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Article

***Hamdan* and Common Article 3: Did the Supreme Court Get It Right?**

Fionnuala Ní Aoláin[†]

Following the atrocities of September 11, 2001, the United States has activated a highly focused and high-profile set of legal, political, and military responses directed at perceived threats to its security at home and abroad. The legal responses to the “war on terror” have been extensive and central to this undertaking. In asserting the primacy of the executive’s rights to unilaterally shape and define the contours of domestic and international law, the United States has invoked the ire of other states, international organizations, and critics at home. Common concerns include executive overreaching, the abandonment of basic principles of due process, transparency, and executive accountability. Courts, both national and international, tend to give considerable deference to states when political or military crises are at hand. They usually avoid direct legal confrontation with executive and legislative assertions of authority and, if required to adjudicate on the validity of legal responses to a perceived threat, demonstrate timidity and caution.¹ The *Hamdan v. Rumsfeld*² decision departs significantly from that general pattern, as do (to lesser degrees) the Su-

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1. OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 17–109 (2006).

2. 126 S. Ct. 2749 (2006). In *Hamdan*, “the Court concludes that petitioner may seek judicial enforcement of the provisions of the Geneva Conventions because ‘they are . . . part of the law of war.’” *Id.* at 2845 (Thomas, J., dissenting) (quoting *id.* at 2794 (majority opinion)).

preme Court's earlier decisions in *Rasul v. Bush*³ and *Hamdi v. Rumsfeld*.⁴

What is also significant about *Hamdan* is that international legal norms are central to its analytical core and to the conclusions the Court draws regarding the application of international norms to state actions. Many scholars have examined the Court's conclusions in *Hamdan* and, in particular, its emphasis on the role of the legislative branch in the decision-making process.⁵ This Article focuses its attention on the Court's assessment and subsequent application of international humanitarian law to the issues raised in *Hamdan*. In doing so, I start from the position that the majority was generally right in its instincts about the relevance of humanitarian law and the appropriateness of using humanitarian law norms to answer the questions posed in *Hamdan*. Nonetheless, I suggest that the Court's reasoning, in all the opinions offered, illustrates a certain clumsiness of application and a dearth of analytical rigor, leaving some very important legal matters unresolved.

Humanitarian law pervades the reasoning of the *Hamdan* opinions. Particularly striking are the Court's views on the enforceability of the Geneva Conventions and specifically that of Common Article 3.⁶ Here the Court determined that the Geneva Conventions are incorporated by Article 21 of the Uniform

3. 542 U.S. 466 (2004).

4. 542 U.S. 507 (2004); see also Tim Otty & Ben Olbourne, *The US Supreme Court and the "War on Terror": Rasul and Hamdi*, 5 EUR. HUM. RTS. L. REV. 558 (2004) (discussing the Court's opinions in *Rasul* and *Hamdi*).

5. See, e.g., Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Judicial Branch*, 23 CONST. COMMENT. 179 (2006); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=922406>.

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

Code of Military Justice into U.S. law.⁷ Humanitarian law is also a source of considerable disagreement between the Justices: on the enforceability of the Geneva Conventions, a five-to-two split; on the applicability of Common Article 3 to the war with al Qaeda, a five-to-two split; on the meaning of Common Article 3, a five-to-three split.⁸

This Article will explore what *Hamdan* tells us about Common Article 3, particularly where applied in the context of a contested war in which the legal status of the conflict has political consequences. Specifically, the status of conflict is fundamental to assessing both the legitimacy of the conflict and the methods and means used to fight the war. This exploration has two aspects. First, this Article will address whether the Court correctly identified and applied the Common Article 3 standard. Second, this Article will assess the Court's articulation of the boundaries of a treaty provision that states have historically applied inconsistently. I suggest that one important meta-narrative to this exploration is the idea that the Supreme Court's decision to apply Common Article 3 advances an antithesis to the rhetoric and policy of the current administration: that there is a "gap" in the law regulating state interface with other states and with non-state entities in the context of the war on terror.⁹

I. THE SCOPE OF COMMON ARTICLE 3

Common Article 3 of the 1949 Geneva Conventions was the first provision of an international agreement attempting to regulate the conduct of parties during a civil or internal con-

7. See *Hamdan*, 126 S. Ct. at 2794 (plurality opinion) ("[C]ompliance with the law of war is the condition upon which the authority set forth in Article 21 is granted."); *id.* at 2780–81 (holding that the phrase "law of war" incorporates at least two sources of international law, the Hague Conventions and the 1949 Geneva Conventions).

8. See *Hamdan*, 126 S. Ct. 2749. As David Glazier notes, the Court "based its critical holding that [Common Article 3] applied on a simplistic discussion occupying little more than a single page in a majority opinion that ran some forty pages overall." David Glazier, *Full and Fair by What Measure?: International Law Standards Regulating Military Commission Procedure*, 25 B.U. INT'L L.J. (forthcoming 2007) (manuscript at 3), available at <http://ssrn.com/abstract=896643>.

9. I explore this idea further in a forthcoming article, Fionnuala Ní Aoláin, *The No-Gaps Approach to Parallel Application in the Context of the War on Terror*, 40 ISR. L. REV. (forthcoming June 2007).

flict.¹⁰ During all of the negotiations preceding the conclusion of the Geneva Conventions of 1949, the substance of what might be contained in Common Article 3 was the most controversial.¹¹ The committee charged with its formulation met twenty-five times before reaching an agreement on its content.¹² As a leading authority of the time, Col. Gerald Draper, correctly identifies:

The Geneva Conventions, in their general approach to the method of protecting and securing good treatment for war victims, adopted the solution of eschewing any direct attempt to legislate for the conduct of actual hostilities. This solution has been brought into Article 3. The scheme of this article is to secure the minimum protection and humanitarian treatment for the victim of internal conflicts. At the same time the legal position of the Parties engaged in the internal conflict is left unaffected. The transactions of the Diplomatic Conference at Geneva in 1949 indicate that, without that express saving, Article 3 would not have been agreed.¹³

This compromise was intended therefore to ensure as much protection as possible to victims of non-international armed conflict, but sought entirely to avoid giving the parties involved in such conflicts legitimacy or status.

Professor Oren Gross and I observe in our recent publication:

[Common Article 3] is the sole article of the 1949 Conventions that specifically addresses the problem of non-international armed conflicts. It has been variously described as the "mini-convention" or the "convention within a convention," providing rules that parties to an internal armed conflict are "bound to apply as a minimum." The opening paragraph of Article 3 states: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . ."¹⁴

10. Portions of this analysis draw upon my previous book. See GROSS & NÍ AOLÁIN, *supra* note 1, at 355-59.

11. "G.I.A.D. Draper attests to the negotiation difficulties [Common Article 3] provoked at the Diplomatic Conference" at Geneva in 1949. *Id.* at 355 n.95 (citing G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 263-64 (1983)).

12. See G.I.A.D. Draper, *The Geneva Conventions of 1949*, 114(I) RECUEIL DES COURS 57, 82 (1965). It should be noted that this portion of the analysis draws on the excellent commentary by Col. Draper in chapter two of his article on the Geneva Conventions. See *id.* at 82-100.

13. *Id.* at 84.

14. GROSS & NÍ AOLÁIN, *supra* note 1, at 355 (quoting Convention I, *supra* note 6, art. 3; Convention II, *supra* note 6, art. 3; Convention III, *supra* note 6, art. 3; Convention IV, *supra* note 6, art. 3).

It should be noted that Common Article 3 was a “seriously amputated version” of the original proposed both by certain states and the International Committee of the Red Cross (ICRC).¹⁵

“[Common Article 3] contains the lowest threshold of both application and protective standards. It is intended to provide a minimum basis of protection to persons not participating in hostilities during internal armed conflicts.”¹⁶ The authoritative ICRC study concerning the customary law status of humanitarian law rules confirms this conclusion.¹⁷ “Article 3 protects those classes of people deemed most vulnerable when conflict occurs.”¹⁸ Significantly, it does not formally address the status of combatants at all—the term does not arise in the language of Common Article 3. Nonetheless, Common Article 3 necessarily presumes the existence of combatants, because by protecting civilians, the article explicitly affirms the existence of hostilities, which inevitably draws attention to the legal status of those persons engaged in violence. By laying out protections, the provision raises questions about who is responsible when violations occur and the precise legal status and entitlements of non-state entities engaged in violence.

Protection under the article is non-discriminatory and non-partisan, these principles being derived from the “then embryonic human rights regimes, and . . . indeed, ahead of some of them.”¹⁹ Its protections exist to ensure that “violence to life or person” is prohibited; that “taking of hostages” is unlawful; that “outrages upon personal dignity, in particular, humiliating and degrading treatment,” are forbidden; that legal processes enforcing adverse consequences upon persons are carried out by regularly constituted courts affording recognized due process

15. Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U. L. REV. 9, 10 (1983) (quoting the spokesman of the Norwegian delegation).

16. GROSS & NÍ AOLÁIN, *supra* note 1, at 356. “The norms stated in Common Article 3 may be viewed as applicable to all conflicts, even those of an international character.” *Id.* at 356 n.96 (citing Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 560 (1995)).

17. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* xxix (2005) (“While common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards and does not contain much detail.”).

18. GROSS & NÍ AOLÁIN, *supra* note 1, at 356.

19. Draper, *supra* note 11, at 269.

rights; and finally that all persons wounded and sick in conflict be cared for.²⁰

The obvious questions, partially answered by *Hamdan* in its specific context, are when does Common Article 3 apply and to whom does it apply. What is notable about the relevant history of Common Article 3 is that states rarely, if ever, invoked it, and consistently avoided applying it to situations within their territory or even with respect to conflicts taking place in the territory of other states.²¹ States were quick to recognize that Common Article 3, if applied to internal conflicts, would constrain their ability to respond to threats undermining their legitimacy without external interference and oversight.²² It could also limit the exercise of state prerogatives, crisis powers, and other forms of executive freedom utilized by states to respond to internal crisis.²³ Thus, the precise threshold at which Common Article 3 becomes activated was left ambiguous.²⁴ A general litmus test used to test the relevance of Common Article 3 has a positive element: there must be an “armed conflict.”²⁵ Its negative counterpart is that the “armed conflict” is “not of an international character.”²⁶ As well as states, domestic courts studiously avoided finding Common Article 3 relevant to conflicts because they viewed invoking Common Article 3 as a *de facto*, if not a *de jure*, recognition of belligerency—giving “status” to persons whom states generally wanted to call “terrorists” or “criminals” and not combatants.²⁷ Thus, it is with some surprise that we see the Supreme Court in *Hamdan* running headlong to embrace Common Article 3 and doing so in a way that gives definition to the scope of the article while rebut-

20. Convention I, *supra* note 6, art. 3; Convention II, *supra* note 6, art. 3; Convention III, *supra* note 6, art. 3; Convention IV, *supra* note 6, art. 3.

