevertheless insists that the law of war does not protect these “combatants” because they do not qualify as “prisoners of war;” and because the application of the laws of war, in any case,

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is sharply limited by the requirements of reciprocity. Critics, of course, have taken issue with each of these claims.

Irrespective of the merits of these claims or criticisms, these disputes should not be recast as disputes about whether aspects of the GWOT constitute an “armed conflict” within the meaning of the Geneva Conventions. Although these disputes turn on how best to define the existence and legal consequences of “war,” they each revolve around quite different policy concerns. That is, the legal concept of “war” is expected to do different kinds of work in each of these issue areas. For example, characterizing the conflict as a “war” might empower the President to exercise extraordinary, draconian powers reserved for the successful prosecution of wars. Or, to take another example, perhaps design of counter-terrorism policy on a “war model,” rather than the “law enforcement model,” is ineffective and counterproductive. My claim here is only that such considerations are irrelevant to whether the Conventions do or should apply. In other words, these collateral consequences, even if of crucial importance, should not cloud our inquiry into whether the Conventions apply to any aspects of the GWOT.¹⁴

Some of these issues obviously turn on matters unrelated to the applicability of the Conventions. Consider a couple of examples. The important (and widely debated) question of whether the “war model” is the most effective means of counter-terrorism should exert no weight on our inquiry into the applicability of rules governing the conduct of war. As a conceptual matter, the propriety of any given conflict has no bearing on whether a conflict in fact exists. Moreover, it is perverse to argue that a poorly justified war may be fought free of the constraints that would (presumably) govern wars

14. To be clear, my point is not that the applicability of the Conventions has no domestic legal consequences. The Conventions have been incorporated into domestic law in multiple important ways. *See, for example*, U.S. DEP’T OF DEFENSE, DIR. NO. 5100.77, DoD LAW OF WAR PROGRAM, ¶ 5.3.1 (1998), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf. (establishing policy to observe the laws of war in all conflicts and the “principles and spirit of” this law in all other operations); U.S. ARMY, REG. NO. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES 1 (October 1, 1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf. (requiring all enemy detainees be treated in accordance with the basic principles of the Geneva Conventions); War Crimes Act, 18 U.S.C. § 1441 (2005). And, of course, the treaties themselves are part of the “law of the land.” *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 157 (2004). My point is that the controversial war powers asserted by the President are controversial not because they trigger the application of the Conventions (or any regime directly tethered to the Conventions—such as the regulations and statutes cited above), but rather because of some other consequence that follows from the more general conclusion that the conflict is a “war.”

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fought for more sound reasons. In short, opposition to the “war model” is a bad reason to oppose application of the Conventions.

Another example is the debate over the validity of the self-defense claim advanced by the United States in the wake of the September 11 attacks. The United Nations Charter generally prohibits the use of force by one state against another sovereign state. The most important exception to this rule is the “inherent right” of all states to use force in self-defense. Under the Charter, states have the right to use force in self-defense provided they have been subject to an “armed attack.” Whether attacks carried out by nonstate actors ever constitute “armed attacks” is an important question—related obliquely perhaps to the question of whether hostilities involving nonstate actors constitute “armed conflicts.” First note that there is no clear relation between the “armed attack” requirement of the Charter and the “armed conflict” threshold in the Conventions. Indeed, some circumstances (even in the inter-state context) would clearly trigger the application of the Conventions without necessarily satisfying the “armed attack” requirement. Recall that a formal declaration of war unquestionably triggers application of the Geneva Conventions—even though, without more (such as the assumption of an aggressive force posture), a declaration of war alone would not constitute an “armed attack.” And, of course, the existence of a non-international armed conflict confined to the territory of one state would not trigger the right to self-defense—even though some aspects of the Conventions govern such circumstances.

These divergent fields of application are the result of divergent policy objectives. The U.N. Charter self-defense rules seek to minimize international aggression—these rules are part of a wider regime committed to the elimination of war as an instrument of national policy. As such, the primary concern is the over-application of the self-defense exception—which tends to push the threshold of application higher. The Geneva Conventions, on the other hand, seek to minimize unnecessary suffering resulting from organized hostilities. Therefore, the primary worry in Geneva law is the under-application of humanitarian rules, which tends to push the threshold for application lower. Because there is no necessary relationship between the optimal level of war and the “optimal” level of suffering in war, there is no necessary relation between the triggering conditions of these regimes. Indeed, any structural linkage of the two

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regimes risks frustrating the policy objectives of one (or both) of the regimes. Any structural relationship between the two regimes would tend to exert pressure in the opposite direction suggested by regime objectives.

More importantly, the resolution of the “armed attack” issue turns on considerations unrelated to the applicability of the Geneva Conventions. Because the Charter issue arises only in the context of contemplated force against another state—as was the case after 9/11 when the United States sought to justify the use of force against Afghanistan—the central issue typically will be whether the attacks are attributable to a state.¹⁵ The dispute over the validity of the U.S. self-defense claim is then, at bottom, a disagreement about the circumstances in which states should be deemed responsible for the acts of private persons (or groups). Irrespective of the merits of these criticisms, the important point is that the debate does not turn on whether states have the right to defend themselves against the kind of attacks witnessed on 9/11.¹⁶

The most important examples, though, are those that implicate the very values the Conventions purport to protect—individual rights. Consider the example of emergency powers. The central point here is that the Convention rules do not define, directly or indirectly, when the President may invoke constitutional war powers. If, when, and to what extent the U.S. Constitution empowers the President to suspend civil liberties present questions that have little, if anything, to do with the applicability of the Conventions. The Conventions define the treatment due vulnerable individuals in the context of organized hostilities. The problem addressed by the Conventions is the radical inhumanity that all too often characterizes warfare. To address this problem, the Conventions prescribe a few simple rules that require humane treatment of captured enemy soldiers and civilians. The limiting principle for these rules is military necessity. Because it is unreasonable to expect warring parties to observe rules that increase the prospect of their defeat, the Conventions require only a modest level of protection—a level that is consistent with the legitimate strategic imperatives of waging war. The Conventions, in this sense, establish minimum rules that apply even when arguably no other law does, shining the light of law, however dim, into the darkness of war.

15. Indeed, this is the formal rationale forwarded by the United States to the United Nations Security Council. *See* Letter from Ambassador Negroponte to the U.N. Secretary General and the President of the U.N. Security Council (October 7, 2001), *available at* <http://www.un.int/usa/s-2001-946.htm>.

16. Any suggestion that the attacks are not the kind of injury against which states have the inherent right to defend is normatively suspect given the scale, sophistication, and purpose of the attacks.

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Given these limited ambitions, the Conventions should apply *whenever* fighting erupts between organized enemies.

The proper scope of presidential war powers, on the other hand, turns on other considerations. These powers, it is thought, promote national security by vesting the President with the authority necessary to wage war successfully. The idea is to empower the President, under certain circumstances, to act outside some of the ordinary constraints of law. This body of law, in this sense, defines when and to what extent the President may act contrary to the law. It may be, for example, that the President has the authority during a war to detain without charge or trial U.S. citizens who take up arms against the United States. Given these features, broad presidential war powers should be triggered only in a narrow range of carefully defined circumstances.

