

Conflict Classification and Detainee Treatment in the War Against al Qaeda

Ensign Scott L. Glabe, U.S. Navy Reserve*

Introduction

As the widespread opposition to the Justice Department's November 2009 announcement that alleged 9/11 mastermind Khalid Sheikh Mohammed would be tried in civilian court suggests,¹ most Americans believe that war, rather than criminal law enforcement, provides the better framework for the global U.S. response to the terrorism of al Qaeda and its affiliates.² Though the current Administration has jettisoned the term "Global War on Terrorism" (GWOT) in favor of "overseas contingency operations" (OCO),³ President Obama, in his inaugural address, affirmed that "[o]ur nation is at war, against a far-reaching network of violence and hatred."⁴ Yet, nearly nine years into what will likely become the longest armed conflict in American history, there is little consensus as to exactly what kind of war the United States is fighting. How OCOs are classified under the law of armed conflict is of great salience to contemporary policy debates, particularly those concerning whether and under what circumstances detainees may be tried by military commissions.⁵ It also matters to the Soldier on the ground: international law, which greatly influences the manner in which combatants are targeted, captured, detained, and interrogated by U.S. troops, prescribes different rules for different categories of conflicts.

This article proceeds on the premise that the military action authorized by a joint resolution of Congress on 18 September 2001⁶ should not be characterized as a war against the sovereign nation of Afghanistan, but rather as an armed conflict against al Qaeda and its affiliates taking place primarily, but not exclusively, in Afghan territory.⁷ The four 1949 Geneva Conventions, which "have achieved a universal status unique among modern treaties,"⁸ apply to two types of armed conflict. The treaties as a whole apply in four situations specified by each convention's Common Article 2 (CA2). Three of these fall into the category of international armed conflict between nation-states, while the fourth is "occupation of the territory of a High Contracting Party."⁹ The conventions' Common Article 3 (CA3)—and that Article alone—applies "in cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"¹⁰

The application of the Geneva Conventions to ongoing OCOs against al Qaeda and its affiliates raises four possibilities: (1) CA2 but not CA3 applies; (2) CA3 but not CA2 applies; (3) both CA2 and CA3 apply; and (4) neither CA2 nor CA3 apply. This article briefly surveys the arguments for and against each of these possible categorizations. It then argues that the last classification—that neither CA2 nor CA3 applies to OCOs against al Qaeda—is the most accurate, but that, perhaps counterintuitively, this conclusion provides the most potential protections for detained enemy combatants.

* J.D. candidate, Yale Law School. This article developed from a paper originally submitted for the Advanced Topics in the Law of War elective at The Judge Advocate General's Legal Center and School, in which the author was enrolled during the 57th Judge Advocate Officer Graduate Course. The author is indebted to Major Jeremy Marsh, U.S. Air Force, for his assistance.

¹ Thomas M. DeFrank, *Majority of Americans Agree That Khalid Sheikh Mohammed Should Tried [sic] Outside New York, Shows Poll*, N.Y. DAILY NEWS, Feb. 10, 2010, available at http://www.nydailynews.com/ny_local/2010/02/10/2010-02-10_majority_of_americans_agree_that_khalid_sheikh_mohammed_should_tried_outside_new.html. For more on Attorney General Holder's initial announcement, see Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 13, 2009, available at <http://www.nytimes.com/2009/11/14/us/14terror.html>.

² Most commentators agree. See, e.g., BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 168–73 (2008); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 2–4 (2006); David W. Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 63–68 (2006); Philip Zelikow, *Legal Policy for a Twilight War*, 30 Hous. J. INT'L L. 89, 95–100 (2007). *Contra* Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003).

³ Scott Wilson & Al Kamen, *'Global War on Terror' Is Given New Name*, WASH. POST, Mar. 25, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

⁴ Barack Obama, *Inaugural Address* (Jan. 20, 2009), available at http://www.c-span.org/pdf/obama_inauguralAddress.pdf.

⁵ See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); Glazier, *supra* note 2, at 55.

⁶ Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . .").

⁷ See Glazier, *supra* note 2, at 77–78. The specific and challenging legal issues raised by the detention of al Qaeda members and affiliates incident to the ongoing war in Iraq are generally outside the scope of this article.

⁸ *Id.* at 70–71.

