

THE GENEVA CONVENTIONS IN MODERN WARFARE: A CONTEMPORARY
ANALYSIS OF CONFLICT CLASSIFICATION, COMBATANT STATUS,
AND DETAINEE TREATMENT IN THE WAR ON TERROR

THESIS

Presented to the Graduate Council of
Texas State University-San Marcos
In Partial Fulfillment
Of the Requirements

For the Degree

Master of ARTS

by

Patrick A. Hardwick, B.A.

San Marcos, Texas
August 2012

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Committee Members Approved:

Robert F. Gorman, Chair

Edward Mihalkanin

William Ruger

Approved:

J. Michael Willoughby
Dean of the Graduate College

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ACKNOWLEDGEMENTS

First and foremost I would like to thank my parents, Don and Alice Hardwick, for their unwavering love and support. The impassioned drive of my parents to provide educational opportunities and moral strength throughout the course of my studies has been truly inspirational. Without a doubt, my ventures into academia as a graduate student, as well as an undergraduate student, were made possible only through their desire and willingness to help me attain these goals. I am forever grateful for their devotion to education and their selfless commitment that has enabled me to pursue my academic career. This thesis would not have been possible without their confidence, encouragement, and personal sacrifice. Thank you so much.

I would also like to express my sincerest gratitude to the members of my thesis committee, Dr. Robert Gorman, Dr. Edward Mihalkanin, and Dr. William Ruger. Throughout my coursework, each professor has contributed to, challenged, and positively impacted my expanding interests in this area of study. Indeed, the expertise of my committee members within their respective fields inspired me to undertake the topic of this thesis. The inspiration, knowledge, and professionalism of my committee members remained unequivocal throughout this lengthy process. It has been a privilege to have learned from and worked with these esteemed professors, and it has been my honor to have Dr. Gorman, Dr. Mihalkanin, and Dr. Ruger oversee and guide this project.

Finally, I would like to extend a special thanks to my colleague and friend, Robert Fraser. Your input and support have been sincerely appreciated from beginning to end.

This manuscript was submitted on May 10, 2012.

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Introduction

The laws of war, by definition, attempt to provide structure within the course of armed conflict. By the 19th century, domestic policy, international laws, and interstate treaties began establishing in an official capacity rules and procedures for the conduct of combatants on the battlefield while also providing protection for those who are affected by warfare off of the battlefield. Over time, laws and treaties have increasingly encompassed and expanded upon these protections, evolving and culminating into the most recognizable wartime treaty, The Geneva Conventions of 1949. Universally accepted amongst nations of the international community, the Geneva Conventions have been studied extensively and highly praised, but, at times, staunchly criticized.

As has often been the case throughout the evolution of the Conventions' long history, armed conflicts involving High Contracting Parties calls into question the practicality of the treaty's provisions. Such is the case with the current War on Terror being waged by the United States and select allies raises new criticisms of this international treaty. Today's War on Terror has presented challenges militarily, politically, and, of course, legally. America's current enemy presented viable threats both domestically and abroad. This war is comprised of an enemy that utilizes new technology along with traditional tactics. Its combatants methodically prey on fear and disappear into the same population which they terrorize. This war is not amongst state militaries like the

ones the Geneva Conventions are intended to cover, but of non-governmental organizations with transnational capabilities.

Now, sixty-three years after the drafting of the Geneva Conventions, policy-makers of modern warfare are struggling to abide by Geneva's provisions. The Conventions of 1949 fail to incorporate the type of enemy faced in the War on Terror and its Additional Protocols of 1977 fall short of being effective. Nevertheless, nations are still expected to uphold their treaty obligations during wartime operations. Thus, the question arises—do the Geneva Conventions, in their current form, best serve those who are a party to it? The current conflict presented the United States with adversaries that are comprised of numerous nationalities and span multiple state borders. “The best example in this category, of course, is...the Al Qaeda network, cells of which are reputed to be festering in about 60 countries throughout the world.”¹ Combating a Stateless adversary, such as an armed resistance movement, is not a new concept in the laws of war, nor is it unfamiliar to the United States military institution. However, new challenges arise in contemporary warfare with the advent of instant globalized communications, ease of access of international travel, and the proliferation of technology.

The idea of a “borderless” enemy within the War on Terror, made possible through the use of technologies such as the internet, is an issue that has not yet been fully addressed in the laws of war. Indeed, the internet and proliferation of technology have changed the ways in which a modern State must conduct a war to ensure its national

¹ Senate Committee on Commerce, Science, and Transportation, *Technology Assessment in the War on Terrorism and Homeland Security: The Role of the OTA*, 107th Cong., 2d sess., S. Rep. 107-61, April 2002. <https://www-hsdl-org.libproxy.txstate.edu/?view&did=2185> (accessed January 21, 2012), 12.

security. States must remain attentive to the numbers of ways members and supporters of terrorist organizations may utilize the internet and other technologies that now provide instantaneous and continuous contact amongst their users. Communication can be conducted by email or in real-time via instant messengers, “According to a survey, more than 186 countries can be reached by e-mail.”² Members and supporters of terrorist organizations can post blogs, make websites, create and display propaganda, engage in chat rooms, view videos, play anti-American online games, and even accept donations. In addition to the increasing speed at which communications may be conducted, they may also be produced and received from nearly anywhere in the world. “Messages can be transmitted from any physical location to any other physical location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another.”³

Bearing this in mind, this thesis analyzes the applicability of the Geneva Conventions in light of this new type of war that is being fought. Taking into consideration the legal, military, and technological advances of the last sixty years, this study addresses whether the Geneva Conventions remain applicable to contemporary warfare. Specifically, this study examines the third convention, “Geneva Convention III Relative to the Treatment of Prisoners of War of August 12, 1949.” The times of warfare in which the annihilation of the enemy’s national armed forces corresponded to victory

² Hosaka Shuji, “The Internet and Middle East Studies,” *JIME Review* 10, no 36 (1997): 2, <http://pws.prserv.net/hosaka/shuji/internet/The%20Internet%20and%20Middle%20East%20Studies.htm> (accessed November 8, 2011).

³ David R. Johnson and David G. Post, “Laws and Borders—The Rise of Law in Cyberspace,” *Stanford Law Review* 48, no. 5 (May, 1996): 5, Temple University, <http://www.temple.edu/lawschool/dpost/Borders.html> (accessed November 8, 2011).

are long past. Written in response to World War II, there are many aspects of modern warfare that the drafters of the 1949 conventions, and indeed those of the Geneva Conventions Additional Protocols of 1977, simply could not have foreseen.

This study is focused on three topics regarding Geneva Convention III. First, is the process of classifying conflicts either as a Common Article 2 or Common Article 3 armed conflict at the onset of hostilities. Conflict classification is critical to the implementation of the Geneva Conventions in warfare and carries with it vast implications dependent upon that decision. The criterion for this classification is presented and, by using the United States as a case study, evaluated to determine whether this aspect of the conventions remains not only applicable but adequate to states who are a party to the treaty. Determinations of the United States and the legal support backing these decisions are thus investigated.

Concomitant to conflict classification, the definitions and criteria established for determining the combatant status of individuals, as lawful or unlawful combatants, under Geneva Convention III is compared to U.S. definitions and practices thereof. The distinction of this status, as a lawful or unlawful combatant, dictates the eligibility of prisoner of war status, and the rights and protections that accompany this classification, towards individuals who fall into enemy hands during the course of warfare. The rights and protections afforded to lawful prisoners of war have evolved immensely since the idea to protect captured soldiers under the law was conceived in the eighteenth century, and status as a POW is vastly preferable than the alternative.

Determining prisoner of war eligibility is not the only purpose that combatant status serves in warfare. In keeping with the principles, and adopting criteria of The Hague Conventions of 1899 and 1907, the Third Geneva Convention of 1949 relative to the treatment of Prisoners of War sought to distinguish combatants from civilians for numerous reasons. Foremost, was to differentiate between soldiers involved in the conflict and civilians in order to ensure civilian immunity during armed conflict. This distinction was important for two reasons. On the one hand, it aims to reduce the possibility of soldiers mistakenly firing upon and killing civilians. On the other hand, it attempts to prohibit combatants from disguising themselves as civilians to gain an unfair advantage on their enemy. As such, the requirements for obtaining prisoner of war status and the processes used by the United States to make combatant status determinations in the War on Terror are examined.

Accordingly, the final topic of discussion is detainee treatment. Having established the previous two points, this thesis examines the manner in which Geneva Convention III enumerates protections and treatment of detained and captured individuals. This study analyzes what improvements can be made to the rhetoric regarding detainee treatment so that ambiguity and misconception of these provisions may be avoided. Analysis of U.S. policy and implementation thereof is undertaken in the context of the War on Terror. The reader must be aware that this is not a critique of U.S. detainee treatment policies and practices within the War on Terror. Rather, it is an analysis of how well Geneva III contributes to the wartime efforts of its High Contracting Parties regarding detainee treatment. Incorporating available technology and considering the globalized nature of the world today, it is pertinent to examine whether Geneva

Convention III can still be used to guide the conduct of States at war. This study examines how well an untraditional war may be fought using the traditional laws of the Third Geneva Convention.

In researching the Third Geneva Convention Relative to the Treatment of Prisoners of War, this study has canvassed all four Geneva Conventions of 1949, their lineages, and the Additional Protocols of 1977. Resources such as the United States' Uniform Code of Military Justice (UCMJ) and army field manuals have been compared to the current version of Geneva Convention III. Available government documents were collected to review the actions of the Bush and Obama administrations with regards to the executive orders, statutes, and signing statements that were respectively issued. These sources included memorandums between high level officials from the United States Departments of State, Justice, and Defense, whose numerous lawyers offered their office's interpretations of Geneva Convention III.

With regards to congress and this topic, acts such as The War Crimes Act (WCA), The Detainee Treatment Act (DTA), The Military Commissions Act (MCA), and the federal torture statute (Title 18 Sect. 2340-2340A), were examined in order to determine to what degree domestic legislation in the U.S. adhered to the Third Geneva Convention. Additionally, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT) was reviewed in order to better understand U.S. interpretations of terms and definitions left undefined by the Geneva Conventions, as well as, the implementation of domestic laws in accordance with that treaty.

For more than sixty years the Geneva Conventions have been a key instrument in the protection of those who partake in and are affected by warfare. However, it is time to examine the evidence and admit that these widely-accepted conventions are in danger of becoming obsolescent in a fast-paced and globalized world. Analysis is needed from multiple fronts—political, legal, and military—to determine whether the Third Geneva Convention of 1949 can remain the primary instrument utilized for regulating combatant conduct, as well as prisoner of war and detainee treatment in warfare. If not, the additional protections and grounds for legal proceedings that the Third Convention of 1949 fails to consider are past due. The ambiguity of combatant definitions and combatant conduct must be directly addressed to eliminate confusion. The broad terminology used in regards to interrogations and intelligence gathering must be condensed. Finally, the new threats of technology and global communications need to be included in a contemporary discussion of the laws of war.

This study was not conducted in an attempt to tarnish the Geneva Conventions of 1949; rather, it was done to examine what gaps, if any, exist between these conventions and contemporary armed conflict. Likewise, it is not the purpose of this study to definitively label the Geneva Conventions as inadequate, but to determine what happens if members of academia and governments alike do not explore issues such as these, and whether there is a concurrent price to pay for inaction. It is pertinent to examine whether some stipulations and regulations of the Conventions have become more of a hindrance than an asset to High Contracting Parties. Relative to this study, it is prudent to determine whether Geneva Convention III obstructs or accommodates the United States in its objective, the abatement of terrorists' threats against the country.

In a past era of state on state violence, the idea to restrain troops and prevent needless loss of life to those no longer able to fight was indeed admirable. However, we have now entered an age of state versus terrorist/non-governmental organization warfare. It is dangerous, even reckless, to bind the hands of those charged with conducting and those who actually fight in modern wars, especially against an enemy which maintains wanton disregard for international laws and customs. Most importantly, this thesis will call into question what adverse ramifications will be endured by troops, sacrifices to national security made, or even damage done to the credibility of our governments, if we as academics, do not explore these issues.

This study of the applicability of Geneva Convention III Relative to the Treatment of Prisoners of War in the modern era was conducted to ascertain whether the Third Convention contains the most viable and prudent protections available to High Contracting Parties to the Conventions, their militaries, and their leaders. The following will discuss the strong points and weaknesses of the Third Geneva Convention, the possible benefits that accompany a revision thereof, issues to consider and their relevance, and, hopefully, provide a strong basis for governments and academia to lend further discussion to the topic.

Chapter 1

Conflict Classification

Determining the conflict classification at the onset of a war or armed conflict allows States who have ratified the Geneva Conventions to know exactly what provisions of the treaty shall be applied throughout hostilities, as different forms of conflicts enact different protections. Under the Geneva Conventions of 1949, armed conflicts may be classified in one of two ways: A Common Article 2 international armed conflict or a Common Article 3 non-international armed conflict.

Stemming from this topic, the designated conflict classification also determines what statuses are to be conferred upon the individuals who take part in the conflict. In his book, The Law of Armed Conflict, David Solis places the upmost importance on determining whether a conflict is classified under Common Article 2 or Common Article 3, since such a classification implies different combatant statuses for those taking part in hostilities—as lawful or unlawful combatants. In theory, a Common Article 2 conflict, reserved for conflicts of an international nature, involves the armed forces of two or more nation-states. Because Common Article 2 conflicts are intended to cover armed conflicts among State militaries, the classification of individuals as unlawful combatants, (e.g. civilians that takes up arms against their enemy) would be less common in this type of conflict. Alternatively, in a Common Article 3 non-international armed conflict, when

the government of a country is dealing with civil war or domestic uprisings, the official armed forces of a nation, in all likelihood, would be employed by only one party to the conflict. The parties that commonly take up arms in a Common Article 3 armed conflict are state militaries and resistance or guerrilla movements of varying types. Therefore, unlawful combatants—or individuals who are not regular members of any military—would be a regular occurrence in this conflict since the belligerent force is technically comprised of civilians.⁴ In this sense, the term civilian is strictly applied as someone who is not officially a part of the armed forces of a nation at the time of the conflict. Before analyzing the actions of the United States in regards to classifying the War on Terror, it is important to fully understand these two Common Articles.

Conflict classification under Geneva Convention III- Common Article 2

Common Article 2 conflict classification is intended to apply to State versus State armed conflicts. The provisions of this article read as follows:

In addition to the provisions which shall be implemented in peacetime, the present Conventions shall 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, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁵

⁴ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 205.

⁵ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 23.

A couple of points in this article are worth mentioning. Common Article 2 makes clear that the provisions of this Convention are not dependent upon a declaration of war. If a declaration of war is issued by one party, the acknowledgement of that declaration by the adversary is irrelevant. If a State that has had war declared upon it recognizes the declaration, Common Article 2 applies. If the State does not recognize the declaration nor issue its own, Common Article 2 still applies. This important provision seeks to ensure that both parties to the conflict will uphold the Third Geneva Convention for the duration of the armed conflict regardless of formal declarations of war. This provision also acts as a safeguard. If an aggressor State issues a declaration of war that is unrecognized by its opponent, it does not absolve the aggressor state from its obligations to adhere to the Convention's provisions. Nor does the lack of acknowledgement of a declaration absolve the defender state from its treaty obligations.

Additionally, this article stipulates that the conventions shall be applied regardless of whether all of the parties to the conflict have ratified the conventions. This provision was included to ensure that a state that is not a High Contracting Party does not attempt to use its non-adherence to the Conventions to its advantages. Likewise, if two or more nations are allied against a common enemy, all nations of the said coalition are bound to the conventions if even one of the allied nations is a High Contracting Party. This ensures that protections will be afforded by all forces within a coalition, not just by some of them. One can imagine the controversies that could arise if a coalition were to use the forces of a non-member nation to perform tasks outside of international law and customs and claim that the state had done no wrong because it is not bound to the provisions of the Geneva Conventions or other international laws and treaties.

Common Article 2 can be found in all four Conventions and, as mentioned, is applicable in all international armed conflicts (i.e. one party fighting another that is not within the former's national territory). The current case study of the United States in the War on Terror is interesting in this regard. Undoubtedly, the United States is not at war with a faction within its territorial borders. However, this faction is not another nation but a terrorist organization. Officials of the U.S. government were forced to view the War on Terror through the lens of Common Article 2 because the War on Terror is an international armed conflict. However, the composition of Al Qaeda and the Taliban, and the close relationship between the two organizations complicated conflict classification of this war, as well as matters surrounding what definitions would be given to those taking an active role in hostilities.

Conflict classification under Geneva Convention III- Common Article 3

In the event of an armed conflict not of an international character, Common Article 3 of the Conventions is enacted. The term non-international conflict is in itself a bit confusing because it indirectly incorporates issues of national sovereignty. One must consider the gray areas of domestic issues here. When does a riot become an insurrection? When does a group of protestors begin to qualify as a resistance movement? When does armed resistance become a civil war? What severity of these issues is required to merit the attention of the international community and institutions such as the United Nations or International Committee of the Red Cross (ICRC)? In the event of domestic uprisings, the international laws of war are of no concern because it is not an international matter. Such instances are to be dealt with by the domestic laws and legal processes of whichever nation they occur within. The drafters of the conventions were

cognizant of this and were also aware that governments would not be prone to admitting that an insurrection or domestic dispute was outside the realm of its control. After all, “what government willingly announces that it is host to an internal revolution so serious as to constitute a non-international armed conflict?”⁶ That would be akin to a government admitting its inability to maintain control of its country.

With these issues in mind, the drafters of the Conventions created Common Article 3. Knowing that not all instances of civil unrest would be deemed non-international armed conflicts, Common Article 3 of the Conventions aims to provide basic protections to those affected by such disputes. The following definition of Common Article 3 comes from a publication of the Geneva Conventions of 1949 by the International Committee of the Red Cross. The first provision of Common Article 3 begins, “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:”

(I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat** by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as

⁶ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 130.

indispensable by civilized people. (2) The wounded and sick shall be collected and cared for.⁷

Common Article 3 endeavors to create a broad definition of who should be protected under what circumstances, as well as what specific protections those persons are granted. It is important to note that the first provision broadly encompasses any individual not actively taking part in hostilities, soldiers and civilians alike. Common Article 3 likewise attempts to remove any prejudices that may lead to the negative or unfavorable treatment of individuals. The idea to incorporate protections relative to gender, race, and religion are noble to be sure. However, the idea that personal discriminations garnered by individuals will be relinquished at the behest of an international treaty is overly ambitious. Such a notion is not a result of cynicism or disbelief that people are incapable of exhibiting tolerance. Rather, it is the recognition that complete, total, and constant oversight of every individual that comprises an armed force cannot, within reason, be expected of any chain of command. Thus, opportunity is inevitably available to individuals who so desire to engage in this type of misconduct.

Common Article 3 concludes with remarks regarding legal statuses and implementation of the above protections, these provisions include:

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its service to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present convention. The

* The Merriam-Webster Dictionary defines *hors de combat* as those placed out of combat or disabled.

⁷ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 24.

application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁸

Conflict classification of the War on Terror by the United States

Wars between States and non-State entities, resistance movements, or guerrilla groups (for example, a war like the American Revolution), is nothing new in the history of warfare. Indeed, the United States has waged war against both States and resistance movements in prior conflicts. However, the reach and capabilities of Al Qaeda and the Taliban challenges the practicability of the Conventions within contemporary warfare. With the attacks of 9/11, Al Qaeda has shown that it possessed the destructive capabilities and willingness to undertake attacks unparalleled by terrorist organizations of the past. The problems that arise from fighting non-governmental organizations, such as Al Qaeda and the Taliban, stem from the fact that these organizations are not held accountable to any international laws or treaties, especially Geneva Convention III. In fact, “the Taliban openly rejected the constraints of international law, purporting to follow a purely ‘Islamic’ approach to law and government, driven by its own interpretation of the Holy Koran.”⁹

The non-adherence to international laws and norms by non-governmental organizations are further complicated by the fact that the organizations faced in the War on Terror, specifically Al Qaeda, are not resistance movements that solely contest their own government, but operate in numerous countries worldwide. Not only does Al Qaeda

⁸ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 154.

⁹ Lee A. Casey, David B Rivkin, Jr., Darin R. Bartman, “Unlawful Belligerency and its Implications Under International Law,” *Federalist Society for Law & Public Policy Studies (U.S.)*, (2003): 7. <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=440044> (accessed on October 14, 2011).

give no regard to international laws, it is likewise unfettered by the domestic laws of the numerous countries in which it operates. To further complicate these matters, the effects of globalization, specifically in regards to the ease of access of international travel as well as communication capabilities that are made available and instantaneous through cell phones and computers, increase and streamline the coordination of these organizations.

Understanding that the War on Terror would be fought on two fronts, the United States was tasked with defining the war in relation to both the Taliban in Afghanistan and Al Qaeda as a whole. Regarding conflict classification, the Bush Administration, with the help of the Justice Department's Office of Legal Counsel (OLC), reviewed and interpreted the Geneva Conventions to determine if, and how, they would apply to this armed conflict.* On February 7, 2002, President Bush issued a memo to his high level officials, including the Vice President, Secretaries of State and Defense, and others, that described the conflict classification of the War on Terror. President Bush's memo read:

Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002...I hereby determine as follows: A.) I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, Al Qaeda is not a High Contracting Party to Geneva. B.) I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. C.) I also accept the legal conclusion of the Department of Justice and determine that Common Article 3 of Geneva does not apply to either Al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in

scope and Common Article 3 applies only to ‘armed conflict not of an international character.’¹⁰

In the above memo, President Bush determined that the conflict between the United States and Al Qaeda was neither a Common Article 2 nor Common Article 3 conflict because Al Qaeda is neither a state nor a High Contracting Party. Additionally, the President determined that none of the provisions within the Geneva Conventions could be read to cover the terrorist group. President Bush, however, decided that the Geneva Conventions would cover the conflict with the Taliban. Given the international nature of this armed conflict, the conflict between the U.S. and the Taliban is classified as a Common Article 2 armed conflict. Even though the official position was that the Geneva Conventions applied to the Taliban, it is worth noting that none of the protections enumerated in the Third Convention, specifically Common Article 3, would be interpreted to cover either adversary of the U.S. within the War on Terror. Common Article 3 protections are considered by some as customary international law due to the basic humanitarian rights and protections they ensure. As such, the denial of Common Article 3, and other, protections of the Third Geneva Convention was not met with universal agreement from within the U.S. government. Now knowing the determination made by the Bush Administration in early 2002, it is pertinent to examine why and how this decision was reached.

*The Hague Conferences of 1899 and 1907, considered to be customary international law and codified as such under the Vienna Convention of 1969, are understood to have applied, and been adhered to by the United States, throughout the War on Terror.

¹⁰ President, Memorandum, “Humane Treatment of Al Qaeda and Taliban detainees,” President George W. Bush, *The White House*, NO. 499. (February 7, 2002): 1-2, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (accessed on October 4, 2011).