Recent actions by the United States illustrate that the two legal concepts are distinct. The U.S. military, for example, had for some time prior to 9/11 mandated and observed the laws of war, including the Geneva Conventions, in all its operations—irrespective of whether these operations were conducted in the context of an armed conflict. United States forces were deployed in Somalia in the early 1990s to secure U.N.-administered humanitarian assistance. The President, however, did not assert any extraordinary war powers during this operation. On the other hand, the President has asserted several special powers in the GWOT despite the administration's claim that the Geneva Conventions do not apply to the conflict with al Qaeda. The important point for our purposes is that the applicability of the Geneva Conventions need not have any bearing on the scope or content of presidential war powers.¹⁷ Of course, this is not to say that the applicability of the Conventions in no way implicates the scope of executive power. If the Conventions apply,

17. The Geneva Conventions might have some direct or indirect *interpretive* significance, as a matter of *domestic* law, for the scope of presidential powers. For example, congressional authorization to wage war might be implicitly or explicitly conditioned by the Geneva Conventions. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2061–62 (2005). This point, though, proves only that some relevant domestic actors, through the legitimate exercise of some public authority, might render the Conventions relevant—irrespective of whether the treaties would be relevant of their own force. *See, for example*, Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2653–54 n.3–4 (2005).

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and if they accord humanitarian protection to captured enemy individuals, then the Conventions clearly impose a legal *constraint* on the scope of the President's power. This kind of concern, however, is not a "collateral" matter at all; rather, it is a direct challenge to the advisability of applying the Conventions. This kind of challenge is best evaluated through focused analysis of specific protections—particularly when provided to specific categories of individuals.¹⁸

More generally, the Conventions, if applicable, do not displace or trigger the application of any other body of rules. Many of the variations of this criticism tacitly trade on the idea that application of the Conventions somehow precludes application of some more robust individual rights scheme—such as ordinary constitutional law, criminal law, or even international human rights law generally. This assumption, however, is plainly inconsistent with the Conventions themselves—and difficult to square with the purposes of humanitarian law generally. No rule in the Conventions requires the warring parties to abrogate any rights-protecting scheme otherwise recognized in its law.¹⁹ In other words, the United States could accord, consistent with the Geneva Conventions, all captured al Qaeda fighters the full protections of international human rights law and the U.S. Code and Constitution. The applicability of the Conventions does not displace these other potentially applicable

18. To highlight one recent example, the Conventions bar prosecution of POWs before ad hoc military commissions, GPW, *supra* note 1, art. 102, 6 U.S.T. at 3395, 75 U.N.T.S. at 212; and the Conventions require court-like procedures to divest a captured fighter of POW status. GPW, *supra* note 1, art. 5, 6 U.S.T. at 3322–24, 75 U.N.T.S. at 140–41. Taken together, these points constitute an important challenge to the legality of military commissions under the Conventions. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 160 (D.C. Dist. Ct. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005).

19. There is one important (potential) exception to this point—though, properly understood, it is orthogonal to my argument here. The Geneva Civilian Convention prescribes rules for the government of occupied territory. One cluster of these rules requires the Occupying Power to preserve, to the extent practicable, the pre-existing criminal laws of the occupied state. Geneva Convention Relative to the Protection of Civilian Persons, Aug. 12, 1949, art. 64, 6 U.S.T. 3516, 3558 75 U.N.T.S. 287, 328 [hereinafter GCP]. This rule, in some circumstances, might require the Occupying Power to administer and to enforce laws inconsistent with its own commitments to individual rights. The U.S. occupation of Iraq is an obvious example. The "legal continuity" rules of the Conventions arguably required the United States to enforce Iraqi criminal laws irrespective of whether these laws were inconsistent with U.S. conceptions of individual liberty. For a fuller consideration of this interesting problem, see Yoram Dinstein, *The Dilemmas Relating to Legislation Under Article 43 of the Hague Regulations, and Peace-Building* (2004) (IHLRI Background Paper), available at <http://www.ihlresearch.org/ihl/pdfs/dinstein.pdf> (discussing the Geneva Convention scheme in light of its predecessor in the Hague Regulations). This rule, however, is a limit on the authority of Occupying Powers, limiting the degree to which the conquering state may impose its sovereign will on the civilians of the occupied power. As such, it is importantly different from the concern that motivates our discussion here.

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regimes.²⁰ Moreover, the inverse is clearly false—states cannot render the Conventions inapplicable simply by deciding to apply some other body of rules.

Critics of my view might sensibly point out that the Conventions seemingly authorize states to restrict the rights of “protected persons”—most notably, they permit the confinement of POWs and, in a more narrow range of circumstances, civilians.²¹ Although accurate at one level, this point involves a categorical mistake. The Conventions do not authorize states to engage in practices otherwise forbidden in law in the way that a domestic statute authorizes actors to exercise some power.²² The Conventions simply are not an instrument that purports to confer authority where none exists.²³ The provision—as a rule of international law and, more specifically, international humanitarian law—cannot be read in the way that an analogous provision of domestic law might be read. Rather, the Conventions are designed to condition or prohibit the exercise of

20. One source of confusion on this point is the common conjecture that the laws of war are *lex specialis* in time of armed conflict. Though obviously correct on one level—clearly, the Geneva Conventions are applicable only in specific circumstances—some commentators infer from this that from the Conventions displace much of international human rights law (which is, on this view, presumably part of the *lex generalis*). This inference is unwarranted for two reasons. First, the Conventions are not “inconsistent” with human rights law in that they do not require, or authorize, states to engage in conduct prohibited by human rights law. Therefore, even if it were correct to say that the Conventions displace inconsistent human rights law, there are no such inconsistencies. Second, international human rights law also purports to govern state action in times of armed conflict. Therefore, human rights law is not subject to displacement as part of the *lex generalis*. Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, 2004 I.C.J. 20, ¶ 159 (July 9); *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur*, U.N. ESCOR Comm’n. Hum. Rts., 61st Sess., U.N. Doc. E/CN.4/2005/7 (2005).

21. See, for example, GPW, *supra* note 1, art. 21, 6 U.S.T. at 3334–35, 75 U.N.T.S. at 153–54; GCP, *supra* note 19, arts. 41–42, 79, 6 U.S.T. at 3544–68, 75 U.N.T.S. at 314–38.

22. The Conventions provide that POWs and civilians retain their “full civil capacity” and they are allowed to exercise all “rights compatible with their status.” GPW, *supra* note 1, art. 14, 6 U.S.T. at 3330, 75 U.N.T.S. at 148; GCP, *supra* note 19, art. 80, 6 U.S.T. at 3568, 75 U.N.T.S. at 338.

23. On another level, the “authorization to confine” objection involves a more fundamental category mistake. These would-be authorizations apply only in the context of an international armed conflict. There are no parallel provisions in the rules governing non-international armed conflicts. Compare GPW, *supra* note 1, art. 3, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136. As a consequence, these provisions are relevant to the GWOT only insofar as this conflict assumes an inter-state character.

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powers routinely associated with the conduct of war. Consider the relevant provision of the POW treaty. Remember that the Conventions protect only those persons who have “fallen into the hands of the enemy.” That is, the Conventions apply from the moment of capture (or surrender) to the time of release and repatriation.²⁴ It is, after all, a treaty governing the treatment of *prisoners* of war.