21. See *infra* notes 105–23, 154–55 and accompanying text.

22. II FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 § B, at 10 (1949) [hereinafter FINAL RECORD] (statement of Sir Robert Craigie).

23. See GROSS & NÍ AOLÁIN, *supra* note 1, at 359–60 (“There is no doubt that states may be extremely sensitive to any attempt to limit their sovereign rights of response when faced with internal crisis.”).

24. See Draper, *supra* note 12, at 86–87.

25. *Id.* at 86.

26. *Id.*

27. See KIERAN MCEVOY, PARAMILITARY IMPRISONMENT IN NORTHERN IRELAND 152–57 (2001) (discussing the United Kingdom’s interface with terrorism and the reluctance by the United Kingdom’s courts as well as the European Court of Human Rights to affirm the applicability of international humanitarian law).

ting some general assumptions that to date have characterized the behavior of states and their courts in relation to this provision.²⁸

Relevant to the Court's approach—though notably not addressed by the plurality opinion—is the drafting history of Common Article 3.²⁹ Draper has outlined the criteria discussed within the confines of the Diplomatic Conference, which were vastly more flexible than those outlined in the acknowledged authoritative Pictet commentaries.³⁰ He reports that “criteria suggested during the Conference ranged from *de jure* or *de facto* recognition of belligerency of [insurgency] to any situation in which troops had to be employed by the Government to deal with armed resistance.”³¹ He states:

The wider of these criteria would appear to include every offer of armed force against the authorities in a State which has been met by more than the ordinary police measures taken against normal, violent criminal activity. It is difficult to know where the border line should properly be drawn.³²

This view of the *travaux* offers an understanding that states actively discussed and envisioned the applicability of the article to lower levels of insurgent activity occurring within state boundaries. This is not to say that agreement was unanimous on this point, but it does point to the views of some states on the article's potential applicability to low intensity conflicts. The indeterminacy of the final formula allows both liberal and conservative interpretation. But many observers have paid little attention to exactly how liberally certain states, at the time of drafting, were prepared to read the article's applicability to internal or collective violence taking place within their borders. There is no consensus regarding this minimum trigger of applicability, but the drafting history opens up a legitimate basis upon which to conclude that the threshold applicability is fixed lower than has commonly been acknowledged.

Academic commentators have also disagreed over the precise scope of Common Article 3's application. The authoritative ICRC commentaries are inconsistent regarding the threshold of

28. Note however that international courts have been significantly less hesitant to make such categorizations. See *infra* note 97 and accompanying text (discussing the Nicaragua decision).

29. See II FINAL RECORD, *supra* note 22, § B, at 9–16.

30. See *infra* notes 33–34 and accompanying text for a discussion of the Pictet commentaries.

31. Draper, *supra* note 12, at 89.

32. *Id.*

violence necessary to activate the application of the article. Some extracts suggest a high threshold of violence—a “genuine armed conflict.”³³ In his commentary on Geneva Conventions I and II, Jean S. Pictet suggests that a conflict must be similar in many respects to an international war, but take place within the geographical confines of a single country, in order to trigger the article.³⁴ However, a similar commentary on Geneva Convention IV provides a more nuanced and detailed overview in the context of a detailed exposition of the drafting history of the provision.³⁵ This commentary asserts that “the scope of application of the article must be as wide as possible. There can be no drawbacks in this”³⁶

Despite some contradictory suggestions in the original commentaries, the “high” threshold position is difficult to sustain for several reasons. Primarily, it flies in the face of states responses to the article. The fact that states have been defensive about the scope of the article’s applicability demonstrates that their real fear lies in its potential applicability to low-intensity conflict.³⁷ Were the threshold generally understood to be as high as Pictet outlines, states ought not be apprehensive about Common Article 3, but in fact just the opposite has been true. Thus, for example, the United Kingdom consistently articulated the position that Common Article 3 was not applicable to the violence experienced in Northern Ireland.³⁸ The United Kingdom was formally consistent in its position—though in practice it demonstrated more flexibility—that the status of

33. JEAN S. PICTET ET AL., COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (Jean S. Pictet ed., 1952).

34. *Id.*; see also JEAN S. PICTET ET AL., COMMENTARY: II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK, AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 33 (Jean S. Pictet ed., A.P. de Henry trans., 1960) (“[Common Article 3] should be recognized as applying to armed conflicts consisting of *hostilities* in which *armed forces* on either side are engaged—in other words, conflicts which are in many respects similar to an international war, but take place within the confines of a single country.”).

35. OSCAR M. UHLER ET AL., COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 25–44 (Jean S. Pictet ed., Major Ronald Griffin & C. W. Dumbleton trans., 1958).

36. *Id.* at 36.

37. *Id.* at 35.

38. See Colm Campbell, ‘Wars on Terror’ and Vicarious Hegemons: The UK, *International Law and the Northern Ireland Conflict*, 54 INT’L & COMP. LAW. L.Q. 321, 331–33 (2005).

non-state actors engaged in the violence was that of “terrorists” rather than combatants.³⁹

The manner in which many states have articulated a high threshold for the application of Common Article 3 arguably undermines the broad aims of the article: “minimum” protection for those trapped in the maelstrom of internal conflict. To assume a high threshold, as outlined in the early ICRC commentaries, is to negate the primary goal of those advocating the article’s inclusion, which was to protect for as wide a class of person and situation as possible.⁴⁰ The assumption of a high intensity-of-violence threshold analogous to the scale of hostilities activated by an international war is misplaced, even in the context of its time. The dynamics, technology, and arming of internal conflicts are not on a similar scale with international conflict counterpart and were not on such a scale even at the time of Common Article 3’s adoption.⁴¹

The article does not explicitly rule out the interpretation that “armed conflict” between opposing insurgent groups within the state, prior to any governmental intervention, would fall within its regulatory frame.⁴² This interpretation distinctly contrasts with the position outlined in Protocol II.⁴³ If “armed

39. See MCEVOY, *supra* note 27, at 216–17 (explaining that Special Category Status was “granted to prisoners convicted of terrorist crimes between 1972 and 1975” and that the status amounted to “*de facto* prisoner of war status”); *id.* at 263–66 (discussing British managerialism directed at terrorist prisoners).

40. Draper also concedes the position that the nature of the humanitarian provisions contained in the article are so fundamental in character that the weight of interpretation is against narrow reading. Draper, *supra* note 12, at 87.

41. See *e.g.*, U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Minimum Humanitarian Standards Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21*, ¶¶ 17–37, U.N. Doc. E/CN.4/1998/87 (Jan. 5, 1998), available at <http://www.unhchr.ch/Huridocda/Hurdoca.nsf/TestFrame/a99aac7862091b84c125661d0039a6e0?OpenDocument> (outlining the nature and form of abuses that take place in situations of internal violence).

42. See Draper, *supra* note 12, at 86 (“[A]n armed conflict between two armed rebel groups in the State, before the Government intervened, would not appear to be excluded from Article 3 . . .”).

43. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (“This Protocol . . . shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 . . . and which take place in the territory of a High Contracting Party be-

conflict" includes these insurgent group conflicts, then the empirical evaluation of whether, in fact, an armed conflict occurs involves assessment of a range of factual scenarios. These include violence taking place between state and non-state entities, violence between various non-state entities, as well as the combined effects of mixed conflict situations. Concisely stated, Common Article 3 encompasses more than simply violence taking place between governments and insurgents.

As early as 1949, a number of states recognized that when a state moved beyond a normal policing response to violence, the state was likely facing a crisis that did not fall within the normal realm; rather, the state was moving along the continuum towards a situation of internal armed conflict.⁴⁴ Other states maintained that the threshold imagined for invoking Common Article 3 was a high one, envisioning a full-fledged two-sided civil war: only with the signing of Protocol II Additional to the Geneva Conventions in 1978 did this threshold shift.⁴⁵ "But it still is useful to keep in mind that a number of states envisioned," at the time Common Article 3 was drafted, a low threshold as the "starting point of applicability" of the article.⁴⁶ Yet, "[t]he vagueness of [A]rticle 3, the price for its broad acceptance, leaves out explicit recognition of such a low-end threshold."⁴⁷

I have argued elsewhere that establishing congruent thresholds for activating Protocol I and II transformed the criteria for activating Common Article 3.⁴⁸ By separating and clearly demarcating certain kinds of armed conflict and subjecting them to a new normative regime—e.g., those conflicts involving colonial domination, alien occupation, racist regimes, and armed conflict as defined in Article 1 of Protocol II—Protocol II clarifies our understanding of what factors are re-

tween its armed forces and dissident armed forces or other organized armed groups . . .").

44. See UHLER ET AL., *supra* note 35, at 32 (reflecting on the drafting history of the 1949 Geneva Conventions and the position of the Italian and French delegations). The efforts by the ICRC to persuade governments to allow regulation of internal conflicts can be traced back to the submission of a draft Convention on the role of the Red Cross in civil wars at the 1912 Conference of the ICRC. *Id.* at 27.