Inapplicability of conflict classification towards Al Qaeda

Understanding the provisions for classifying international armed conflicts under Common Article 2 or non-international armed conflicts under Common Article 3 of the Third Convention, this study acknowledges that the United States had grounds for denying, or at least deeming as inapplicable towards Al Qaeda and the Taliban, both Common Article 2 and Common Article 3 conflict classifications. With respect to Al Qaeda, the following discussion examines the legal opinions issued by the Office of Legal Counsel to President George W. Bush and his legal. In a memorandum written by then Assistant Attorney General Jay Bybee in January of 2002, Mr. Bybee explained the inapplicability of Common Articles 2 and 3. Bybee appropriately places great emphasis on Al Qaeda not being a State, or a party to the Conventions, and as such the organization does not deserve the treatment and protections due to High Contracting Parties. Additionally, Bybee claimed that, “the nature of the conflict precludes application of common article 3 of the Geneva conventions.”¹¹ If one is to interpret Common Article 3 conflicts by their literal definition of being non-international in character, then it is comprehensible why this stance was taken. The War on Terror is not a non-international armed conflict between the United States and an adversary within its territorially defined borders, thereby precluding application of Common Article 3 conflict classification.

Considering the international nature of the War on Terror in regards to the United States, the classification as a Common Article 2 conflict seems logical, supported by

¹¹ U.S. Department of Justice, *Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban detainees*, prepared by Assistant Attorney General Jay S. Bybee. Office of Legal Counsel. January 22, 2002. (Washington, D.C., 2002): 9, United States Justice Department, <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (accessed on October 4, 2011).

Common Article 3 classification being denied or deemed inappropriate toward this conflict. However, the language of Common Article 2 within the Third Convention likewise disqualifies the treaty for application in the War on Terror. As explained by Mr. Bybee in his memo, “Common Article 2, which triggers the Geneva Convention provisions regulating detention conditions and procedures for trial of POWs, is limited to cases of declared war or armed conflict ‘between two or more of the High Contracting Parties.’ Al Qaeda is not a High Contracting Party.”¹² This memo from the Office of Legal Counsel is effectively claiming that neither Common Article 2 nor Common Article 3 armed conflict classification applies in regards to Al Qaeda. The OLC, in 2002, issued the opinion that, “the text of common article 3, when read in harmony with common article 2, shows that the Geneva Conventions were intended to cover either: a) traditional wars between state parties to the conventions (article 2), b) or non-international civil wars (article 3). Our conflict with Al Qaeda does not fit into either category.”¹³

Inapplicability of conflict classification towards the Taliban

Because Al Qaeda is neither a State nor a party to the Geneva Conventions, the determination that the protections of Geneva III do not apply to that organization is straightforward. The case with the Taliban in Afghanistan was less clear. The problems surrounding conflict classification of the War on Terror with regards to the Taliban were derive from the fact that Afghanistan is a state that is recognized by the international community and has been a party to the Geneva Conventions since 1956.¹⁴ Although

¹² Ibid.

¹³ Ibid., 10.

¹⁴ Ibid., 10.

Afghanistan is a High Contracting Party, the functionality of the Afghan government was contested by some U.S. officials. The Taliban militia, at one time, could plausibly have claimed to be in charge of the government of Afghanistan, not because the organization acted as a responsible governing entity, but because the organization asserted widespread influence over a vast majority of the country's population. "There is no functioning central government [in Afghanistan]. The country is divided among fighting factions...the Taliban [is] a radical Islamic movement [that] occupies about 90% of the country,"¹⁵ claimed a 2001 U.S. State Department report.

In some sense the Taliban militia was in control of the Afghan Government, but, according to officials of the Office of Legal Counsel, it failed to provide the services or functions expected of a governing institution. "The Taliban have shown no desire to provide even the most rudimentary health, education, and other social services expected of any government. Instead, they have chosen to devote their resources to waging war on the Afghan people, and exporting instability to their neighbors."¹⁶ Additionally, at the onset of the War on Terror, the Taliban-controlled Afghanistan Government had been recognized by three Arab nations: Saudi Arabia, Pakistan, and the United Arab

¹⁵ Bureau of South Asian Affairs, United States Department of State, *Background Note* (October 2001), available at <http://www.state.gov/r/pa/bgn/index.cfm?docid=5380> (accessed January 10, 2002). Quoted in U.S. Department of Justice, *Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban detainees*, by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel. January 22, 2002. (Washington, D.C., 2002): 21, United States Justice Department, <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (accessed on October 4, 2011).

¹⁶ United States Department of State, International Information Programs, *Rocca Blames Taliban for Humanitarian Disaster in Afghanistan* (October 12, 2001) available at <http://www.usinfo.state.gov/regional/nea/sasia/afghan/text2001/1010roca.htm> (visited January 10, 2001). Quoted in U.S. Department of Justice, *Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban detainees*, by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel. January 22, 2002. (Washington, D.C., 2002): 18, United States Justice Department, <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (accessed on October 4, 2011).

Emirates.¹⁷ As such, the Taliban could not be considered as a non-state actor ineligible for protection under the GPW because the nation of Afghanistan is recognized in the international community and is a party to the Conventions. Furthermore, the Taliban-led government had itself been recognized by other nations in the region.

Afghanistan as a “failed state” and conflict classification

To address this issue, the Office of Legal Counsel and the Bush Administration, in the early stages, decided that Afghanistan as a whole could be considered a “failed State.” A failed state status would effectively absolve the United States of its treaty obligations. In other words, if Afghanistan was deemed by the United States to be a failed state, then the Geneva Conventions, under Common Article 2 international conflict classification, would not apply to the U.S.-Taliban conflict. Additionally, this justification relieves the U.S. of its responsibility to classify the war as a Common Article 2 or Common Article 3 conflict, just as it did with Al Qaeda. Under the failed state scenario, Geneva III could be deemed inapplicable to the conflict with the Taliban in Afghanistan, assuming that Afghanistan is actually a failed state. However, how does one nation decide that another has failed?

To answer this question we delve deeper into the Office of Legal Counsel’s January 2002 memo. The former Assistant Attorney General asserted that a failed state is one that is “characterized by the collapse or near-collapse of state authority. Such a collapse is marked by the inability of central authorities to maintain government institutions, ensure law and order or engage in normal dealings with other governments,

¹⁷ John Yoo, *War by Other Means* (New York: Atlantic Monthly Press, 2006), 28.

and by the prevalence of violence that destabilizes civil society and the economy.”¹⁸ As evidence, the memo’s author borrows from the State Department’s four-part test of statehood. This test involves the following criterion: “i) whether the entity have effective control over a clearly defined territory and population; ii) whether an organized governmental administration of the territory exist; iii) whether the entity has the capacity to act effectively to conduct foreign relations and to fulfill international obligations; iv) whether the international community recognizes the entity.”¹⁹ Afghanistan, under the Taliban, did not meet any one of the four requirements of this State Department test to a satisfactory extent and Mr. Bybee references numerous officials and experts to support this conclusion. The inability of the Taliban-led government in Afghanistan to pass this test for statehood is less paramount to this study than is the, at times, incredulous language contained within the government documents regarding this claim.

At the onset of his analysis claiming that Afghanistan constituted a failed state, Mr. Bybee included a “disclaimer” of sorts: “We want to make clear that this Office does not have access to all of the facts related to the activities of the Taliban militia and Al Qaeda in Afghanistan. Nonetheless, the available facts in the public record would support the conclusion that Afghanistan was a failed state—including facts that pre-existed...the formation of the new transitional government.”²⁰ It is, of course, true that the primary function of the Justice Department is not foreign intelligence gathering and it would be irrational for one to hold the Justice Department or its offices to that task. However it

¹⁸ U.S. Department of Justice, *Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban detainees*, by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel. January 22, 2002, (Washington, D.C. 2002): 15, United States Justice Department, <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (accessed on October 4, 2011).

¹⁹ *Ibid.*, 16.

²⁰ *Ibid.*

appears both obvious and reasonable to expect that an agency such as the Office of Legal Counsel, charged with providing legal advice to offices such as the presidency, would be obliged to obtain as much information as possible before issuing legal views that could condemn another nation as a failed state. The forewarning that the OLC did not have access to all information available, whether from its own agency or others within the intelligence community, is disconcerting and leads one to question the credibility and thoroughness of the Office of Legal Counsel on this matter.

Throughout the War on Terror, the Office of Legal Counsel provided numerous memorandums and opinions to the Bush Administration which served as the legal backing to subsequent executive and military orders of the president. Even though Jay Bybee in the above memo asserts that not all information is available to his office, the OLC opinions were not alone in questioning the functionality of the Afghan Government at the beginning, or leading up to, the War on Terror. The United Nations Security Council had been aware of the use of Afghan territory by Al Qaeda, as well as the relationship the terrorist organization maintained with the Taliban, several years prior to the attacks of September 11 that provoked this armed conflict. As early as 1998, the UN Security Council had been calling on the Taliban government to cease its dealings with Al Qaeda and other similar organizations and ordered that the Taliban stop allowing its territory to be used by these organizations.

In 1999, UN Security Council Resolution (UNSECRES) 1267 called attention to the Taliban government harboring Osama Bin Laden and likewise allowed for the presence of terrorist training camps within its territory despite his indictment by the

United States.²¹ UN Security Council Resolution 1333, in 2000, reaffirmed UNSECRES 1267 and again called upon the Taliban government of Afghanistan to turn over Osama Bin Laden and associated leaders from the terrorists organizations without delay to the proper authorities.²² Following the attacks of September 11, 2001, UNSECRES 1373 mandated that States, “(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.”²³

The Taliban Government failed to comply with these and all other similar UN Resolutions that strive for the abatement of terrorism. The noncompliance of the Taliban government with these efforts reveals a couple of different possibilities. First, it may imply that the Taliban government did not possess the sufficient control of its territory necessary to bring these individuals to justice as stipulated by the resolutions or that it did not have the means possible to do so. Alternatively, non-compliance with the UN Resolutions can show that the Taliban government maintained a strong bond with Al Qaeda and its leaders and was simply unwillingly to comply because good standing with the United Nations is less beneficial to their organization than a strong relationship with Al Qaeda. Whatever the case, the Taliban government failed the statehood test by the U.S. Department of State, failed to comply with the United Nations, and thereby added

²¹ UN Security Council Resolution 1267 (1999). Adopted by the Security Council at its 4051st meeting on 15 October 1999: 1-2, United Nations, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement> (accessed March 28, 2012).

²² UN Security Council Resolution 1333 (2000). Adopted by the Security Council at its 4251st meeting, on 19 December 2000: 4. United Nations, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement> (accessed on March 28, 2012).

²³ UN Security Council Resolution 1373 (2001). Adopted by the Security Council at its 4385th meeting, on 28 September 2001: 2, United Nations, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement> (accessed March 28, 2012).

support to the notion that Common Article 2 conflict classification could be deemed inapplicable based on failed state status.

Option to suspend U.S. treaty obligations towards Afghanistan

Considering the non-adherence to UN Resolutions by the Taliban government and the nature of the armed conflict taking place within Afghanistan at the beginning of the War on Terror; the option to suspend the Geneva Conventions towards Afghanistan was presented to the Bush Administration. Such a suspension would again exclude this war from Common Article 2 conflict classification. “If Afghanistan could be found in material breach for violating ‘a provision essential to the accomplishment of the object or purpose of the [Geneva Conventions],’ suspension of the conventions would have been justified.”²⁴ According to officials of the Office of Legal Counsel, the authority to suspend treaties lay within customary international law as well as, for the United States, the President’s constitutional authority under Article II to interpret international treaties. In fact, a January 2002 memo from the OLC claimed that failed state status would justify the United States decision to suspend the Geneva Conventions in regards to the Taliban in Afghanistan.

Nevertheless, suspension of the Geneva Conventions is not as simple as it may seem. Common Article 1 of the 1949 Conventions stipulates adherence to the treaty by stating that, “The High Contracting Parties undertake to respect and to ensure respect for

²⁴ U.S. Department of Justice, *Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban detainees*, by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel. January 22, 2002, (Washington, D.C. 2002): 23, United States Justice Department, <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (accessed on October 4, 2011).

the present Convention in all circumstances.”²⁵ Accordingly, a legal opinion issued by Jay Bybee regarding the application of treaties towards Al Qaeda and the Taliban warned that, “A decision by the United States to suspend Geneva III with regard to Afghanistan might put the United States in breach of customary international law.”²⁶ A possible counterargument to the proposed suspension of the Geneva Conventions is the claim that the Geneva Conventions are not a ‘*we will if you will treaty*,’ “The duty of performance [of the Geneva Conventions] is absolute and does not depend upon reciprocal performance by other state parties. Under this approach, the substantive terms of the Geneva Conventions could never be suspended, and thus any violation would always be illegal under international law.”²⁷ This claim, however, was disputed by the Office of Legal Counsel, “This understanding of the... Geneva Conventions cannot be correct. There is no textual provision in the Geneva Conventions that clearly prohibits temporary suspension.”²⁸

Despite the Convention’s attempt to ensure that States will observe the Convention’s provisions at all times, in peace and war, under Article 1, “under customary international law, the general rule is that the breach of a multilateral treaty by a state party justifies the suspension of that treaty with regard to that state.”²⁹ The Geneva Conventions do not explicitly prohibit temporary suspension. In fact, the Geneva

²⁵ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 133.

²⁶ U.S. Department of Justice, *Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban detainees*, by Assistant Attorney General Jay S. Bybee. Office of Legal Counsel. January 22, 2002. (Washington, D.C. 2002): 23, United States Justice Department, <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> (accessed on October 4, 2011).

²⁷ *Ibid.*, 24.

²⁸ *Ibid.*

²⁹ *Ibid.*

Conventions of 1949 do not even mention temporary suspension. One possible reason that suspension is not discussed is because the drafters did not want states to have the ability to do so, or in a different scenario, did not want to grant states the ability to pick and choose which provisions they would like to follow. Instead of providing provisions for suspension, the conventions lay out the processes for ratifying and withdrawing from the treaty and special circumstances that may exist therein. For instance, a state may chose to withdrawal from the Geneva Conventions under Article 142 of the Third Convention, but if a state chooses to do so while it is engaged in armed conflict, the withdrawal is postponed until the close of hostilities and the cease of all war-related activities.³⁰

Objections to “failed state” status

Claiming that the Geneva Conventions did not apply to the Taliban in Afghanistan by reason of a failed state status was not unanimously accepted by, nor was it the only option available to, the Bush Administration. Gary Solis presents a scenario in which both Common Article 2 and Common Article 3 conflict classification could be applied towards Afghanistan at the beginning of the War on Terror. Solis claims, “On October 17, 2001, the United States invaded Afghanistan, initiating a common Article 2 international armed conflict. The [law of armed conflict] that applied was the 1949 Geneva Conventions in their entirety, and for states that had ratified it, 1977 Additional

³⁰ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 133.

Protocol I.”³¹ This position is logically sound. The United States invaded Afghanistan. Both are High Contracting Parties. Therefore, Common Article 2 applied.

However, the U.S. invasion in 2001 was not the only armed conflict occurring within Afghanistan at that time. “At the same time, in northern Afghanistan, there was an ongoing conflict between Afghanistan’s Taliban government and...the Northern Alliance, made up of various Afghan groups. That was a Common Article 3 non-international armed conflict—an internal conflict.”³² The conflict status between the U.S. and Afghanistan was again changed with the installment of a new Afghan government. “The U.S.-backed Afghan Interim Authority assumed power on December 22, 2001 and formed a new Afghan government in January 2004. At this point the U.S. occupation ended, although armed conflict within Afghanistan did not. When the new government assumed power, continuing American involvement became an armed presence bolstering Afghanistan’s fight against the Taliban insurgents; a common Article 3 non-international conflict.”³³ Once the new Afghan government was formed, the United States was not technically engaged in an armed conflict against Afghanistan or combatants therein. Rather, the United States was militarily aiding the Afghan government. In other words, the United States was supplying troops and war-materials for an internal conflict that was not technically its own.

The above example demonstrates that, regardless of the status of a state, the ability to label conflicts as Common Article 2 or Common Article 3 still exists. In this example, the United States initiated a Common Article 2 conflict on a High Contracting

³¹ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 211.

³² *Ibid.*

³³ *Ibid.*

Party already engaged in a Common Article 3 conflict. Needless to say, the Geneva Conventions do not expressly state the standard operating procedure for this scenario. Once, the international character of the invasion was concluded, the official U.S. occupation was ended and the United States moved to supporting a Common Article 3 conflict of another nation. Confusing though it may be; Solis provides a strong example of how the conflict *could be* classified instead of bypassing the classifications due to the failed state status of Afghanistan.

Analysis of conflict classification in the War on Terror

At the onset of the War on Terror, the first order of business for the Bush Administration was to determine whether the impending war would be classified as a Common Article 2 or Common Article 3 conflict. The Administration knew that its adversaries were the transnational terrorist organization Al Qaeda and the mostly unrecognized Taliban government of Afghanistan, which made classifying the conflict difficult to say the least. Since the United States would be employing its armed forces outside of its territorial borders it seemed logical to claim that a Common Article 2 classification would be appropriate due to the international nature of the conflict. However, there is more to be considered for this classification because Common Article 2 only technically applies to, “all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties* [emphasis added], even if the state of war is not recognized by one of them.”³⁴ Therefore, if one is to

³⁴ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 75.

consider this article for its literal meaning, it could not be applied to Al Qaeda because the organization is not a state, nor a High Contracting Party to the convention.

Additionally, the United States had grounds to deem a Common Article 2 conflict classification as inappropriate towards the Taliban as well. The government of Afghanistan is a High Contracting Party to the Geneva Conventions, but the Taliban, as an organization, is not—and cannot be—a party thereto. Even though the Taliban claimed to be in control of the Government of Afghanistan, the functionality and degree of control the Taliban exerted over the state government was questionable according to officials of the United States. Therefore, in accordance with a failed state status, Common Article 2 conflict classification could not be applied—or deemed as wholly appropriate—in either of the conflicts faced by the United States towards Al Qaeda or the Taliban. Even though these organizations are parties to the conflict, they are not a party to the Conventions, rendering Common Article 2 classification inapplicable.

When considering Common Article 3, it is easy to understand why this article would not encompass the War on Terror. Common Article 3 is intended only to cover conflicts not of an international nature, and, for the United States, this war was international in scope. Although not explicitly stated in Common Article 3, an instance of armed insurrection, revolution, or civil war would fall under the purview of a Common Article 3 conflict if it occurs within the territory of a High Contracting Power. Recall that this article does not cover riots or all forms of civil unrest as the Conventions defer such matters to domestic means of governance such as police enforcement.

As such, the Bush Administration had sufficient grounds to deny the War on Terror as a Common Article 3 conflict for two reasons. First, despite any ties to the State Government of Afghanistan or claims of legitimacy therein, neither the Taliban nor Al Qaeda represented legitimate State governments nor are either organization a High Contracting Parties to the Conventions. Thus, Common Article 3 may be denied because “only states can be parties to a conflict in which the laws and customs of war apply.”³⁵ Second, even though the United States is a High Contracting Party to the conventions, it is not engaged in an armed conflict occurring within its territory. Although the U.S. was attacked on 9/11 within its territorial borders, the U.S. is not conducting military operations with combat troops for the War on Terror domestically. Therefore, a Common Article 3 conflict classification could again be denied or viewed as inapplicable.

The criteria contained within Geneva Convention III to classify armed conflicts, either as Common Article 2 or Common Article 3 conflicts, is found wanting in the War on Terror. Recalling that conflict classification is used to determine which of the four Geneva Conventions of 1949, and for those ratifying states, its Additional Protocols of 1977, are to be enacted in an armed conflict, the current criteria is mostly preclusive in the current war. This determination is due to the fact that the War on Terror is international in scope—excluding the application of Common Article 3 conflict classification. As well as the fact that Common Article 2 of Geneva Convention III only pertains to cases of declared war or any other forms of armed conflict between two or more High Contracting Parties. The ability to find both classifications inapplicable to the War on Terror has implications on determining combatant status and standards of

³⁵ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 238.

treatment towards detainees, which are dependent upon the conflict classification at the onset of war or armed conflict. As such, the conflict classifications criteria of the 1949 Geneva Conventions failed to provide clear guidelines for the United States at onset of the War on Terror.

Recommendations

Common to both Articles in classifying conflicts is the requirement of statehood by at least one of the parties thereto. However, precluding conflicts with transnational, non-governmental or similar organizations from the purview of the Conventions due to the non-state status of one party is imprudent in contemporary warfare. Lacking state status does not mean an organization cannot be as destructive as a state. For example, when one examines the war in Afghanistan in respect to how that conflict should be classified, it is relevant to consider, among other things, the duration of the war, financial costs, and casualties incurred therein. The financial and military resources necessary to sustain large-scale and protracted wars is a capability more commonly attributed to States or State-assisted rebel groups.

The ability of the Taliban to put forth ample resistance against the United States' military and coalition forces for over a decade is therefore worthy of note.

Acknowledging the duration of the war in Afghanistan and taking into account the destructive capabilities demonstrated by Taliban forces thus far, the process of classifying conflicts under the Geneva Conventions could be simplified if organizations such as these were not excluded because of a technicality regarding statehood. In addition, states are increasingly employing their militaries to meet the challenges presented by non-

governmental forces and it is imperative that the laws of war adapt to these changes. The decreasing occurrence of State versus State armed conflicts and declared wars, considered to be the norm for warfare at the Conventions' drafting following World War II, coupled with the increasing occurrence of State versus Non-Governmental Organization armed conflicts, provides support to the claim that High Contracting Parties could more easily classify these types of conflicts if the Conventions were expanded to incorporate these non-governmental organizations.

In regards to Al Qaeda, despite this organization not having a quasi-government established as the Taliban does in Afghanistan, it too certainly has the means to launch devastating attacks. In addition to the opposition presented by Al Qaeda forces overseas, it is important to recognize the transnational nature of Al Qaeda's attack on September 11, 2001. Irrefutably the worst attack, to date, carried out against the United States within its borders in terms of loss of life, the attacks are comparable only to the attacks of December 7, 1941 by the Empire of Japan—a nation-state recognized by the international community. The destructive capabilities of the Al Qaeda organization proved the organization to be a viable threat at the international level with or without statehood status.

If Common Articles 2 and 3 are to be used as tools to classify conflicts in order to determine which Conventions apply to armed conflicts, it is recommended that the Geneva Conventions be expanded to include transnational organizations. Considering that the Geneva Conventions were written following the Second World War, State versus State conflicts and internal conflicts such as civil wars were of key concern in that era. However, in contemporary warfare, the transnational capabilities of organizations like Al

Qaeda and the Taliban must be addressed. Recognizing that the Hague Conventions of 1899 and 1907 and customary international laws applied to the War on Terror, it is not recommended that these organizations be considered or classified as states within the laws of war or under the Geneva Conventions—absent international recognition as such. Instead, a sub-category of “State-like,” “State-comparable,” or “Organization of International Threat” may be added so that the process of conflict classification does not become convoluted in future armed conflicts. Expanding the Conventions to include transnational terrorist organizations should not be confused with mandating States to provide additional protections or preferential treatment to them. To include organizations like the Taliban and Al Qaeda in the Conventions does not necessitate that they be protected or rewarded for their lawlessness. Condemning the activities of the Taliban, Al Qaeda, and associated or like organizations, within a new version of the Third Geneva Convention is a feasible option. New provisions are necessary to, at a minimum, incorporate the existence of these groups in the realm of the Conventions, and acknowledge that organizations such as these pose potential threats at the international level.