The persons protected by the Convention and the period during which it applies underscore that the treaty governs the treatment of persons made prisoner by the enemy. The “authorization” to intern is better understood as a limit on the kinds of force states do and will use to confine POWs. “Internment” is explicitly distinguished from “detention” (which involves the close confinement of individuals) and implicitly distinguished from killing.²⁵ States cannot “detain” or kill POWs as a means to prevent their return to the fight, but they may, though they need not, “intern” them. The sharp edge of the rule is what it prohibits, or how it qualifies the exercise of some power states will predictably seek to exercise in war.²⁶ Another example helps illustrate the same point. The Civilian Convention allows the detention of peaceful civilians only when necessary to protect the security of the detaining state.²⁷ This provision, for all the reasons canvassed above, is best understood as a prohibition of the detention of civilians in circumstances not satisfying the standard or perhaps as recognizing a right to release for all civilians not satisfying the standard—but not as conferring on the detaining authority the legal power to detain.

One important purpose of the Conventions, and humanitarian law generally, is to define the minimum standard of acceptable treatment. The Conventions establish a floor below which the treatment of individuals may not fall—even in time of war, even with respect to one’s enemy.²⁸ The problem addressed by humanitarian law is that

24. This is, as a formal matter, an oversimplification. Some aspects of the Civilian Convention, for example, govern the targeting of certain civilian institutions and, of course, many provisions of that Convention govern the administration of “occupied territory.” The oversimplification presented in the text nevertheless helps illustrate the more general point that the Conventions do not augment state power to restrict the rights of persons subject to its authority.

25. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 178 (Jean S. Pictet ed., 1958), *available at* <http://www.icrc.org/ihl.nsf/COM/375-590027?OpenDocument> [hereinafter “ICRC COMMENTARY”].

26. The ICRC Commentary makes plain the background assumptions informing the rule. *Id.*

27. GCP, *supra* note 19, art. 42, 79, 6 U.S.T. at 3544–68, 75 U.N.T.S. at 314–38.

28. The Conventions encourage warring parties in multiple contexts to negotiate a higher standard of treatment. *See, for example*, GPW, *supra* note 1, arts. 109, 111 6 U.S.T.

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organized hostilities are often characterized by lawlessness and barbarity. The Conventions, then, prescribe the rules that must be observed *even if* no other rules apply. This is, of course, importantly different from the view that the Conventions prescribe rules that apply *because* no other rules apply. And it is manifestly inconsistent with the view that the Conventions prescribe rules that *have the effect of displacing* other rights-regarding rules.

II. ARMED CONFLICTS AND NONSTATE ACTORS

Some also suggest that the Geneva Conventions do not regulate GWOT because the terrorist groups against which the United States fights are not states. This variation, though common, is not plausible. Whether the Conventions apply to a particular situation does not turn on whether one or more of the parties to the conflict are nonstate actors.²⁹ Another (more nuanced) variation on this idea is tethered more closely to the text and history of the Geneva Conventions. The Bush Administration, for example, acknowledges that the Conventions regulate some conflicts involving nonstate actors. They nevertheless argue that the GWOT is not an international armed conflict within the meaning of the Geneva Conventions because the United States is not fighting another state.³⁰ That the GWOT pits states against nonstate entities is indeed crucial in that it partly determines which aspects of the Conventions govern the conflict. Considered in isolation, however, this feature of the conflict does not place the conflict outside the scope of the Conventions altogether. Some aspects of the Conventions potentially apply even if the enemy terrorist organizations are unaffiliated with any state. And, the rules regulating international armed conflict potentially apply if these groups act on behalf of any state or if these groups fight alongside any state that is itself in an armed conflict with another state.

at 3400–02, 75 U.N.T.S. at 218–20; GCP, *supra* note 19, arts. 7, 14, 15, 6 U.S.T. at 3522, 3528, 75 U.N.T.S. at 292, 298.

29. As I discuss more fully below, *which aspects* of the Conventions apply to a given situation might, in fact, turn on whether the parties are nonstate actors. For the moment, I consider only whether *any* aspect of the Conventions govern a particular situation.

30. The Bush administration also argues that the GWOT is not a non-international armed conflict within the meaning of the Geneva Conventions because it is transnational in character—the fighting is not confined to the territory of one state. I discuss and evaluate this point below as part of the third family of objections.

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Many also suggest that the GWOT does not constitute the kind of hostilities triggering application of the Conventions, even if the treaties otherwise govern some circumstances in which states fight against nonstate entities. This more nuanced variation of the nonstate actor objection is an important point; and it is one that requires detailed consideration. The central question is whether any aspects of the GWOT constitute an “armed conflict” within the meaning of the Conventions. An important subsidiary question is whether the Conventions govern only particular types of “armed conflict.” I conclude that some aspect of the Conventions apply to all armed conflicts, even if neither party formally recognizes a state of war.

There are two circumstances in which some aspect of the Conventions governs hostilities directed against nonstate actors—and one in which no aspect is. Such hostilities might constitute an international armed conflict within the meaning of the Conventions, triggering the application of the full panoply of rules governing conflicts between “High Contracting Parties.” Or, more commonly, such hostilities might constitute a non-international armed conflict within the meaning of Common Article 3 of the Conventions. And, most commonly, such hostilities might not constitute an “armed conflict” within the meaning of the Conventions. Under the latter circumstances, the Conventions do not apply at all.³¹

A. *Common Article 2: International Armed Conflicts*

First, the Conventions apply to all armed conflicts between states that have ratified the treaties. This is a classical “international armed conflict”—so named because the conflict pits state against state, hence it is inter-national. The Conventions also apply to hostilities directed against a nonstate group *in the context of such an international armed conflict provided that the nonstate group fights alongside an enemy state*. This situation is best illustrated by reference to the 2001–2002 conflict between the Taliban regime in Afghanistan and the coalition of states assembled by the United States. These hostilities, from the moment they were initiated by U.S. and U.K. air strikes on October 7, 2001, clearly constituted an international “armed conflict” within the meaning of the Conventions

Because Afghanistan and the United States are both party to the Geneva Conventions, the treaties governed their “mutual relations” in the conflict. That neither party formally declared a state of war is

31. I am assuming away, again for expositional purposes, the possibility that the United States might occupy the territory of another state as part of the GWOT. In such circumstances, the Civilian Convention would apply. *See* GCP, *supra* note 19, art. 2. 6 U.S.T. at 3518, 75 U.N.T.S. at 289.

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immaterial. So long as the parties were in fact engaged in hostilities, the Conventions applied. Notwithstanding the “armed conflict” threshold requirement, the applicability of the Conventions in the vast majority of international hostilities is obvious and uncontroversial.³² The ICRC Commentary on the POW Convention suggests, in fact, that the “armed conflict” requirement is satisfied whenever one state uses force, however intense or organized, against another that leads to the capture of any persons protected by the Conventions.³³ Given the limited purposes of the Conventions—*viz.*, to provide for the humane and fair treatment of enemy detainees in time of conflict—the “armed conflict” requirement is a very low threshold in international armed conflicts. This is sensible because the forces favoring application of the Conventions in inter-state conflict swamp the minimal, and often nonexistent, countervailing considerations.