⁹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

¹⁰ GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

The War Against al Qaeda as a Common Article 2 Conflict

The Israeli Supreme Court has adopted the view that military operations against terrorism constitute “armed conflict . . . of an international character” and therefore trigger the application of CA2 of the Geneva Conventions.¹¹ The court justified this classification in a 2006 opinion concerning the targeted killings of Palestinian terrorists by noting that terrorist organizations often possess military capabilities that rival or exceed those of states; therefore, it concluded that “[c]onfronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of an international character.”¹²

While this reasoning is appealing in its simplicity,¹³ it is facially inconsistent with the language of CA2, which applies only to four situations: (1) “all cases of declared war . . . between two or more of the High Contracting Parties”; (2) “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”; (3) “all cases of partial or total occupation of the territory of a High Contracting Party”; and (4) situations in which a Power not party to the convention “accepts and applies the provisions thereof.”¹⁴ No terrorist organization is a High Contracting Party, ruling out situations (1) to (3). Al Qaeda is not a Power (since it is not a nation-state) nor has it “accept[ed] and applic[ed] the provisions” of the Geneva Conventions.¹⁵ Thus, there is no way that a war between the United States and a global terrorist organization could trigger an application of the Geneva Conventions under the terms of CA2.

Furthermore, the Israeli Supreme Court’s argument, if taken to its logical conclusion, would purport to apply the law of international armed conflict to almost every civil war and, perhaps, even other forms of internal strife previously considered to be definitively outside the scope of CA2. If capabilities alone are sufficient to constitute an international armed conflict, a multitude of non-state actors, not just terrorists, would potentially qualify for the whole swath of Geneva Conventions protections, rendering the body of international law intended to specifically govern non-international armed conflict virtually meaningless.

¹¹ HCJ 769/02 Public Comm. Against Torture in Israel v. Gov’t of Israel [2006], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.a34.pdf (last visited May 12, 2010).

¹² *Id.* ¶ 21.

¹³ David Turns, *The Treatment of Detainees and the “Global War on Terror”*: Selected Legal Issues, in 84 INT’L L. STUD. 199, 212 (Michael D. Carsten ed., 2008).

¹⁴ GC I, *supra* note 9, art. 2; GC II, *supra* note 9, art. 2; GC III, *supra* note 9, art. 2; GC IV, *supra* note 9, art. 2.

¹⁵ Glazier, *supra* note 2, at 77.

More fundamentally, classifying the war against al Qaeda as a CA2 conflict would leave difficult questions unanswered—namely, whether captured combatants qualify for prisoner of war (POW) status under the Convention Relative to the Treatment of Prisoners of War (GC III).¹⁶ Most commentators agree that al Qaeda would fail to satisfy the four criteria enumerated in that convention’s Article 4, rendering its members ineligible for POW status.¹⁷ This, in turn, would risk leaving combatants with no Geneva Convention protections at all, despite GC III’s theoretically broad scope—although a limited number of detainees might technically be eligible for “protected person” status under the Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).¹⁸ Those eager to apply CA2 for its supposedly robust protections should be chastened by this result, while those wishing to deny detained combatants Geneva protections can argue for this same outcome via less convoluted means. It is thus unlikely that the war against al Qaeda and its affiliates will be widely considered a CA2 conflict anytime soon.

The War Against al Qaeda as a Common Article 3 Conflict

In *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that the Global War on Terrorism is a CA3 conflict because “[t]he term ‘conflict not of an international character’ is used [in CA3] in contradistinction to a conflict between nations,” meaning that CA3 applies to any armed conflict not covered by CA2.¹⁹ The assertion that there is no “gap” between CA2 and CA3 is textually colorable, particularly given that the trigger for CA3 is phrased in the negative (“conflict not of an international character”) rather than in the affirmative (e.g., “internal armed conflict”).²⁰ The Court’s reasoning in this regard is also historically tenable, given that the drafting of CA3 was triggered by and intended to include civil wars with “trans-national characteristics.”²¹

¹⁶ GC III, *supra* note 9.

¹⁷ Glazier, *supra* note 2, at 82–83; see GC III, *supra* note 9, art. 4.