The basic problems of classifying the War on Terror as a Common Article 2 or Common Article 3 conflict derived from the fact that Al Qaeda and the Taliban are not covered under either article. In an attempt to classify this conflict to determine subsequent protections, the Geneva Conventions were found inapplicable due to the incompatible nature of these provisions. Leaders of the United States were forced to turn to interpretations and implied definitions of the Conventions or alternative treaties and international laws for guidance. Both Common Article 2 and Common Article 3 would

benefit from a provision that claimed that transnational terrorist organizations, or international belligerent groups/movements, are to be considered, for example, with the same respect as members of a volunteer corps or militias and held to the same standards and requirements therein.

Additionally, the stipulation that Common Article 2 conflicts are only applicable to High Contracting Parties should be expanded to include this new sub-category. As such, denial of Geneva Conventions protections in armed conflicts of an international nature could not be justified due to the fact that one party to the conflict is not a State. The status as a “failed state” would be removed as a viable argument for the denial of the Conventions or suspension thereof, ensuring the proper protections of the treaty could be applied throughout. Including this new sub-category would benefit policymakers in their decision-making processes to know how to classify conflicts like the War on Terror. It eliminates doubt as to whether the decisions they make are in violation of the Conventions. Likewise; it allows organizations such as the International Committee of the Red Cross or United Nations, as well as other members of the International Community, to better monitor the application of the Geneva Conventions in armed conflicts.

Chapter 2

Combatant Status

Under Geneva Convention III Relative to the Treatment of Prisoners of War, the combatant status of an individual can either be a lawful combatant eligible for prisoner of war (POW) status and protections thereof if captured, or as an unlawful combatant ineligible for POW protections. An important reason for distinguishing combatants and noncombatants within the Geneva Conventions is to appropriately award prisoner of war status to those who have been captured. The importance of POW status and protections is not to put on a display of mercy, but to show a measure of good faith. It is the prospect that one country's efforts to award POW protections to their adversary's troops, and treat them in accordance with that status, will be returned with equivalent standards of treatment towards their own captured soldiers. In the War on Terror the United States faces an adversary whom it knows will not reciprocate this show of good faith. However, the values of the United States as a nation call for the country to endure these hardships. It is indeed a test of the national character of the United States. In an opinion issued by the Israeli High Court on the matter, the court writes, "A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its

understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”³⁶

Combatant status under “Geneva Convention III Relative to the Treatment of POWs”

Within Geneva Convention III, Articles 4 and 5 are the primary articles used for defining combatants in an armed conflict. The provisions of these articles apply to both Common Article 2 and Common Article 3 armed conflicts. In order for an individual to be considered a lawful combatant that is eligible prisoner of war status there are four conditions that must be met. The four criteria for lawful combatant which the U.S. recognizes and adheres to are derived from Hague Regulation IV of 1907. Building upon and borrowing from Hague IV, the Third Geneva Convention of 1949 stipulates in Article 4, paragraph 2, that in order for a soldier to be considered a lawful combatant, the individual or force in question must satisfy the following conditions: “1. That of being commanded by a person responsible for his subordinates; 2. That of having a fixed distinctive sign recognizable at a distance; 3. That of carrying arms openly; 4. That of conducting their operations in accordance with the laws and customs of war.”³⁷

Accordingly, Article 4 of Geneva Convention III also explains who may qualify for combatant status and how. Article 4(A) sub sections (1), (2), and (3) define prisoners of war as those who have fallen into the hands of the enemy who belong to: the regular armed forces of a High Contracting Party, militia members, volunteer corps, and resistance movements who meet the four requirements of a lawful combatant.

³⁶ H.C. 5100/94, *Public Committee against Torture in Israel v. The State of Israel* (September 6, 1999), at para. 39, quoted in Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 439.

³⁷ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 125.

Additionally covered are members of the regular armed forces of a power not recognized by the Detaining Power. Provisions (4), (5), and (6) of this article likewise address members and crew of aircrafts, sea vessels, or comparable vehicles, and also extends protections to those who accompany the armed forces, and levee en masse efforts.³⁸ If a combatant belongs to one of the groups enumerated in this article and also meets the four requirements of combatancy, he may be deemed a lawful combatant eligible for POW status. If an individual does not fall into one of these categories, or does not meet the four requirements of a lawful combatant, or both, then the individual is understood to be an unlawful combatant.

In order to ensure that prisoner of war status is awarded to combatants who have earned it, and denied to those who have not; Article 5 of Geneva Convention III stipulates that persons of unknown status are to be given the same treatment as a lawful prisoner of war until such time that their status can be determined. Article 5 reads:

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.³⁹

Subsequently, when doubt arises as to a combatant's status, under Article 5 the United States is obliged to employ competent tribunals to review the combatant's status to determine whether or not the individual may warrant POW status. According to Article

³⁸ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 76-77.

³⁹ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 78.

4, the protections of the convention apply to those who are eligible for prisoner of war status and those in the process of being determined eligible for POW status. Even if the individual was an unlawful combatant, if there is any doubt regarding his status, he is protected under this convention until a competent tribunal finalizes his combatant status as either lawful or unlawful.

Varying definitions of combatant in the War on Terror

In the War on Terror, the process of labeling enemy combatants has proven difficult and complex, both in the law and on the battlefield. The term ‘enemy combatant,’ commonly used in the rhetoric of warfare to define the adversary’s troops, has become entangled in a web of various terms and definitions. These terms include: enemy combatant, lawful enemy combatant, unlawful combatant, unlawful enemy combatant, unprivileged belligerent, and detainee. The terms lawful and unlawful combatant, according to the Geneva Conventions, are described above. The United States holds that a fighter is considered a lawful combatant if the individual in question is a member of one of the forces enumerated in Article 4 and likewise satisfies all four requirements of a lawful combatant. If both of these conditions are met, then the United States will label an individual as a lawful combatant eligible for status as a prisoner of war, and all of the rights and protections thereof. If an individual engaged in hostilities against the United States or its allies does not meet *all four* of these requirements, he or she is accordingly labeled an unlawful combatant. Although labeling a combatant as either lawful or unlawful seems relatively straightforward, other definitions have complicated this process.

With regards to unlawful combatants, one may be tempted to classify a combatant as unlawful strictly because he or she does not meet the basic four requirements, but there is more to be considered. A legal advisor of the International Committee of the Red Cross has defined unlawful combatant as, “all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.’ (One might add to that definition that the persons taking a direct part must be civilians.)”⁴⁰ It is important to note that this definition by the ICRC explicitly points out that unlawful combatants are those engaged in activities “without being entitled to do so”. Traditionally, those entitled to be engaged in hostile activities were members of a regular armed force of a State. The Geneva Conventions, through Article 4, also provides for instances when individuals who are not a part of a regular armed force; such as those belonging to militias, volunteer corps, or levee en masse efforts, can still be considered lawful combatants—provided they abide by the four requirements of combatancy.

According to this legal opinion, a fighter does not technically have to be present on the battlefield engaging the enemy to be considered an unlawful combatant. One may be coordinating enemy combatant movement from a safe distance, providing supplies and ammunition, or driving a vehicle used in an attack, for example. There are numerous ways for an individual to participate in hostilities without using a weapon; the important distinction to take away from this ICRC opinion is the fact that these individuals are not entitled to be committing these acts. Therefore, it is important to remember that the term

⁴⁰ Knut Dormann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants,’” 849 *Int’l Rev. of Red Cross* (2003), 45, quoted in Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 207.

“unlawful combatants” does not solely refer to fighters on the battlefield who are not satisfying all four requirements.

Lee Casey claims that the rules governing the status of unlawful combatants have gone relatively unchanged over the years. These individuals “are not entitled to the rights and benefits associated with prisoners of war.” In referring to the 1942 Supreme Court case *Ex Parte Quirin*, Casey notes that unlawful combatants “can be processed through a military justice system...and punished (including the death penalty) for nothing more than the ‘acts which rendered their belligerency unlawful.’”⁴¹ In other words, if a combatant is to be labeled unlawful and does not enjoy the privilege of belligerency, then he may be held accountable for his actions under domestic and international laws. As such, an unlawful combatant not entitled to belligerent conduct in war can be held and prosecuted for their crimes.

Moving to the idea of a ‘belligerent’, this term proves to be repetitious in most instances within the laws of war. Belligerent, according to the definition provided by Merriam-Webster, is one who is, “inclined to or exhibiting assertiveness, hostility, or combativeness.” Therefore, the terms belligerent and combatant, whether lawful or unlawful, are often interchangeable in the context of this field. In a report by the Special Rapporteur of the UN Human Rights Council, Martin Scheinin, the Special Rapporteur references the treatise *The Legal Status of Prisoners of War* by Allan Rosas regarding this subject. “The adjective ‘unlawful’ was used together with the noun ‘combatant’ by Allan Rosas...to describe persons who commit hostile acts in international conflicts without

⁴¹ Lee A. Casey, David B Rivkin, Jr., Darin R. Bartman. “Unlawful Belligerency and its Implications Under International Law,” Federalist Society for Law & Public Policy Studies (U.S.), 2003. <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=440044> (accessed on October 14, 2011), 1.

authorization to do so. ‘Unprivileged belligerent’ would be a synonymous expression.”⁴² The reader should be aware that ‘belligerent’ and ‘combatant’ are often used to identify the same person. Gary Solis makes a keen observation regarding belligerents and combatants. He states, “Being an unlawful combatant/unprivileged belligerent is not a war crime in itself. Rather, the price of being an unlawful combatant is that he forfeits the immunity of a lawful combatant—the combatant’s privilege, and potential POW status—and he may be charged for the [law of armed conflict] violations he committed that made him an unlawful combatant.”⁴³

The final three terms; detainee, enemy combatant, and unlawful enemy combatant, likewise have varying definitions. These three terms are the product of the modern age and are often employed in the War on Terror. Interestingly, these terms “do not appear in 1907 Hague Regulation IV, in any Geneva Convention, or in the 1977 Additional Protocols. There is no internationally agreed upon definition of any of the three terms...Each suggests a variation on unlawful combatant status and, upon capture, each may determine the treatment of an individual so labeled.”⁴⁴ These treaties did not incorporate these terms due to the fact that an armed conflict similar in nature to the War on Terror was likely not conceivable to the drafters. Considering that there is not

⁴² Allan Rosas, *The Legal Status of Prisoners of War* (1976, reprinted 2005), p. 305 et seq., quoted in UN General Assembly, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Human Rights Council Report of the Special Rapporteur, Sixth Session, A/HRC/6/17/Add3. Prepared by Martin Scheinin pursuant to his mission to the United States of America, November 22, 2007: 9, <https://www.hsdl.org.libproxy.txstate.edu/?abstract&did=482716> (accessed October 14, 2011).

⁴³ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 211.

⁴⁴ *Ibid.*, 224.

internationally agreed upon definitions for these terms, they do at times overlap one another and are occasionally interchangeable.

U.S. positions on combatant status in the War on Terror

The February 2002 White House memo from President Bush was the first of many documents that attempted to label the combatant status of Taliban and Al Qaeda fighters. President Bush determined, as this memo portrays, that none of the provisions of the Geneva Conventions would be applied towards Al Qaeda. Additionally, President Bush claimed the Geneva Conventions would apply to the Taliban, however, members of the Taliban organization would not qualify for prisoner of war status. The President likewise acknowledged his ability to suspend the Geneva Conventions despite there being no provisions allowing this in the Conventions themselves. Regarding combatant status, the February 2002 Presidential memo reads:

C.) I also accept the legal conclusion of the Department of Justice and determine that Common Article 3 of Geneva does not apply to either Al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.' D.) Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with Al Qaeda, Al Qaeda detainees also do not qualify as prisoners of war...3) Of course, our values as a Nation...call for us to treat detainees humanely, including those who are not legally entitled to such treatment.⁴⁵

⁴⁵ President, Memorandum, "Humane Treatment of Al Qaeda and Taliban detainees," President George W. Bush, *The White House*, NO. 499. (February 7, 2002), George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (accessed on October 4, 2011) 1-2.

Recall that clause B of this memo asserted that the provisions of Geneva would apply to the Taliban—as a Common Article 2 international armed conflict—meaning that the Taliban would be held to the four criteria of a lawful combatant. However, President Bush determined that members of the Taliban were to be considered unlawful combatants and ineligible for POW rights due to the unlawful policies and practices of the Taliban organization. Al Qaeda detainees are to be considered unlawful combatants because Al Qaeda is not a state and cannot be considered under the conventions purview. As such, this determination allows the U.S. to detain these individuals in the course of the conflict and allows for detention until the end of hostilities. In his November 2001 Military Order, Bush stated, “for the effective conduct of military operations...it is necessary for individuals subject to this order...to be detained, and when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”⁴⁶ The definitions of ‘individuals subject to this order’ are narrowed at first to current or former members of Al Qaeda but also expands to incorporate anyone who has taken part of, aided, helped prepare, or supported those who have carried out malicious acts against the United States.

Detaining lawful and unlawful combatants under Geneva III

According to Geneva Convention III, Article 4 explains how individuals are to be classified within an armed conflict. Article 5 provides means to ensure that these classifications are provided. Regardless of the status conferred upon an individual, a State that is party to a conflict has historically, and continues to, have the right to detain individuals under the laws of war. The detention of enemy combatants is done to prevent

⁴⁶ President, Military Order, “Military Order of November 13, 2001- Detention, treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” *Federal Register* 66, no. 222 (November 16, 2001) <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=625> (accessed October 18, 2011), 57833.

captured individuals from rejoining their force and resuming an active role in hostilities. The intent of detention is not to punish individuals for being combatants, lawful or otherwise. John Yoo asserts, “No trial is necessary because the detainees are not being held as a punishment for a crime.”⁴⁷ This should not be confused with a State’s ability to press charges against an individual for committing war crimes or breaches of the Conventions. If a state chooses to do so, requirements and standards for legal proceedings are enumerated in the conventions. The assertion by John Yoo states that trials are not necessary for those who are not being charged with a crime but are instead being detained to prevent the individual from rejoining the conflict based on the fact that they are an enemy combatant. “The rules of war have always recognized enemy combatants as those who fight on behalf of the enemy, and warring nations have always been permitted to imprison them.”⁴⁸ The U.S. Supreme Court, John Yoo asserts, has likewise recognized the ability for states to detain enemy combatants. In a 2004 opinion following *Hamdi v. Rumsfeld*, the court explained, “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”⁴⁹

According to Article 118 of Geneva Convention III, “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”⁵⁰ If a State party to a conflict has pressed charges against an individual, their detention may be prolonged until the end of the legal proceedings or until their punishment has been carried out. Article 119 asserts, “Prisoners of war against whom criminal proceedings for

⁴⁷ John Yoo, *War by Other Means* (New York: Atlantic Monthly Press, 2006),129.

⁴⁸ *Ibid.*

⁴⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) quoted in John Yoo, *War by Other Means* (New York: Atlantic Monthly Press, 2006),129.

⁵⁰ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 123.

an indictable offense are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offense.”⁵¹ The repatriation process after hostilities have ended is, for the most part, straightforward under Geneva Convention III. What constitutes the end of hostilities in this particular war is less clear. A High Contracting Party engaged in armed conflict is not obligated to release prisoners or detainees until the official end of hostilities. However, since the United States is combating terrorism, the cessation of hostilities will be determined by the State’s officials, not by traditional means of surrender or treaties.

As of Spring 2012, U.S. combat troops have been withdrawn from Iraq and similar orders have been given to combat troops in Afghanistan which are to be executed through the year 2014. However, this will not constitute an end to hostilities in the region. The U.S. will undoubtedly continue to keep troops stationed in the Middle East and Counterterrorism and Intelligence gathering for national security purposes will surely continue. If the U.S. claims it is still at risk of a terrorist attack, then hostilities have not concluded regardless of the diminishing presence of U.S. combat troops overseas. As such, if hostilities are not officially over; the U.S. technically has the right to continue to detain combatants under international law and the current conventions.

⁵¹ Ibid., 125.

Al Qaeda and the Taliban as unlawful combatants

The abovementioned February 2002 memo from President Bush declared that Al Qaeda and Taliban were unlawful combatants in the War on Terror. This determination, however, was not made impulsively. Many legal documents and opinions were provided to help the president come to this conclusion. Some of the documents supported these designations while others were wary of its implications. It is important to note that all of the government documents that surfaced regarding the status of the Taliban and Al Qaeda fighters were not necessarily issued by the president or his office. Memos and opinions were circulated from many positions within the government such as Secretaries of office, the Attorney General, the Joint Chiefs of Staff, and others. Therefore, when the “Bush Administration” is referenced, it is not always referring to President Bush himself. Criticisms or praises of the administration contained herein do not reflect opinions, approval, or disapproval of George W. Bush as a president.

The Taliban as unlawful combatants

At the onset of the War on Terror, President Bush asserted that the Geneva Conventions would apply to the conflict in Afghanistan but that Taliban members were unlawful combatants ineligible for status and rights of a prisoner of war under the Third Convention. The reason that the Bush Administration denied POW status to the Taliban was their inability to satisfy all four requirements of a lawful combatant. This study acknowledges that ample amounts of academic research have been done which show that the Taliban continuously failed to meet the four criteria of combatancy and regularly disregarded civilian immunity. Researchers in this field can find numerous sources

relating to how the Taliban violated each individual requirement for lawful combatancy. However, for the purposes of this analysis relative to the War on Terror, the documents and memos circulated by U.S. government officials are examined.

A 2002 legal opinion of the Office of Legal Counsel, also authored by Jay Bybee, examined the status of Taliban forces under Article 4 of Geneva Convention III. This memo examined whether the Taliban could be considered lawful combatants if they were classified as a militia, or as the regular armed forces of Afghanistan. In both scenarios the answer is no. This OLC opinion acknowledged that the Taliban have described themselves as a militia, therefore the United States is obliged to examine their qualifications as a militia under the Geneva Conventions. Article 4 stipulates that in order for militia members to be eligible for POW status, they must meet all four requirements for lawful combatancy—that of having a responsible command structure, wearing a fixed distinctive emblem recognizable at a distance, carrying arms openly, and conducting operations in accordance with the laws and customs of war. The Taliban fails to satisfy all of these requirements.

As a militia, Bybee contended that the Taliban satisfies only one of the four requirements of lawful combatancy. In his memo to the Counsel to the President, Bybee addresses all four requirements and acknowledges that the Taliban only satisfies the requirement to carry arms openly:

First, there is no organized command structure whereby members of the militia report to a military commander who takes responsibility for his subordinates...Second, there is no indication that the Taliban militia wore any distinctive uniform or other insignia that served as a 'fixed distinctive sign recognizable at a distance'...Third, the Taliban militia carried arms openly.... As GPW requires military groups to do, but this did not serve to distinguish the

Taliban from the rest of the population... Finally, there is no indication that the Taliban militia understood, considered themselves bound by, or indeed were even aware of, the Geneva conventions or any other body of law.⁵²

Even though the Taliban satisfied the requirement to openly carry arms, Jay Bybee asserted that this fact was inconsequential because it did not serve to distinguish members of the Taliban from the rest of the civilian population. “The Taliban militia carried arms openly. This fact, however, is of little significance because many people in Afghanistan carry arms openly.”⁵³ Recalling that the intent of these four requirements is to differentiate between combatants and civilians, the fact that the Taliban carried arms openly is irrelevant if it failed to distinguish members of the Taliban from the civilian population. Without exception, all four requirements must be met. Therefore, under the criteria set forth for militias to be eligible for prisoner of war status, the Taliban fails to satisfy the necessary requirements.

The same opinion of the Office of Legal Counsel also took into consideration whether the Taliban could qualify for prisoner of war status under Geneva III if the organization was acknowledged as the armed forces of Afghanistan—the alternative classification to the status as a militia. The author of the opinion likewise rejected the Taliban’s eligibility for POW status under this denotation. Article 4 of Geneva III grants prisoner of war status to the armed forces of a State, and to armed forces of powers not recognized by one or more of the parties to the conflict. The Taliban would not qualify as

⁵² U.S. Department of Justice, *Memorandum Opinion for the Counsel to the President: Re: Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949*, by Assistant Attorney General Jay S. Bybee, February 7, 2002. Office of Legal Counsel (Washington D.C.): 2-3, United States Justice Department, <http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf> (accessed October 4, 2011).

⁵³ *Ibid.*, 3.

the regular armed force of a nation not recognized by another party to the conflict because Afghanistan is recognized as a state by the international community. If the Taliban were to be considered as the armed force of Afghanistan, this office still rejected the idea based on the notion that they do not fulfill the four requirements. Therefore, the author concluded, the Taliban is precluded from lawful combatant and prisoner of war status even if the Taliban were considered to be the official armed forces of Afghanistan.

It is worth noting that Geneva Convention III does not explicitly state that the armed forces of a nation abide by the four requirements for lawful combatancy. Bybee admits that the conventions do not place the four requirements of lawful combatancy on members of armed forces, but he finds this unsatisfactory for the War on Terror.⁵⁴ Mr. Bybee was of the opinion that membership in the armed forces of a nation does not circumvent a combatant's requirement to fulfill the four criteria laid out in the conventions. Simply being a member of a regular armed force does not automatically make an individual a lawful combatant. As such, Jay Bybee believed that the armed forces of a State must be held to the same standards as militias—standards that the Taliban failed to meet. As a result, the former Assistant Attorney General asserted that if the president has the ability to deny POW status to the Taliban as members of a militia, he likewise has the ability to deny them POW status as members of the armed forces.⁵⁵ “We believe that the President...has ample grounds upon which to find that members of the Taliban have failed to meet three of these four criteria, regardless of whether they are

⁵⁴ Ibid., 4.

⁵⁵ Ibid.

characterized as members of a ‘militia’ or of an ‘armed force.’ The President, therefore, may determine that the Taliban, as a group, are not entitled to POW status under GPW.”⁵⁶

Al Qaeda as unlawful combatants

The determination by the Bush Administration that Al Qaeda members could not be considered as lawful combatants eligible for prisoner of war status under Geneva Convention III is sound. This determination, however, does not mean that its members are not covered by any provision of the four Geneva Conventions or other international laws governing warfare. It only means that Al Qaeda members cannot benefit from Prisoner of war status if captured. Disregarding for a moment the fact that Al Qaeda is a stateless organization, this is not its only disqualifying factor. “Its fighters do not operate under a ‘responsible’ command structure, do not wear uniforms, do not carry arms openly, and do not conduct their operations in accordance with the laws and customs of war.”⁵⁷ Combatants must meet all four of these requirements to be considered eligible for prisoner of war status. Al Qaeda, same as the Taliban, failed to do so.

The denial of combatant status to Al Qaeda members is justified by multiple officials in the Bush Administration. Analysis offered by numerous government officials acknowledged that Al Qaeda is precluded from the Conventions due to their non-state status. One example is the legal opinion issued by John Yoo and Robert Delahunty, Deputy Assistant Attorney General and Special Counsel to the Justice Department respectively, on January 9, 2002 regarding the application of treaties and laws to Al

⁵⁶ Ibid.