Consider the extreme case. In any “conflict” that leads to the capture and detention of a person otherwise protected by the Conventions, the very humanitarian rationale that motivates the Conventions provides a sound reason to conclude that they apply. The “armed conflict” requirement was designed, after all, to track the circumstances in which persons would be made subject to the authority of a power that considers him the “enemy.” If the use of force objectively places individuals in this kind of vulnerable position, then there is a nontrivial reason to conclude that the “armed conflict” threshold is crossed.

Moreover, the modest protections embodied in the Conventions give rise to few, if any countervailing considerations. Bare assertions of state sovereignty typically are unavailing in an international conflict—in such circumstances, there is a clear role for an international regime defining the rights and obligations of the disputing states.

And although the Conventions do regulate matters clearly related to national security (the treaties concern the treatment of the enemy, after all), security-based considerations are also unlikely to cut

32. See, for example, YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2004).

33. ICRC COMMENTARY, *supra* note 25, at 23 (discussing de facto “armed conflict” standard in Common Article 2).

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against the application of the Conventions. The problem is that the stronger the security-based reasons to deny application, the stronger the reasons for applying the Conventions. The more intense the threat to national security posed by the state for which the affected individuals fight, the more likely such persons will find themselves in the kind of vulnerable position the Conventions were designed to govern. I should also underscore that the Conventions embody a modest commitment to humanitarianism—one that reflects, in its scope and content, a commitment to promoting humanitarian values without sacrificing military effectiveness. The rules establish a humanitarian baseline even in situations that pose the greatest challenge to state security. If the Conventions apply when the security-based rationales are at their apex, then less severe security-based concerns can not provide a valid basis for denying their application.

All this is not to say that disputing states will always (or even usually) comply with the Conventions. The evidence suggests they all too often do not comply with the rules. How best to secure compliance with the Conventions is a separate question though—an inquiry that will require that we assess why states often fail to comply with the rules. My point here is only that the applicability of the Conventions in international armed conflicts does not involve a collision of grand principles that ought to shape the proper understanding of the “armed conflict” threshold.

Before turning to the complications generated by nonstate actors, I reiterate that the applicability of the Conventions does not necessarily mean that captured Taliban fighters were entitled to POW status under the Third Geneva Convention. Whom the Conventions protect when they apply is a separate matter. The fact that the hostilities between the United States and the Taliban were an international armed conflict meant only that the Conventions *might* accord detainees captured in that conflict some humanitarian protection. This important conceptual distinction is often overlooked in debates about the Conventions. For example, the Bush administration announced in January 2002 its policy on the treatment of detainees captured in the conflict in Afghanistan. The President determined that the Geneva Conventions applied to the conflict with the Taliban government of Afghanistan, but denied POW status to all captured Taliban fighters because they ostensibly failed to satisfy the requirements for this status. Although many criticized the Bush administration position as incoherent (or worse), the conceptual

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structure of the Conventions, properly understood, makes clear that the seemingly contradictory determinations are coherent.³⁴

So far I have explained only that the Conventions governed the conflict between the United States (and its allies) and the Taliban government. The difficulty presented by the GWOT, though, is that hostilities are also (and even primarily) directed against al Qaeda and its affiliate terrorist organizations. Is it possible for the rules applicable in international armed conflicts (conflicts between states as made plain by Common Article 2 of the Conventions) to apply to hostilities directed against a terrorist organization? This is an important question because the full range of protections provided by the Conventions applies only in the context of an international armed conflict within the meaning of Common Article 2. Even if the hostilities between the United States and al Qaeda constitute a non-international armed conflict within the meaning of Common Article 3, a matter I take up below, then only the minimal (though important) rules provided in Common Article 3 would apply unless these hostilities are also covered by Common Article 2.

The question is not only important, it is also ill-framed—at least when it is pitched at an abstract level. The problem is that the question, as I have framed it above, answers itself—and it does so in a misleading way. At the highest level of abstraction, a conflict with a nonstate entity obviously is not covered by rules that expressly govern only inter-state hostilities. The simple fact of an armed conflict between a state and a nonstate actor, such as al Qaeda, would not trigger the application of the full Conventions—such a conflict is, at most, a non-international armed conflict.

If, however, individual members of al Qaeda, for example, are captured in the context of an inter-state conflict they may be entitled to protection under the Conventions in virtue of their affiliation with a state party to the conflict. The basic point is that some nonstate actors, including various categories of private armed groups, are potentially protected by the Conventions because of their relationship to a state that is engaged in an international armed conflict. For example, the POW Convention protects members of “militias,”

34. I do not mean to suggest that I endorse the decision to deny these detainees POW status. There are serious issues concerning the merits of the administration's classification and the adequacy of the procedures by which these fighters were so classified.

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“volunteer corps,” and “organized resistance movements” even if these fighters do not form part of the “armed forces” of the state provided that these groups fight alongside a party to the conflict.³⁵ If, then, al Qaeda fought alongside the Taliban in its international armed conflict against the United States, then individual members of al Qaeda captured in that conflict might qualify for POW status (assuming they satisfy the other requirements provided by the POW Convention). The logic of this idea is simple: the Conventions apply to the conflict with the Taliban; the Conventions define which (and to what extent) individuals are protected; al Qaeda fighters might fall within one of those categories of protected individuals.³⁶

The public record provides sufficient evidence to take seriously the proposition that some al Qaeda forces were incorporated into the Taliban forces. The leading study of al Qaeda documents that al Qaeda fighters comprised a brigade of the Taliban forces.³⁷ The 9/11 Commission Report also notes the close organizational affiliation between al Qaeda forces and the military structure of the Taliban—strongly suggesting some degree of formal integration of the former into the latter.³⁸ Moreover, formal factual assertions made by the government in the Combatant Status Review Tribunals (CSRT) process suggests substantial overlap and integration between al Qaeda and the Taliban. Of the publicly available government reports filed in the CSRTs, the government alleged that 196 of 454 suspected combatants were members or affiliates of both the Taliban and al

35. GPW, *supra* note 1, art. 4(a)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (the groups must “belong[] to” a party to the conflict). To qualify for POW status, these groups must satisfy various requirements enumerated in this provision.

36. This point also illustrates how best to evaluate the “two conflicts” argument forwarded by the Bush administration in some of the detainee cases. The administration argues that the United States was engaged in two armed conflicts in Afghanistan—one against the Taliban and one against al Qaeda and its affiliates. This claim, as far as it goes, is consistent with the Geneva Conventions. That is, there is nothing in Common Article 2 or 3 (or in some implied relation between the two) that calls into question the “two conflicts” argument. It is a mistake, however, to infer from this that no rules applicable in international armed conflicts protect captured al Qaeda fighters—for the reasons I outline in the text. Some al Qaeda fighters might enjoy the protection of rules applicable only in international armed conflict in virtue of their affiliation with the Taliban.

³⁷ ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 58-60 (2002); *id.* at 58 (noting that the “055 Brigade” was “integrated into” the army to fight the Northern Alliance through 2001, and constituted the “shock troops of the Taliban ... function[ing] as an integral part of the [Taliban’s] military apparatus”); AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA* 139 (2000). These forces were, in turn, integrated into various specific combat detachments of the Taliban. *See* Gunaratna, *supra*, at 58.