45. Protocol II, *supra* note 43, art. 1.

46. GROSS & NÍ AOLÁIN, *supra* note 1, at 356.

47. *Id.*

48. *Id.* at 355–59.

quired to “name” the application of Common Article 3.⁴⁹ Common “Article 3 now stands as the lowest threshold for [making] the determination that an armed conflict exists, and provides the minimum standards to apply” in that context.⁵⁰ It seems unremarkable to assert “that its threshold for application has shifted, no longer requiring the presence of the classic two-sided civil war.”⁵¹ Moreover, jurisprudence from the ad hoc criminal tribunals for the Former Yugoslavia and Rwanda has lent further interpretative meaning to the term “armed conflict”—producing evident implications for Common Article 3. For example, in *Prosecutor v. Tadic*, a case trying a Serbian paramilitary leader for crimes against humanity committed in 1992, the Appeal’s Chamber found that “armed conflict exists whenever there is a resort to force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁵²

The shift does not define precisely the threshold of activation. In part what is unusual about the Supreme Court’s invocation of Common Article 3 in *Hamdan* is how the Court has departed from other domestic courts adjudicating in conflict related contexts by not avoiding this legal terrain.⁵³ The central-

49. De Shutter and Van De Wyngaert suggest that while “Protocol II does not modify the existing conditions of application for common article 3, many governments at the 1977 Diplomatic Conference apparently read the conditions of application of Protocol II into common article 3.” See Bart De Schutter & Christine Van De Wyngaert, *Coping with Non-International Armed Conflicts: The Borderline Between National and International Law*, 13 GA. J. INT’L & COMP. L. 279, 285 (1983). As a result, while the Protocol contains several improvements “vis-à-vis common article 3, [it] may well be a restriction rather than an improvement.” *Id.*

50. GROSS & NÍ AOLÁIN, *supra* note 1, at 357.

51. *Id.*; see also Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 29–31 (1983). *But see* *Hamdan v. Rumsfeld (Hamdan I)*, 415 F.3d 33, 41 (D.C. Cir. 2005), *rev’d* 126 S. Ct. 2749 (2006) (noting that Common Article 3 applies only to international conflicts and civil wars).

52. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995); see also Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, 97.

53. See FIONNUALA NÍ AOLÁIN, *THE POLITICS OF FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND* 120–26 (2000) (demonstrating the unwillingness of courts in Northern Ireland to apply humanitarian law); cf. Dicle Kogacioglu, *Dissolution of Political Parties by the Constitutional Court in Turkey*, 18 INT’L SOC. 258 (2003) (assessing the Constitutional Court in Turkey’s approach to cases against two political parties in which the court apparently fails to identify the status of the conflict between the Kurdish separatists and the Turkish military); Paddy Woodworth, *The*

ity of Common Article 3 to the Court's findings is all the more important in the context of the article's vague status and of the lack of consensus among states regarding the level of violence, the type of actors, and the specific contexts that give rise to the application of the laws of war. The key questions are whether the Court used the appropriate standard and whether it applied that standard correctly.

II. THE SUPREME COURT AND COMMON ARTICLE 3

The Court makes very clear in its majority opinion that the government has violated the Geneva Conventions, and in doing so it affirms the status of the Geneva Conventions as self-executing treaties with domestic legal consequences.⁵⁴ The majority then further entrenches its views by placing the status of the Geneva Conventions in an international context. This finding and the reliance on comparative and international indicators of legal esteem is very significant in light of the substantial criticism waged at the Court from those who argue that the Court should not consider or rely on international standards or external reference points in reaching its determinations.⁵⁵ The Court then addresses the application of Common Article 3 to Hamdan's situation.⁵⁶ In a sense, this methodology was predetermined, because the Court of Appeals had concluded that the Conventions did not apply to the armed conflict in which Hamdan was captured.⁵⁷ The Supreme Court succinctly identified that

The [C]ourt [of Appeals] accepted the Executive's assertions that

War Against Terrorism: The Spanish Experience from ETA to Al-Qaeda, 17 INT'L J. IBERIAN STUD. 169, 175 (2004) (noting the positive role of Spain's judicial branch in fighting the country's war on terrorism while ignoring the courts' unwillingness to define the status of the conflicts).

54. *Hamdan v. Rumsfeld (Hamdan II)*, 126 S. Ct. 2749, 2786, 2793–97 (2006).

55. *See Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (“[F]undamentally . . . the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“[T]his Court . . . ‘should not impose foreign moods, fads, or fashions on Americans.’” (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring))); *see also* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (to be codified at 18 U.S.C. § 2441) (“No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States . . .”).

56. *Hamdan II*, 126 S. Ct. at 2794–98 (plurality opinion).

57. *Hamdan I*, 415 F.3d at 38–40.

Hamdan was captured in connection with the United States' war with al Qaeda and that the war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions.⁵⁸

The majority evidently disagrees with this view.⁵⁹ Justice Stevens then follows with the core of his reasoning on Common Article 3.⁶⁰

Justice Stevens acknowledges the government's argument that the conflict with al Qaeda is not covered by Article 2 of the Geneva Conventions because Article 2 common to the four Conventions applies only to conflicts that occur between states.⁶¹ The government had contended that since Hamdan was captured and detained during an incident involving al Qaeda and not the Taliban, and since al Qaeda is not a state party, then, by deduction, the Conventions are not applicable to Hamdan.⁶² The Court then moves quickly to say that it need not address this matter because another provision of the Geneva Conventions applies even if the relevant conflict is not between signatories.⁶³

The Court's decision not to address Hamdan's status in the context of the law of war relevant to the conflict in Afghanistan is politically understandable but legally regrettable. The Bush administration's post-September 11 legal and political responses to the al Qaeda threat have generated an evident and growing rift domestically and internationally.⁶⁴ Many courts would characterize any foray into this territory—whether determination of status or other matter—as quintessentially political. Moreover, states and jurists sharply dispute which parts

58. *Hamdan II*, 126 S. Ct. at 2794–95.

59. *Id.* at 2795–96.

60. *Id.* (plurality opinion).

61. *Id.* Common Article 2 states that the Geneva Conventions apply to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Convention I, *supra* note 6, art. 2; Convention II, *supra* note 6, art. 2; Convention III, *supra* note 6, art. 2; Convention IV, *supra* note 6, art. 2; see also Derek Jinks, *September 11th and the Laws of War*, 28 YALE J. INT'L L. 1, 22–23, 38–39 (2003) (discussing what triggers the application of Common Articles 2 and 3).

62. *Hamdan II*, 126 S. Ct. at 2795 (plurality opinion).

63. *Id.*

64. See, e.g., NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 361–428 (2004) (discussing both the various strategies Americans should consider in addressing the post-9/11 threat and the need to recognize the structure of American government in order to meet this threat).

of the law of war and how much of that law applies to al Qaeda.⁶⁵ On one reading, the Court's decision to avoid the question is simply a decision to avoid a hard legal and political question. On another view, the Court's position signals that the government's contention is not *prima facie* accepted. This Article contends that the latter reading is correct.

Regrettably, the majority fails to articulate a substantive position on this point. One of a number of complex issues resulting from the war is the extent to which the Geneva Conventions apply to the Taliban. An equally difficult but related question is whether the nature of the relationship between the Taliban and al Qaeda in Afghanistan was such as to create an agency relationship between them,⁶⁶ thus activating the principles of state responsibility with implications for the status of al Qaeda members whom U.S. forces captured in Afghanistan.⁶⁷ While the Court's assessment of state responsibility would not settle the matter of the status attributed to captured persons under international humanitarian law, this kind of exploration would have greatly clarified the legal terrain and laid the foundations for answering the status question broadly defined.⁶⁸

65. See Yutaka Arai-Takahashi, *Disentangling Legal Quagmires: The Legal Characterisation of the Armed Conflicts in Afghanistan Since 6/7 October 2001 and the Question of Prisoner of War Status*, 5 Y.B. OF INT'L HUMANITARIAN L. 61, 66, 72 (2002). Professors Julian Ku and John Yoo express concern about the Court's analysis of Article 21 of the Uniform Code of Military Justice as it was deemed to incorporate the Geneva Conventions. See Ku & Yoo, *supra* note 5, at 189–91. Notably, however, Ku and Yoo's analysis makes little serious attempt to deal with the drafting history of Common Article 3 or subsequent international or state practice with respect to the customary status of the Geneva Conventions. See *id.*

66. Cf. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (finding that the U.S. violated its international law obligations through "acts imputable to the United States" for support of the guerrilla forces in opposition to the Nicaraguan government).

67. See U.N. Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, 63–68, U.N. Doc. A/56/10 (2001) [hereinafter *Int'l Law Comm'n Report*] (discussing the responsibility of a state for its internationally wrongful acts); see also Arai-Takahashi, *supra* note 65, at 63 (analyzing the Afghan "war" as a series of several armed conflicts, each of which has a distinctive normative character).

68. A useful comparison, with respect to the status question analysis, is the U.N. Commission of Inquiry on Lebanon's view of Hezbollah fighters in the conflict between Israel and Lebanon. See U.N. Gen. Assembly, Human Rights Council, Comm'n of Inquiry on Leb., *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, ¶¶ 9, 50–62, at 3, 21–24, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006), available at <http://www.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf>.

In determining whether a state is responsible for committing an internationally wrongful act, courts generally ascertain whether the state's conduct "(a) [i]s attributable to the State under international law and (b) [c]onstitutes a breach of an international obligation of the state."⁶⁹ In assessing the action of al Qaeda members who do not have a formal link with a state, the first query is critical.⁷⁰ I do not propose to resolve whether the state responsibility doctrine is activated by the relationship which existed between the Taliban and al Qaeda, but rather I suggest that one weakness of the majority's analysis in *Hamdan* is its unwillingness to examine questions of attribution. I criticize the Court, while not underestimating either the technical or substantive difficulties involved in such deliberations. Practically, it is difficult to identify and then apply the attribution standards to private individuals or groups having no formal relationship with a state.⁷¹ Nonetheless, other courts in equally charged circumstances have deliberated on the question of the responsibility of states for the wrong of individuals operating within or coming from their territories.⁷² These courts have articulated workable tests using standards of "control" and "effective control" of territory to assess state responsibility.⁷³ Such clarity on the issue of state responsibility would bring us substantially closer to determining issues of combatancy and status.

69. *Int'l Law Comm'n Report, supra* note 67, at 43.