⁵⁷ Lee A. Casey, David B Rivkin, Jr., Darin R. Bartman. “Unlawful Belligerency and its Implications Under International Law,” Federalist Society for Law & Public Policy Studies (U.S.), 2003. <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=440044> (accessed on October 14, 2011), 5.

Qaeda and Taliban detainees. Yoo and Delahunty claim “that these treaties do not protect members of the Al Qaeda organizations, which as a non-State actor cannot be party to the international agreements governing war.”⁵⁸ The authors assert that Al Qaeda, not being a state, is not due the protections of the conventions. As such, the Geneva Conventions cannot, and should not, regulate the detention of Al Qaeda members.⁵⁹

In a memo from William H. Taft IV, Legal Adviser to the State Department, Mr. Taft pointed out that the above conclusion was supported by numerous lawyers from varying offices. Due to the non-state status of Al Qaeda, Taft asserted that lawyers from the Defense Department, Justice Department, White House Counsel, and Office of the Vice President all agree “as a matter of law that our conflict with Al Qaeda, regardless of where it is carried out, is not covered by GPW.”⁶⁰

Afghanistan as a failed state and combatant status

The discussion of Afghanistan being a failed state resurfaces in the discussion of combatant statuses. The same implications and arguments that arose from Afghanistan’s status as a failed state in the process of classifying the War on Terror as a Common Article 2 or Common Article 3 conflict likewise affect the status of Taliban and Al Qaeda members as lawful or unlawful combatants. If Afghanistan were to be deemed a failed

⁵⁸ U.S. Department of Justice, *Memorandum for William J. Haynes II General Counsel, Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, by John C. Yoo-Deputy Assistant Attorney General- and Robert J. Delahunty-Special Counsel. Office of Legal Counsel, January 9, 2002. (Washington D.C., 2002):1, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> (accessed February 23, 2012).

⁵⁹ *Ibid.*, 2.

⁶⁰ U.S. Department of State, *Memorandum for the Counsel to the President: Subject: Comments on Your Paper on the Geneva Conventions*, February 2, 2002. By William H. Taft IV, Office of the Legal Adviser. (Washington, D.C.): 3, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.02%20DOS%20Geneva.pdf> (accessed February 23, 2012).

state, then Taliban fighters could technically be considered on the same grounds as Al Qaeda which is classified as a non-state actor and precluded from the protections of the Geneva Conventions. In a memorandum written by John Yoo and Robert Delahunty, the authors suggest that the Taliban should not be afforded prisoner of war rights not simply because of their inability to satisfy all four requirements needed for POW status, but because Afghanistan is not a functioning state. The plausibility of suspending international obligations between the United States and Afghanistan is again presented. While Yoo and Delahunty are not the only officials to suggest that the president has the authority to suspend the conventions towards Afghanistan, they introduce a unique argument where the Taliban may be considered guilty by association in their dealings with Al Qaeda. “It appears...that the Taliban militia may have been so intertwined with Al Qaeda as to be functionally indistinguishable from it. [Therefore], its members would be on the same legal footing as Al Qaeda.”⁶¹

As previously mentioned, it had been known for several years leading up to the War on Terror that the Taliban maintained a relationship with Al Qaeda. Numerous United Nations Security Council Resolutions called upon the Taliban Government to cut ties with the terrorist organization but to no avail. For instance, as early as December of 1998, UN Security Resolution 1214 “demanded that the Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan

⁶¹ U.S. Department of Justice, *Memorandum for William J. Haynes II General Counsel, Department of Defense: Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, by John C. Yoo-Deputy Assistant Attorney General- and Robert J. Delahunty-Special Counsel. Office of Legal Counsel. (Washington D.C., 2002). George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> (accessed February 23, 2012), 2.

factions cooperate with efforts to bring indicted terrorists to justice...⁶² Subsequent Security Resolution 1267 acknowledged the relations between the two organizations in December of 1999 by condemning “the fact that the Taliban continues to provide safe haven to Usama [*sic*] Bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations...⁶³ This position was reaffirmed one year later by the UN Security Council in UNSECRES 1333. Finally, UNSECRES 1390, in January of 2002, further condemned the Taliban’s relationship with Al Qaeda by rebuking “the Taliban for allowing Afghanistan to be used as a base for terrorists training and activities, including the export of terrorism by the Al-Qaida [*sic*] network and other terrorist groups as well as for using foreign mercenaries in hostile actions in the territory of Afghanistan.”⁶⁴

Even though the Taliban had dealings with Al Qaeda, and because Al Qaeda had been determined not to benefit from the Geneva Conventions, this relationship does not serve as a sufficient reason to preclude members of the Taliban from POW status. Nor does it serve as a legitimate reason to suspend Geneva Convention obligations towards Afghanistan and the Taliban as suggested by the Yoo/Delahunty memo. The Taliban ignoring or refusing to comply with UN Security Council Resolutions does not show

⁶² UN Security Council Resolution 1214 (1998). Adopted by the Security Council at its 3952nd meeting, on 8 December 1998: 4, United Nations, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/387/81/PDF/N9838781.pdf?OpenElement> (accessed on March 28, 2012).

⁶³ UN Security Council Resolution 1267 (1999). Adopted by the Security Council at its 4051st meeting on 15 October 1999. United Nations, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement> (accessed March 28, 2012), 1.

⁶⁴ UN Security Council Resolution 1390 (2002). Adopted by the Security Council at its 4452nd meeting, on 16 January 2002. United Nations, http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1390%282002%29 (accessed on March 28, 2012), 1.

noncompliance to the laws of war or the GPW; it only shows their unwillingness to comply with the United Nations. The delinquent relationship with Al Qaeda maintained by the Taliban is regrettable. However, “the Taliban Military must do something collectively unlawful in the course of the armed conflict in order for the U.S. to claim that it has lost its combatant privileges as a fighting force. It is possible for the Taliban to protect, train, supply, and agree with Al Qaeda’s principles without violating the laws of war in its own military operations against U.S. forces.”⁶⁵ As such, the close relationship between the two terrorist organizations, though undesirable, does not serve as a sufficient justification to preclude individuals from prisoner of war status. Additionally, because the Third Geneva Convention obviously does not mandate compliance to UN resolutions, the non-adherence to the above mentioned Security Council Resolutions does not serve as legal grounds for the United States to suspend Geneva Convention treaty obligations towards Afghanistan.

Legal incentive to deny prisoner of war status

Additional arguments amongst United States officials supporting the denial of the Geneva Conventions and POW status in the War on Terror claimed that it provided strong legal defenses for the U.S. government, its officials, and personnel. If the United States were not bound by the provisions of the Geneva Conventions, then it stands to reason that it cannot be held liable for violations thereof. Former Attorney General John Ashcroft issued a commentary paper to the President explaining the possible implications and benefits of determining that Al Qaeda and the Taliban would not be awarded POW

⁶⁵ Scott Reid, Major, U.S. Army, *Terrorists as Enemy Combatants: An Analysis of How the United States Applies the Law of Armed Conflict in the Global War on Terrorism*, in the Homeland Security Digital Library: 10, <https://www-hsdl-org.libproxy.txstate.edu/?view&did=447349> (accessed October 13, 2011).

status. Mr. Ashcroft claimed that if the President were to determine that Afghanistan was a failed state, strong legal defenses in favor of the United States may follow. “If a determination is made that Afghanistan was a failed state...and not a party to the treaty, various risk of liability, litigation, and criminal prosecution are minimized. This is a result of the Supreme Court’s opinion in *Clark v. Allen* providing that when a president determines that a treaty does not apply, his determination is duly discretionary and will not be reviewed by the federal courts.”⁶⁶

If the president determined that Afghanistan was not a failed state and would continue to be considered a party to the conventions and the Taliban still did not qualify for POW status under the conventions; then “*Clark v. Allen* does not accord American Officials the same protection from legal consequences.”⁶⁷ In other words, if President Bush were to determine that the Geneva Conventions applied to the conflict in Afghanistan then no presidential interpretation of the Conventions has actually taken place, the Conventions simply remained in effect. In this scenario, because a presidential determination regarding the Conventions has not occurred, charges brought against the United States for treaty violations are within the jurisdiction of the federal courts and no longer protected by *Clark v. Allen*. “If a court chose to review for itself the facts underlying a Presidential interpretation that detainees were unlawful combatants, it could

⁶⁶ U.S. Department of Justice, *Commentary on the National Security Council’s Discussion Concerning the Status of Taliban Detainees February 1, 2002*, by Attorney General John Ashcroft, Office of the Attorney General (Washington D.C.): 1, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/020201.pdf> (accessed February 23, 2012).

⁶⁷ Ibid.

involve substantial criminal liability for involved U.S. officials,”⁶⁸ asserted Attorney General Ashcroft.

It is important to remember that Ashcroft is not only referring to legal consequences being brought against those who commit violations of the Conventions on the battlefield; legal repercussion may also be incurred by officials within the government who condoned their behavior. War crimes are not only a violation of the Conventions which can be punished in international courts. The War Crimes Act (WCA), discussed below, makes violations of the Conventions illegal under the domestic laws of the United States as well. Therefore, officials may be liable on more than one front, under both international and domestic laws. Bearing this in mind it was the opinion of the then Attorney General that determining the Geneva Conventions *do* apply may incur substantial legal liability.

Alberto Gonzales, Counsel to the President, also believed that benefits could be gained legally from a determination that members of Al Qaeda and the Taliban were unlawful combatants. In a memo to President Bush, Mr. Gonzales provided arguments for this determination on the grounds that it would substantially reduce the possibility of domestic prosecution for violations of the War Crimes Act. The WCA prohibits the commission of war crimes by or against U.S. officials, including grave breaches of the Conventions and violations of Common Article 3. Gonzales reiterated that some of the provisions of the WCA remain in effect even if the status of prisoners of war is not recognized.⁶⁹ “A determination that the GPW is not applicable to the Taliban would mean

⁶⁸ Ibid., 2.

⁶⁹ Counselor to the President, *Decision Regarding Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, by Alberto Gonzales, 30th White House Counsel,

that Section 2441* would not apply to actions taken with respect to the Taliban. Adhering to your determination that GPW does not apply would guard effectively against misconstruction or misapplication of Section 2441 for several reasons.”⁷⁰ The safeguards surrounding Section 2441, mentioned here, refers to the ambiguity of definitions contained within Section 2441 of the WCA. Gonzales provided as an example the violation “outrages upon personal dignity” noting that a specified and detailed definition of what this term entails has not been agreed upon. The ambiguity of definitions like this essentially provides the United States with strong legal grounds to argue against allegations of outrages upon personal dignity, or similar charges, because one cannot definitively prove whether certain acts are in fact outrages on personal dignity due to the term’s unspecified criteria under the law. The positive consequences provided by Gonzales for not applying the GPW, are positive only for United States personnel who may find themselves in court, not combatants engaging in conflict or those who find themselves detained by an enemy power.

U.S. obligations under Geneva III- Article 5

Article 5 of Geneva Convention III establishes procedures by which a combatant’s status may be determined if question thereof is to arise. Tribunals are to be established so that anytime doubt occurs; individuals will have the opportunity to present information as to why or why not they are a lawful combatant by proving which faction under Article 4 he or she belong to. Treatment under the status of a prisoner of war is obviously preferential to the alternative; therefore, Article 5 tribunals are an essential tool

January 25, 2002: 2. George Washington University,
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/> (accessed October 4, 2011).

* Section 2441 of the War Crimes Act is the U.S. codification of Common Article 3 Violations

⁷⁰ Ibid.

for combatants attempting to receive the most favorable treatment possible, whether they belong to Al Qaeda, the Taliban, or U.S. and Coalition Forces.

Under this article, the United States is obliged to use, when necessary, competent tribunals to review a combatant's status to determine whether or not an individual may warrant POW status. Former Assistant Attorney General Jay Bybee provides a counterclaim to this requirement by stating, "The presumption and tribunal requirement are triggered, however, only if there is 'any doubt' as to a prisoner's Article 4 status."⁷¹ Bybee implies that the President may interpret Geneva Convention III to find that no members of the Taliban meet the status requirements of a POW under Article 4. Thereby, "A presidential determination of this nature would eliminate any legal 'doubt' as to the prisoner's status, as a matter of domestic law, and would therefore obviate the need for Article 5 tribunals... We therefore conclude that there is no need to establish tribunals to determine POW status under Article 5."⁷²

Counsel to the President, Alberto Gonzales, asserts that a positive outcome of this determination is that it preserves flexibility for the United States. "A determination that GPW does not apply to Al Qaeda and the Taliban eliminates any argument regarding the need for case-by-case determinations of POW status. It also holds open options for the

⁷¹ U.S. Department of Justice, *Memorandum Opinion for the Counsel to the President: Re: Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949*, by Assistant Attorney General Jay S. Bybee, February 7, 2002. Office of Legal Counsel (Washington D.C.): 8, United States Justice Department, <http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf> (accessed October 4, 2011).

⁷² *Ibid.*

future conflicts in which it may be difficult to determine whether an enemy force as a whole meets the standard for POW status.”⁷³

Alberto Gonzales provides a sound argument. If the United States knew that neither the Taliban nor Al Qaeda met the four conditions for POW status rendering individuals of the group unlawful combatants, there would in fact be no need for the tribunals. It is important to recall that Article 5 exists to determine if an individual belongs to one of the categories enumerated in Article 4. Even still, belonging to one of the groups designated in Article 4 does not ensure individuals thereof will receive prisoner of war rights or protections because the party to the conflict is still obligated to abide by the four requirements of lawful combatancy. Alternatively, if a group or organization as a whole continually violates international norms and customs, especially the laws of war regarding lawful combatancy, the entire group—and its members—may be deemed ineligible for prisoner of war status. If “atrocities are carried on by individual elements in an armed force, they are considered to be war crimes and punished on an individual basis. However, when it is the policy of the group in question to undertake such activities, they may be considered unlawful belligerents.”⁷⁴ Therefore, if the Taliban and Al Qaeda adopt a “policy of violating the laws of war, its members can be considered unlawful combatants as a group, and no further or individual assessment of their status is

⁷³ Counselor to the President, *Decision Regarding Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, by Alberto Gonzales, 30th White House Counsel, January 25, 2002: 2. George Washington University.

<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/> (accessed October 4, 2011).

⁷⁴ Lee A. Casey, David B Rivkin, Jr., Darin R. Bartman. “Unlawful Belligerency and its Implications Under International Law,” *Federalist Society for Law & Public Policy Studies* (U.S.), 2003: 8, <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=440044> (accessed on October 14, 2011).

necessary.”⁷⁵ Although this scenario is less beneficial to detainees than the preferred treatment of prisoner of war status; under the Third Geneva Convention, the United States was, and continues to be, within their right to deny POW status to Al Qaeda and Taliban detainees.

Dissent regarding combatant status determination- Objections of Secretary Powell

The decision to classify all members of Al Qaeda and the Taliban as unlawful enemy combatants was not met with unanimous consent within the Bush Administration. Secretary of State Colin Powell was particularly concerned with the ramifications that would ensue from determining that Geneva Convention III did not apply in the War on Terror, whether it was due to the failed state status of Afghanistan or other reasons. In a memorandum to Alberto Gonzales, Secretary Powell explained that the consequences of denying GPW protections in the War on Terror far outweighed the benefits. His first concern was the possible ramifications that this determination would have on U.S. foreign policy. The Secretary of State forewarned that determining the GPW does not apply could “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.”⁷⁶ The Secretary further supported this claim by adding, “The United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged...while no-one anticipated the precise situation we

⁷⁵ Maj. Holly Rawson, USAF, *Mercenaries, Terrorists and Corporations (Oh My!): The Yellow Brick Road to Dealing with Non-State Actors in Combat*, in the Homeland Security Digital Library: 12. <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=458532> (accessed October 13, 2011).

⁷⁶ U.S. Department of State, *Memorandum to Counsel to the President & Assistant to the President for National Security Affairs: Subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan.*, January 2002. Prepared by Secretary of State Colin Powell. (Washington D.C.): 2. George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf> (accessed October 4, 2011).

face, the GPW was intended to cover all types of armed conflict and did not by its terms limit its application.”⁷⁷

A small caveat must be added here. There is no rhetoric in the Geneva Conventions that specifically states that the GPW was intended to cover all forms of armed conflict. This position was in fact rejected by some members of the Office of Legal Counsel who argued that if the drafters of the Conventions intended for Geneva Convention III, or any other of the other three Conventions, to cover all forms of armed conflict—regardless of whether the conflict was provided for in the Conventions— it would have been explicitly stated. In claiming that the GPW is intended to cover all forms of armed conflicts, Secretary Powell may be referring to the argument present in this field which maintains that the protections of Common Article 3, while not originally intended to do so, have evolved to the level of customary international law. This means that, regardless of state accession to the Geneva Conventions, the protections of Common Article 3 are so basic to humanitarian norms that States are obliged to apply them. Whatever the intent of his statement, the reader should be aware that there is no clause in Geneva Convention III Relative to the Treatment of Prisoners of War that mandates that this treaty be expanded to cover all forms of armed conflict, especially in regards to armed conflicts that are international in nature.

In regards to Afghanistan specifically, Secretary Powell cautioned that “any determination that Afghanistan is a failed state would be contrary to the official U.S. government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the

⁷⁷ Ibid., 5. Under “Comments on the Memorandum of January 25, 2002.”

Geneva Conventions.”⁷⁸ As such, the Secretary warned that a determination to suspend the GPW may incur negative consequences towards the international relations between the United States and others in the international community. Secretary Powell believed that refusing the application of the Geneva Convention III “has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain. Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement.”⁷⁹ In other words, Secretary Powell is concerned that the suspension of the Geneva Conventions in the War on Terror had potential to cause other nations to refuse to cooperate with the United States in its war efforts overseas.

Similar to other legal opinions, the January 2002 memo from Secretary Powell also offered considerations for legal defenses pursuant to the determination that POW status may be denied to the Taliban and Al Qaeda. However; unlike other officials, the Secretary of State is concerned that the United States will be at a legal disadvantage if the GPW is *not* applied. In making his case that the application of the Conventions to this conflict is more beneficial than the alternative, Secretary Powell claimed that determining otherwise would produce negative effects. Secretary Powell elaborates by claiming that this decision:

Undermines the President’s Military Order by removing an important legal basis for trying the detainees before military commissions. We will be challenged in international fora (UN Commission on Human Rights; World Court; etc.). The Geneva Conventions [provide] a more flexible and suitable legal framework than

⁷⁸ Ibid.

⁷⁹ U.S. Department of State, *Memorandum to Counsel to the President & Assistant to the President for National Security Affairs*: By Secretary of State Colin Powell. *Supra*, 2.

other laws that would arguably apply (customary international human rights, human rights conventions). The GPW permits long-term detention without criminal charges. Even after the President determines hostilities have ended, detention continues if criminal investigations or proceedings are in process. The GPW also provides clear authority for transfer of detainees to third countries. Determining [the] GPW does not apply deprives us of a winning argument to oppose habeas corpus actions in U.S. courts.⁸⁰

Secretary Powell is taking a different stance for U.S. legal protections than had other officials who had issued legal opinions on the matter. Other U.S. officials argued that denying the GPW would provide the government with strong legal defenses on the basis that the treaty does not apply. Secretary Powell was of the opinion that the United States can use the provisions of the GPW to better protect the U.S. in the event that legal charges are brought against it, rather than opt out of the treaty all together.

Thus, Secretary Powell proclaimed that applying the Geneva Conventions to Al Qaeda and the Taliban had potential to yield more positive outcomes than negative. Applying the Geneva Conventions would provide a strong legal foundation for the United States in both international and domestic law. Also, “it presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support.”⁸¹ Likewise, “It maintains POW status for U.S. forces, reinforces the importance of the Geneva Conventions, and generally supports the U.S. objective of ensuring its forces are accorded protection under the convention.”⁸² Memorandums such as this one from Secretary Powell show the wide array of legal and policy implications regarding the

⁸⁰ Ibid., 2-3.

⁸¹ U.S. Department of State, *Memorandum to Counsel to the President & Assistant to the President for National Security Affairs*: By Secretary of State Colin Powell. *Supra*, 3.

⁸² Ibid., 4.

Geneva Conventions that had to be addressed at the onset of armed conflict. Likewise, this memo shows the differing opinions of high level officials within the Bush Administration at the beginning of the War on Terror.

Dissent regarding combatant status determination- Objections of William H. Taft, U.S. Department of State

In a memorandum to Alberto Gonzales, Counsel to the President, Legal Adviser to the State Department, William H. Taft IV, provides his comments regarding Mr. Gonzales's arguments for and against applying the Geneva Conventions. Similar to Secretary Powell, Mr. Taft believed that the U.S. would better benefit from the application of Geneva Convention III. Of particular concern to Mr. Taft were the preexisting international obligations the U.S. was subject to prior to the War on Terror. Taft writes, "The President should know that a decision that the conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years."⁸³ Taft supported this claim by stating that this stance is also the opinion of State Department lawyers as well as other parties to the convention. Taft reminded the Attorney General that the president is obliged to implement the conventions not only because the United States is a party thereof, but because it also bound by the United Nations. "UN Security Council Resolution 1193 [affirms] that 'all parties to the conflict [in Afghanistan] are bound to

⁸³ U.S. Department of State, *Memorandum for the Counsel to the President, February 2, 2002*. By William H. Taft IV, Office of the Legal Adviser. (Washington, D.C.): 1, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.02%20DOS%20Geneva.pdf> (accessed February 23, 2012).

comply with their obligations under international humanitarian law and in particular the Geneva Conventions...⁸⁴

With respect to international criticisms, Mr. Taft asserted that applying the Conventions in the War on Terror would show the world that the United States decides its policy not based on options that best benefit and protect government officials. Instead, applying the Geneva III would show that the U.S. bases its foreign policy on the treaties that it has sworn to uphold in international agreements. Mr. Taft acknowledges the arguments of several other legal advisors who claim that U.S. officials are at greater risk of legal prosecution if the conventions are not applied. However, he argues that the uniformity of that opinion by other lawyers is insignificant. “Any small benefit from reducing [legal risk] further will be purchased at the expense of the men and women in our armed forces that we send into combat.”⁸⁵ As such, “the Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict – Al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the conventions do not apply to the conflict *no one* [emphasis added] involved in it will enjoy the benefit of their protections as a matter of law.”⁸⁶

The concept that no one will enjoy the protections of the conventions is unique to Taft’s memorandum. Other opinions have presented concerns that U.S. adversaries will be disinclined to apply protections of the conventions to captured U.S. military personnel, but few claimed that U.S. forces would likewise be disqualified from GPW protections if

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid., 2.

the treaty was not applied. The context of other legal opinions implies that some officials were under the impression that the Geneva Conventions would only be suspended one-way, towards Taliban and Al Qaeda combatants, but not towards U.S. forces.

Disregarding that the conventions do not allow for suspension, it would be unreasonable to expect that the conventions could be revoked towards one party to a conflict without equal revocation. It is justifiable to deny prisoner of war status to individuals based on the fact that their organization/armed resistance movement does not meet the four requirements. However, suspending the treaty as a whole has different implications. If the treaty is suspended and the Conventions do not apply to the conflicts with Al Qaeda and the Taliban, then they likewise do not cover the forces opposing them.