³⁸ NATIONAL COMMISSION ON TERRORIST ATTACKS ON THE UNITED STATES 59-63 (2004); *id.* at 61 (documenting that Al Qaeda members “enjoy[ed] the use of official Afghan Ministry of Defense license plates”).

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Qaeda—43 percent of the available reports.³⁹ In short, the claim that al Qaeda is sufficiently linked to the Taliban forces is empirically plausible and potentially legally significant.

Of course, this point is a claim about *which individuals are entitled to protection* under the Conventions, and as such, it does not directly concern the circumstances in which the Conventions apply. I will take up the matter in more sustained way in subsequent work. I raise it here only to clarify what types of concerns are relevant in any inquiry into the applicability of the Conventions—and to illustrate how such an inquiry should proceed.

B. Common Article 3: Non-international Armed Conflict

Even if hostilities directed against al Qaeda and its affiliates do not constitute an international armed conflict, they might constitute a non-international armed conflict—triggering the application of Common Article 3 of the Conventions. As I elaborate below, my assessment is that the hostilities constitute a non-international armed conflict. But I reach this conclusion only after some difficulty. The problem is that the Geneva Conventions do not provide an authoritative definition of “armed conflict.” Substantial evidence suggests, in fact, that the drafters of the Conventions purposely avoided any rigid formulation that might limit the applicability of the treaties.⁴⁰ In the context of Common Article 2, this purposeful ambiguity has not presented significant difficulties. As discussed above, hostilities between states are, for the most part, governed by the Conventions irrespective of the intensity, duration, or scale of the conflict. The application of Common Article 3, on the other hand, is more problematic.

This difficulty arises because the threshold of application for Common Article 3, unlike that for Common Article 2, requires balancing two fundamental principles of the international order. The limiting factor that shapes the definition of “armed conflict” in this

³⁹ See *Combatant Status Review Board Letters*, at www.defenselink.mil/pubs/foi/detainees.

⁴⁰ ICRC COMMENTARY, *supra* note 25, at 35 (stating that the Convention deliberately avoided definition of “conflict” in Article 3); CASTRÉN, *supra* note 7, at 85 (“The Convention Article deliberately avoids defining a conflict devoid of international character, primarily because this could lead to restrictive interpretation.”).

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context is state sovereignty. Therefore, the definition of “armed conflict” in Common Article 3, as the factual predicate for the operation of the laws of war in non-international hostilities, should both reflect the humanitarian purposes of the Conventions *and* respect the national sovereignty of states. Balancing these often competing objectives is necessary because the international regulation of internal armed conflict is both necessary and potentially problematic.

On the one hand, hostilities that constitute a severe threat to humanitarian values should be classified as “armed conflicts.” Warfare in the traditional sense constituted such a threat because it involved the organized protracted and intense application of force. Similarly, organized (as opposed to “unorganized”) and protracted (as opposed to “short-lived”) internal hostilities pose this sort of threat. This point justifies applying Common Article 3 “as wide[ly] as possible.”⁴¹ On the other hand, states clearly sought to retain their sovereign authority to suppress internal violence.⁴² States may legitimately assert the right to regulate and suppress “mere acts of banditry” and low-intensity insurrections through domestic law enforcement procedures. These points suggest that Common Article 3 has a *broad, but limited* field of application—the precise contours of which require further explication. The central difficulty is determining the point at which an internal disturbance/public order problem becomes an “armed conflict” within the meaning of international law.⁴³

Although delegations at the 1949 Diplomatic Conference rejected the idea of defining “armed conflict” in the text of Common Article 3, review of the *travaux préparatoires* (the “legislative history” of the treaties) reveals several criteria that states thought relevant to the classification of hostilities. The ICRC Commentary identifies a number of “convenient criteria”⁴⁴ drawn from proposed definitions that were favorably received at the Diplomatic Conference.⁴⁵

1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having

41. ICRC COMMENTARY, *supra* note 25, at 36.

42. This authority, of course, is subject to domestic law and any other applicable international law, such as international human right law (though this law was undeveloped and, at best, piecemeal at the time the Conventions were drafted.

43. *See, for example*, GEOFFREY BEST, WAR AND LAW SINCE 1945, 168–79, 248–49 (1994); JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 80–137 (1974); MOIR, *supra* note 6, at 67–88.

44. ICRC COMMENTARY, *supra* note 25, at 35.

45. *See* II.B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 121. [hereinafter “DIPLOMATIC RECORD”]

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the means of respecting and ensuring respect for the Convention.

2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.

3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or

(b) That it has claimed for itself the rights of a belligerent; or

(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or

(d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.

4. (a) That the insurgents have an organization purporting to have the characteristics of a State.

(b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory.

(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.

(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.⁴⁶

These criteria identify four kinds of circumstances that constitute “armed conflicts” within the meaning of Common Article 3. Therefore, they provide a useful, if not indispensable, general framework for evaluating the applicability of Common Article 3 to any given situation. The criteria clearly reflect the dual purposes of Common Article 3: the minimization of human suffering and the

46. ICRC COMMENTARY, *supra* note 25, at 35–36.

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respect for state sovereignty. They also recognize that some circumstances pose such substantial risks to humanitarian values that international regulation is justified irrespective of the resultant constraints on state autonomy. As a consequence, two important sets of considerations pertain to (1) the intensity of the violence; and (2) the capacity and willingness of the parties to carry out sustained, coordinated hostilities. In addition, concerns about state sovereignty are not significant in circumstances where the state itself accepts or invokes application of the laws of war. Therefore, another important set of criteria concerns the reaction of the state to the hostilities. In addition, the reaction of the international community straddles these categories, and, as a consequence, may provide evidence relevant to both sets of criteria.

Table 1. Existence of an “Armed Conflict”: Humanitarian Concerns and State Sovereignty

Humanitarian Costs	High Intensity (organized, protracted)	Low Intensity (disorgan- ized, short-lived)
Sovereignty Costs		
State Asserts Sovereign Prerogative; Denies Hu- manitarian Law Applicable	Yes	No
State Accepts Applicability of Humanitarian Law	Yes	Yes

Non-international hostilities constitute “armed conflict” within the meaning of the Conventions if (1) the conditions pose an aggravated threat to core humanitarian values (an objective standard); *or* (2) the state party to the hostilities interprets them as an “armed conflict” (a subjective standard). These two circumstances are separate methods of establishing the existence of an “armed conflict.” Therefore, any situation satisfying the objective criteria constitutes an “armed conflict” irrespective of the views of the state party to the conflict.

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Likewise, any hostilities characterized by the state party as an “armed conflict” should be understood as such, irrespective of the objective conditions. There is, after all, no indication that Common Article 3 was drafted so as to enable international actors to second-guess a state’s classification of non-international hostilities as an “armed conflict.” To the contrary, the Article was exhaustively debated and repeatedly revised because of disagreement about the conditions under which the laws of war apply to internal conflicts despite opposition from the state.⁴⁷

Table 2. Summary of Criteria.