70. See HELEN DUFFY, *THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW* 48–63 (2005) (discussing the various factors relevant in assessing state responsibility for the acts of the Taliban and al Qaeda). The International Criminal Tribunal for the Former Yugoslavia (ICTY) has emphasized the degree of state control in evaluating state responsibility. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 588 (May 7, 1997) (suggesting that in considering state responsibility the question is "whether, even if there had been a relationship of great dependency . . . there was such a relationship of control . . . that the acts of [a non-state group] can be imputed to [the state]").

71. See Sara N. Schiedeman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 252 (2000) (noting the difficulty of assigning liability to a state for acts of terrorism by individuals).

72. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (finding the United States in violation of its customary international law obligations in supporting opposition to the Nicaraguan government).

73. The ICTY, for example, articulated a test as to state responsibility which asks whether the state in question exercises "effective control" over the activities of the non-state actors in question. *Tadic*, ¶ 588.

The question of attribution and status is central not only to Hamdan's individual status, but also to the legal determinations that follow for hundreds of persons captured during the hostilities in Afghanistan, currently held in Guantanamo Bay and elsewhere, who may lay claim to combatant or civilian status based on the application of Article 2 of the Geneva Conventions to the hostilities taking place there.⁷⁴

A. NON-STATE ENTITIES AND STATUS OF COMBATANTS

As noted above, one of the most curious aspects of the *Hamdan* majority opinion is the Court's reluctance to address the status of Hamdan himself. One might defend the Court by noting that Hamdan's counsel did not specifically seek to have the Court determine his status.⁷⁵ Yet, it seems curious for the Court to address the weighty procedural matters presented by Hamdan but not to address the corresponding status issues. Furthermore, having made the foray into the determination of conflict status, the obvious question is then solicited—namely, how to account for Hamdan's status once you have determined that Common Article 3 applies.

Notably, Common Article 3 does not require a determination of the combatant's status.⁷⁶ Its drafting history demonstrates that states intended the provisions to apply regardless of status: combatants only appear in the article by negative inference. Thus, because Common Article 3 expressly refers to those "hors de combat,"⁷⁷ the article implicitly presumes a con-

74. Note that this position does not imply that the entirety of the Geneva Conventions would be applicable to the actions and actors of al Qaeda elsewhere. The arguments only apply to the situation in Afghanistan.

75. Hamdan contended that the military commission established by the President lacked authority to try him for the crime of conspiracy. See *Hamdan v. Rumsfeld* (*Hamdan II*), 126 S. Ct. 2749, 2759 (2006). He argued first that "neither Congressional Act nor the common law of war support[ed] trial by th[e] commission for the crime of conspiracy." *Id.* Second, Hamdan asserted that "the procedures that the President ha[d] adopted to try him violated the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him." *Id.* Importantly, Hamdan's counsel may have taken the view that to seek a formal determination of his status would have alienated the Court, precisely because it is understood that courts in times of crisis tend to be timid in their responses to the exercise of executive powers. See GROSS & NÍ AOLÁIN, *supra* note 1, at 72–79.

76. See, e.g., 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 11 (2005).

77. Convention I, *supra* note 6, art. 3; Convention II, *supra* note 6, art. 3; Convention III, *supra* note 6, art. 3; Convention IV, *supra* note 6, art. 3.

text of conflict, in which some actors remain involved in violent activity. Historically, however, states have refused to apply Common Article 3 to situations of internal armed conflict precisely because such application might create an inference that the state recognized the fighters in that conflict to be combatants.⁷⁸

Some examples highlight these inconsistencies. The Stevens opinion, noting that the comity considerations identified in *Schlesinger v. Councilman* are relevant to *Hamdan*,⁷⁹ makes a number of distinguishing reservations. First, the opinion states that Hamdan is not a member of the U.S. armed forces.⁸⁰ Second, Hamdan is not being tried by an integrated system of military courts,⁸¹ and third, as a result, he has no right of appeal to the civilian judges of the Court of Military Appeals.⁸² So far so good. Yet, even though the logical sequence of Stevens's argument here would seem to mandate some reflection on Hamdan's actual status, the opinion fails to address his status.

The problem is further compounded by the way in which the Stevens opinion—the prevailing and, in most respects, majority opinion—addresses the issue of whether the rules governing military commissions are on par with the procedures governing courts-martial.⁸³ Stevens discusses *In re Yamashita* in detail,⁸⁴ because it challenges the conception of uniformity between courts-martial and military commissions. The Court ultimately decides that *Yamashita* no longer has precedential value.⁸⁵

The Stevens opinion then explores the status of non-state entities by stating that the “Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture.”⁸⁶ Stevens seems almost oblivious to the fact that the language he employs, namely, “extending” POW status, implicitly transforms the Court's overall approach with respect to Hamdan's status. The logical inconsis-

78. See *infra* notes 105–23.

79. *Hamdan II*, 126 S. Ct. at 2771–72 (plurality opinion) (citing *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)).

80. *Id.* at 2771.

81. *Id.*

82. *Id.*

83. See *id.* at 2776–77.

84. *In re Yamashita*, 327 U.S. 1 (1946).

85. *Hamdan II*, 126 S. Ct. at 2790.

86. *Id.* at 2789 (plurality opinion).

tency here is that the opinion begs the question: what is Hamdan's actual status? This Court studiously avoids the status question by engaging in an overly formalistic application of Common Article 3,⁸⁷ without conducting a rigorous analytical assessment of whether the material threshold conditions for applying Common Article 3 have been met. This lack of analytical traction has, of course, obvious implications for deciding whether Hamdan is or is not a combatant. I want to suggest that there is a clear connection between the language of "extension" that is used to describe Geneva III and the potential deployment of a similar narrative of an "extension" when assessing how the prisoner of war principle might be applied in the context of Common Article 3, a connection that the Court seems to miss entirely.

Another weakness of the Stevens opinion is its use of negative inferences. For example, Stevens finds erroneous the government's assertion that "Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.'"⁸⁸ After a rather tortuous review of Common Article 3's plain meaning, the Court rather shortly concludes that "the phrase 'not of an international character' bears its literal meaning."⁸⁹ The opinion then approvingly cites the view that "[a] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other."⁹⁰ However, the Court provides little, if any, explanation of what the "legal status" of the entities in question might be. And while the Court is entirely correct in suggesting that the official commentaries accompanying Common Article 3 indicate that a substantial number of states wanted to furnish as wide a degree of protection as possible to

87. *Id.* at 2705–96.

88. *Id.* at 2795 (internal quotation marks omitted) (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006)).

89. *Id.* at 2796 (quoting Convention I, *supra* note 6, art. 3; Convention II, *supra* note 6, art. 3; Convention III, *supra* note 6, art. 3; Convention IV, *supra* note 6, art. 3).

90. *Id.* (citing Sylvie-Stoyanka Junod, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1305, 1351 (Yves Sandoz et al. eds., 1987)).

as wide a group as possible,⁹¹ this fact alone does not suffice to demonstrate why Common Article 3 *actually* applies to al Qaeda.⁹²

B. CUSTOMARY INTERNATIONAL LAW

Writing in 1965, Draper asserted:

In due course the humanitarian rules now found in Article 3 may form part of the customary law that binds States, and all the population, in the conduct of any internal conflict within their frontiers, irrespective of the accorded status of belligerency and the application of the customary law of war.⁹³

Various commentators, the most prominent and vocal of whom has been Theodor Meron,⁹⁴ have argued that Article 3 has the status of customary law, and some have sought to elevate it to *jus cogens* standing.⁹⁵ Many of the basic rights outlined in Article 3, such as the prohibitions on murder, mutilation and torture, have attained *jus cogens* status in their own right.⁹⁶ Support for customary status was considerably augmented by the 1986 decision of the International Court of Justice (I.C.J.) to view portions of the Geneva Conventions as customary law in *Military and Paramilitary Activities (Nicaragua v. United*

91. See PICTET ET AL., *supra* note 33, at 43–48, 49–51.

92. See generally *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 218–19 (June 27) (setting forth the general criteria for determining whether Common Article 3 applies and applying the criteria to the conflict at issue).

93. Draper, *supra* note 12, at 99.

94. See THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989) (surveying the broad and deepening relationship between human rights and humanitarian law norms and, inter alia, confirming the customary law status of core standards such as Common Article 3).

95. See, e.g., Stephen Marks, *Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts*, in 1 *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 175, 200 (Karel Vasak ed., 1982) (“Common article 3 defines rules which are applicable ‘at any time and in any place’ and lays down, according to the Commentary, imperative rules.” (quoting Convention I, *supra* note 6, art. 3; Convention II, *supra* note 6, art. 3; Convention III, *supra* note 6, art. 3; Convention IV, *supra* note 6, art. 3)). It should be noted that, more broadly, the nearly universal acceptance of the Geneva Conventions as treaties, may make their customary status practically meaningless. As of August 2006, 194 states were parties to the Geneva Conventions. See Press Release, Int’l Comm. of the Red Cross, Geneva Conventions of 1949 Achieve Universal Acceptance (Aug. 8, 2006), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-news-210806>.

96. See Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 15 (1986).

States).⁹⁷ The Statute of the I.C.J. describes customary status (or "international custom") "as evidence of a general practice and accepted as law."⁹⁸ The court's finding that portions of the Geneva Conventions categorically constitute customary international law highlights the relationship between treaty and custom. Common Article 3 has focused attention on the capacity of the I.C.J. to unequivocally evaluate an armed conflict situation and—without prompting by the parties—validate its standing and status.

Nicaragua v. United States is of direct relevance to contemporary discussions about Common Article 3 because of the I.C.J.'s conclusion on two matters which potentially limit recognition of Common Article 3 as customary international law. First, in addressing the gap between state practice and the binding nature of customary rules, the I.C.J. did not require "for a rule to be established as customary, [that] the corresponding practice . . . be in rigorous conformity with the rule."⁹⁹ This observation directly engages state practices of non-recognition and non-enforcement of Common Article 3, lending credence to the notion that the article's status was limited.¹⁰⁰ The I.C.J.'s commentary on the modalities of rule formation addresses and to some degree subverts traditional notions of how norms achieve customary status.¹⁰¹ By construing certain provisions as customary law, notwithstanding aberrant state practice, the I.C.J. redefines the legitimate basis for defining certain rules as customary and focuses attention on what should be considered authoritative in making the assessment about when and how rules achieve customary status.