In agreement with Secretary Powell, Mr. Taft objected to a determination that Geneva Convention III did not apply to the conflict based on the notion that doing so would deprive the ability of U.S. troops to claim the protections of the Third Convention. Even though the non-adherence of the Geneva Conventions by one party to a conflict does not absolve another party from its treaty obligations, the case to determine that a U.S. combatant is eligible for POW status is weakened if the United States decided that the Conventions did not apply in the conflict in Afghanistan. The Taliban and Al Qaeda are known to have ignored customary international laws and the laws of war in general and the same was to be expected in the War on Terror. Due to the fact that U.S. troops were already at risk of being treated in a manner inconsistent with the principles of Geneva III if captured by the Taliban or Al Qaeda, determining that the Conventions did not apply to Afghanistan could be deemed by the terrorist organizations as an additional incentive not to accord captured U.S. combatants the proper rights and protections

enumerated in the GPW. Despite factors that disqualify both the Taliban and Al Qaeda from the protections of Geneva III, the decision to apply the treaty as a matter of policy allows the U.S. to demand proper status and treatment of U.S. troops in the event of their capture.

Recommendations

In regards to determining combatant status under the Third Geneva Convention in order to properly ensure that prisoner of war status is conferred upon the individuals who have fulfilled the necessary requirements, this study finds that GPW remains an adequate guideline in contemporary warfare. Determining that an individual is an unlawful combatant is not a damning classification nor does it imply that the individual is at risk of being treated inhumanely. Unlawful combatant status only denotes that an individual has not earned the protections of a legal prisoner of war. The requirements for lawful combatancy in Geneva III, carried forth from Hague Regulation IV, provide sufficient criteria to label combatants in the War on Terror. However, the fact that the criterion within Geneva Convention III remains adequate or applicable to current warfare does not infer that the treaty would not benefit from revisions.

Similar recommendations proposed for the above issue of classifying conflicts as Common Article 2 or Common Article 3 can be repeated with the issue of labeling combatants. The problem is the same in both instances. The Geneva Conventions of 1949 do not contain provisions for this type of conflict with this type of enemy. Geneva Convention III would benefit from the above mentioned subcategories of “State-like,” “State-comparable,” or “Organization of International threat” in the process of

determining combatant status. A revision of Geneva Convention III relative to the treatment of POWs to include these subcategories would obviate the need for governments to employ numerous legal scholars to interpret the conventions for how they may or may not apply to a conflict such as the War on Terror. The conventions, however, should not be criticized or condemned for lacking provisions for conflicts such as this; “Laws rarely anticipate situations that have never arisen before, and the prospect of a nation-state waging war on a terrorist group with no state sponsorship or defined nationality is something that probably never occurred to the members of the Geneva and Hague conferences.”⁸⁷

In his book War by Other Means, John Yoo quotes President Ronald Reagan’s address to the Senate regarding the conferment of prisoner of war protections to members of terrorists groups. President Reagan proclaimed, “we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.”⁸⁸ Agreed, terrorist groups have not earned nor do they deserve protections under humanitarian law which they themselves continue to violate. However, it is appropriate for these groups to be recognized—or at the very least, more formally defined—under Geneva Convention III. As with conflict classification, a revision need not reward organizations of these new subcategories for their lawless behavior. If delegates of the High Contracting Parties wish to, *and agree upon*, amendments that subject members of this subcategory to immediate detention upon capture, that is acceptable. If delegates

⁸⁷ Maj. Holly Rawson, USAF, *Mercenaries, Terrorists and Corporations (Oh My!): The Yellow Brick Road to Dealing with Non-State Actors in Combat*, in the Homeland Security Digital Library, <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=458532> (accessed October 13, 2011), 1.

⁸⁸ Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, Jan. 29, 1987, available at <http://www.Reagan.utexas.edu/archives/speeches/1987/01281987B.htm>. Quoted in John Yoo, *War by Other Means* (New York: Atlantic Monthly Press, 2006), 36.

wish to deny trial rights, alter detention requirements, or impose harsh penalties for being a member of an organization under these new subcategories, that is acceptable. If delegates simply wish to establish that organizations of these new subcategories are bound to comply with the four traditional requirements of combatancy and may accordingly be classified as lawful combatants eligible for POW status, or as unlawful combatants void of these privileges; that is also acceptable.

So long as a revised version of Geneva Convention III is expanded to incorporate organizations such as these, the laws of war can be considered to be progressing and adapting to contemporary warfare. The ability to settle, or avoid in the first place, disputes over the interpretation of Geneva Convention III would be the primary goal of this revision. Under a revised version of the GPW, government officials will no longer have to spend time concerned with how they will be protected against legal prosecution. The incorporation of this subcategory will benefit State leaders who will have a more transparent understanding of what violates the conventions and what does not.

Acknowledgement of the Additional Protocols of 1977

A counterargument to these proposed subcategories is that the Geneva Conventions of 1949 have already taken steps to acknowledge groups such as the Taliban, Al Qaeda, and other non-state actors, via the Additional Protocols of 1977. However, the United States has refused to ratify either of the two Additional Protocols. The United States adheres to the four requirements for lawful combatancy in Article 4 of the Third Geneva Convention which was carried forth from Hague Regulation IV. When the Additional Protocols of 1977 were submitted to the U.S. senate for approval and

ratification, the United States did not necessarily disagree with all provisions of Protocol I. Instead, U.S. lawmakers primarily objected to the newly defined and relaxed standards required for combatants to attain prisoner of war status.

Excluding the new requirements for lawful combatancy provided for in this protocol, the United States has long recognized the humanitarian protections provided for in Additional Protocol I to be customary international law. A decade after the Protocols were completed, “a U.S. Department of State Deputy Legal Advisor announced that the United States affirmed that it considers fifty-nine of the Additional Protocol I’s ninety-one substantive Articles to be customary international law.”⁸⁹ Based on this notion, in contemporary warfare and the War on Terror, “the United States has afforded Al Qaeda (and Taliban) members the fundamental humane treatment prescribed by the Protocols, but international law contains no higher obligation.”⁹⁰

In regards to the less controversial second Protocol, most of the provisions contained within Additional Protocol II largely overlap the protections provided for in Common Article 3 of the 1949 Geneva Conventions. Since the humanitarian principles contained in Common Article 3 are considered to be customary law which the United States already strives to adhere to, Common Article 3 is preferred to Additional Protocol

⁸⁹ Yoram Dinstein, “Comments on Protocol I,” 320 *International Review of the Red Cross* (Oct. 1997), 515, quoted in Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 134.

⁹⁰ “Statement by White House Press Secretary Ari Fleischer,” *United States Mission-Geneva, Press Releases 2002*, 7 February 2002.< <http://www.us-mission.ch/press2002/0802fleischerdetainees.htm>>, (accessed February 7, 2004), quoted in Scott Reid, Major, U.S. Army, *Terrorists as Enemy Combatants: An Analysis of How the United States Applies the Law of Armed Conflict in the Global War on Terrorism*, February 2004: 5, in the Homeland Security Digital Library, <https://www-hsdl-org.libproxy.txstate.edu/?view&did=447349> (accessed October 13, 2011).

II due to its repetitious nature.⁹¹ The United States adheres to the humanitarian principles provided for in both Additional Protocols but refuses to ratify them, and, rightfully so. “The United States, frequently called on to provide combatant forces to keep or enforce peace in the world’s far corners, to protect humanitarian missions, and to end armed incidents in violent places, has reason to object to Additional Protocol I (and II), most particularly with regard to the Protocol’s relaxing the criteria for POW status. States with lesser stakes in the realities of *jus en bello* can more easily accept Protocol I’s ‘fairly bold innovations,’ and object to the U.S. position.”⁹² Nonetheless, the fact that the United States has not ratified the Additional Protocols is not a sufficient counter claim to the proposed subcategories.

Additional Protocol I

Additional Protocol I is intended to apply to international armed conflicts the same as Common Article 2. The main point of contention between the United States and Additional Protocol I is the revised definition of lawful combatants. Articles 43-44 reiterate the four traditional requirements of lawful combatancy but add several new aspects. Article 44 stipulates that combatants are obliged to abide by the international laws of war and customary international laws, but also asserts that combatants who do not follow these laws shall not lose their right to combatant status. In regards to carrying arms openly and wearing distinctive emblems or uniforms, this article stipulates that, “combatants are obliged to distinguish themselves from the civilian population *while they are engaged in an attack or in a military operation preparatory to an attack* [*emphasis*

⁹¹ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 129.

⁹² *Ibid.*, 138.

added]...owing to the nature of the hostilities [if] an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries arms openly.”⁹³ Article 44 goes on to state, “a combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in [the previous paragraph] shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this protocol.”⁹⁴

The provisions provided in this article, in effect, countermand one another. The beginning of the article mandates that combatants follow the law, but then claims that no adverse consequences will come from not doing so. Likewise, the article claims that combatants must distinguish themselves from the population, but then allows for combatants to retain their status even when they do not. Most disparagingly, this article mandates that combatants adhere to the four requirements of lawful combatancy, and when a combatant does not fulfill these requirements, the protocol still awards the combatant the same protections as if he had. This protocol nullifies the four basic requirements. If an unlawful combatant is aware of the fact that he or she would be treated in the same manner as a combatant who met the requirements for POW status, what is to keep them from deviating from those requirements? In essence, had the United States ratified this convention, it would have to treat every enemy combatant who takes arms against it, as a prisoner of war under the conventions.

⁹³ International Committee of the Red Cross, *Protocols Additional to the Geneva Conventions of 12 August 1949*, (Geneva, 1996), 31.

⁹⁴ *Ibid.*

A particularly disturbing aspect of the Additional Protocols is the civilian/combatant distinction highlighted above. Under Protocol I, a combatant must distinguish himself from the civilian population during, and while preparing for, an attack. The term ‘while preparing for an attack’ leaves too large a margin for interpretation. Preparing for an attack, technically, can include the years or months leading up to an offensive, or be as short-term as the minutes or seconds before the attack. Gary Solis gives the example of an insurgent approaching an American patrol dressed as a civilian, concealing a weapon, and appearing to be of no threat. If the insurgent suddenly attacks or ambushes this patrol, even while impersonating a noncombatant, he would still be protected under Protocol I.⁹⁵

In the event of such an attack, the offending combatant would neither lose his status as a combatant nor be treated any differently than a law-abiding prisoner of war. The requirements to give POW status to combatants who clearly have not earned it is one of the main objections of the United States to this protocol, for obvious reasons. The idea that soldiers may be ambushed by seemingly harmless “civilians” is appalling. The notion that the United States should grant more rights and protections to perpetrators of this sort is even worse. Given that the United States' adversaries in the War on Terror are already not marked by traditional military uniforms, the only practical distinction of a combatant during an attack is whether or not the combatant is brandishing a weapon. These provisions, in effect, disregard the respect owed to civilian immunity in armed conflicts.

⁹⁵ Gary Solis, and Fred L. Borch. *Geneva Conventions*. (New York: Kaplan, 2010), 36.

Additional Protocol II

Additional Protocol II, considerably shorter than the first, is intended to apply in armed conflicts of a non-international nature or those classified as a Common Article 3 conflict. The main U.S. objection to this protocol lies within Article 1 which stipulates that an armed resistance movement have sustainable control over a territory in order for the protocol to be enacted.⁹⁶ The United States is not necessarily opposed to organizations holding or controlling a defined territory; rather, it recognizes that this standard is unreasonably high for many armed opposition groups. Additional opposition to ratification is the protocol's redundancy. Additional Protocol II largely reiterates many of the same protections found in Common Article 3, provisions of which are already considered customary law. As such, Additional Protocol II is of little consequence. "Because the United States already respects and observes common Article 3 requirements, it presents little impediment to our military operations."⁹⁷

Recommendations

The Additional Protocols of 1977 attempt to incorporate non-state groups, and other forms of combatants, under the protections of the 1949 Geneva Conventions. Nevertheless, these protocols can be found inadequate and at times misguided. To incorporate a non-state actor into the laws of war does not necessitate that the four traditional requirements of combatancy be altered. An individual can still earn lawful combatant status, but he should not be accorded these protections if he is dressed as a civilian and ambushing military personnel. The Geneva Conventions can be revised to

⁹⁶ International Committee of the Red Cross, *Protocols Additional to the Geneva Conventions of 12 August 1949*, (Geneva, 1996), 90.

⁹⁷ Gary Solis, and Fred L. Borch. *Geneva Conventions*. (New York: Kaplan, 2010), 260.

include actors such as the Taliban and Al Qaeda who may qualify for combatant status just as easily as they may disqualify themselves from it. Additionally, the provisions of the Additional Protocols that mandate that individuals abide by the laws of war but offer no punishment to those who do not, does nothing but offer incentive to violate the laws of war. There is no need to incorporate stipulations such as this if there is not undesirable treatment that comes from non-adherence.

A revision to the Geneva Conventions that includes the proposed subcategories, which covers non-state and failed-state actors, and also requires that the traditional four requirements be met, better serves the practicality of the contemporary laws of war. Likewise, this revision would supersede the land-holding requirement for resistance movements enumerated in Additional Protocol II. The demand of Additional Protocol II that organizations maintain control of a defined territory has the potential to preclude more organizations than it provides applicability to. The laws of war must look past the Additional Protocols with the recommendations above, and account for organizations that do not control a defined territory within a set region, but continue to be a threat.

Chapter 3

Detainee Treatment

The final topic this thesis is concerned with is the treatment of detainees once captured. Similar to combatant status being derived from conflict classification, the standards of treatment for detainees are derived from combatant status. Continuing to use the War on Terror as a case study, the ensuing sections of this analysis aim to determine whether the provisions regarding detainee treatment contained within the Third Geneva Convention Relative to the Treatment of Prisoners of War remain applicable in contemporary warfare. Before delving into this portion of the analysis, it is important to understand who can be subject to detention within the War on Terror.

U.S. definitions of detainees and combatants relative to POW treatment

To begin, it is relevant to know how the United States defines detainees and combatants, lawful or otherwise, who are subject to detention. Understanding these definitions, we may then turn to U.S. law that has been enacted in accordance with the provisions and protections of Geneva III.

A 2006 U.S. Department of Defense (DoD) Directive labels detainees as, “Any person captured, detained, held, or otherwise under the control of DoD personnel (military, civilian, or contractor employee). It does not include persons being held

primarily for law enforcement purposes, except where the United States is the occupying power.” A detainee may include enemy combatants, lawful enemy combatants, unlawful enemy combatants, enemy prisoner of war, retained person, or civilian internee.⁹⁸ An enemy combatant is defined as, “In General, a person who engaged in hostilities against the United States or its coalition partners during an armed conflict. The term ‘enemy combatant’ includes both ‘lawful enemy combatants’ and ‘unlawful enemy combatants.’”⁹⁹ According to this directive, a detainee is an individual detained by the Department of Defense no matter what their status may be. It is important that the reader not confuse being detained with being arrested. The term arrest, according to Merriam-Webster, means, ‘to take or keep in custody by authority of law’. The Defense Department, specifically the military, is not a law enforcement agency by definition. It does not obtain warrants or arrest individuals on the battlefield because of laws they have broken. The Defense Department does however have the ability, under the Geneva Conventions, to detain or keep individuals in custody to prevent them from rejoining the conflict.

The definition of lawful enemy combatant provided by the Defense Department Directive is consistent with Geneva Convention III. As Stipulated by Common Article 4, the definition includes combatants of regular armed forces, militias, volunteer corps, and organized resistance movements, and includes forces loyal to entities not recognized by

⁹⁸ Gordon England, Deputy Secretary of Defense. United States Department of Defense, *The Department of Defense Detainee Program*, Directive NO. 2310.01E September 5, 2006: Enclosure 2, in the Homeland Security Digital Library, <https://www-hsdl-org.libproxy.txstate.edu/?view&did=466662> (accessed on February 22,2012).

⁹⁹ Ibid.

the United States government. Likewise, the DoD definition also mandates that the above specified individuals comply with the four requirements of legal combatancy.¹⁰⁰

The term unlawful enemy combatant employed by the United States has been met with more contention than other relative terms. The DoD defines an unlawful enemy combatant as:

persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.¹⁰¹

A point of contention with the above definition of unlawful enemy combatant is the broad manner in which “support” is used. It is easy to understand that a member of Al Qaeda or the Taliban, failing to comply with the four requirements of lawful combatancy, would be classified as an unlawful combatant. However, if the Defense Department is also to classify individuals who support these organizations as unlawful combatants, it should therefore define to what degree and in what manner supporting these entities designates an individual as America’s enemy. There are numerous ways that an individual may support Al Qaeda or the Taliban; individuals are capable of supporting a war effort by directly contributing to the efforts behind an attack even if they do not participate in the attack itself. “Supporters” may provide funding, food, water, or shelter. The passing of information; for instance monitoring American troop location and movement, can be regarded as support.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

Correspondingly, it is well known among scholars of this field that there is a vast amount of anti-American sentiment throughout the world, especially within the Middle East. Individuals who reside in the Middle East, specifically in countries where the War on Terror is being conducted, do not have to be part of a terrorist organization to dislike American military presence in their region. Likewise, it is certainly not against any law of war, or international law for that matter, for an individual to favor the forces who oppose an occupying power. Due to the lack of specificity in the directive, the Defense Department Directive fails to properly explain what qualifies as supporting the Taliban or Al Qaeda and leaves the definition open to interpretation.

Protections afforded under Geneva Convention III

Understanding who may be subjected to detention within the War on Terror, it is important to know what standards of treatment, dependent upon combatant status, that individuals are entitled to. In beginning this discussion, it is important for the reader to know that the following protections of Geneva Convention III are only bestowed upon individuals who have been determined to be lawful combatants according to Articles 4 and 5 of the GPW. The following presentment of the protections afforded to prisoners of war in Geneva Convention III is taken from the 2007 International Committee of the Red Cross publication of the Geneva Conventions of 1949.

According to Article 4, the protections of the Convention apply to those eligible for prisoner of war status, and also to those in the process of being determined eligible for POW status via Article 5 tribunals. In the event that the individual status of a combatant

is unknown or in doubt, the combatant is protected under Article 5 of this convention until a competent tribunal finalizes his combatant status.

Humane Treatment

Additional protections of Geneva Convention III not enumerated thus far can be found in Articles 13 and 14 which address humane treatment and respect of prisoners.

Article 13 addresses safety of POWs and mandates that:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of this convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.¹⁰²

Pursuant to these protections, Article 14 addresses respect for prisoners of war.

“Prisoners of war are entitled in all circumstances to respect for their persons and their honor. Women shall be treated with all regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men.”¹⁰³ As was the case with the ambiguous definitions of cruel treatment and murder under Common Article 3, these articles provide broad and general protections for prisoners but do not offer any specific prohibitions. Article 16 likewise aims to eliminate discrimination based on race, color, religion, sex, and other perceived prejudices.

¹⁰² International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 81.

¹⁰³ *Ibid.*, 82.

Questioning of Prisoners

The beginning provisions of Article 17 address the questioning of prisoners of war. The article stipulates that captured combatants are only required to give a minimal amount of identifying information, i.e., name, rank, or regiment. A refusal of this information cannot strip the captured combatant of his POW status but it can limit the privileges that he may later be accorded. The closing provisions of Article 17 address torture, interrogation, and questioning. The prohibited procedures include:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind [whatsoever]. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service... The questioning of prisoners of war shall be carried out in a language which they understand.¹⁰⁴

Although the language of this article would imply that no disadvantageous treatment may be conferred upon POWs who refuse to give adequate information for identifying themselves upon capture; one could literally interpret this article to include interrogations also. The plain language that prisoners may not be tortured to gain information of any kind could likewise be expanded to include military intelligence gathering.

Clothing

While it may seem fundamental in character, Article 27 relative to the clothing of prisoners is pertinent for this and ensuing discussions. This article establishes that, “Clothing, underwear, and footwear shall be supplied to prisoners of war in sufficient

¹⁰⁴ Ibid., 83.

quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained.”¹⁰⁵

Complaints and Requests

Moving forward through Geneva III, Article 78 affords prisoners the right to file complaints or requests regarding the condition of their captivity. They may do so by reporting to the proper authorities of the Detaining Power, or through those acting as representatives to their Protecting power.¹⁰⁶ However, in the present War on Terror, this article can be difficult to apply. With regards to the Taliban and Al Qaeda; neither of these organizations are a party to the conventions and as such neither has a protecting power that could speak on their behalf. Although Afghanistan is a High Contracting Party, under Taliban rule and according to U.S. officials, they were unable to maintain their international obligations. Therefore, even if a detainee of one of these groups gives his nationality, his country of origin may not be obliged to represent or protect him.

Duration of Punishments

Article 90 provides that the punishments of prisoners may not exceed thirty days even if a prisoner is being punished for more than one offense.¹⁰⁷ It is important to acknowledge that this article only pertains to the length of a punishment, not duration of captivity or interrogations. The GPW asserts no time limits for the former and there are no internationally agreed upon time constraints in regards to interrogations.

¹⁰⁵ Ibid., 87.

¹⁰⁶ Ibid., 108.

¹⁰⁷ Ibid., 112-113.

Confinement Safeguards

Article 98 asserts that even if a prisoner is held in confinement as a punishment, he may not be deprived of any of the protections of this Convention. No matter what the case, a confined POW shall always be able to utilize his rights under Articles 78 and 126.¹⁰⁸ Article 78 is addressed above; Article 126 pertains to assurances that representatives and delegates of the POWs will not be denied access to the prisoners, whether these representatives are from the Protecting Power or international organizations such as the ICRC.

Legal Proceedings

Two articles are of particular interest for this study regarding legal implications of prisoners and detainees. First, is Article 99 which ensures prisoners and detainees are not prosecuted for acts that are not prohibited and codified by the Detaining Power. This article mandates:

No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed. No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act which he is accused. No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel.¹⁰⁹

¹⁰⁸ Ibid., 115.

¹⁰⁹ Ibid., 116.

Pursuant to Article 99, Article 106 attempts to provide legal equality for detainees who wish to appeal a sentence or conviction. This article affords:

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.¹¹⁰

Death of POWs

Article 121 takes into account the possibility of a sentry—a guard or other member of the armed forces—killing or seriously wounding a prisoner of war. Worthy of note, this article does not provide specific punishments to be enacted under this treaty if such a scenario arises. Instead, it leaves the responsibility of punishing those individuals to the Detaining Power. The 2007 International Committee of the Red Cross publication of the Geneva Conventions denotes this section as “prisoners killed or injured in special circumstances.” This denotation is interesting, it acknowledges that the death of a prisoner may occur as a result of a sentry’s actions but it is careful not to imply allegations of abuse or homicide on the part of the sentry. Article 121 reads:

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official inquiry by the Detaining Power...If the inquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.¹¹¹

¹¹⁰ Ibid., 119.

¹¹¹ Ibid., 126.