¹⁸ If denied POW status, detainees would receive this protection if (1) CA2 applies to OCOs against al Qaeda and its affiliates, (2) the detainees were captured in Iraq or Afghanistan at a time when the United States was an “occupying power,” and (3) the detainees are nationals of a country with which the United States does not have normal diplomatic relations. See GC 4, *supra* note 9, arts. 2, 4. See generally Memorandum from Jack L. Goldsmith, Assistant Attorney Gen., Dep’t of Justice, to Alberto Gonzales, Counsel to the President, The White House, subject: “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), available at <http://www.usdoj.gov/olc/2004/gc4mar18.pdf>. It is unlikely that many of the detainees in question would satisfy all of these criteria. See Glazier, *supra* note 2, at 88–89.

¹⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

²⁰ See GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

²¹ Geoffrey S. Corn, *Snipers in the Minaret—What Is the Rule? The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 28, 31 n.27.

The Court's approach in *Hamdan* also has the benefit of substantive clarity since, in CA3 conflicts, there is a direct relationship between conflict classification and detainee protections: all of its provisions apply to all persons "taking no active part in hostilities."²² Common Article 3 specifies that such individuals "shall in all circumstances be treated humanely" and prohibits, among other things, "violence to life and person," "outrages upon personal dignity [including] cruel treatment and torture," and "the passing of sentences without . . . previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by free peoples."²³ It was this last provision that was at issue in *Hamdan*.

Since CA3 constitutes a "convention in miniature,"²⁴ the precise nature of these protections is far from clear.²⁵ Furthermore, the Article is frustratingly limited in scope. For instance, it does not even address the treatment of individuals directly participating in hostilities and the attendant distinction between combatants and civilians, both of which are extremely salient in the context of transnational terrorism.²⁶ However, given both the general uncertainty surrounding the proper treatment of OCO detainees and the reluctance of the George W. Bush Administration to provide al Qaeda combatants with any Geneva Convention protections, CA3's practical straightforwardness in applying all of its (limited) protections to all individuals not taking part in hostilities in all circumstances at least partially accounts for the Supreme Court's classification of the war against al Qaeda as a CA3 conflict.

Despite its utility, *Hamdan*'s characterization of CA3 is textually dubious, given that the Article applies only to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."²⁷ The OCOs against al Qaeda and its affiliates are taking place simultaneously in the territory of many High Contracting Parties.²⁸ One could argue that this modifying clause is a minimum "floor," which allows for the reading an implicit "at least" into the sentence, but such a reading would be

inconsistent with the purpose of CA3, which was to apply minimum protections of the law of war to disputes within a single country that rose to the level of armed conflict.²⁹

Furthermore, *Hamdan*'s assertion that there is perfect complementarity between CA2 and CA3—that is, that an armed conflict must fall under one or the other—is historically suspect. Support for this contention comes from an unlikely source: the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (AP I), which the United States has not ratified.³⁰ Article 1, section 2 of that treaty institutes bare minimum protections for "cases not covered by this Protocol or by other international agreements," thereby implicitly suggesting that there are armed conflicts that fall outside the purview of CA2, CA3, and AP I.³¹

The War Against al Qaeda as Both a Common Article 2 and a Common Article 3 Conflict

The British Government has, at least in the past, taken the position that operations against terrorists can be classified as within the purview of either CA2 or CA3, depending on the circumstances.³² Thus, an operation within Afghanistan or Iraq might fall under CA3 (since the British Government regards the conflicts there to be civil wars)³³ while an operation to capture or kill an al Qaeda member elsewhere could trigger CA2.

While this approach is admirable for its ability to provide maximum flexibility in adapting to a complex reality, it would prove unworkable for U.S. forces and judge advocates on the ground, as well as for policymakers. Moreover, allowing OCOs to be alternately classified as falling under CA2 or CA3 would invite opportunism in characterizing them; given the global unpopularity of the U.S. approach to the Geneva Conventions after 9/11, the United States can ill afford even the perception of abuse that might accompany such a classification scheme.

²² GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

²³ GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

²⁴ COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 32 (Jean S. Pictet ed., 1958), available at <http://www.icrc.org/ihl.nsf/COM/380-600006?OpenDocument>.

²⁵ Glazier, *supra* note 2, at 93.

²⁶ For an introduction to the concept of "direct participation in hostilities," see *Direct Participation in Hostilities: Questions and Answers*, INT'L COMM. OF THE RED CROSS, June 2, 2009, <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-faq-020609>.

²⁷ GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3 (emphasis added).