Second, the I.C.J. explicitly addresses the issue of a norm under consideration for customary status running up against

97. 1986 I.C.J. 14.

98. Statute of the International Court of Justice art. 38(1)(b), 59 Stat. 1055, 1060 (1945).

99. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. at 98.

100. In fact, the court expands on the position further in paragraph 186:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should [sic] generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

Id.

101. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

incompatible state practice.¹⁰² Its conclusions, read across the situations confronted in the “typical” Common Article 3 situation, are illuminating. The Court states that if a state acts in a manner that is prima facie incongruous with a recognized rule, but despite its apparent norm violation still “defends its conduct by appealing to exceptions or justifications contained within the rule itself, . . . [then such action serves] to confirm rather than to weaken the rule.”¹⁰³ This qualification is significant for the finding by Justice Stevens that elements of Common Article 3 had customary international law status.¹⁰⁴ States and commentators have consistently claimed that Common Article 3 should apply neither to low-intensity internal conflicts nor to “new” asymmetrical conflicts.¹⁰⁵ The point of departure for these claims has invariably been an internal reference point: the premise is that the conflict does not reach the threshold required by the scope of Common Article 3 itself.

In Common Article 3’s earliest history, a dispute arose over its applicability to the Algerian revolution.¹⁰⁶ At the height of the struggle, 500,000 French forces were in Algeria,¹⁰⁷ and the Algerian National Liberation Front (FLN) displayed a high degree of organization, going so far as to treat captured French soldiers as prisoners of war.¹⁰⁸ Though France ultimately abandoned its efforts to prosecute Algerian rebels as criminals, this occurred at a comparatively late stage in the fighting.¹⁰⁹ In March 1958, General Salan ordered that military prisoners be held in special camps rather than in ordinary prisons. The ICRC “construed these actions to mean that the French government intended to accord to FLN militants treatment ‘closely related’ to that governing prisoners of war.”¹¹⁰

102. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. at 98.

103. *Id.*

104. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797 (2006) (plurality opinion).

105. See, e.g., James E. Bond, *Application of the Law of War to Internal Conflicts*, 3 GA. J. INT’L & COMP. L. 345, 368–69 (1973) (reviewing state practices indicating that governments involved in internal conflicts “may eventually treat captured persons as prisoners of war” even though Article 3 does not confer prisoner of war status upon anyone in internal conflicts).

106. See Arnold Fraleigh, *The Algerian Revolution as a Case Study in International Law*, in THE INTERNATIONAL LAW OF CIVIL WAR 179, 179–83 (Richard Falk ed., 1971).

107. *Id.* at 192.

108. *Id.* at 196.

109. Bond, *supra* note 105, at 368.

110. Fraleigh, *supra* note 106, at 196.

In 1961, United Nations forces encountered the issue of Common Article 3's applicability: this time, the issue arose in the context of the engagement of the United Nations Operations in the Congo (ONUC) forces near Elizabethville in the Congo. The context of this conflict, arising from the killing of an ICRC delegate during intense fighting near Elizabethville,¹¹¹ is highly specific but nonetheless worthy of mention. At that time, ONUC was engaged in combat with the mercenary forces of Katanga (a southwest province of the Congo), who were attempting to secede.¹¹² The resulting dispute which arose between the United Nations and the ICRC, forced the issue of the applicability of Common Article 3. In particular, the question was whether the ONUC forces themselves were subject to Article 3. The dispute was never resolved.¹¹³

Whether and to what extent the 1949 Conventions should have applied to the Vietnam conflict was—and remains—unclear. In this conflict, all “three of the principal participants—the Republic of Vietnam, the Democratic Republic of Vietnam and the United States—were parties to the Conventions,” though the Viet Cong was not.¹¹⁴ What remained unacknowledged was “whether relations between the forces of the Government of the Republic of Vietnam and of the Provisional Revolutionary Government of the Republic of South Vietnam were governed by [C]ommon Article 3.”¹¹⁵

The historical list of conflicts potentially governed by Common Article 3 is lengthy. It includes, on cursory examination, the Mau Mau uprising in Kenya,¹¹⁶ the Malayan jungle fighters,¹¹⁷ and the Eoka rebellion in Cyprus.¹¹⁸ All of these conflicts engaged large numbers of United Kingdom troops.¹¹⁹

111. Draper, *supra* note 12, at 94.

112. See JEAN-CLAUDE WILLAME, *PATRIMONIALISM & POLITICAL CHANGE IN THE CONGO* 94–96 (1972).

113. See *id.*

114. R.R. Baxter, *The Law of War*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 107, 110 (Maarten Bos ed., 1973).

115. See *id.*

116. See CAROLINE ELKINS, *IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA* 96–97 (2005) (discussing the scope of Common Article 3 in the context of the Mau Mau detainees).

117. See generally ANTHONY SHORT, *THE COMMUNIST INSURRECTION IN MALAYA 1948–1960* (1975) (providing a detailed account of the Malayan Emergency).

118. See generally R.R. DENKTASH, *THE CYPRUS TRIANGLE* (1982) (recounting the Cyprus Dispute).

119. See A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE*:

Demonstrating the general approach of states in such context, British government policy held that, even if there were a civil war going on in Cyprus, "only Article 3 of the Fourth [Geneva] Convention would apply, and not Article 33."¹²⁰ Other conflict candidates include the Northern Angolan revolt of 1961¹²¹ and Tibet's resistance after it had been absorbed as an autonomous region of the People's Republic of China.¹²² The lesson of all of these circumstances is the persistent reluctance of states to admit the application of Article 3, leaving few clues as to its general or specific scope.¹²³ States consistently and uniformly deny Common Article 3's applicability, and so this historical lineage confirms the need for the I.C.J.'s rule-making approach in *Nicaragua v. United States*.

In *Nicaragua v. United States*, the I.C.J. explicitly finds Common Article 3 to apply to the conflict before it—not on the basis of multilateral treaty obligations, but pursuant to the finding that Common Article 3 forms part of that portion of fundamental principles of humanitarian law binding on all states.¹²⁴ The I.C.J. unequivocally concludes that Common Article 3 is part of customary international law:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity." The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.¹²⁵

BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 830–38, 897–912 (2001) (outlining the extensive military, political, and legal roles played by the United Kingdom in these post-colonial insurgency situations).

120. 573 PARL. DEB., H.C. (5th ser.) (1957) 1611.

121. See generally 1 JOHN MARCUM, THE ANGOLAN REVOLUTION 123–80 (1969) (describing the atrocities committed during the Northern Angolan revolt).

122. See generally FRANK MORAES, THE REVOLT IN TIBET 64–93 (1960) (describing the absorption process and the resistance that followed).

123. See SIMPSON, *supra* note 119, at 321–22, 833–37 (confirming the general reluctance of Britain to admit that Common Article 3 applies).

124. 1986 I.C.J. 14, 113–14 (June 27).

125. *Id.* at 114 (citation omitted) (quoting *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (1949)).

By contrast, the majority in *Hamdan* resists the opportunity to assert that the “law” (Common Article 3) that it is dealing with is universal. Instead the Court refers to Common Article 3 only in very specific contexts but never makes overall claims about the status of the article as customary international law—a claim that otherwise would be an obvious starting point.

For example, in addressing *Ex Parte Quirin*,¹²⁶ the Stevens opinion notes that the “violation there alleged was, by ‘universal agreement and practice’ both in this country and internationally, recognized as an offense against the law of war.”¹²⁷ In assessing the appropriateness of the conspiracy charge against Hamdan, the Stevens opinion concludes that “international sources confirm that the crime charged here is not a recognized violation of the law of war.”¹²⁸ This approach also is consistent with the Court’s unwillingness to address the overall issues related to status of conflict. By slicing up the references to the laws of war, the Court seems to avoid the overarching questions: What is the legal status of this conflict to which the law of war applies? And specifically, which elements of the law of war apply to the conflict?

C. LEGISLATURES, COURTS AND COMMON ARTICLE 3

One of the weaknesses of the Supreme Court’s approach is its understandable, but not inevitable, overarching conclusion that, had Congress formally and unequivocally agreed to the government’s position, the Court’s response might have been less robust. Cass Sunstein describes this approach as the “clear statement principles” approach, asserting, “In essence, the prevailing view in *Hamdan* can be captured in a single idea: *If the President seeks to depart from standard adjudicative forms through the use of military tribunals, the departure must be authorized by an explicit and focused decision from the national*

126. 317 U.S. 1 (1942).

127. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality opinion) (quoting *Quirin*, 317 U.S. at 30). “This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.” *Quirin*, 317 U.S. at 35–36 (quoted in *Hamdan*, 126 S. Ct. at 2780) (footnote omitted).

128. *Hamdan*, 126 S. Ct. at 2784 (plurality opinion). The Court further notes that “none of the major treaties governing the law of war identifies conspiracy as a violation thereof.” *Id.*

*legislature.*¹²⁹ This view is explicitly confirmed and amplified by Justices Kennedy¹³⁰ and Breyer.¹³¹ Thus, the Stevens opinion's discussion of the Detainee Treatment Act § 1005(e)(1) and § 1005(h)—provisions which Hamdan argues raise grave questions about Congress's authority to impinge upon the Supreme Court's appellate jurisdiction—notes the Court previously has held that “Congress would not be presumed to have effected such denial absent an unmistakably clear statement to the contrary.”¹³² On one reading, this is straightforward judicial interpretation, identifying separate spheres of operation and legitimacy and their appropriate relationship to one another. But, on another level, this analysis leaves certain rights unnecessarily vulnerable given that those rights could be protected by alternative modes of judicial interpretation.