State Responsibilities and Grave Breaches

The final articles of Geneva Convention III address responsibilities of states who become a party to the convention. Article 127 stipulates that the High Contracting Parties disseminate the conventions as widely as possible, not only within the military but among civilians and the remainder of the population as well. With regard to the armed forces, this article states, “Any military or other authorities, who in time of war assume responsibilities in respect to prisoners of war, must possess the text of the convention and be specially instructed as to its provisions.”¹¹²

Breaches against the conventions are classified in two ways; breaches against the laws of war and grave breaches. Readers may relate this to “the dichotomy of misdemeanors and felonies in criminal law. Grave breaches might be thought of as the felonies of the law of war.”¹¹³ If an offense is not explicitly defined as a grave breach by the convention, then no act, no matter what it may be, can be considered as such. Grave Breaches are addressed in all four conventions of 1949 and are Common Articles 50/51/130/147 respectively. The rhetoric of the following article is pivotal to the subsequent discussion of detainee treatment. Article 130 of Geneva III states that grave breaches include:

[...] Those involving any of the following acts, if committed against persons or property protected by the convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the

¹¹² Ibid., 130.

¹¹³ Gary Solis, and Fred L. Borch. *Geneva Conventions*. (New York: Kaplan, 2010), 25.

forces of the hostile Power, or willfully depriving a prisoner of war of the right of fair and regular trial prescribed in this convention.¹¹⁴

Accordingly, Article 131 mandates, “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.”¹¹⁵ Some of these acts, such as inhuman treatment and biological experiments, have appeared in previous provisions of the conventions. Article 130 differentiates these acts as grave breaches rather than simple violations of the conventions.

The aforementioned articles are included to familiarize the reader with specific protections of Geneva Convention III that are due to prisoners of war. Controversies over detainee treatment arise because, in many instances, the Geneva Conventions fail to provide criteria for what constitutes the act it is prohibiting, for instance, torture, cruel punishment, great suffering, etc. As such these offenses are left to the interpretation and codification of nations within their own laws, or by varying international treaties. States may often times defer to definitions provided by international institutions, legal opinions, or their own laws for guidelines. However, there is no one universally accepted definition for terms such as these.

As seen in the preceding discussion, Geneva Convention III, Relative to the Treatment of Prisoners of War, provides vague and over-arching protections to combatants who have been captured. There are no specific prohibitions or definitions for maltreatment provided in the Convention. For instance, the provisions found in Article 17

¹¹⁴ International Committee of the Red Cross, *The Geneva Conventions of August 12 1949*, (Geneva, 2007), 131.

¹¹⁵ *Ibid.*

which prohibit the exposure to disadvantageous or similar forms of treatment, do not define what constitute these acts. To address this issue, states have drafted and ratified numerous international treaties that attempt to provide specific provisions for the principles enumerated in Geneva III. Most notably, is the United Nations Convention Against Torture.

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984)

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) aims to eliminate torture and other forms of mal treatment *within* the territory of States that are party to the treaty, as well as territory they have jurisdiction over, e.g. commonwealths or lands possessed by the State. The Convention Against Torture is somewhat of a pioneer on this matter. The CAT is the first international treaty that attempted to assign a definition to the act of torture. According to the CAT, torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected to have committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹¹⁶

¹¹⁶ *U.N. Convention Against Torture (CAT): Overview and Application of Interrogation Techniques*, Congressional Research Service, RL32438. Prepared by Legislative Attorney Michael John Garcia, January 26, 2009: 1, Federation of American Scientist, <http://www.fas.org/sgp/crs/intel/RL32438.pdf> (accessed February 29, 2012).

The definition of torture provided by the CAT is not all encompassing but it does stipulate that ratifying states criminalize acts that fall within the purview of this definition. It is likewise important to note that the CAT differentiates between torture and cruel, inhuman, and degrading, forms of treatment. “The Convention’s definition of ‘torture’ does not include all acts of mistreatment causing mental or physical suffering, but only those of a severe nature.”¹¹⁷ In quoting President Reagan’s May 1988 address to congress regarding the UN CAT, Michael John Garcia notes, “The State Department suggested that rough treatment falling into the category of police brutality, ‘while deplorable, does not amount to “torture” for purposes of the Convention, which is ‘usually reserved for extreme, deliberate, and unusually cruel practices...[such as] sustained systemic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.’”¹¹⁸ This distinction is important in the discussion of detainee treatment relative to the Third Geneva Convention.

Instead of providing specific prohibitions against torture, the UN Convention against Torture and other Cruel, Inhuman, or degrading Treatment or Punishment, stipulates that ratifying States take it upon themselves to criminalize these offenses. Article 4 of the CAT mandates that States party to the treaty ensure all acts of torture that occur within their territory, or territory over which they have jurisdiction, are criminalized under state laws. In order to ensure that States who ratify the CAT do not exploit any loopholes therein by utilizing non-signing States and their territories, Article 3 asserts, “No State Party shall expel, return...or extradite a person to another State

¹¹⁷ Ibid., 2.

¹¹⁸ Ibid.

where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹¹⁹ Accordingly, Article 5 asserts that States shall have jurisdiction over torture related offenses including: “(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is a national of that State; (c) when the victim is a national of that State if that State considers it appropriate.”¹²⁰

Additionally, to ensure that the prohibition of torture remained unbridged, Article 2 of the CAT asserts:

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. 3. An order from a superior officer or a public authority may not be invoked as a justification of torture.¹²¹

In regards to provision 3 of this article, Senate Report 101-30 asserts that in order for a public official to “acquiesce an act of torture, that official must, ‘prior to the activity constituting torture, have *awareness* [emphasis provided] of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”¹²²

In his January 2009 Congressional Research Service Report, Michael John Garcia references Senate Executive Report 101-30, Resolution of Advice and Consent to Ratification (1990), to explain the reservations of, and stipulations placed on, the

¹¹⁹ UN General Assembly, Meeting no. 93, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/39/46, December 10, 1984: at Article 3. United Nations, <http://www.un.org/documents/ga/res/39/a39r046.htm> (accessed March 2, 2012).

¹²⁰ *Ibid.*, at Art. 4

¹²¹ *Ibid.*, at Art. 2.

¹²² *U.N. Convention Against Torture (CAT): Overview and Application of Interrogation Techniques*, Congressional Research Service, RL32438. Prepared by Legislative Attorney Michael John Garcia, January 26, 2009. Federation of American Scientist, <http://www.fas.org/sgp/crs/intel/RL32438.pdf> (accessed February 29, 2012), 5.

interpretation of the treaty by the United States. Garcia notes that mental torture is not defined under the CAT, as such, Senate Executive Report 101-30 defines the term for the U.S:

The United States understands such actions to refer to prolonged mental harm caused or resulting from (1) the intentional infliction or threatened infliction of severe physical pain and suffering; (2) the administration of mind-altering substances or procedures to disrupt the victim's senses; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.¹²³

Torture and cruel, inhuman, or degrading treatment under U.S. law

The UN Convention Against Torture obliges ratifying States to create laws within their countries to criminalize acts of torture. The United States, however, did not enact any new laws domestically to address torture and cruel treatment, because the U.S. held that existing federal and state laws prohibiting acts such as assault, manslaughter, murder, etc. already satisfied these CAT requirements.¹²⁴ In order to address torture outside of the territorial United States over which the U.S. has jurisdiction, Congress added chapter 113C (18 U.S.C. sections 2340-2340B, commonly referred to as the Federal Torture Statute), to the U.S. Criminal Code which prohibited acts of torture.¹²⁵ Sections 2340-2340A regarding torture were enacted under the “Foreign Relations Authorization Act,

¹²³ Sen. Exec. Rept. 101-30, Resolution of Advice and Consent to Ratification, (1990) quoted in *U.N. Convention Against Torture (CAT): Overview and Application of Interrogation Techniques*, Congressional Research Service, RL32438. Prepared by Legislative Attorney Michael John Garcia, January 26, 2009: 5, Federation of American Scientist, <http://www.fas.org/sgp/crs/intel/RL32438.pdf> (accessed February 29, 2012).

¹²⁴ Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application of Interrogation Techniques*, Congressional Research Service, RL32438, January 26, 2009. Federation of American Scientist, <http://www.fas.org/sgp/crs/intel/RL32438.pdf> (accessed February 29, 2012), 7.

¹²⁵ *Ibid.*, 7.

Fiscal Years 1994 and 1995” in accordance to the U.S. ratification of the UN Convention Against Torture and apply to acts of torture committed outside the territorial United States.

According to section 2340(2), “‘torture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering... upon another person within his custody or physical control.”¹²⁶

Elaborating upon this definition, section 2340 of 18 U.S.C. defines ‘severe mental pain and suffering’ as prolonged mental harm caused by:

1) the intentional infliction or threatened infliction of severe physical pain or suffering; 2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the sense or the personality; 3) the threat of imminent death; or 4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.¹²⁷

In the following provision, Section 2340A provides for punitive matters for those involved with torture. Section 2340A under U.S. law reads:

(a) Offense.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. (b) Jurisdiction.—There is jurisdiction over the activity prohibited in subsection (a) if—(1) the alleged offender is a national of the United States ; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender. (c) Conspiracy.—A person who

¹²⁶ *Foreign Relations Authorization Act, Fiscal Years 1994-1995*, Public Law 103-236, 103d Congress., 2d sess. (January 25, 1994), <http://www.gpo.gov/fdsys/pkg/BILLS-103hr2333enr/pdf/BILLS-103hr2333enr.pdf> (accessed March 2, 2012), 82.

¹²⁷ 18 U.S.C. 2340 (2) quoted in *U.N. Convention Against Torture (CAT): Overview and Application of Interrogation Techniques*, Congressional Research Service, RL32438. Prepared by Legislative Attorney Michael John Garcia, January 26, 2009. Federation of American Scientist, <http://www.fas.org/sgp/crs/intel/RL32438.pdf> (accessed February 29, 2012), 7.

conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.¹²⁸

At the beginning of the War on Terror, the Office of Legal Counsel offered interpretations of U.S. obligations under 18 U.S.C. sections 2340-2340A. In another controversial memo regarding torture, Jay Bybee presented to Alberto Gonzales, Counsel to the President, a legal opinion that offers his interpretation of the Federal Torture Statute in regards to the current war. According to the memo, in order for an act to constitute torture, “it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain and suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months even years.”¹²⁹ Jay Bybee establishes tough standards for acts to constitute torture under this U.S. law. Since the former Assistant Attorney General provides no standard of measurement for how much pain is equivalent to organ failure or impairment of bodily function, the interpretation is left open to the individual who is committing the act on another. Bearing in mind that what constitutes extreme pain for one individual, may be tolerable—albeit uncomfortable—by another, there is no real way for a person to measure that kind of

¹²⁸ Cornell University Law School, Legal Information Institute. “18 USC 2340A-Torture,” <http://www.law.cornell.edu/uscode/text/18/2340A> (accessed February 23, 2012).

¹²⁹ United States Department of Justice, *Memorandum Opinion for Alberto Gonzales, Counsel to the President: Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A*, prepared by Asst. Attorney General Jay S. Bybee, Office of Legal Counsel, August 2, 2002: 1, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> (accessed February 23, 2012).

pain. This memo provided by Jay Bybee is ambiguous and open-ended—two undesirable qualities in the realm of the laws of armed conflict.

Bybee also places specific emphasis on an individual's intent during the act of torture. In order to violate Section 2340A, he contended, "severe pain and suffering must be inflicted with specific intent. . . . In order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act."¹³⁰ In other words, this memo proclaimed that a perpetrator must engage in torturous acts with the intent to torture in order for an act to be considered torture. Bybee differentiates this from a defendant who acts with general intent. "If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent."¹³¹

Making one final observation regarding specific intent, Bybee concedes that the differentiation between general and specific intent may go unnoticed—if not ignored—by a jury. Bybee admits:

Even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead, a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control. While as a theoretical matter such knowledge does not constitute specific intent. . . . a jury will in all likelihood conclude that the defendant acted with specific intent.¹³²

Even though he provides a warning following this observation, the very suggestion that "I didn't mean to" could be used as a viable legal defense against torture is preposterous.

¹³⁰ Ibid., 3.

¹³¹ Ibid., 3-4.

¹³² Ibid., 4.

The burden of proof that is placed on prosecution lawyers to prove specific intent is unattainable. There is no way that a court could prove, short of a confession, what an individual was thinking or intending to do while engaged in acts of torture.

It is important to acknowledge that not all acts of maltreatment, no matter what the intent of the offender, constitute torture. Cruel, inhuman, and degrading treatment is not defined within the CAT, as torture is. Instead, under Article 16, ratifying states are tasked with interpreting, defining, and prohibiting these acts under their own laws. Upon ratifying the CAT, the United States asserted a reservation to the stipulations of Article 16. Senate Report 101-30 proclaimed that the United States will consider itself bound to Article 16 of the CAT, but only to the extent that those acts are defined by the 5th, 8th, and 14th amendments of the U.S. constitution.¹³³ This reservation deferring cruel, inhuman, or degrading treatment or punishment under Article 16 to the U.S. constitution—namely, Amendment VIII that prohibits excessive bail, fines, and cruel and unusual punishment—has been met with some degree of contention. One can see that the rhetoric of Amendment VIII is no more specific regarding cruel treatment than is the CAT or Geneva III. As mentioned, the United States Congress held that existing laws, and the protections of the U.S. constitution, were sufficient to cover Article 16 prohibitions of cruel, inhuman, and degrading treatment. Garcia asserts that this can be interpreted one of two ways.

First, this reservation can be interpreted that because cruel treatment is prohibited under the 8th amendment to the U.S. constitution, only citizens of the United States can

¹³³ Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application of Interrogation Techniques*, Congressional Research Service, RL32438, January 26, 2009. Federation of American Scientist, <http://www.fas.org/sgp/crs/intel/RL32438.pdf> (accessed February 29, 2012), 6.

benefit from its protections, whereas non-citizens do not fall within its purview.¹³⁴

Therefore, “under this interpretation, CAT Article 16, as agreed upon by the United States, would not necessarily prohibit the U.S. from subjecting certain non-U.S. citizens to ‘cruel, inhuman, and degrading treatment or punishment’ at locations outside U.S. territorial boundaries where the U.S. nonetheless asserts territorial jurisdiction.”¹³⁵

The alternative to this view argues that, because the U.S. asserted reservations to Article 16 and claimed that cruel, inhuman, and degrading treatment would be understood in the same context of the 8th amendment to the constitution, the United States is obliged to prohibit all such conduct that occurs within its jurisdiction regardless of citizenship. “This view holds that the purpose of the U.S. reservations to CAT Article 16 was to more clearly define types of treatment that were ‘cruel, inhuman, and degrading,’ rather than to limit the geographic scope of U.S. obligations under CAT Article 16.”¹³⁶ Due to this discrepancy, the United States enacted additional legislation following the ratification of the CAT, as well as during the War on Terror, to clarify this contradiction. The pertinent legislation that addresses torture, cruel, inhuman, and degrading treatment under U.S. law include the War Crimes Act (WCA), the Detainee Treatment Act (DTA), and the Military Commissions Act (MCA).

The War Crimes Act of 1996

In accordance with the Geneva Conventions of 1949, the United States criminalized the grave breaches of torture and cruel treatment on detained individuals under the War Crimes Act of 1996 (18 U.S.C. section 2441). Under the War Crimes Act

¹³⁴ *Ibid.*, 11.

¹³⁵ *Ibid.*, 12.

¹³⁶ *Ibid.*

(WCA), “persons convicted for an offense under the Act may be sentenced to life imprisonment or, if death results from the breach, be executed.”¹³⁷ The WCA criminalizes war crimes and grave breaches that are committed by or against U.S. personnel and citizens. The WCA defines ‘war crimes’ as: any grave breach to the Geneva Conventions or protocols that the U.S. is a party to, acts prohibited under Articles 23, 25, 27, and 28 of Hague Convention IV, and violations of Common Article 3 during non-international armed conflicts.¹³⁸ The WCA enumerates and defines the offenses determined to be Common Article 3 violations as:

- A. Torture
- B. Cruel or inhuman treatment
- C. Performing biological experiments
- D. Murder
- E. Mutilation or maiming
- F. Intentionally causing serious bodily injury
- G. Rape
- H. Sexual assault or abuse; and
- I. Taking hostages¹³⁹

The Detainee Treatment Act of 2005

The Detainee Treatment Act (DTA) of 2005 is among the important legislative acts aimed to regulate the treatment of detainees. The DTA is included in the National Defense Authorization Act for 2006 and may be found under Title XIV. Section 1402 of the DTA, in addressing interrogation standards, asserts that no individual detained by or under the control of the Department of Defense may be subjected to interrogation techniques that are “not authorized by and listed in the United States Army Field Manual

¹³⁷ Ibid., 8-9.

¹³⁸ Cornell University Law School, Legal Information Institute. *18 USC, 2441- War Crimes*, <http://www.law.cornell.edu/uscode/text/18/2441> (accessed February 23, 2012).

¹³⁹ Ibid.

on Intelligence Interrogation.”¹⁴⁰ The Army Field Manual on Intelligence Interrogation is also denoted as Field Manual (FM) 34-52. United States Army Field Manual 34-52 was published in 1992 and remained in effect until it was superseded in 2006 by FM 2-22.3 Human Intelligence Collector Operations.¹⁴¹

The Detainee Treatment Act, while addressing the prohibition on cruel, inhuman, or degrading treatment or punishment, also provides that the geographic location of an individual does not limit the applicability of the Act. The DTA defines cruel, inhuman, or degrading treatment or punishment as acts prohibited by the 5th, 8th, and 14th amendments to the U.S. constitution as well as the definitions provided by the UN Convention Against Torture according to U.S. “Reservations, Declarations and Understandings”¹⁴² therein.

In addition to prohibiting cruel, inhuman, or degrading treatment, the Detainee Treatment Act also provides for legal defenses of those engaged in authorized interrogations. A provision worthy of note in section 1403 states, “it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know that the practices were unlawful.”¹⁴³ With respect to legal proceedings; the DTA also asserts that no U.S. court, other than the U.S. Court of Appeals for the District

¹⁴⁰ *National Defense Authorization Act for Fiscal Year 2006*, Public Law 109-163, 109th Cong., (January 6, 2006), Department of Defense, <http://www.dod.mil/dodgc/olc/docs/PL109-163.pdf> (accessed March 2, 2012), 3474.

¹⁴¹ Department of the U.S. Army, “Stand-To!,” under “Today’s Focus” Friday September 8, 2006. United States Army, <http://www.army.mil/standto/archive/2006/09/08/> (accessed March 3, 2012).

¹⁴² *National Defense Authorization Act for Fiscal Year 2006*, Public Law 109-163, 109th Cong., (January 6, 2006), Department of Defense, <http://www.dod.mil/dodgc/olc/docs/PL109-163.pdf> (accessed March 2, 2012), 3475.

¹⁴³ *Ibid.*, 3475-3476.

of Columbia Circuit, shall have jurisdiction or authority over habeas corpus petitions filed on behalf of individuals detained at Guantanamo Bay, Cuba.¹⁴⁴

Relative to statements obtained as a result of coercion, the DTA stipulates that Combatant Status Review Tribunals (CSRTs), or other competent tribunals, be responsible for determining if coercion was used to obtain information. Likewise, these committees have the ability to determine if the coerced statement is of value to their tribunal.¹⁴⁵ This provision does not mandate that coerced statements be omitted nor does it condone their use in all instances, it only places the responsibility of determining the value and relevance of the information obtained on the members of the CSRTs, and maintains that admitting the coerced statement as evidence is an available option.

Two final points of interest arise in the Detainee Treatment Act regarding definitions and translations. Section 1405 of the DTA defines the geographic “United States.” The DTA defers this definition to the Immigration and Nationality Act but does assert that the U.S. Naval Base at Guantanamo Bay, Cuba may not be included under this definition.¹⁴⁶ With regards to translation, and acknowledging the training role of the U.S. military towards Iraqi forces in the War on Terror, the DTA mandates that the Secretary of Defense provide translated versions of U.S. FM 34-52 to Iraqi security forces. However, this provision only stipulates that the Defense Secretary provide translations for the “unclassified portions” of intelligence gathering, not the field manual in its entirety.

¹⁴⁴ Ibid., 3477.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid., 3479.

The Military Commissions Act of 2006

Among the many provisions of the Military Commissions Act of 2006 is the enumeration of Common Article 3 violations. The MCA is not the first U.S. statute to address breaches or violations of the Geneva Conventions. However, it is relevant to this study because it provides definitions for the below acts as well as explanations for other terms left undefined by Geneva Convention III. The MCA asserts that no one in the custody of the United States, or any of its agencies, may be subjected to cruel inhuman or degrading treatment regardless of their country of origin or physical location during detention. The act also expands the definition of such treatment to include acts which are prohibited by the 5th, 8th, and 14th amendments to the U.S. constitution; and, to the degree applicable, acts defined under the UN Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

The MCA lists twenty-eight offenses that may be tried by military commissions for persons subject to the act's provisions, namely alien unlawful enemy combatants. Considering that persons subject to the Military Commissions Act only technically include alien unlawful enemy combatants, because these acts are violations of Common Article 3, the United States accession to the Geneva Conventions nevertheless effectively expands the scope of this act to include the armed forces of the U.S. as well. Of the twenty-eight triable offenses listed, the MCA restates the eight offenses enumerated under the War Crimes Act of 1996 as violations of Common Article 3. It is pertinent to note the MCA disclaims that, "The definitions [provided] in this subsection are intended

only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.”¹⁴⁷

Since Geneva Convention III Relative to the Treatment of Prisoners of War only prohibits the acts of torture and cruel treatment of detainees generally, the MCA elaborates and provides definitions for these terms which are to be prohibited under United States law. Cruel or Inhuman Treatment is defined by the MCA as, “...an act [that is] intended to inflict severe or serious physical or mental pain or suffering..., including serious physical abuse.”¹⁴⁸ This provision also stipulates that these acts are punishable, by death in some cases, if death occurs to the victim(s). This definition of cruel or inhuman treatment, like other legislation and treaties, is still liable to different interpretations. An alleged defendant may claim that cruel or inhuman treatment did not occur because their actions did not produce *severe or serious* pain. Knowing the possibility of such a defense, the authors of this act elaborate on the definitions provided therein. ‘Serious physical pain or suffering’ is thus defined:

The term ‘serious physical pain or suffering’ means bodily injury that involves— (I) a substantial risk of death; (II) extreme physical pain; (III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or (IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty. (ii) The term ‘severe mental pain or suffering’ has the meaning given that term in section 2340(2) of title 18.¹⁴⁹

Likewise, serious bodily injury is defined as acts which involve, “a substantial risk of death, extreme physical pain, protracted and obvious disfigurement; or protracted

¹⁴⁷ *Military Commissions Act of 2006*, Public Law 109-366, 109th Cong., 2d. sess. (October, 17, 2006), <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=481617> (accessed October 14, 2011), 2635.

¹⁴⁸ *Ibid.*, 2627.

¹⁴⁹ *Ibid.*, 2627-2628.

loss or impairment of the function of a bodily member, organ or mental faculty.”¹⁵⁰ It is commendable that the authors of the MCA elaborated on otherwise ambiguous terms, however, incorporating language such as ‘substantial,’ ‘extreme,’ and ‘impairment’ generally, continue to leave the acts open to interpretation and possible violation. Again, what constitutes extreme pain for one individual may be tolerable by another.