<i>AGGRAVATED THREAT TO CORE HUMANITARIAN VALUES</i>	<i>LIMITED INFRINGEMENT OF STATE SOVEREIGNTY</i>
<ol style="list-style-type: none"> 1. Intensity of the hostilities 2. Organizational capacity to engage in sustained hostilities 3. Intention to engage in sustained hostilities 4. Third party state or states recognize the armed group as a “belligerent” 	<ol style="list-style-type: none"> 1. State recognition of armed group as a “belligerent” 2. State invokes “rights of belligerency” 3. State submits the matter to the UN Security Council for Chapter VII action 4. State otherwise asserts applicability of the laws of war 5. Third party state or states recognize a state of belligerency 6. State does not exercise effective control over some part of its territory

The systematic application of these factors to the U.S. hostilities against al Qaeda strongly suggests that the “armed conflict” requirement is satisfied. Again, the crucial issues are: organization, intensity, and the countervailing consideration of state sovereignty. Al Qaeda exhibits some minimal organization, the hostilities

47. The most important consideration defining the “armed conflict” threshold was state sovereignty. *See, for example*, ICRC COMMENTARY, *supra* note 25, at 31–33.

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between this group (and its affiliates) and the United States have assumed a high degree of intensity, and the United States does not assert that the characterization of the hostilities as a conflict undermines its sovereignty—indeed it has clearly chosen to respond to the group as a belligerent. The September 11 attacks were coordinated applications of force resulting in enormous property destruction and an astonishing loss of life. As evidenced by the attacks, al Qaeda is an armed group with the organizational capacity to engage in sustained hostilities on a global scale. Substantial evidence suggests that al Qaeda considered itself “at war,” and that the attacks were part of an extended, escalating military campaign against the United States. The United States characterized the attacks as an “armed attack” and as “acts of war,” and subsequently launched an international military campaign against al Qaeda and its supporters. Moreover, the international community condemned the attacks and recognized the United States’ inherent right to self-defense against such armed aggression. Military operations directed against al Qaeda and its affiliates have continued to the time of this writing—currently ongoing in Afghanistan, the Philippines, Colombia, and several countries in the horn of Africa.⁴⁸ These factors, considered in light of the values underlying Common Article 3, justify classifying the hostilities as an “armed conflict” within the meaning of the Geneva Conventions.

This does not mean that all counter-terrorist operations are an armed conflict or that all such operations are part of the conflict with al Qaeda. There can be no armed conflict or “war” against terrorism as such. Wars waged against phenomena—the War on Poverty, the War on Drugs and, in some sense, the general notion of a War on Terrorism—are not armed conflicts within the meaning of the Conventions. Whether any situation is properly characterized as an armed conflict turns on the degree of organization of the nonstate party, the intensity of the hostilities, and the reasons for and degree to which the state party resists this characterization (if at all).

One other issue remains. Even if hostilities directed against al Qaeda amount to an “armed conflict,” they may not constitute an “armed conflict not of an international character” within the meaning of Common Article 3. Some suggest that the provision was designed to cover only wholly internal conflicts—situations similar to traditional “civil wars” wherein two or more groups vie for control of the government and/or territory. Although this is a serious view that enjoys non-trivial historical support, it is importantly flawed. This is

48. See ANDREW FEICKERT, CRS REPORT FOR CONGRESS, U.S. MILITARY OPERATIONS IN THE GLOBAL WAR ON TERRORISM, RL32758 (2005).

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an important issue in the GWOT—indeed, the Bush administration denies the applicability of Common Article 3 to the conflict on these grounds.⁴⁹ In support of this claim the administration argues that the GWOT is transnational, as opposed to internal, armed conflict, and that it does not resemble a classical civil war in that the parties are not fighting for control of any territorial or government. Of course, this is the claim expressly rejected by the Supreme Court in *Hamdan*.

The great strength of this view is that it reflects, even if only in a very general way, the circumstances directly contemplated in the treaty drafting process. It is clear that, at the time the Conventions were drafted, the paradigmatic civil war was the sort of non-international armed conflict the treaty makers had in mind. Nevertheless, the drafting history, considered in more dynamic way, does not support this view. The Diplomatic Conference rejected a proposal by the U.S. delegation that would have established a similar threshold.⁵⁰ The Conference also specifically rejected a draft of the article that would have limited its application to “civil wars.”⁵¹

More fundamentally, this understanding of Common Article 3 is difficult to square with the purposes of the provision. Indeed, it would create an inexplicable regulatory gap in the Conventions. On this reading, the Conventions would cover international armed conflicts proper and wholly internal civil wars, but would not cover armed conflicts between a state and a foreign-based (or

49. See Memorandum from the President to the Vice President et al. (Feb. 7, 2002) (stating the legal conclusion regarding humane treatment of al Qaeda and Taliban detainees). The legal analysis supporting this conclusion is provided in two DOJ memoranda. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President, & William J. Haynes II, General Counsel, Department of Defense (Jan. 22, 2002); Memorandum from John Yoo, Deputy Assistant Attorney General, & Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002).

50. The United States proposal emphasized several essential ingredients including that the insurgents must have an organization “purporting to have the characteristics of a State;” the insurgent civil authority must exercise *de facto* authority over person within a determinate territory; the armed forces must act under the direction of the organized civil authority and must be prepared to observe the ordinary laws of war; and the insurgent civil authority must agree to be bound by the provisions of the Convention. DIPLOMATIC RECORD, *supra* note 45, at 121.

51. The ICRC Draft included an additional paragraph in Common Article 2 that would have made the entire Conventions applicable to “civil wars,” but the draft was rejected in favor of a draft with much more modest substantive commitments and a much lower threshold of application. *Id.*

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transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state. There is no apparent rationale for such a regulatory gap. And, indeed, the kinds of considerations that ought to frame the application of Common Article 3, canvassed above, strongly suggest otherwise. In addition, this reading of the provision also misconstrues the considerations that *limit* the application of Common Article 3. As mentioned above, Common Article 3 was revolutionary precisely because it purported to regulate *wholly internal matters* as a matter of international humanitarian law. If the provision governs wholly internal conflicts, then it would obviously apply to armed conflicts with transnational dimensions.

Some also argue that the view enjoys some textual support in that the provision, by its terms, covers only cases of “armed conflict not of an international character *occurring in the territory of one of the High Contracting Parties*.”⁵² Of course, all the reasons canvassed above for rejecting the “civil wars” interpretation also apply to the exceedingly literalist reading of this clause. The actual purpose of this language, as the drafting history and subsequent commentary make clear, was to require a jurisdictional nexus between the conflict and a state party to the treaty.⁵³ In other words, this clause should be understood to mean that the armed conflict must occur in the territory of *at least* one of the High Contracting Parties.⁵⁴ A similar example of arguably unartful drafting is exhibited in Common Article 2. That provision states that the Conventions apply to all cases of armed conflict between High Contracting Parties “even if the state of war is not recognized by one of them.”⁵⁵ Several other aspects of the negotiating history of the Conventions discredit the Government’s view. First, the Government can point to no discussion in the drafting negotiations wherein such an astonishing limitation was contemplated, proposed, or debated. Second, the case that served as the primary impetus for drafting Common Article 3 and provided the paradigmatic case of a conflict covered by the provision—the Spanish Civil War—had substantial transnational dimensions.⁵⁶ For example, several countries aided one of the sides in the conflict (including

⁵² For example, GPW, *supra* note 1, art. 3, 6 U.S.T. at 3318, 75 U.N.T.S. at 136 (emphasis added).