One response to the Court's position, arguably now delivered by Congress, is to use the legislative process to expressly grant the President the powers he seeks.¹³³ But this grant of power may not be the end of the matter. Under the Geneva Conventions and international law norms, the Court had further choices, extending beyond a separation of powers analysis. These choices included expressly finding that Common Article 3 of the Geneva Conventions constituted “customary international law,” and that on this basis, the Court and the executive were bound to apply or at least give substantive deference to Common Article 3's substantive content. Taking this approach, at least as a legal matter, would make it far more difficult for the Court to then suggest that the executive's solutions to the “problem” would be simply to seek and gain congressional approval. The Stevens majority, along with the Breyer and Kennedy opinions, fails to reference or confirm the status of the

129. Sunstein, *supra* note 5, at 4.

130. See *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part) (“Trial by military commission raises separation-of-powers concerns of the highest order It is imperative then, that when military tribunals are established, full and proper authority exists for the Presidential directive.”).

131. See *id.* at 2799 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here.”).

132. *Id.* at 2764 (plurality opinion) (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 104–05 (1868)).

133. See Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3, § 948(h), 120 Stat. 2600, 2603 (to be codified at 10 U.S.C. § 948(h)) (“Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.”).

Geneva Conventions in international law, and also fails to confirm the resulting obligations that arise for the United States as a signatory to these treaties. This failure, no doubt prompted by the negative reactions following the Court's previous references to international law norms,¹³⁴ will, in my view, make the Court vulnerable on the issue of how much protection it has in fact accorded the substantive rights at play in the *Hamdan* case. The proof of this weakness lies in the Military Commissions Act, portions of which seek to rewrite or limit the application of certain rules of customary international law.¹³⁵

III. A RESPONSE TO THE "GAPS" THEORY ON THE WAR ON TERROR

A significant challenge, led by the current U.S. administration, has emerged in the post-September 11 context. This challenge posits that a gap of legal applicability exists between Common Article 2 and Common Article 3. This "gap" purportedly results from new phenomena—namely, the emergence of al Qaeda as a transnational terrorist organization whose actions and actors do not fit existing legal norms and sanctions.¹³⁶ This view is most strongly articulated with respect to the "reach" and "traction" of international law: the nature and form of the "war on terror"—as articulated by the National Security Policy of the United States,¹³⁷ complemented by the "Bush" doctrine of pre-emptive self-defense¹³⁸—pose considerable challenges to the reach of international law in general, and to human rights and humanitarian law's traction in particular.¹³⁹

134. See *supra* note 55 and accompanying text.

135. See, e.g., Richard Waddington, *Red Cross Says Concerned at U.S. Interrogation Law*, REUTERS, Oct. 19, 2006, at 1 (reporting the ICRC's concern that the Military Commissions Act of 2006 could "weaken basic guarantees under the Geneva Conventions that . . . protect everybody from humiliating and degrading treatment").

136. See Ní Aoláin, *supra* note 9 (manuscript at 1–2, on file with author).

137. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), available at <http://www.whitehouse.gov/nsc/nss/2006/index.html>.

138. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA § 3 (2002), available at <http://www.whitehouse.gov/nsc/nss/2002/index.html> ("While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country . . .").

139. See, e.g., Christine Bell, Colm Campbell & Fionnuala Ní Aoláin, *The*

International law potentially applies to a range of contexts in which states assert they are contending with the problem of terrorism. I have challenged this position elsewhere; the argument “suggests [that] a legal lacuna exists” and denies that “appropriate legal tools are available to states and international organizations as they confront the post-September 11 [challenges].”¹⁴⁰ The Stevens opinion, in particular, supports the view that states can address this challenge at the jurisprudential frontline.

Clear evidence that traditional legal tools are available is found in the majority’s position in *Hamdan* that none of the acts that Hamdan is alleged to have committed violate the law of war.¹⁴¹ Had the Court been more willing to heed the pleas of the executive, the Court might also have accepted the view that in the non-traditional war on terror, such formalities should not matter.¹⁴² Moreover, by refusing to accept that the same rules governing courts-martial apply to military commissions, the Court’s interpretation of Article 36 of the Uniform Code of Military Justice points to the majority’s clear unwillingness to accept a wide view of the President’s powers.¹⁴³ Specifically, the Court seems to reject the idea that the nature of the war on terror is so profoundly out of the legal universe inhabited by the state that new and completely different rules have to apply. The Court synthesizes the government’s arguments in this regard by saying that “the only reason offered in support of [choosing not to apply court-martial rules] is the danger posed by international terrorism.”¹⁴⁴ The Court is downplaying the

Battle for Transitional Justice: Hegemony, Iraq and International Law, in HUMAN RIGHTS, DEMOCRACY AND TRANSITION: ESSAYS IN HONOUR OF STEPHEN LIVINGSTONE (John Morison et al., eds.) (forthcoming 2007); T.M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regulating Recourse to Force?*, 27 HASTINGS INT’L & COMP. L. REV. 425, 425–26 (2004) (arguing that the Bush doctrine challenges traditional notions of anticipatory self-defense).

140. Ní Aoláin, *supra* note 9 (manuscript at 2, on file with author).

141. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2784 (2006).

142. *Id.* at 2778–79 (“[That none of the overt acts that Hamdan is alleged to have committed occurred in a theater of war on any specified date after September 11, 2001] casts doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict.”).

143. *Id.* at 2791 (rejecting the government’s argument that President Bush’s determination was “explanation enough for any deviation from court-martial procedures”).

144. *Id.* at 2792 (plurality opinion).

government's core political arguments and is more widely offering a skeptical response to the President's plea of special circumstances. The Court implicitly holds that it is unprepared to abandon a law-and-order model of response to terrorism, and that the government's arguments are not persuasive.¹⁴⁵

The Court might have adopted Justice Thomas's highly deferential position regarding presidential authority in a situation of "war": Thomas concludes that, as regards the nature of the offense charged, the common law of war is "flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present."¹⁴⁶ Instead in addressing whether conspiracy can be charged under the rubric of the law of war, the Court majority is rigid and formalistic in its reading of the requirements and thereby essentially quashes the executive's conspiracy charges.¹⁴⁷

IV. "WAR"—THE RHETORIC AND THE LEGAL THRESHOLDS

A consistent theme of the Justices' opinions in *Hamdan* is the pervasive use of the term "war" and the application of the "law of war" to regulate the conduct of hostilities.¹⁴⁸ However,

145. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 54–75 (2006) (discussing the existing legal framework and its potential application to the detention of terrorist fighters).

146. *Hamdan*, 126 S. Ct. at 2829 (Thomas, J., dissenting).

147. See *id.* at 2782 (plurality opinion) ("*Quirin* supports *Hamdan*'s argument that conspiracy is not a violation of the law of war. Not only did the [*Quirin*] Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the actual commission of or attempt to commit a 'hostile and warlike act.'" (quoting *Ex Parte Quirin*, 317 U.S. 1, 37 (1942))).

148. *E.g., id.* at 2781 ("[I]t is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 841 (1920))); *id.* at 2804 (Kennedy, J., concurring in part) ("This determination, of course, must be made with due regard for the constitutional principle that congressional statutes can be controlling, including the congressional direction that the law of war has a bearing on the determination."); *id.* at 2824 (Thomas, J., dissenting) ("An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." (quoting *In re Yamashita*, 327 U.S. 1, 11 (1946))).

entirely missing from the majority opinion is any sustained reflection on the status of the conflict to which the legal corpus is being applied and, correspondingly, the appropriate status of the parties to the conflict in question.¹⁴⁹ Stevens's opinion is replete with references to the status attributed to the law of war, and he weaves the phrase throughout his substantive analysis of the applicable domestic legislation. On the one hand, an international lawyer might read this feature of the opinion positively, as acknowledgement that the questions before the Court cannot be legally resolved without reference to the relevant field: the law of war. Alternatively, the use of the term in this unspecified manner, lacking both rigor and application, poses certain problems of procedure and substance.

The procedural problem is that the law of war is not an undistinguishable corpus. Part of its uniqueness and the strength of its development in the post-World War II context was the agreement by states that the status of the conflict itself determined which parts of the law of war would apply to a particular situation. The danger of the Stevens opinion is that its failure to address sufficiently the status-of-conflict issue elides the Court's approach with that of the administration, making "war on terror" a term of art, rather than a precise legal term with specific legal consequences for the state.¹⁵⁰

This procedural problem raises the obvious question of which category of armed conflict—as defined by the law of war—is activated by the hostilities between the United States and al Qaeda. In short, categorization of the conflict is essential. The Supreme Court ought to have addressed this question comprehensively and its failure to do so may, in the longer term, create more problems for administration of justice in the context of the U.S.-led "war on terror" than it solves.¹⁵¹ I open

149. *Id.* at 2755 ("Together, the UCMJ, the AUMF, and the DTA [statutes] at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including *the law of war.*" (emphasis added)).

150. See generally WINTHROP, *supra* note 148 (giving a general historical backdrop to the role of military law in regulating state responses); LOUIS FISHER, *MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS* (Cong. Research Serv., CRS Report for Congress Order Code RL 32458, July 9, 2004), available at <http://www.fas.org/sgp/crs/natsec/RL32458.pdf> (providing a summary of the types of military tribunals that have functioned from revolutionary times to the present).