The definition of torture under the MCA incorporates many of the terms mentioned above, but also emphasizes the intent of the perpetrator (referenced above by the OLC opinion regarding the Federal Torture Statute). Torture, according to the MCA, is described as, “the act of a person who commits, or conspires to commit, an act *specifically intended* [emphasis added] to inflict severe physical or mental pain or suffering...for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.”¹⁵¹ The phrase ‘specifically intended’ is emphasized because it may also act as a defense for an individual who commits torture. If an individual were to claim he did not intend for his actions to result in severe pain, by the language of this law, he may be absolved of torture charges.

Detainee treatment in the War on Terror

The following discussion examines specific cases of U.S. treatment of individuals detained in the War on Terror. This encompasses physical treatment of detainees, living conditions, and interrogations. The following is not intended to condone or condemn the practices employed by the United States during the current war. The ensuing examples

¹⁵⁰ Ibid., 2628.

¹⁵¹ Ibid., 2633.

are intended only to provide evidence which will contribute to this analysis of the contemporary applicability of Geneva Convention III which is derived from the treaty's degree of practicability in the War on Terror. To do so, the official government documents that requested or authorized the use of interrogation techniques and other methods of treatment at the U.S. Naval base at Guantanamo Bay, Cuba are examined. To reiterate, this subsection will mainly focus on the content of the requested or authorized methods as compared to the protections of Geneva Convention III and other applicable laws. Next, the report prepared by Major General Antonio M. Taguba regarding allegations of detainee abuse at Abu Ghraib Prison in Baghdad, Iraq, is examined as a case study for the applicability of the GPW.

Requested interrogation methods, Guantanamo Bay, Cuba

Evidence that the applicability of Geneva Convention III Relative to the Treatment of Prisoners of War is declining can be found in a series of U.S. Defense Department memos issued in late 2002. These memos address interrogation and counter-resistance techniques requested for implementation by interrogators at Guantanamo Bay, Cuba (GITMO). The request to implement the additional techniques, denoted as Category I, II, and III techniques, was made by the Commander of Joint Task Force 170 at Guantanamo Bay. On September 27, 2002 William J. Haynes II, General Counsel to the Department of Defense, submitted his recommendation to authorize the three requested categories of interrogation methods to be used on detainees held at GTMO—consisting of a total of 18 techniques—to Secretary of Defense Donald Rumsfeld for his approval.

Category I, the least harsh of the techniques, would allow interrogators to yell at detainees—although not at a level that would cause hearing damage— and also allow interrogators to employ means of deception during questioning or interrogations. Deception in this context may include, but is not limited to, interrogators claiming identities other than their own. For instance, an interrogator may claim he is a national of a State that has a reputation for maltreatment of detainees or other prisoners.¹⁵²

The requested Category II techniques would make available to the interrogator 12 specific acts to support intelligence gathering efforts. The requested techniques include:

- 1) The use of stress positions (like standing), for a maximum of four hours.
- 2) The use of falsified documents or reports.
- 3) Use of the isolation facility for up to 30 days...Extensions beyond the initial 30 days must be approved by the Commanding General...
- 4) Interrogating the detainee in an environment other than the standard interrogation booth.
- 5) Deprivation of light and auditory stimuli.
- 6) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.
- 7) The use of 20-hour interrogations.
- 8) Removal of all comfort items (including religious items).
- 9) Switching the detainee from hot rations to MREs.
- 10) Removal of clothing.
- 11) Forced Grooming (shaving of facial hair etc...).
- 12) Using detainees individual phobias (such as fear of dogs) to induce stress.¹⁵³

The four techniques enumerated under Category III, the harshest of the three categories, require approval from the Commander of USSOUTHCOM for their application towards a detainee. Category III techniques are reserved for only the most

¹⁵² Lt. Col. Jerald Phifer, United States Army, U.S. Department of Defense, "Memorandum for Commander, Joint Task Force 170: Subject: Request for Approval of Counter-Resistance Strategies," October 11, 2002. APO AE 09860 JTF-J2: 1, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf> (accessed February 23, 2012).

¹⁵³ Ibid., 1-2.

resistant detainees who are believed to have valuable information. LT. Col. Phifer of the U.S. Army reiterates the fact that some Category III techniques are already being employed by other agencies of the Defense Department, and recommends that they be extended to military interrogators. Category III techniques include:

- 1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.
- 2) Exposure to cold weather or water (with appropriate medical monitoring).
- 3) Use of a wet towel and dripping water to induce the misperception of suffocation.
- 4) Use of mild, non-injurious contact, such as grabbing, poking in the chest with the finger, and light pushing.¹⁵⁴

The official recommendation of Mr. Haynes was for the Secretary of Defense to approve all of the Category I and II techniques as well as the fourth technique enumerated in Category III. Mr. Haynes asserted in his memo that all Category III techniques may one day be a viable legal option. However, he did not believe that the approval of Category III as a whole was necessary at the time. Secretary of Defense Donald Rumsfeld approved for the Guantanamo Bay commander the techniques recommended by Mr. Haynes.

Geneva III and Category I, II, and III interrogation techniques

A number of legal opinions were circulated among the U.S. Department of Defense prior to Secretary Rumsfeld's authorization of the requested interrogation techniques at Guantanamo Bay. Staff Judge Advocate Lt. Colonel Diane Beaver was among those to provide a legal opinion to the Secretary of Defense. Lt. Col. Beaver

¹⁵⁴ Ibid., 2-3.

provided a thorough examination of the legality of these techniques in regards to the Geneva Conventions, UN Convention Against Torture, and numerous domestic laws.

Lt. Colonel Beaver begins her analysis by asserting, that “the detainees currently held at Guantanamo Bay, Cuba, are not protected by the Geneva Conventions...[However], they must be treated humanely and, subject to military necessity, in accordance with the principles of the GC.”¹⁵⁵ Beaver asserted that the detainees’ ability to intermingle and talk amongst themselves has enabled them to adjust to and prepare for traditional means of interrogation, rendering old methods obsolete. The “old methods” utilized in 2002 are outlined in Army FM 34-52 which Beaver claimed to be restricted by the Geneva Conventions. As a result, Beaver is of the opinion that “the Geneva Conventions limitations that ordinarily would govern captured enemy personnel interrogations are not binding on U.S. personnel conducting detainee interrogations at GTMO.”¹⁵⁶

In her memo to the Secretary of Defense, Lt. Col. Beaver examines the legality of each technique requested. The techniques enumerated in categories I and II are determined to be legal on the condition that the interrogators do not implement the techniques with the specific intent to cause physical damage or mental harm. Furthermore, Beaver finds these techniques permissible because there is a “legitimate

¹⁵⁵ Lt. Col. Diane E. Beaver, Staff Judge Advocate United States Army, U.S. Department of Defense, “Memorandum for Commander, Joint Task Force-170: Subject: Legal Brief on Proposed Counter-Resistance Techniques,” October 11, 2002. APO AE 09860, JTF 170-SJA: 1, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf> (accessed February 23, 2012).

¹⁵⁶ Ibid.

governmental objective in obtaining the information necessary... for the protection of the national security of the United States, its citizens, and allies.”¹⁵⁷

In regards to the last group of techniques, the harsher Category III techniques, only one of the four is found to be illegal. Technique 1, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him or her and/or their family, is proclaimed as legal due to “compelling governmental interest,”¹⁵⁸ so long as the threats are not executed to intentionally cause prolonged harm. Lt. Col. Beaver adds that caution should be exercised by interrogators when using this technique because death threats, under the Federal Torture Statute, are technically considered as a means to inflicting mental harm. The legality of the second technique, exposure to cold weather or water, is justified by the stipulation that “appropriate medical monitoring” be used with this practice.¹⁵⁹

The third technique of placing a wet towel over a detainee’s head to simulate suffocation is also considered legal “if not done with the specific intent to cause prolonged mental harm.”¹⁶⁰ Once more, Beaver adds that caution should be used with this technique because foreign courts have already acknowledged the potential mental harm that this technique may cause. The fourth and final technique, physical contact with the detainee, is the only provision that Lt. Col. Beaver deems illegal. Beaver points out that physically pushing, poking, or shoving a detainee “will technically constitute an assault under Article 128, [of the] UCMJ.”¹⁶¹ This technique would also fall under the purview

¹⁵⁷ Ibid., 6.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

of the UN Convention Against Torture, which mandates that ratifying States ensure domestic law is in place to address torture and cruel treatment, but eludes the reach of Geneva Convention III in this scenario.

The interrogation methods enumerated in categories I and II, although unfavorable to detainees experiencing them, would not likely constitute torture under Geneva Convention III, the CAT, or other applicable laws. However, there are many variables that also must be considered. For example, the use of stress positions may not cause severe pain and suffering to a physically fit soldier. Although, the use of the same stress positions for someone who was terminally ill, elderly, pregnant, wounded, etc., may indeed cause severe pain and suffering. Therefore, it is not possible to claim with any amount of certainty that these techniques would never amount to torture.

The deprivation of light and auditory stimuli and the removal of clothing under category II—as well as threats towards detainees and exposure to cold weather or water under category III— could be considered in violation of Articles 17, 22, 25, and 27 of Geneva III, but with some conditions. Article 17 of the Third Geneva Convention prohibits the threatening of detainees in order to obtain information. Articles 22 and 25 ensure protection from injurious climate and guarantee adequately heated and lighted premises respectively. Article 27 ensures that sufficient clothing shall be supplied by the Detaining Power, although it does not strictly prohibit the removal of clothing, it may be inferred. Despite the provisions of these articles, the argument may be appropriately asserted that these protections are only afforded to those who have been awarded prisoner of war status.

Since members of Al Qaeda and the Taliban had been determined to be ineligible for the status of a prisoner of war, the provisions of these articles do not technically apply to them. The issues of detainee treatment with regards to the implementation of categories II and III techniques towards Taliban and Al Qaeda members exceeds the purview of Geneva Convention III. Instead, domestic laws and international treaties, namely the UN Convention Against Torture, would be applied in this situation. According to the United States' reservations and understanding of the CAT, in order for these acts to be deemed as cruel, inhuman, or degrading treatment, a competent authority—such as the judiciary—would be responsible for determining that these acts violate the constitutional protections of the 8th amendment.

Examination of Geneva Convention III at Abu Ghraib: United States Department of the Army, Article 15-6 Investigation of the 800th MP Brigade

The preceding discussion of interrogation methods requested at Guantanamo Bay is included to examine the administrative aspects of applying Geneva Convention III with regards to detainee treatment. Accordingly, a contemporary analysis of the Geneva Conventions, and the applicability thereof, should examine not only those who authorize policy, but those who implement it as well. For the latter, this study turns to the report produced by Major General Antonio M. Taguba following his investigation of the 800th Military Police Brigade at Abu Ghraib Prison, in Baghdad, Iraq.

Major General Taguba was ordered to conduct this investigation in early 2004 following allegations and reports of detainee abuse at Abu Ghraib Prison. The investigation focuses on allegations of abuse that arose between October and December

2003 from numerous battalions and brigades stationed at the Iraq prison. Taguba provides ample amounts of information including witness statements, general observations, and recommendations regarding his investigation. Nonetheless, in an attempt to avoid conjecture from statements within the report, this thesis will focus only on the incidents that Major General Taguba confirmed to have transpired.

Findings

According to confessions as well as witness statements from both detainees and soldiers, the investigation found the following acts of detainee abuse to have been committed by military personnel:

- a) Punching, slapping, and kicking detainees; jumping on their naked feet;
- b) Videotaping and photographing naked male and female detainees;
- c) Forcibly arranging detainees in various sexually explicit positions for photographing;
- d) Forcing detainees to remove their clothing and keeping them naked for several days at a time;
- e) Forcing naked male detainees to wear women's underwear;
- f) Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
- g) Arranging naked male detainees in a pile and then jumping on them;
- h) Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric shock torture;
- i) Writing "I am a rapist" [*sic*] on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and the photographing him naked;
- j) Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;
- k) A male MP guard having sex with a female detainee;
- l) Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee;
- m) Taking photographs of dead Iraqi detainees.¹⁶²

¹⁶² Maj. Gen. Antonio M. Taguba, United States Army, "Article 15-6 Investigation of the 800th Military Policy Brigade," United States Department of the Army, January 2004: 16-18, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/Taguba%20Report.pdf> (accessed February 23, 2012).

Additional instances of maltreatment were also expressed by detainees held at Abu Ghraib. The following allegations were deemed credible by Major General Taguba due to the clarity of their statements in conjunction with evidence provided by witnesses:

- a) Breaking chemical lights and pouring the phosphoric liquid on detainees;
- b) Threatening detainees with a charged 9mm pistol;
- c) Pouring cold water on naked detainees;
- d) Beating detainees with a broom handle and a chair;
- e) Threatening male detainees with rape;
- f) Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;
- g) Sodomizing a detainee with a chemical light and perhaps a broom stick;
- h) Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.¹⁶³

The Geneva Conventions within the Taguba Report

The Geneva Conventions are referenced intermittently within the Taguba report and warrant mention in this discussion. Major General Taguba stated:

I find that prior to its deployment to Iraq for Operation Iraqi Freedom, the 320th MP Battalion and the 372nd MP Company had received no training in detention/internee operations. I also find that very little instruction or training was provided to MP personnel on the applicable rules of the Geneva Convention Relative to the Treatment of Prisoners of War...Moreover, I find that few, if any, copies of the Geneva Conventions were ever made available to MP personnel or detainees.¹⁶⁴

Major General Taguba also observed that the 800th Military Police Brigade likewise failed to post copies of the Geneva Conventions within areas of the prison under the brigade's control. Taguba affirmed that this was not the first time the 800th MP had been cited for this offense. The Major General noted the absence of the Geneva Conventions

¹⁶³ Ibid., 17-18.

*MI – Military Intelligence

¹⁶⁴ Ibid., 19-20.

“even after several investigations had annotated the lack of this critical requirement.”¹⁶⁵

According to the report, disciplinary actions were taken against those who admitted guilt, or were found guilty of abuse. Worthy of note, the Major General’s report noted that, despite the circumstances, commendations were still warranted by soldiers who excelled in their overall function and objective absent strong leadership, as well as to those who reported questionable activity to their chain of command.¹⁶⁶

The findings of the Taguba Report were not included in an attempt to condemn military practices or claim that this standard of treatment is the norm in U.S. military detention facilities. Indeed, the commission of these acts is disgraceful and the United States Military rightfully pursued disciplinary actions against those responsible. This report is included as a tool for comparison. States continue to be held to the standards of the Geneva Conventions but these standards are not always clearly defined. The fallacy of the protections enumerated in Geneva Convention III is that they are accorded in an overly broad manner. Even though breaches and grave breaches are prohibited under Geneva III, it is the responsibility of domestic lawmakers and prosecutors to determine whether specific acts, such as the ones described above, violate the general prohibitions of this treaty. Whether an act constitutes cruel treatment, physical torture, or psychological and mental torture, is still left open to interpretation because there is no universally agreed upon definitions for these terms.

The GPW does not specifically prohibit any of these or other acts in particular, even though it may be argued that they violate some of the conventions more general

¹⁶⁵ Ibid., 26.

¹⁶⁶ Ibid., 50.

prohibitions. However, one must also consider that these offenses, when committed against Taliban, Al Qaeda, or similarly affiliated detainees, are not technically in violation of the GPW because of the unlawful combatant status of both organizations. Because the Taliban and Al Qaeda, as unlawful combatants, do not fall within the purview of the Third Convention, these issues would again be deferred to varying domestic laws and international treaties regarding human rights.

The Taguba Report demonstrates the legal gray area that exists in regards to detainee treatment. Whether these acts constituted torture or should be considered as cruel, inhuman, or degrading treatment is also disputable. The controversies surrounding treatment of detainees at Guantanamo Bay and the Abu Ghraib Prison scandal are not derived from the United States and its personnel egregiously violating domestic or international law. Contention arises, in many instances, because there is a legal void where the laws of war do not cover scenarios within the War on Terror. Geneva Convention III, in its current form, explains what protections are granted to prisoners of war but fails to outline standards of treatment for unlawful combatants who also do not qualify for protection as civilians under Geneva Convention IV, thereby deferring these standards of treatment to alternative treaties and laws.

As it stands, Geneva Convention III Relative to the Treatment of Prisoners of War does not adequately enumerate nor clearly prohibit the acts which spurred the Army's Article 15-6 investigation. Due to the limited scope of the GPW and the generality of its prohibitions relating to torture, maltreatment, and cruel punishments, it is advisable that this treaty not be used as the primary instrument to regulate detainee treatment in armed conflicts similar in nature to the War on Terror.

Recommendations

In the realm of intelligence gathering for national security, there is a fine line to be drawn between State necessity and human rights. Although international treaties, domestic laws, and customary laws prohibit the use of torture and other forms of cruel treatment and punishment, no law necessitates that detention be comfortable. Where the distinction lies between State security and fundamental guarantees of humanitarian rights, however, remains undecided. No States are obligated, nor likely, to make sacrifices to their own safety and security in order to observe humanitarian norms. As such, State leaders and military personnel are charged with the unenviable task of balancing national security needs with humanitarian obligations under treaties like the Geneva Conventions and UN Convention Against Torture.

Issues surrounding detainee treatment could be better managed by a revised version of Geneva Convention III for many of the same reasons provided for conflict classification. Legal obscurity could be bypassed with a revised version of the GPW by incorporating the proposed subcategories of “State-like,” “State-Comparable,” or “Organization of International Threat,” and explicitly stating what, if any, protections these individuals are to be afforded. If the GPW was expanded to incorporate these new subcategories, States would be better equipped to handle legal issues that surround unlawful combatants. Inclusion of these subcategories, at the very least, eliminates the argument that an individual, group, or organization is not covered by the Conventions. It is still possible to deny these individuals all of the rights, protections, and privileges accorded to prisoners of war; incorporating the new subcategories simply legitimizes doing so under Geneva Convention III.

In addition to the inclusion of the new subcategories of actors, Geneva Convention III would better serve High Contracting Parties if the broad terminology regarding prisoner of war treatment were elaborated upon. For instance, Army Field Manual 2-22.3 (formerly FM 34-52) was updated in late 2006 to prohibit specific acts of cruel, inhuman, or degrading treatment in accordance with U.S. domestic and international laws. The amendments to the Army Field Manual prohibit the implementation of the following eight offenses on individuals detained by the U.S. military:

- 1) Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner;
- 2) Placing hoods or sacks over the head of a detainee; using duct tape over the eye;
- 3) Applying beatings, electric shock, burns, or other forms of physical pain;
- 4) Waterboarding;
- 5) Using military working dog;
- 6) Inducing hypothermia or heat injury;
- 7) Conducting mock executions; and
- 8) Depriving the detainee of necessary food, water, or medical care¹⁶⁷

A revised GPW would not have to include the above provision per se, but the above revisions to FM 2-22.3 serve as a sufficient example of what the revisions to Geneva Convention III should strive for. Although U.S. Army FM 2-22.3 is obviously not all encompassing nor does it prohibit all possible forms of maltreatment, it can serve as a sufficient example of how a revised GPW could be formatted. Revisions such as these delineate what methods of treatment or interrogation techniques are allowed, and, it also provides peace of mind to those charged with interrogating enemy combatants.

¹⁶⁷ *U.N. Convention Against Torture (CAT): Overview and Application of Interrogation Techniques*, Congressional Research Service, RL32438. Prepared by Legislative Attorney Michael John Garcia, January 26, 2009. Federation of American Scientist, <http://www.fas.org/sgp/crs/intel/RL32438.pdf> (accessed February 29, 2012), 13-14.

Those charged with obtaining information for national security purposes will benefit from the clarity of these revisions and the possibility of interrogators being prosecuted for offenses not clearly defined in international or domestic law will be reduced.

In the case of the Abu Ghraib Prison scandal, when asked why he did not report instances of abuse to his superiors, a Sergeant from the 372nd Army MP Company, interviewed in Taguba's report, replied, "Because I assumed that if they were doing something out of the ordinary or outside the guidelines, someone would have said something."¹⁶⁸ It is not the opinion of this thesis that these revisions in and of themselves will reduce the prospect of prosecution. Instead, it implies that clarity of the law and proper dissemination thereof will reduce the probability of the offense being committed in the first place. Clearly defining standards of detainee treatment is a prudent measure not only for conflicts such as the War on Terror where a state is combating a non-governmental agency, but also for future conflicts involving High Contracting Parties where the warring factions are comprised of lawful combatants eligible for prisoner of war status.

¹⁶⁸ Maj. Gen. Antonio M. Taguba, United States Army, "Article 15-6 Investigation of the 800th Military Policy Brigade," United States Department of the Army, January 2004: 19, George Washington University, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/Taguba%20Report.pdf> (accessed February 23, 2012).

Chapter 4

Analysis and Discussion

This study has discussed the applicability of Geneva Convention III with regards to conflict classification, combatant status, and detainee treatment within the War on Terror. By using the United States and the War on Terror as a case study, this paper has found that Geneva Convention III maintains applicability only towards determining combatant status—bearing in mind that this thesis analyzed combatant status according to the 1949 Geneva Conventions and not the 1977 Additional Protocols, to which the U.S. is not a party. The recommendations for the new subcategories of actors were presented to remedy the process of conflict classification under Common Article 2 and Common Article 3 so that States may swiftly and accurately determine which Geneva Convention protections to apply in armed conflicts to come. Likewise, the option to expand upon treatment definitions to eliminate ambiguity was recommended to clarify the legality of actions regarding detainee treatment and interrogation.

Counterclaim - Geneva III needs no revision

An obvious argument to the idea presented for revising Geneva Convention III Relative to the Treatment of Prisoners of War, is that the treaty needs no revision because it still serves the needs of States who are a party to it. This argument bears some truth. Indeed, the GPW can still serve the needs of High Contracting Parties engaged in armed

conflict to some extent. However, according to this analysis, the GPW only sufficiently served the United States when determining the combatant status of its foes. Sufficient standards are not ideal in warfare, and if states are going to continue to be held to Geneva standards then the treaty must continue to adapt to contemporary warfare. According to the current version of Geneva III, the criteria for classifying conflicts and clearly defining standards of treatment for detainees who neither qualify for prisoner of war status nor civilian immunity are less practicable in contemporary warfare, especially within the War on Terror.

If Geneva Convention III is to remain the primary instrument utilized for enumerating prisoner of war rights in armed conflict, then delegates must expand its definitions so that it clearly defines what is prohibited. A counterargument to this recommendation is made by Solis who claims, “it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.”¹⁶⁹ This is a valid argument to make in this discussion, but it is not a valid excuse for inaction. This problem can be solved with regularly schedule amendments to the GPW by High Contracting Parties—assuming their willingness and desire to clearly define standards of treatment for prisoners of war and detainees. If an agreement cannot be reached regarding specific offenses and the definition of what constitutes said acts—as is often the case in multilateral treaties regarding this matter which induces the use of ambiguous rhetoric to begin with—then a reconvening may be deemed appropriate. To claim that Geneva Convention III is not outdated and needs no revision is to take a backwards-looking

¹⁶⁹ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*. (Cambridge: Cambridge University Press, 2010), 442.

stance that does not prepare for the increasing possibility of State versus transnational organization armed conflict.