²⁸ Glazier, *supra* note 2, at 93.

²⁹ Corn, *supra* note 21, at 31 n.27.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3-608 [hereinafter AP I].

³¹ *Id.* art. 1 ("In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience."); Glazier, *supra* note 2, at 93.

³² Turns, *supra* note 13, at 213-14.

³³ *Id.* at 214.

The War Against al Qaeda as Neither a Common Article 2 Nor a Common Article 3 Conflict

Some have argued that the war against al Qaeda falls within a “gap” between CA2 and CA3 because it is neither an international armed conflict between parties of the Geneva Conventions nor a non-international armed conflict within the territory of a single nation-state. This reasoning was used by then-U.S. Assistant Attorney General Jay S. Bybee in a January 2002 memo that formed the basis of President Bush’s February 2002 determination that denied members of al Qaeda any protections of the Geneva Conventions.³⁴ Many found this determination both legally and morally objectionable, and it sparked much of the controversy and litigation that has surrounded anti-terror OCOs for the last eight years.

However, the “gap” argument put forth in Bybee’s now infamous memo, while heavily criticized, is facially consistent with the text of both CA2 and CA3. Quite simply, a global war against a non-state actor is neither an international armed conflict between High Contracting Parties under CA2 nor an “armed conflict not of an international character” within the common-sense meaning of CA3.³⁵ As noted above, this interpretation of the text is bolstered by AP I’s reference to “cases not covered by . . . international agreements.”³⁶

It is important to note that Bybee’s premise does not lead inexorably to his preferred conclusion. Even if neither CA2 nor CA3 applies to the war against al Qaeda and its affiliates as a matter of treaty law, it is still possible for the treatment provisions of CA3 to apply as a matter of customary international law. In support of this proposition, one can argue that CA3 codified fundamental principles of *international* armed conflicts and explicitly applied them to *non-international* armed conflicts. This explicit application, arguably an abrogation of the longstanding legal tradition that a sovereign reigned supreme within its borders, “was motivated by a perceived need to interject some limited humanitarian regulation into the realm of ‘internal’ conflicts”³⁷ It does not preclude an *implicit* application of the

principles in CA3 to *all* armed conflict as a matter of customary international law.³⁸

The view that CA3 has now become a “minimum yardstick of protection of all conflicts,” in the words of the International Court of Justice in *Nicaragua v. United States*,³⁹ is consistent with both the spirit of international law dating back to the Martens Clause and, more importantly, recent jurisprudence: in *Prosecutor v. Tadić*, the International Criminal Tribunal for the former Yugoslavia held that “the character of the conflict is irrelevant” in deciding whether CA3 applies.⁴⁰ This view is not inconsistent with *Hamdan*, in which the plurality never explicitly holds that the war against al Qaeda falls under CA3 *because* it is an “armed conflict not of an international character.”⁴¹ The Court is insistent that CA3 applies to OCOs against transnational terrorists, but it never says exactly why—and it cites both *Nicaragua v. United States* and *Prosecutor v. Tadić* as part of its reasoning.⁴²

Rendering CA3 applicable to war against al Qaeda based on customary international law would allow for the explicit importation of other aspects of customary international law, most notably Article 75 of AP I.⁴³ Article 75 elaborates in great detail on many of the general pronouncements made by CA3.

[u]nlike the rather ambiguous ‘judicial guarantees which are recognized as indispensable by civilized peoples’ standard of CA3, [Article 75] contains ten specifically enumerated criteria amplifying the general proviso that requires trial by ‘an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.’⁴⁴

While, as noted above, the United States has not ratified AP I, multiple high-ranking U.S. officials have stated that they consider Article 75 to be binding customary

³⁴ Memorandum from Jay S. Bybee, Assistant Attorney Gen., Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep’t of Def., subject: Application of Treaties and Laws to al Qaeda and Taliban Detainees 10 (Jan. 22, 2002), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf> [hereinafter Bybee Memo]; see Memorandum from President George W. Bush to Richard B. Cheney, Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (“I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al-Qaida in Afghanistan or elsewhere throughout the world . . .”).

³⁵ See GC I, *supra* note 9, arts. 2–3; GC II, *supra* note 9, arts. 2–3; GC III, *supra* note 9, arts. 2–3; GC IV, *supra* note 9, arts. 2–3.