151. It is useful to compare the Court's approach in *Hamdan* with the role of the Supreme Court of Israel in respect of the occupation by Israel of the West Bank. David Kretzmer's masterful study of the jurisprudence of that

this reflection by suggesting that terrorist acts can, in principle, activate the application of international humanitarian law.¹⁵² The implication of this finding is that persons who commit terrorist acts can conceivably benefit from the status of combatant offered by the law of war if the organizations to which they belong and the results of threshold-of-violence tests suffice to activate the law applicable to international armed conflict. As regards internal armed conflicts, both state and non-state actors benefit from a status-of-conflict categorization, but combatant status is formally irrelevant as no combatant status is available under the applicable law.¹⁵³

States contend that they encounter conceptual and political barriers in applying international humanitarian law to terrorist acts or situations. They have frequently resisted the application of such law on the general grounds that to do so would be to give an undeserving status—both symbolic and practical—to organizations and individuals engaged in terrorist violence.¹⁵⁴ States have also been concerned that, because neither Common Article 3 nor Protocol II contain any specific provisions on criminal responsibility, non-state actors will escape legal sanction.¹⁵⁵ These latter concerns have been at least partially addressed by the Statute of the International Criminal Court,¹⁵⁶ by a developing jurisprudence of universal jurisdiction and by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹⁵⁷ Moreover, when a con-

Court relating to the Occupied Territories reveals, among other things, that the Court's willingness to hear cases involving military action must be juxtaposed against practical outcomes. DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 2 (2002). In particular, Kretzmer affirms that, in viewing the jurisprudence of the Court, an outcome of such review could be the conclusion that the effect of the Court's jurisprudence "has been to legitimize government actions in the Territories. By clothing acts of military authorities in a cloak of legality, the Court justifies and rationalizes these acts." *Id.*

152. See Christopher Greenwood, *War, Terrorism, and International Law*, 56 *CURRENT LEGAL PROBS.* 505, 515 (2003) (stating that an act of terrorism can constitute both a crime under international law and a justification for recourse to force); Jinks, *supra* note 61, at 2 (arguing that the September 11 attack violated the laws of war and that humanitarian law provides a stable, widely-endorsed normative framework for condemning the attacks).

153. See *supra* notes 105–23 and accompanying text.

154. See Ní AOLÁIN, *supra* note 53, at 224–30.

155. *Id.*

156. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

157. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence

flict situation falls within the parameters of an international armed conflict, such that the armed forces satisfy the prisoner of war conditions set out in Article 4 of the Third Geneva Convention¹⁵⁸ or Articles 43–45 of Protocol I,¹⁵⁹ then the fact that individual combatants may have engaged in acts of terrorism does not alter the continued application of international humanitarian law to the conflict.¹⁶⁰ Therefore, those combatants are still entitled to the protections of the Third Geneva Convention, but significantly, they can be prosecuted for terrorist acts which constitute war crimes or other serious violations of international humanitarian law.¹⁶¹

Two discrete questions follow from the forgoing analysis: (1) whether terrorism per se can engage international humanitarian law, and (2) whether the particular acts of al Qaeda, commencing with the attacks of September 11, 2001, activated the laws of armed conflict.¹⁶² While September 11 arguably serves as a bright line establishing the onset of hostilities between the United States and al Qaeda, there is a substantial body of evidence demonstrating that lower-level conflict existed between the two entities prior to that date. For example, such violence includes the 1993 World Trade Center bombing.¹⁶³

Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

158. Convention IV, *supra* note 6, art. 4.

159. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43–45, June 10, 1977, 1125 U.N.T.S. 3.

160. Jan Klabbbers, *Rebels with a Cause? Terrorists and Humanitarian Law*, 14 EUR. J. INT'L L. 299, 303–08 (2003) (analyzing the tension inherent in the Geneva Conventions between classifying non-state actors as lawful combatants or as common criminals, and affirming that the latter classification does not strip the conflict of its assigned conflict status per se).

161. Specifically, terrorists may be responsible for grave breaches of the Geneva Conventions and the Additional Protocols. See Hans-Peter Gasser, *Acts of Terror, "Terrorism" and International Humanitarian Law*, 84 INT'L REV. RED CROSS 547, 556 (2002) ("Beyond all doubt, [the Geneva Conventions and their Additional Protocols] ban terrorist activities insofar as they are directed against civilians.").

162. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2068 (2005) ("[T]he post-September 11 war on terrorism possesses more characteristics of a traditional war than some commentators have acknowledged.").

163. The following is a list of pre-2001 acts of violence by al Qaeda against the United States: Hotel bombing in Yemen, 1992; First World Trade Center bombing, 1993; Military base bombing in Saudi Arabia, 1996; Khobar Towers attack in Saudi Arabia, 1996; Nairobi and Dar es Salaam embassy bombings, 1998; U.S.S. Cole bombing, Yemen, 2000. See BBC News, *Timeline: Al-Qaeda*, <http://news.bbc.co.uk/1/hi/world/3618762.stm> (last visited Apr. 8, 2007); PBS,

In addressing the first question, legal scholars have expressed a wide variety of views on the core question as well as on related matters such as the right of self-defense, the status and legitimacy provided (or not) by the Security Council, and the status of non-state actors engaged in terrorist activity.¹⁶⁴ The threshold question of whether an act (or acts) of terrorism can engage international humanitarian law involves detailed consideration of a number of legal terms, thresholds, and organizational responses, including the meaning of the following terms appearing in the United Nations Charter: the meaning of "use or the threat of force," "armed attack," and "act of aggression."¹⁶⁵ Moreover, one can stratify the question further and identify two important sub-queries. First, whether a terrorist attack may constitute an armed attack under Article 51 of the Charter; and second, whether an armed conflict to which international humanitarian law applies may exist in the interchange of force between a state and a group that employs terrorist tactics.¹⁶⁶ As Kenneth Watkin notes, in examining the general question, there is a danger that:

A very low threshold of what constitutes an armed attack has the potential to blur the lines between armed conflict and criminal law enforcement. At the other end of the spectrum, too high a threshold may leave a state at risk, especially if there is a credible threat involving the use of weapons of mass destruction by a non state actor.¹⁶⁷

These distinctions indicate that a general response is inappropriate. Rather, we should assess each particular situation on its own merits, and we should apply the appropriate thresholds

Timeline: Al Qaeda's Global Context, <http://www.pbs.org/wgbh/pages/frontline/shows/knew/etc/cron.html> (last visited Apr. 8, 2007). The United States responded to the embassy bombings by targeting al Qaeda camps in Afghanistan and a chemical plant in Sudan. See *U.S. Missiles Pound Targets in Afghanistan, Sudan*, CNN.COM, Aug. 21, 1998, <http://www.cnn.com/US/9808/20/us.strikes.02/>.

164. See RICHARD FALK, *THE GREAT TERROR WAR* (2003); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993 (2001); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 41 (2002); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (2004).

165. Note also the problems engendered by the I.C.J.'s distinction between "most grave" use of force and "less grave" use of force in the case of Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 14 (June 27).

166. My thanks to David Kretzmer for raising these specific questions. It can be noted that both sub-queries arise in the Afghanistan situation, but they are not interdependent.

167. Watkin, *supra* note 164, at 5 (footnote omitted).

independently. Simply put, one cannot make a blanket judgment on the application of the law of war to all situations or acts of terrorism for all times. However, as I have asserted at length elsewhere,¹⁶⁸ we should not automatically exclude the application of international humanitarian law, and we should further consider hybrid application in which significant parts of counter-terrorism law would continue to operate within a crime control model while, in parallel contexts, an armed conflict model would apply.¹⁶⁹ Arguably, had the Supreme Court been willing to address the specific question of conflict status more fully, the Court would have significantly augmented an understanding of the broader threshold issues. The *Hamdan* Court let this opportunity slip by.

On the second question concerning the legal regime that should apply to actions taken against al Qaeda on and since the events of September 11, I have taken the position that the relevant body of norms activated is Common Article 3 to the Geneva Conventions of 1949.¹⁷⁰ In this I agree with Justice Stevens's formulation, but for different reasons. Interestingly, the core arguments advanced by Justice Thomas—namely the evolutionary and flexible nature of the common law of war—could and should be employed in advancing this approach.¹⁷¹

The relevant starting point is identifying why the law of internal armed conflict would apply in place of the law of international armed conflict. A relevant history of the law of armed conflict tells us that its provisions aim to regulate “armed conflicts” between sovereign states.¹⁷² Thus, Article 2 of the Geneva Conventions of 1949 states that the laws of war apply to armed conflicts taking place between states, regardless of whether any state involved in the conflict has formally declared

168. Significant parts of this argument are drawn from GROSS & NÍ AOLÁIN, *supra* note 1, at 384–95.

169. For an interesting exploration of the applicability to targeted killings of suspected terrorists of a mixed model incorporating features of international human rights law and international humanitarian law, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005).

170. GROSS & NÍ AOLÁIN, *supra* note 1, at 388–94.

171. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2829 (2006) (Thomas, J., dissenting) (“First, as with the common law generally, it [the common law of war] is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present.”).

172. INGRID DETTER, *THE LAW OF WAR* 17–20 (2d ed. 2000).

war.¹⁷³ Logically, therefore, the full protections of the Geneva Conventions only apply to armed conflicts which arise between High Contracting Parties. In legally categorizing the nature of the hostilities between al Qaeda and the coalition of Western states led by the United States, Derek Jinks succinctly points out that “[a]bsent proof that al Qaeda acted on behalf of a state or that a state has recognized al Qaeda as a ‘belligerent,’ the only potentially applicable body of law is the law of war governing internal armed conflicts.”¹⁷⁴ To a greater or lesser degree, all the Justices share this view.¹⁷⁵ However, teasing out which portions of that body of law that may apply to a conflict, or may change as the conflict escalates or diminishes, is complex. Moreover assessing how such norms influence the rights of particular individuals subject to legal process by states engaged in hostilities with groups such as al Qaeda, is a far more technical, substantive, and demanding analysis.

Because, as Jinks observed, there is no nexus between al Qaeda’s actions and any High Contracting Party, the conflict activated between al Qaeda and the United States on September 11 has generally not been recognized as an international armed conflict.¹⁷⁶ Using the starting point of the ICTY’s defini-

173. The Pictet commentary on Article 2 of the Geneva Conventions provides, “Any difference . . . leading to the intervention of members of the armed forces is an armed conflict It makes no difference how long the conflict lasts, or how much slaughter takes place.” UHLER ET AL., *supra* note 35, at 20.

174. Jinks, *supra* note 61, at 12 (footnotes omitted).

175. *Hamdan*, 126 S. Ct. at 2759–60; *id.* at 2799 (Kennedy, J., concurring in part) (“Congress requires that military commissions like the ones at issue conform to the ‘law of war.’”); *id.* at 2825 n.2 (Thomas, J., dissenting) (“Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so.”); *id.* at 2853 (Alito, J., dissenting) (“[I]t does not follow that the military commissions created by that order are not ‘regularly constituted’ or that trying petitioner before such a commission would be inconsistent with the law of war.”).