The Geneva Conventions and technology: a forward-looking analysis

This study has examined the applicability of Geneva Convention III in modern warfare by casing the United States War on Terror. It is not enough, however, to only explore the practicality of the treaty in the present. It is likewise important to look forward to the various scenarios that the Conventions will be called upon to answer in the future. Moving forth into the 21st Century the evolving aspects of technology are presenting new challenges not only within warfare, but in domestic legislation and international law as well. “Cyberlaws,” or laws pertaining to the realm of technology and communications, remain largely unprecedented in many aspects. While researching this topic, the disparity between the potentially ill-willed capabilities of technology—such as the internet—and regulation thereof became more apparent. “I can’t think of another area in Homeland Security where the threat is greater and we’ve done less,” stated U.S. Senator Susan Collins in a 2012 CBS News interview.¹⁷⁰

As technology evolves and ease-of-access proliferates, nations of the international community will be obliged to enact legislation to regulate this expanding arena of human interaction. This study is of the opinion that technology is an area of concern that must be addressed within the laws of war as well. Relative to the research at hand, it is imperative that technology, the internet in particular, be taken into account in a discussion regarding the one topic of the convention that this research has found remains

¹⁷⁰ *60 Minutes*, CBS News, “Stuxnet: Computer worm opens new era of warfare,” (originally aired March 4, 2012), printed script from:1, CBS News, http://www.cbsnews.com/8301-18560_162-57390124/stuxnet-computer-worm-opens-new-era-of-warfare/?tag=contentMain;contentBody (accessed March 10, 2012).

applicable to contemporary warfare— combatant status. The following discussion explains why the time to act is sooner rather than later.

The means by which the internet can be used to achieve destructive ends continues to expand and domestic and international laws have been slow to incorporate these changes. The internet can be used in a number of ways by members and supporters of terrorist organizations and this multitude of tasks can be done instantaneously. Communication can be conducted by email or done in real-time via instant messengers. Members and supporters can post blogs, make websites, create and display propaganda, engage in chat rooms, view videos, play anti-American online games, and even accept donations. In addition to the speed at which communications may be conducted, they may also be produced and received from nearly anywhere in the world. “Messages can be transmitted from any physical location to any other physical location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another.”¹⁷¹ Already, “competent terrorists... and even small groups have access to impressive new encryption technologies.”¹⁷²

The widespread membership of Al Qaeda that spans many nations throughout the world is only made possible through ever-evolving communications technology and the internet. The transnational composition of Al Qaeda is unique from resistance movements of the past. Technology allows individuals to participate in or support the actions of

¹⁷¹ Stanford Law Review, “Laws and Borders—The Rise of Law in Cyberspace,” by David R. Johnson and David G. Post, Temple University, <http://www.temple.edu/lawschool/dpost/Borders.html> (accessed November 8, 2011), 4.

¹⁷² Richard K. Betts, “Fixing Intelligence,” in *Understanding the War on Terror*, ed. James F. Hoge Jr. and Gideon Rose (New York: Norton & Company, 2005), 288.

terrorist groups like Al Qaeda and the Taliban from inside and outside of the Middle East. Most notably, the internet helps to break down traditional borders and allows for trans-national membership, recruiting, and training.

The recruitment capabilities of the internet should not be overlooked as a meager instrument. Unlike traditional means to garner support and gain recruits from localized areas, “The internet also provides a global pool of potential recruits and donors.”¹⁷³ One burgeoning method of recruiting new members to the Al Qaeda network is the use of chat rooms. “According to U.S. government officials, Al Qaeda now uses chat rooms to recruit Latino Muslims with U.S. passports, in the belief that they will arouse less suspicion as operatives than would Arab-Americans.”¹⁷⁴ Clearly, the internet allows the reach of Al Qaeda to span far beyond the training camps in Afghanistan, not only to countries in close proximity to the United States, but possibly to individuals within the United States as well.

Jessica Stern notes that resources are already available to new recruits to help them take part in Al Qaeda’s agenda. “The ‘encyclopedia of jihad’, parts of which are available on-line, provides instructions for creating ‘clandestine activity cells,’ with units for intelligence, supply, planning, preparation, and implementation.”¹⁷⁵ If a terrorist sympathizer agrees with the online content of these sites but does not wish to take an active role in the hostilities, the internet has made it possible to donate money to organizations like Al Qaeda and the Taliban. “Online terrorist fundraising has become so

¹⁷³ Council on Foreign Relations, *Terrorists and the Internet*, prepared by Eben Kaplan, January 2009: 2, Council on Foreign Relations, <http://www.cfr.org/terrorism-and-technology/terrorists-internet/p10005> (accessed November 8, 2011).

¹⁷⁴ Jessica Stern, “The Protean Enemy,” in *Understanding the War on Terror*, ed. James F. Hoge Jr. and Gideon Rose (New York: Norton & Company, 2005), 361.

¹⁷⁵ *Ibid.*

commonplace that some organizations are able to accept donations via the popular online payment service PayPal.”¹⁷⁶

In the event that online material fails to convince an interested individual to take action, it is still successful in spreading the message and principles of the terrorist organizations. The spread of information can be a powerful tool especially when it is available to regions and individuals that are predisposed to anti-American sentiment. Propaganda is an effective tool to gain sympathy and support for Al Qaeda’s cause. “Bin Laden [had] posted a rambling 11,000 word declaration of war against the U.S. on-line. This document is known as ‘The Ladenese Epistle.’ It calls for the expulsion of U.S. forces from Saudi Arabia and the overthrow of the current Saudi government. He calls this a jihad or holy war.”¹⁷⁷ Terrorist propaganda does not always include something as straightforward as a “declaration of war” from the late leader of Al Qaeda, Bin Laden. However, each of these individuals who are swayed to action online is a plausible combatant, recruited by, trained with, and who can use technology to inflict harm.

Propaganda on terrorist websites is not confined to simply viewing content online. There have been instances where the interactive nature of terrorist propaganda has purported to extend to real life application. Evan Kohlmann, an expert specializing in terrorist organizations’ use of the internet, is cited by Eben Kaplan as recalling, “one extreme instance in which the Iraqi insurgent group Army of the Victorious Sect held a contest to help design the group’s new website. According to Kohlmann, the prize for the

¹⁷⁶ Council on Foreign Relations, *Terrorists and the Internet*, prepared by Eben Kaplan, January 2009: 2, Council on Foreign Relations, <http://www.cfr.org/terrorism-and-technology/terrorists-internet/p10005> (accessed November 8, 2011).

¹⁷⁷ Lt. Col. Bradley K. Ashley, USAF, *Anatomy of Cyberterrorism: Is America Vulnerable?* in the Homeland Security Digital Library, February 2003: 30, <https://www-hsdl-org.libproxy.txstate.edu/?view&did=2693> (accessed January 23, 2012).

winning designer was the opportunity to, with the click of a mouse, remotely fire three rockets at a U.S. military base in Iraq.”¹⁷⁸ The ability to launch an attack on U.S. troops abroad and civilians domestically simply by using a computer provides new challenges for labeling combatants in the War on Terror and armed conflicts to come. The internet now provides terrorists with the luxury of not only being off of the battlefield but conceivably being hundreds, or thousands, of miles away.

From a legal perspective, “global computer-based communications cut across territorial borders, creating a new realm of human activity and undermine the feasibility—and legitimacy—of applying laws based on geographic boundaries.”¹⁷⁹ Despite the capabilities of the internet continuously expanding, governments and international organizations alike continue to struggle over how this new realm should be governed. “While there is a common understanding of the Internet, there is not yet a shared view of internet governance.”¹⁸⁰ One may suggest that domestic legislation is the proper instrument with which to address illegal or dangerous cyber activity and punitive matters relating thereto, however, this thesis is of the alternative opinion. The transnational capabilities of the internet to inflict serious damage—whether financial or physical—is a serious threat that must be addressed preemptively rather than post-catastrophically. “The September 11, 2001 terrorist attacks provided further momentum

¹⁷⁸ Council on Foreign Relations, *Terrorists and the Internet*, prepared by Eben Kaplan, January 2009: 2-3, Council on Foreign Relations, <http://www.cfr.org/terrorism-and-technology/terrorists-internet/p10005> (accessed November 8, 2011).

¹⁷⁹ Stanford Law Review, “Laws and Borders—The Rise of Law in Cyberspace,” by David R. Johnson and David G. Post: 1, Temple University, <http://www.temple.edu/lawschool/dpost/Borders.html> (accessed November 8, 2011).

¹⁸⁰ United Nations, *Report of the Working Group on Internet Governance*, prepared by Chateau de Bossey, June 2005: 4, in the Homeland Security Digital Library, <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=455414> (accessed April 23, 2012).

by raising the specter of cyber attacks on critical infrastructure facilities, financial institutions, [and] government systems.”¹⁸¹

The primary example of this scenario took place in 2010. A computer virus, known as Stuxnet, was discovered by a Belarus-based company while investigating complaints of computer glitches in Iran. What they discovered was a virus that, unlike other viruses on the internet, was not intent on making its creator rich or gaining access to sensitive information, or obtaining weapons. “Stuxnet appeared to be crawling around the world, computer by computer, looking for some sort of industrial operation that was using a specific piece of equipment.”¹⁸² This piece of equipment is not the type of war instrument that is typically thought of in the War on Terror. “The programmable logic controller, or PLC, is one of the most critical pieces of technology you’ve never heard of. They contain circuitry and software essential for modern life and control the machines that run traffic lights, assembly lines, oil and gas pipelines, not to mention water treatment facilities, electric companies, and nuclear power plants.”¹⁸³ The complicated Stuxnet virus sought to infiltrate this piece of equipment and slowly, in the ensuing months and even years to come, subtly disrupt operations without detection.¹⁸⁴

Cyber attacks and cyber-terrorism are not issues that may be disregarded or only considered as a threat in the distant future—they are already happening. According to a segment in the March 4, 2012 edition of CBS’s news show ‘60 Minutes,’ correspondent

¹⁸¹ *Cybercrime: The Council of Europe Convention*, Congressional Research Service, RS21208. Prepared by Kristin Archick, December 1, 2005:1, in the Homeland Security Digital Library, <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=458591> (accessed March 24, 2012).

¹⁸² *60 Minutes*, *CBS News*, “Stuxnet: Computer worm opens new era of warfare,” (originally aired March 4, 2012), printed script from:3, CBS News, http://www.cbsnews.com/8301-18560_162-57390124/stuxnet-computer-worm-opens-new-era-of-warfare/?tag=contentMain;contentBody (accessed March 10, 2012).

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*, 4.

Steve Kroft writes, “for the past few months now, the nation’s top military, intelligence and law enforcement officials have been warning Congress and the country about a coming cyberattack against critical infrastructure in the United States... The warnings have been raised before, but never with such urgency, because this new era of warfare has already begun.”¹⁸⁵

Thus enters the correlation between the conventions and technology. There is a wide array of potential perpetrators that may wreak havoc on a nation through this type of attack ranging from: individuals unaffiliated with any organization or resistance movement, members of terrorist organizations, state-sponsored organizations, or a state itself. Retired General and former CIA Director under the George W. Bush Administration, Mike Hayden, warns that this kind of conduct may soon be deemed as acceptable behavior amongst members of the international community. Hayden stated, “We have entered into a new phase of conflict in which we use a cyberweapon to create physical destruction, and in this case, physical destruction in someone else’s critical infrastructure... The rest of the world is looking at this and saying ‘Clearly someone has legitimated this kind of activity as acceptable international conduct.’ The whole world is watching.”¹⁸⁶ If General Hayden is correct, and states are condoning these types of activities then the laws of war should be ready to adapt to this new type of conflict as well.

¹⁸⁵ *60 Minutes*, *CBS News*, “Stuxnet: Computer worm opens new era of warfare,” (originally aired March 4, 2012), printed script from: 1, CBS News, http://www.cbsnews.com/8301-18560_162-57390124/stuxnet-computer-worm-opens-new-era-of-warfare/?tag=contentMain;contentBody (accessed March 10, 2012).

¹⁸⁶ *Ibid.*, 2.

It is impractical to assume that a state of war could not one day be induced through the use of cyber related attacks, for instance, one that takes down critical infrastructure. Although such a provocation has not yet occurred, this does not condemn the laws of war to dormancy in the meantime. Taking into account that domestic legislation is lagging in this area for countries such as the United States and others, addressing combatants who may potentially use the internet as a weapon under the laws of war will prepare High Contracting Parties for the ever-evolving challenges of contemporary warfare.

Accordingly, this thesis proposes that individuals or organizations that carry out destructive cyber attacks on a scale considered to be an act of war, be classified as unlawful combatants. Assigning unlawful combatant status would insure that these individuals and the organizations to which they belong may be pursued, put on trial, and punished accordingly. Currently, trial and punishment for crimes relating to cyber activity are at the behest of the nations where the crime takes place. Although treaties such as the Council of Europe Convention on Cybercrime exist and attempt to synchronize laws and efforts amongst nations to address the transnational character of these crimes, the nations that are signing treaties such as these “are not the ‘problem countries’ in which cyber criminals operate relatively freely.”¹⁸⁷

If deeming the perpetrators of war-like cyber attacks as unlawful combatants is unsatisfactory, consider holding these individuals to the traditional four requirements of lawful combatancy, the same as all other combatants in warfare. Recalling that all four

¹⁸⁷ *Cybercrime: The Council of Europe Convention*, Congressional Research Service, RS21208. Prepared by Kristin Archick, December 1, 2005:3, in the Homeland Security Digital Library, <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=458591> (accessed March 24, 2012).

requirements must be met in order to be afforded prisoner of war status, a “cyber-terrorist” would undoubtedly fail to satisfy the requirement to carry arms openly. There is no need for a command structure because this type of combatant is capable of being a significant threat while operating alone. If a terrorist organization as a whole adopts a policy of cyber attacks, their command structure could thusly be examined. The requirement to wear a distinctive emblem recognizable at a distance is obviated because the purpose of this requirement is to distinguish combatants from civilians. Since unlawful combatants engaging in cyber attacks can remain hidden, this requirement is rendered obsolete. Finally, the fourth requirement, to abide by the laws and customs of war is altogether unattainable regarding cyber activity. An individual cannot comply with the laws and customs of war where none exist on the matter. These reasons are precisely why this study urges the inclusion of combatant status within the context of the laws of war where the internet and other technology are involved.

An alternative scenario does exist, however. It is plausible that an individual who does meet the four requirements of lawful combatancy engages in a form of cyber attack. What is to be the status of a lawful combatant who commits an unlawful cyber crime? Considering the staggering effects that a successful cyber attack could have on the critical infrastructure of a nation, this thesis proposes a zero-tolerance policy for such a scenario.

In future conflicts, there remains a potential for dispute among States that will not be able to determine jurisdiction over war-like activities committed in cyberspace. Therefore, a logical step is to address it as an international matter. The Council of Europe Convention on Cybercrime determined over a decade ago, “that the transnational

character of cyber crime could only be tackled at the global level.”¹⁸⁸ It is therefore imprudent—and unwise—to dismiss the discussion of combatant status for those who pose threats at the international level through the use of the internet or other communications technology. According to the Berkman Center for Internet & Society at Harvard Law School, “cybersecurity is [now] viewed as central to general security. No doubt, a disabling of the Internet would wreak havoc on industrialized societies. A single government is inadequate on its own to ensure the security of the Net.”¹⁸⁹

A revision to the Conventions that makes cyber attacks on critical infrastructure, transportation systems, communications, etc., a war crime bypasses the debate that is slowing domestic legislation. Because domestic laws of nations are not presently equipped to handle war-like crimes that involve cyberspace; allow the laws of war to assume the role. It is imperative that domestic laws do not hinder, and international laws are appropriately equipped, to support the means to national security without sacrificing the integrity of integral treaties such as Geneva Convention III.

As a matter of prudence, the United States, as well as the international community, must take appropriate actions against these threats at all levels. Regardless of domestic or international jurisdiction; through revisions to Geneva III, academia and governments alike can acknowledge and prepare for the effects that technology is having on national borders. States, terrorist organizations, and even individuals, have the potential to inflict serious harm through cyber capabilities. Were the GPW to be revised,

¹⁸⁸ Ibid.

¹⁸⁹ Mary Rundle, *Beyond Internet Governance: The Emerging International Framework for Governing the Networked World*, research publication no. 2005-16, Fall 2005:12, The Berkman Center for Internet & Society at Harvard Law School, in the Homeland Security Digital Library, <https://www-hsdl-org.libproxy.txstate.edu/?abstract&did=473857> (accessed April 23, 2012).

State delegates to an international convention can prepare the laws of war for armed conflict in a technological age. Even if a revised Third Convention did not create specific cyber prohibitions, offenses, or punishments; the revision would do well, at the very least, to address how states will confront combatant status along with jurisdictional issues in the event of a cyber attack.

Incorporating these norms into the laws of war provides High Contracting Parties with international legal precedent on the matter. If an organization can use the internet to successfully carry out a cyber attack, as opposed to a traditional military attack or surprise terrorists attack, on a scale that brings a nation to arms—much like the hijacked planes of 9/11 did— then preparing the laws of war now is nothing less than sensible policymaking at the international level. Without a doubt, if nations combating terrorism do not defend and prepare themselves on all fronts— ranging from military functions, intelligence gathering, and cyberspace capabilities—terrorist organizations will continue to spread their malicious agenda to those willing to carry it out. “Perhaps the ultimate, tragic example...is the fact that without the Internet, cell phones, and modern telecommunications systems, the Al Qaeda network could never have evolved into the pervasive, pernicious web of evil it has become.”¹⁹⁰

These are issues that must be addressed in the laws of war sooner rather than later. In a time of instant and globalized communications, the laws of war certainly cannot afford to waste time arguing over boundaries, jurisdiction, or precedents. Terrorist organizations are already taking active strides to counter the technological intelligence

¹⁹⁰ Senate Committee on Commerce, Science, and Transportation, *Technology Assessment in the War on Terrorism and Homeland Security: The Role of the OTA*, 107th Cong., 2d sess., S. Rep. 107-61: 23, <https://www-hsdl-org.libproxy.txstate.edu/?view&did=2185> (accessed January 21, 2012).

that is in use by countries such as the United States, and it is vital that States combating terrorism stay at the forefront of cyberspace capabilities while also remaining consistent with the principles of Geneva.

Adapting Geneva Convention III and similar international laws to the contemporary age of technology is the most efficient way in which States can progress the laws of armed conflict and ensure that governments and their populace are not caught unaware or unprepared for the issues surrounding cyber attacks that will be presented in future armed conflicts. It is not expected that revisions to Geneva III would, or could, account for all instances of cyber-terrorism or crimes. However, these acts warrant mention in the international laws of war. Failure to address technology within international laws that may be utilized in contemporary warfare may be considered nothing short of a failure by nations to prepare and protect themselves for armed conflicts inevitably to come.

Conclusion

In concluding this analysis of the contemporary applicability of the Third Geneva Convention Relative to the Treatment of Prisoners of War, this study has found the Convention's degree of applicability wanting in areas regarding conflict classification and detainee treatment. At the onset of armed conflict, conflict classification is made to determine which, if not all, of the provisions of the four Conventions of 1949 are to apply to the armed conflict. This determination is imperative due to the fact that different conflicts enact different protections. In the War on Terror, the dated rhetoric of the GPW was unable to include the war under the Convention's purview. To be sure, the Convention provides a solid foundation for conflict classification in armed conflict, but in modern warfare, more is needed. The Geneva Conventions can continue to act as strong guidelines for the conduct of States at war and the protection of people therein, but in order to do so, the Conventions must also adapt to modern times. The proposed subcategories of actors will simplify conflict classification, which mandates what protections of the Conventions are to be enacted and has a direct effect on combatant status, in State versus transnational/non-governmental organization warfare.

When examining combatant status, this study has found that Geneva Convention III remained applicable to the current conflict, albeit convoluted at times. Geneva III, while applicable to the War on Terror, did fail to provide strong or clear definitions for the United States with which to adequately define its adversaries with any degree of

certainty. In the War on Terror, the process of labeling enemy combatants has proven difficult and complex, both in the law and on the battlefield. The process of defining combatants is paramount within the Third Geneva Convention of 1949, and the determination of this status weighs heavily on the treatment, rights, and protections of combatants in war. The incorporation of the proposed sub-categories of actors can simplify this process.

In regards to the issues surrounding detainee treatment, the broad language of Geneva Convention III, in most instances, fails to provide any substantive protections for detainees and prisoners. Revisions to Geneva Convention III that remove the ambiguity and generality will help regulate States' detention processes in armed conflicts. This study has not advocated that those who belong to terrorist organizations, such as Al Qaeda or the Taliban, should be accorded additional protections traditionally reserved for lawful combatants. Instead, this study calls upon the international community to elaborate and clearly define what treatment and methods are prohibited and which are not. Elaborating on these prohibitions and acceptable treatment methods relieves states of the uncertainty associated with what is acceptable, whether under the GPW or their own laws as stipulated by treaties like the UN Convention Against Torture, and likewise creates uniformity on the subject.

In the War on Terror, the Third Convention tended to be more of a moral guideline than an interactive law. The execution of the principled protections of the GPW during the War on Terror is often deferred to other treaties such as the UN Convention Against Torture or domestic laws. In order for the Conventions to truly remain effectual, amendments must be made, as often as necessary, to clearly define what constitutes

conduct in violation of principles and provisions of Geneva Convention III. If elaboration of Geneva III protections is not deemed possible and issues surrounding detainee treatment are to continue to be deferred to alternative international treaties or laws, then it is time to accept that the detainee protections contained within Geneva III exist now more in principle than practicality.

The drafters of the 1949 Geneva Conventions must be commended for the treaty they produced. Universally accepted amongst nations, the Geneva Conventions have served High Contracting Parties engaged in armed conflicts for over sixty years. The Third Geneva Convention is not condemned by this study as weak or wholly incapable of being utilized in armed conflicts today. This study has found that Geneva III can still efficiently serve High Contracting Parties if the proper revisions are undertaken. Updating the Third Convention will usher the treaty into the 21st century and the wars that are being, and will be, fought therein. The proposed revisions and recommendations that have been made will ensure the laws of war adapt to contemporary warfare and provide the best available protections for soldiers and combatants on the battlefield, as well as provide clear guidelines for officials and policymakers who engage their States in armed conflict in the years to come.

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VITA

Patrick Adam Hardwick was born in Waco, Texas, on January 28, 1987, the son of Alice Hurtado Hardwick and Don Stephen Hardwick. After completing his work at Midway High School, Waco, Texas, in 2005, he entered McLennan Community College. In the fall of 2006 he entered Texas State University-San Marcos. He received the degree of Bachelor of Arts with Majors in Political Science and History from Texas State in August 2009. In August 2009, he entered the Graduate College of Texas State.

Permanent Address: 716 Arliss

Waco, Texas 76712

This thesis was typed by Patrick A. Hardwick.

