SQUARE PEGS AND ROUND HOLES: AL-QAEDA DETAINEES AND COMMON ARTICLE 3

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"If our work is to be of value, we must always keep realities in view, and avoid laying down rules which cannot be applied. We must go as far as possible, and yet never transgress the bounds beyond which the value of the new Convention will become an illusion."[1]

I. INTRODUCTION

Who can forget that dreadful morning of September 11, 2001, with its obscene images of civilian airliners crashing into—and bringing down—the World Trade Center towers in New York City and of the Pentagon in flames? In truth, those attacks constituted a new chapter in the history of armed conflict. On 9/11, a non-state actor, the transnational terrorist organization al-Qaeda, was able to accomplish in one terrible morning what most currently-existing nation-states would be hard-pressed to do at all: al-Qaeda successfully projected power half-way around the globe and mounted a well-coordinated attack to inflict unprecedented damage and destruction on the world's sole superpower. Nineteen al-Qaeda terrorists managed in one awful morning to inflict more death and destruction on the United States—using box cutters and hijacked civilian aircraft as their weapons of choice[2]—than the Empire of Japan managed to do at Pearl Harbor with one of the world's most sophisticated naval

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1. Max Petitpierre, *Minutes of the First Seven Plenary Meetings*, *in* 2-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 at 9, 10 (2004) [hereinafter FINAL RECORD].

2. Nineteen al-Qaeda members hijacked four civilian aircraft, two of which were intentionally flown into the World Trade Center towers in New York City, one of which was intentionally flown into the Pentagon in northern Virginia, and one of which crashed in Pennsylvania when passengers sought to take back control of the aircraft before it, too, could be used as a missile against another high value target. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U. S., THE 9/11 COMMISSION REPORT FINAL REPORT OF THE NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004), *available at* http://www.gpoaccess.gov/911/pdf/fullreport.pdf. A total of 2973 persons were killed by these acts. *Id.* at 552 n.188.

arsenals of its day.[3]

The resulting "Global War on Terror"[4] (GWOT) is thus an anomaly: not quite "war" in the traditional sense with vast naval armadas, armies, and air forces, yet too lethal and geographically extensive to constitute mere "criminal activity" to be dealt with solely by the Nation's criminal justice system.[5] The GWOT is, in reality, a hybrid straddling the fence between traditional armed conflict and extremely heinous criminal activity.[6] The GWOT's hybrid nature

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3. Japan attacked the U.S. fleet at Pearl Harbor and U.S. Army airfields on Oahu from a naval flotilla consisting of sixty-seven ships, including six aircraft carriers, from which 353 planes were launched to conduct the attacks. *Pearl Harbor Facts Trace History, Consequences of 1941 Attack*, MORNING CALL (Allentown, Pa.), May 27, 2001, at A4. A total of 2403 Americans were killed by the Japanese attacks. *Id.*

4. "Global War on Terror" is an unfortunate moniker that suffers much from its imprecision. It wrongly suggests that one's foe can be a method or means of warfare. Nevertheless, the Bush Administration has made clear that the so-called Global War on Terror is not aimed at "terror" per se, though one might be excused for thinking that based on the phrase itself, but rather only at those *terrorist groups* that can project power globally. *See* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://whitehouse.gov/news/releases/2001/09/print/20010920-8.html (emphasis added) [hereinafter Bush, Address to Congress]:

> Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya . . . .
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> Al Qaeda is to terror what the mafia is to crime.
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> . . . .
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> Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group *of global reach* has been found, stopped and defeated.

5. The ongoing war is unlike any before in our history. *See, e.g., id.* ("The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and [to] make no distinction among military and civilians, including women and children.") Mark Fineman & Stephen Braun, *After the Attack; The Terror Network; Life Inside al Qaeda: A Destructive Devotion*, L.A. TIMES, Sept. 24, 2001, at A1:

> [Al Qaeda members'] commitment is unyielding. They film their own suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States.

See also Deputy Sec'y of Def. Paul Wolfowitz, Prepared Statement for the House and Senate Armed Services Committees: "Building a Military for the 21st Century" (Oct. 3, 2001), available at http://www.defenselink.mil/speeches/2001/s20011003-depsecdef.html:

> Our new adversaries may be, in some cases, more dangerous than those we have faced in the past.
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> . . . .
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> Their decision-making is not subject to the same constraints that earlier adversaries faced. [They] answer to no one. They can use the capabilities at their disposal without consultation or constraint—and have demonstrated a willingness to do so.