³⁶ AP I, *supra* note 30, art. 1.

³⁷ See Corn, *supra* note 21, at 31 n.27.

³⁸ See *id.*; Turns, *supra* note 13, at 212.

³⁹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27).

⁴⁰ Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995); Corn, *supra* note 21, at 31 n.27 (“Common Article 3 can be regarded as somewhat of an extension of the principle that absent applicable treaty provisions, individuals effected [sic] by conflict remain under the protection of the principles of humanity. This principle is reflected in the ‘Martens Clause,’ which was first included in the Preamble of the Hague Convention of 1899 and has been replicated in subsequent law of war treaties and statutes.”).

⁴¹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–32 (2006).

⁴² *Id.* at 631 n.63.

⁴³ AP I, *supra* note 30, art. 75.

⁴⁴ Glazier, *supra* note 2, at 114.

international law.⁴⁵ In 2003, then-State Department Legal Adviser William Howard Taft IV stated categorically that “the United States . . . does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.”⁴⁶ While some might argue that the United States only recognizes Article 75 as customary international law in CA2 conflicts (since those are the conflicts to which AP I, by its own terms, applies), Taft’s statement was unequivocal in its reference to “all persons.” Moreover, many of Article 75’s protections are repeated verbatim in Articles 4 and 5 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (AP II), to which “the United States has not raised serious objections” and which the Reagan Administration transmitted to the Senate for advice and consent in 1987.⁴⁷

In addition to providing detainees the protection of multiple treaties via an application of customary international law, the classification of the war against al Qaeda as neither a CA2 nor a CA3 conflict has numerous comparative advantages over the other options discussed above. In contrast to all three of the other possibilities, this approach allows for a policy that respects the substance of the Geneva Conventions without distorting their text. It avoids the risk inherent in classifying the current war as only a CA2 conflict in which detainees will get no protection whatsoever if they fail to qualify for POW status. Applying CA3 as a matter of customary international law rather than as a matter of treaty law also provides a compelling alternative to the U.S. Supreme Court’s approach in *Hamdan*, which, at least implicitly, purports to limit the protections available to detainees at the same time it guarantees them. Additionally, it allows the U.S. Government to recognize the novel nature of the conflict with al Qaeda without resorting to the unworkable view adopted by the British Government that individual anti-terror operations fall within the purview of either CA2 or CA3 depending on the circumstances.

Conclusion

There is nothing inherently contradictory in the view that the war against al Qaeda is not a CA2 and/or CA3 conflict but that CA3 (and perhaps Article 75 of AP I) also applies as a matter of customary international law. It is understandable that some might be hesitant to rely on customary international law alone for detainee protections given the skepticism towards it exhibited by some members of the previous Administration.⁴⁸ However, now that the Executive Branch, along with the Supreme Court, seems to be implicitly assuming that CA3 applies to all armed conflict,⁴⁹ it is perhaps time to make those assumptions explicit and assert customary international law as the basis of U.S. detainee policy. To do so instead of relying on a distorted interpretation of the text of the Geneva Conventions would be to simultaneously show respect for those venerable treaties, for the novel nature of ongoing OCOs, and for the authority and relevance of properly-applied customary international law.

To heed this call would, of course, require placing yet another burden on the Judge Advocate General’s Corps, which is already charged with developing and implementing rule-of-law frameworks for wars in Afghanistan and Iraq. However, there is no better time to properly classify ongoing OCOs against al Qaeda and other terrorists than now—when the military possesses a trained cadre of judge advocates with deep knowledge of the law of armed conflict and extensive experience with detainee operations.

⁴⁵ *Id.* at 116.

⁴⁶ William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003).

⁴⁷ Glazier, *supra* note 2, at 116–18; see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 4–5, June 8, 1977, 1125 U.N.T.S. 609–99.

⁴⁸ See Bybee Memo, *supra* note 34, at 32–37 (“[C]ustomary international law does not bind the President or the U.S. Armed Forces in their decisions concerning the detention conditions of al Qaeda and Taliban prisoners.”).

⁴⁹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 n.63 (2006); U.S. DEP’T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. 4.2 (Sept. 5, 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf> (“All persons subject to this Directive shall . . . apply, *without regard to a detainee’s legal status, at a minimum* the standards articulated in Common Article 3 to the Geneva Conventions of 1949”) (emphasis added).