⁵³ See generally MOIR, *supra* note 6.

⁵⁴ See Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 39–41 (2003).

⁵⁵ For example, GPW, *supra* note 1, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

⁵⁶ G.I.A.D. Draper, *The Geneva Conventions of 1949* at 114-I RECUEIL DES COURS 57, 83 (1965).

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sending entire fighting divisions into Spain, providing transport for Franco's troops from Morocco into Spain, and providing use of foreign port facilities); the Spanish forces seized and sunk foreign supply ships; and fighting spilled over Spain's borders.⁵⁷ Third, at the Treaty Conference amendments were proposed and rejected that would have *restricted* Common Article 3 to include *only* conflicts, like the Spanish Civil War, "resembling an international war in dimensions."⁵⁸ Although amenable to multiple interpretations, the consensus view is that the provision should be understood to mean that the Conventions apply even if the state of war is not recognized by *either* one of them.⁵⁹ Moreover, during the negotiations some states expressed concern that more of the provisions of the full Conventions (including those for POWs and the shipwrecked) were not incorporated into Common Article 3. These states argued that such rules should apply since the scope of Article 3 included, as a subset, the kind of "civil wars which resembled international wars."⁶⁰ Also consider that this understanding of the provision suggests that the most "civil wars" fall outside the rule.⁶¹ Most non-international conflicts are transnational in the sense that the fighting spills over international borders—including several paradigmatic applications of Common Article 3 including: Rwanda, Algeria, the Chechen Republic, Bosnia, Kosovo, and the Congo.

The best reading of Common Article 3 is that it applies, at a minimum, to all armed conflicts involving non-state actors.

III. RECIPROCITY CONSTRAINTS

⁵⁷ . See, e.g., Hugh Thomas, *The Spanish Civil War* 357-58, 551-55, 934-44 (2d rev. 2001); Ann van W. Thomas & A. J. Thomas, International Legal Aspects of the Civil War in Spain, 1936-1939, in *The International Law of Civil War* 111, 113-14 (Richard A. Falk ed. 1971).

⁵⁸ *II-B Final Record, supra*, at 123.

⁵⁹ See G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 9 n.31a (1958).

⁶⁰ *II-B Final Record, supra*, at 123; *id.* at 335 (statement of Switzerland) (discussing "non-international conflicts which most resembled international wars").

⁶¹ See, for example, Halvard Buhang & Scott Gates, *The Geography of Civil War*, 39 J. PEACE RES. 417, 425 (2002) (documenting that the "conflict zone," even when defined narrowly, of over half of the civil wars occurring between 1946 and 2000 was arguably trans-territorial).

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The third reason to question the applicability of the Conventions is the absence of reciprocity in the GWOT. Many argue that the laws of war, including the Conventions, do not apply to the GWOT because the terrorist groups against which the United States fights do not accept or observe the rules of war.⁶² The idea here is that the laws of war are subject to a robust “reciprocity constraint.” Because the very purpose of terrorist groups is to commit acts radically inconsistent with the laws of war, these rules do not apply to operations directed against them. The question here is not whether noncompliance with the rules of war modifies in any way the scope of protection accorded certain individuals. Rather, the question here is whether the failure to accept or observe the rules by one of the parties renders the Conventions altogether inapplicable to a given conflict.

The Conventions, properly understood, do indeed include an important reciprocity constraint in that they presume a mutuality of obligations. This constraint, however, is almost always inapplicable in non-international conflicts (as it is in the GWOT). Moreover, this kind of reciprocity constraint—what I will call “first-order reciprocity”—is quite modest even when applicable. And the Conventions do not, and should not, embrace a robust “second-order reciprocity” by calibrating protection according to individual-level conduct.

There is both widespread disagreement and widespread confusion about the role of reciprocity in the Conventions. Some insist that the Conventions are not predicated on any notion of reciprocity; and that any incorporation of a reciprocity constraint is inconsistent with the humanitarian character of the treaties. Others argue that the Conventions are predicated on reciprocity, and that any attempt to read reciprocity out of the Conventions will render them irrelevant (or worse). Although (and perhaps because) both side can point to aspects of the Conventions seemingly supporting their respective views, evaluation of the merits of these competing claims is fraught with complications. In short, the debate suffers from a startling degree of under-specification. My aim here is to sort out this debate by explaining the limited, even if important, role reciprocity plays in the Conventions.

There are three general ways to understand the importance of reciprocity for the Conventions. Reciprocity might be important because the only good reason for states to comply with the Conventions is the reciprocal treatment such compliance is thought

62. This is an extremely common, even if typically unexplained, claim. *See, for example*, Ruth Wedgwood, *The Rules of War Can't Protect Al Qaeda*, N.Y. TIMES, Dec. 31, 2001; John Yoo, *Terrorists Have No Geneva Rights*, WALL ST. J., May 29, 2004.

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to elicit from the enemy. On this view, there is no good reason to consider the Conventions applicable to hostilities directed against an enemy unlikely, unwilling, or unable to reciprocate. Although variations of this idea are fairly common in public debates about the laws of war, there is no textual or historical evidence suggesting that the Conventions embrace this understanding of reciprocity. Moreover, there are good reasons to comply with the Conventions even if the enemy does not reciprocate. Humane and fair treatment of the enemy directly promotes the humanitarian objectives of the Conventions—an important good in itself. In addition, humane and fair treatment increases battlefield effectiveness because poor treatment discourages surrender, encourages reprisals, decreases troop morale, and decreases political support at home and abroad for the war effort. Compliance with the Conventions, on the other hand, might induce the enemy to humanize its tactics. Compliance might also form an important part of a more generalized reciprocity—one that aims to promote cooperation and fair play with states not party to the instant conflict and perhaps even in issue areas not related to the laws of war. The important point here is that there are good reasons to apply the Conventions even if the enemy refuses to do so.⁶³ This approach to reciprocity neither has nor should have a meaningful role in the Conventions.

There are, however, two other approaches to reciprocity that do, and should, play some role in the Conventions. Reciprocity might be important as a means to ensure *mutuality of obligations* between the parties. On this view, the Conventions do not impose unilateral obligations on the parties—belligerents are obligated under the rules only insofar as their adversary is. Common Article 2 expressly incorporates this kind of reciprocity constraint. This provision, by its terms, requires belligerent states party to the treaties to observe the Conventions “in their mutual relations.”⁶⁴ In other words, the Conventions do not require that states party to them apply the treaties

63. My point here is not that an interest-based analysis would always favor perfect compliance with the Conventions. Countervailing strategic or tactical considerations in specific cases might overwhelm the benefits associated with compliance—and there may be cases in which one or more of these benefits would not accrue to the law-regarding party. Here, I claim only that there are reasons to comply even in the absence of direct reciprocation from the enemy.

64. For example, GPW, *supra* note 1, art. 2, 6 U.S.T at 3320, 75 U.N.T.S. at 138.

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when fighting against states that have not accepted the Conventions. This is, to be sure, a form of reciprocity, but it aims only to ensure the mutuality of obligations. That is, the Conventions impose on belligerent states only those obligations it also imposes on its adversary. Because the Conventions could not impose obligations on states not party to them, the treaties do not govern the mutual relations of parties and nonparties. This is a thin commitment to reciprocity.⁶⁵ This “first-order reciprocity” aims to ensure only that the belligerents are subject to a common set of rules.⁶⁶ The mutuality of obligations required by Common Article 2 is a *formal* reciprocity designed to ensure only that the law applies to both parties, not to ensure that both parties are equally accountable as a sociological matter.