6. For purposes of this paper, the GWOT will be understood as constituting "armed conflict" within the meaning of the international law of war. This stance is consistent with the views of: (1) the President of the United States, *see, e.g.*, President George W. Bush, Remarks

helps explain the ongoing confusion in the United States and elsewhere concerning the type of treatment owed by the United States and its allies to those captured and detained in this war. Those who view the 9/11 attacks as acts of war, as something beyond mere criminal acts *writ large*, argue that al-Qaeda detainees should be subject to and governed by the law and customs of war;[7] on the other hand, those who view the events of 9/11 as extremely heinous criminal acts, but not acts of war, argue that the detainees should be subject to and governed by the United States criminal justice system, with all of its inherent rights and protections.[8]

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at National Day of Prayer and Remembrance (Sept. 4, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/print/20010914-2.html ("War has been waged against us. . . ."); Bush, Address to Congress, *supra* note 4 ("On September the 11th, enemies of freedom committed an act of war against our country."); (2) the Congress of the United States, *see, e.g.*, Sense of Congress Regarding Terrorist Attacks, Pub. L. No. 107-40, 115 Stat. 224 ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ."); (3) the Supreme Court of the United States, *see, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)) (noting that "capture, detention, and trial of unlawful combatants . . . are 'important incident[s] of war'"); (4) the United Nations Security Council, *see, e.g.*, S.C. Res. 1368, pmbl., U.N. Doc. S/Res/1368 (Sept. 12 2001) (recognizing and reiterating, in light of the events of 9/11, a nation's "inherent right of individual and collective self-defence," a war-related right); (5) our NATO allies, *see, e.g.*, Statement by NATO Secretary General, Lord Robertson, Statement of Support (Oct. 2, 2001), *available at* http://www.state.gov/s/ct/rls/other/5197.htm (confirming that 9/11 attacks triggered application of mutual defense provision, Article 5, of the Washington Treaty); (6) our ANZUS Pact allies, *see, e.g.*, The Hon. John Howard, Prime Minister of Austl., Joint Press Conference with the Deputy Prime Minister and the Ministry for Foreign Affairs (Sept. 14, 2001), *available at* http://www.pm.gov.au/media/speech/2001/speech1240.htm) (announcing that the Australian Cabinet had agreed that the attacks of 9/11 warranted invocation of mutual defense provisions of the ANZUS treaty); and (7) our Rio Pact allies, *see, e.g.*, Org. of Am. States [OAS] Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism, OEA/Ser.F/II.23, RC.23/RES.1/01 (Sept. 21, 2001), *available at* http://www.oas.org/OASpage/crisis/RC.23e.htm (recognizing that the 9/11 attacks triggered the reciprocal defense provisions of the Rio Pact). *See also* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 21 (2003) (noting that 9/11 attacks exhibit "characteristics of armed conflict including their purpose, coordination, and intensity"); *id.* at 35 (noting that al-Qaeda intended the attacks as "acts of war" against the United States).

7. *E.g.*, captives must meet certain criteria to receive protection under the Prisoner of War Convention, *see* Geneva Convention (III) Relative to the Treatment of Prisoners of War arts. 3-5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; captives are to be detained by the regular armed forces of the detaining nation, *see id.* art. 39; captives may receive legal representation upon the filing of charges, *see id.* art. 105. Note that captives are kept in preventive, not punitive, detention, i.e., they are detained to ensure that they do not again take up arms, not as punishment for their activities. Taking up arms unlawfully, i.e., in violation of the Conventions' rules, is itself a war crime: "[U]nlawful combatants . . . violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the 'killing [and] disabling . . . of peaceable citizens and soldiers.'" Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2832 (2006) (Thomas, J., dissenting) (quoting W. Winthrop, MILITARY LAW AND PRECEDENTS 784 (rev. 2d ed. 1920)).

8. *See, e.g.*, Brief for Petitioners at 14, Al Odah v. United States, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96764 (alleging that the U.S. Government was "violating

One author has attempted to place the events of 9/11 in historical perspective in these words:

> In the hours and days that followed [the attacks of 9/11,] many compared the events of September 11, 2001, to those of December 7, 1941—another day of infamy. Just as Franklin D. Roosevelt declared war following the attack on Pearl Harbor, so George W. Bush declared war following the attack on the World Trade Center and the Pentagon. But what kind of war would it be? It soon became clear that the "war on terrorism" would bear little resemblance to World War II. After December 7, 1941, America mobilized as never before. Millions of men traded civilian clothes for military uniforms, millions of women left home to take jobs left vacant, whole factories were retooled from making cars and tractors to manufacturing tanks and artillery shells. After four years of extreme exertion, America's sacrifices were rewarded with the unconditional surrender of its foes—Imperial Japan, Nazi Germany, Fascist Italy.
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> No such triumph would be likely over the forces of terrorism—any more than total victory could be declared in the war on crime, or the war on drugs, or the war on poverty. Just as this was not a conflict that would result in total victory, so it would not call for total mobilization of the home front. No draft was instituted after the attack, nor was industry put