176. Notably however, as outlined above, the relationship between al Qaeda and the Taliban raises separate issues as to whether a sufficient degree of agency exists between them such that the hostilities in Afghanistan would raise status issues for the conflict itself, as well as those captured and detained by United States forces during the hostilities. See *supra* notes 54–68 and accompanying text. Separately, as regards military occupation—which is at least partly relevant to the situation in Iraq for a considerable period—cases of total or partial military occupation are also international conflicts for the purposes of international humanitarian law. See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 580, 604–18 (2006) (discussing the possible application of

tion of an armed conflict—"the resort to armed force between States or protracted armed violence between State and non-state entities"¹⁷⁷—one can apply the definition to the conflict between al Qaeda and the United States. In claiming that an "armed conflict" was activated by the September 11 attacks, one can argue that the combined elements of the nature and ferocity of the attacks and the subsequent scale of destruction (an intensity of violence threshold), added to the legal responses by international organizations and other states (a recognition threshold supported by the domestic legal responses of the United States) join together to collectively ascribe this Common Article 3 status.¹⁷⁸ Here the scale of the violence experienced combined with the scope of collective responses to it are the key elements in extending the scope of Common Article 3's application beyond national territorial boundaries. In this line of analysis, it is both possible and consistent with the standards of international humanitarian law to apply Common Article 3 to the hostilities that have unfolded between the United States and al Qaeda since September 2001.

First, while the events of September 11, thus far constitute a unique series of violent actions against the United States, those events generated a number of legal consequences. First, immediately following the attacks, the United Nations Security Council condemned the acts and recognized the inherent right of the United States to self-defense against unambiguous external aggression.¹⁷⁹ The North Atlantic Treaty Organization (NATO), for the first time in its history, invoked Article 5 of the Washington Treaty,¹⁸⁰ demonstrating "NATO's overall approach to security can include the possibility of collective action

the international law on occupations to post-2003 Iraq).

177. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

178. S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001); see also INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 17–19 (2003), [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5XRDC/\\$File/IHLcontemp_armed_conflicts_FINAL_ANG.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5XRDC/$File/IHLcontemp_armed_conflicts_FINAL_ANG.pdf) (discussing whether the "war on terror" is a war in the legal sense).

179. S.C. Res. 1368, *supra* note 178; see also S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (reaffirming resolution 1368).

180. See Lord Robertson, Sec'y Gen., N. Atl. Treaty Org., Statement to the Press on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty Following the 11 September Attacks Against the United States (October 4, 2001), available at <http://www.nato.int/docu/speech/2001/s011004b.htm>.

in response to a terrorist attack from abroad.”¹⁸¹ Second, the United States Congress authorized its President to use military force against those responsible for the attacks against the territorial integrity of the United States.¹⁸² Consequently, President Bush’s Military Order, providing for trial of suspected terrorists by military commissions, characterized the events of September 11 as an attack “on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”¹⁸³ The scale and ferocity of the attacks also serve a threshold function. Recent ICTY jurisprudence concerning the contours of the term “armed conflict,” discussed above,¹⁸⁴ also supports this reading of Common Article 3. Finally, although not required to activate the applicability of Common Article 3, the organizational structure of al Qaeda is such as to make it capable, though clearly not willing, to reach the command and control prerequisites¹⁸⁵ of international humanitarian law.¹⁸⁶ All of these factors, combined with the value system underpinning the international humanitarian law regime, justify classifying the hostilities between al Qaeda and the United States and its allies as an “armed conflict” within the meaning of the Geneva Conventions.

Yet a “formal” legal application issue arises when applying Common Article 3: the provision only textually applies to armed conflicts occurring in the territory of a state party. This issue raises the question of whether Common Article 3 applies in transnational contexts. A formalistic approach would suggest that a conflict must be either an interstate (international) conflict or an internal conflict taking place in the territory of a specific state. In response it might be argued that this clear-cut distinction exposes a lacuna in international humanitarian law in urgent need of attention. My response is more nuanced. I suggest that, to start with, we should probe the term “transna-

181. Press Release, N. Atl. Treaty Org., Statement on Combating Terrorism: Adapting the Alliance’s Defence Capabilities (Dec. 18, 2001), available at <http://www.nato.int/docu/pr/2001/p01-173e.htm>.

182. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

183. Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001).

184. See *supra* note 177 and accompanying text.

185. See *supra* notes 43–51 and accompanying text.

186. See, e.g., ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* (2002); MARC SAGEMAN, *UNDERSTANDING TERROR NETWORKS* (2004).

tional” more critically. Namely, while certain non-state groupings are transnational, many such groups still continue to operate and identify locally, and many enjoy the explicit or tacit consent of states. Furthermore, the post-September 11 terrorist actions—e.g., the terrorist attacks in London in July 2005—indicate that what might be ascribed as “transnational terrorism” has in fact a clear, homegrown nexus with national and territorial links. Undoubtedly such groupings, notwithstanding their international associations, will be found to fall, in the long run, within the traditional material conditions activating international humanitarian law, despite their transnational linkages.

Third, when applying the laws of war, it would be helpful to think less in terms of dichotomous categories of international armed conflict or internal armed conflict.¹⁸⁷ A state may very well be in conflict on both levels: a conflict may primarily involve non-state groupings but international armed conflict rules may also come to apply when states come in conflict with state supporters of such groups. To some extent this janus-faced conflicts may encompass some of the pertinent transnational elements of non-state groupings operating across and within state borders. Many of these dual features emerge in *Hamdan*, yet the Court studiously avoids recognizing them. In part, the *Hamdan* Court lost the opportunity to provide some concrete guidance on these matters, in a context where the issue of status of conflict was not an abstract subject. Rather, in *Hamdan* the liberty issues involved are substantial and generalizable to a substantial class of individual detainees. The Court’s failure to address the status-of-conflict issues in a way that engages the substantial legal issues at play undermines the Court’s resolution of the due process and liberty values at the nub of the opinions. This negative effect derives from the Court’s superficial treatment of the relevant legal framework.

It is also important to stress that the legal status of the United States’ invasion and bombing of Afghanistan in October 2001 is distinct from the status of hostilities between al Qaeda

187. Helen Duffy usefully notes in her assessment of non-international armed conflicts that conflicts often spill over “beyond a state’s national borders and the geographic limits are probably not an essential characteristic of non-international armed conflict.” DUFFY, *supra* note 70, at 222 n.27. Furthermore, she points out that the fact that military operations connected with a non-international armed conflict spill over into the territory of a state does not necessarily affect the non-international status of the conflict. *Id.*

and the United States.¹⁸⁸ The Court avoids examining the hostilities in any detail and also avoids addressing the interrelationship between conflicts.

Finally, while advocating the benefits of applying Common Article 3, I should also acknowledge that we should expect movement between legal regimes, and that the application of the Geneva Conventions does not mean that at some other stage counter-terrorism actions may not fully slip back from an armed-conflict model into a crime-control model, or that both models may not operate in tandem with one another.

CONCLUSION

There are many policy-based and humanitarian reasons to apply the laws of war to the contemporary war on terror.¹⁸⁹ When courts have the opportunity to quantify the rationale for formal legal applicability, under specific legal requirements of appropriate thresholds of violence, they must do so. Courts also must seize the opportunity to assess the intensity, organization, and state acknowledgement of a situations of belligerency, and they must grasp it fully and comprehensively. Also, courts examining legal issues that push these questions to the forefront must respond with attention to detail and rigor of analysis. In my view, the Supreme Court missed an opportunity to do so in *Hamdan*.

The utilitarian question might be what benefits accrue from categorization of a conflict under Common Article 3? First, as a technical matter, by its explicit terms Common Article 3 imposes its obligation on all parties to the conflict, but its application in no way affects the legal status of parties to the conflict. Affirming this has both symbolic and practical significance. As a definitional matter, al Qaeda's acts of terror perpetrated on September 11 and since clearly violate the pro-

188. One could advocate that the issues are not separate, that is, that there was an international armed conflict between the United States and Afghanistan and that the status of all individuals caught up in the hostilities, including members of al Qaeda, must be determined in the context of this conflict. In this view, members of al Qaeda would then either be combatants—requiring assessment under the terms of the third Geneva Convention—or civilians.

189. Jinks, *supra* note 61, at 4–5 (“[I]f the attacks are outside the purview of the laws of war, then the attacks themselves arguably could not serve as a basis for criminal charges.”); see also Kretzmer, *supra* note 169, at 186–88 (advocating a parallel application of human rights and humanitarian norms to terrorist attacks and discussing the rights and obligations of the targeted state).

visions of Common Article 3.¹⁹⁰ As such the harms caused explicitly constitute violations of the essential rules of humanity whose protection was the core rationale for the adoption of Common Article 3. It is important to ensure that conflicts that fall within Common Article 3's mandate are formally recognized in order to protect, both for state and non-state actors, the core humanitarian values for which Common Article 3 was designed.¹⁹¹ Common Article 3 must apply without any conditions requiring reciprocity. Particularly because the present U.S administration gives deeply paradoxical and inconsistent messages about the applicability of legal norms to the regulation of the war on terror, Courts must neutrally and legitimately "name" applicable legal norms. Common Article 3 negates the argument that there is a legal gap, exposed by recent acts of terrorism, which can only be filled by state domestic dictate. It also confirms the capacity of an armed conflict involving acts of terrorism to be contained within one of the fundamental legal models provided by international law. In the current context, where the reach of legal norms is under considerable challenge, this power is neither small nor unimportant. It is one that the Supreme Court should grasp confidently and firmly.

190. Note also that Article 4(2)(d) of Additional Protocol II, *supra* note 43, prohibits "acts of terrorism."

191. See Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EUR. J. INT'L L. 283, 283 (2003) (arguing that international humanitarian law should govern a state's actions in an armed conflict against a foreign terrorist organization because "restricting counterterrorist operations is justified, in part by bedrock human rights of the terrorists themselves, but more strongly by the rights of innocent civilians exposed to counterterrorist violence").