Even so, some might point out that al Qaeda and its affiliates do not accept (or observe) the laws of war—hence, the “first-order reciprocity” constraint suggests the Conventions are inapplicable to hostilities directed against them. The trouble with this claim, though, is that it misapprehends the nature of the reciprocity constraint. The “first-order reciprocity” constraint is typically relevant only to the mutual relations of *states*. States, in general, have the power to impose obligations on individuals and other sub-state actors subject to their jurisdiction. That is, members of al Qaeda are obligated to observe the Conventions via a number of mechanisms—for example, the state of which they are nationals, the state in which they reside, or the state in which they conduct military operations may have ratified the treaty.⁶⁷ The important point is that “mutuality of obligations” is rarely a problem in non-international armed conflicts—only sovereign states have the capacity to insulate themselves from the imposition of legal obligation (and even their capacity to do so is in sharp decline). This conclusion is reinforced by the seemingly inexplicable absence of any reciprocity provision in Common Article 3.

Reciprocity might also be important for the Conventions because it is an effective strategy for promoting compliance with treaty objectives. In general, reciprocity is a mechanism that helps to overcome collective action problems—here, the problem of how to

65. This is not to suggest that “first order reciprocity” is unimportant. To the contrary, it is an essential feature of stable, cooperative outcomes in this context. See James Morrow, *Common Conjectures and the Laws of War*, 31 J. LEGAL STUD. 41 (2002).

66. The practical relevance of the constraint in Common Article 2 conflicts is negligible now that the Conventions have been ratified by nearly all states.

67. Of course, this is not to say that these actors will comply with these obligations. The claim here is only that the formal mutuality of obligations required by the “first order reciprocity” constraint is satisfied irrespective of whether these obligations are “accepted” by any particular members of al Qaeda or al Qaeda as such.

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achieve stable cooperation in the observance of the Conventions in the absence of a centralized authority enforcing the treaties. On this view, reciprocity is an *enforcement strategy*. If states seek to promote the values embodied in the Conventions, then they should reward treaty-regarding behavior and punish treaty-disregarding behavior. I will call this “second-order reciprocity.” Note that this approach to reciprocity does not necessitate imposing a reciprocity constraint on the application of the Conventions. Indeed, on this view, reciprocity-based considerations should not limit the *application* of the Conventions. Rather, this approach favors reciprocity within the framework the Conventions. To understand exactly how these abstract ideas work in the Conventions requires some specification of the “rewards” and “punishments” appropriate to the regime—and the identification of actors who ought to be targeted for incentivization.

Neither Common Article 2 nor Common Article 3 conditions the application of the Conventions on the enemy’s substantial compliance with the rules. Indeed, the Conventions do not even authorize states to withhold humane and fair treatment as an inducement to comply with the rules or as a response to violations of the rules. Indeed, the only discernable legal consequence of noncompliance is that enemy fighters might be denied POW status—and even this is a reciprocity constraint bearing on who is protected, and how much, rather than a threshold question of applicability.⁶⁸ The point is not that the Conventions fail to punish noncompliance by denying humane and fair treatment. Rather, the claim is only that the applicability of the Conventions is not subject to such a constraint. For example, the Conventions applied to the 1991 and 2003 armed conflicts between the United States (and its allies) and Iraq despite the fact that Iraqi forces systematically mistreated U.S.

68. And as I have argued elsewhere, the denial of POW status carries only a few, mostly modest, protective consequences. See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367 (2004). Several other provisions of the Conventions illustrate that even law breakers enjoy substantial humanitarian protection. For example, the POW Convention expressly provides that persons convicted of war crimes retain their POW status. GPW, *supra* note 1, art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202. In addition, the Conventions require fair trials for individuals accused of committing serious violations of the treaties. See, for example, GPW, *supra* note 1, arts. 129–31, 6 U.S.T. at 3418–20, 75 U.N.T.S. at 236–38. Moreover, the Civilian Convention requires at a minimum humane treatment and, in the case of punishment, fair trials for “unlawful combatants.” GCP, *supra* note 15, art. 5, 6 U.S.T. at 3520, 75 U.I.T.S. at 290.

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and allied POWs—and irrespective of the fact that there was no realistic expectation that Iraq would exercise restraint in the conduct of its military operations. That Iraq had ratified the treaties was sufficient to satisfy the mutuality of obligations requirement of Common Article 2.

Of course, this is not to say that the Conventions contemplate no adverse consequences for bad actors. In fact, there is an important commitment to “second-order reciprocity” embodied in the treaties. The Conventions emphasize procedurally-adequate war crimes prosecutions by national authorities. In addition, the treaties expressly contemplate the provision of rewards through increased protections (rather than through a decision not to withhold protection). The Conventions provide a framework within which belligerents might negotiate prisoner exchanges, the parole of prisoners, or even a more robust, comprehensive protection regime.

This approach to “second-order reciprocity” is understandable because of the special character of the regime. The problem is that other ways of incorporating “second-order reciprocity” might undermine, rather than promote, compliance with the treaties. Of course, reciprocity is an effective enforcement strategy only if the enemy understands when a particular action is a reward and when it is a punishment. A decision to apply the Conventions to a conflict, or the decision to accord humane treatment, is unlikely to be understood by the enemy as a “reward.” The protections required by the treaties are much more likely to be understood as entitlements. Moreover, a decision not to apply the Conventions, or (worse still) not to accord humane treatment, may not be understood as a punishment. The difficulty is that this type of retaliation can itself be understood as a *violation* of the treaty—which, in turn, risks prompting retaliation from the enemy as a response to this “violation,” *ad infinitum*, thereby risking a retaliatory spiral into unmitigated barbarity. These problems help explain why law-regarding war crimes prosecutions might best promote reciprocity. This form of punitive “retaliation” is itself recognized and regulated in the Conventions. The relative merits of this approach, of course, should be assessed fully, but doing so is beyond the scope of this Chapter. For the moment, it suffices to say only that, although the Conventions do employ reciprocity as an enforcement strategy, there is no “second-order reciprocity” constraint on the *applicability* of the Conventions.

Even if al Qaeda and its affiliates do not “accept” or comply with rules of war, the Conventions might nevertheless apply to hostilities directed against them. The treaties, in short, potentially protect even those who systematically violate its rules. The Conventions, however, do not shield such individuals from adverse

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consequences—under the treaties, such persons ought to be prosecuted for their unlawful acts.

CONCLUSION

The objectives of this Chapter are to clarify, as a conceptual matter, the question of whether the Conventions apply; and to explain, as a doctrinal and policy matter, how the relevant provisions of the Conventions should be understood in the context of the GWOT. The upshot is that the Geneva Conventions govern substantial aspects of the GWOT. Both Common Articles 2 and 3 of the Conventions provide some basis to apply some aspect of the rules. That the hostilities are directed against a nonstate actor is of no moment. Nor is it significant (for the applicability question) that the enemy fails to observe the rules of war. The text and purposes of the treaties, properly understood, strongly support these conclusions.