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fundamental principles of due process by imprisoning [Petitioner] indefinitely without charge, access to counsel, or access to any impartial process for reviewing [his] detention[]."); Petitioners' Brief on the Merits at 4-5 n.3, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 162758 (alleging that petitioners have not been charged with any wrongdoing or brought before any panel and have been denied counsel). *But see* Kenneth Anderson, *What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POL'Y 591 (2002).

> The ability to prosecute domestic crime, and the necessity of providing constitutional standards of due process, including the extraordinarily complex rules of evidence, suppression of evidence, right to counsel, and the rights against self-incrimination have developed *within* a particular political community, and fundamentally reflect decisions about rights within a fundamentally domestic, democratic setting in which all of us have a stake. . . .
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> It is a system, in other words, that fundamentally treats crime as a *deviation from* the domestic legal order, not fundamentally an *attack upon* the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial. . . . U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals *and* enemies. U.S. district courts are eminently unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11.

Id. at 610-11 (emphasis in original).

> on alert. This war would be fought by a relatively small number of professional soldiers, sailors, airmen, marines. They would be pitted against the men of the shadows, holy warriors who wore no uniform, who shirked open battle, who took refuge among civilians and emerged to strike when least expected at the infidel's most vulnerable outposts. . . . The greatest challenge in fighting terrorism was not to kill the enemy; it was to identify the enemy. Spies, police officers, covert operators, even diplomats would be on the front lines; and civilians would suffer more heavily than the uniformed military.[9]

The international community anticipated neither the rise of groups like al-Qaeda, able to engage in extensive, lethal, armed conflict around the globe, nor the hybrid nature of the armed conflict that has resulted.[10] Because no one foresaw the advent of non-state actors like al-Qaeda being able to engage in global armed conflict, the current law of war[11] lacks defined and adequate means to deal with the peculiarities inherent in such a conflict. Despite this reality, today many in the West and elsewhere are arguing that the specific rules enunciated in the 1949 Geneva Conventions—agreements adopted, first and foremost, to deal with gaps in, and abuses of, the law of war arising out of the events of World War II[12]—are adequate to deal with the GWOT and can be easily and neatly applied to it.

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9. MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER xiii-xiv (2002).

10. These attacks are, indeed, difficult to categorize. As one commentator opined:

> Because al Qaeda did not act on behalf of a state, the conflict was not an "international armed conflict" on September 11. Because al Qaeda neither controls nor seeks to control territory in the United States, the conflict is not a classical "internal" armed conflict.. Moreover, because al Qaeda neither challenges the legitimate authority of the United States government within its territory nor suggests that the United States exercises illegitimate dominion over any other territory, the hostilities are not part of a "war of national liberation."

Jinks, *supra* note 6, at 20 (internal citations omitted).

11. "Law of war," "law of armed conflict," and "international humanitarian law" are synonyms and may be used interchangeably.

12. *See* COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 5-6 (Jean S. Pictet ed., 1960) [hereinafter GC III CMT.] (noting that, despite the overall successful application of the 1929 Convention during World War II, it was nevertheless apparent that the 1929 Convention needed revision; that the ICRC began to draft proposed changes even before the Second World War had ended; and that the ICRC drafts served as the point of departure for the conferences dealing with revising the 1929 Convention); 2-A FINAL REPORT, *supra* note 1, at 9 ("Unfortunately, the Conventions of 1929 . . . prove[d] inadequate to alleviate th[e] sufferings [of World War II]. It is our duty never to lose sight of the tragic experiences the world has seen and to remedy as far as possible the deficiencies revealed in the texts of 1929."); JAMES E. BOND, THE RULES OF RIOT INTERNAL CONFLICT AND THE LAW OF WAR 43 (1974) (noting that rules governing warfare lag behind the means of conducting warfare and seldom anticipate technological innovations).

Such arguments simply fail to recognize the unique, especially brutal and lawless, nature of the GWOT: a war in which international law and humanitarian norms are routinely *and intentionally* flouted and mocked by al-Qaeda and its supporters. Current international rules cannot adequately deal with those unalterably opposed to civilized norms, and to think that they can grossly misapprehends the goals of the terrorist groups involved.[13] Treating the GWOT like previous armed conflicts reflects either gross ignorance or intentional blindness on the part of the West. Such an approach contributes, not to enhancing peace and world order, but instead to increased international lawlessness and disrespect for international law. It does so by extending rights and protections explicitly designed for combatants adhering to international law and humanitarian norms to those who heinously and purposefully violate such rules and norms.

International treaties, such as the Geneva Conventions, have historically sought to provide enhanced rights and protections as a reward to those who engage in *lawful belligerency* in order to encourage combatants to respect and keep international law and norms of behavior, thereby mitigating the evil effects of war.[14] Extending the same rights and protections to those who intentionally flout and disobey the law of war by engaging in purposeful barbarism destroys the incentive for all future combatants to abide by the Geneva Conventions' rules and norms and constitutes a significant step backward. Moreover, such action subverts the authority and legitimacy of international treaties, since extending rights and protections specifically designed for lawful combatants to the intentionally lawless constitutes an illegitimate and unauthorized amending of what the High Contracting Parties at Geneva agreed to observe and be bound by, thereby making a mockery of such conventions and reducing the incentive of all States to participate in negotiating future agreements.[15] Such misplaced application seems to be especially true of

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13. *See, e.g.*, Op-Ed, *Ridding Islam of the Cancer Within*, IRISH TIMES, Oct. 4, 2005, at 16 (quoting al-Qaeda spokesman Suleiman Abu Ghaith: "We have not reached parity with [the Americans]. We have the right to kill four million Americans—two million of them children—and to exile twice as many and wound and cripple hundreds of thousands."); Gordon Cucullu, *Gitmo Jive*, AM. ENTERPRISE (Sept. 2005), *available at* http://www.taemag.com/issues/articleid.18656/article_detail.asp:

> [The prisoners at Guantanamo Bay] are not driven by poverty, unemployment, or class deprivation. They are motivated by a virulent form of Islam that promotes jihad and death to Western Civilization. They will kill Americans—including women and children—without conscience, for they are convinced that restoration of the Islamic caliphate is their sole mission on this Earth.

14. *See, e.g.*, GC III CMT., *supra* note 12, at 9 (noting that Geneva Conventions determined "to mitigate the sufferings of war victims"); RESPECT FOR INTERNATIONAL HUMANITARIAN LAW: HANDBOOK FOR PARLIAMENTARIAN S 11 (1999) (noting that the purpose of the law of war is "to limit the effects of war on people and objects").

15. *See infra* note 98. One should also ask why States would desire to enter into future agreements if the terms they have agreed to in past treaties are to be stretched beyond recognition and applied in a manner inconsistent with what was agreed. When treaties can be interpreted to effect what was not intended or agreed, they actually promote lawlessness and

Common Article 3 of the 1949 Geneva Conventions.[16]

This Article analyzes Common Article 3 of the 1949 Geneva Conventions. Part II reviews the historical antecedents of Article 3. Part III focuses on what transpired at the 1949 Geneva Conference and on what the State Parties agreed to concerning Article 3. Part IV evaluates how Article 3 is being distorted and applied today, in direct contradiction to what the High Contracting Parties anticipated and agreed.[17]

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disorder in international affairs, since no State can be sure how some international adjudicative body will twist the meaning of a treaty to suit its view of what the treaty *should mean* rather than what the parties agreed, through negotiations and compromise, that the treaty *actually means*. COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 19 (Jean S. Pictet, ed., 1958) [hereinafter GC IV CMT.] ("There could be *no question of obliging a State to observe the Convention in its dealing with an adverse Party which deliberately refused to accept its provisions*.") (emphasis added).

This does not mean, however, that unlawful combatants like members of al-Qaeda enjoy no protections at all under international law. All detainees, including captive members of al-Qaeda, must be treated humanely in accordance with the norms of the customary law of war. What it does mean, though—as this Article will show—is that Article 3 and its requirements do not apply to al-Qaeda and its members.

16. Article 3 is often referred to as "Common Article 3," since the same language is included as Article 3 in each of the four Geneva Conventions of 1949. Note that current Article 3 changed numbers during the course of the 1949 Diplomatic Conference at Geneva. What is known today as Article 3 was originally the fourth paragraph of Article 2. *See* 2-A FINAL RECORD, *supra* note 1, at 128. Later, it was separated from Article 2 and redesignated as Article 2A. *See id.* at 129. *See also* 3 FINAL RECORD, *supra* note 1, at 205, 211, 217, 231. For convenience in this Article, except where discussing the issue in its historical context, the article will be referred to as Article 3 or Common Article 3.

Article 3 reads, in pertinent part:

> 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: [here follows a list of provisions applicable to victims of such conflicts, including members of armed forces who have laid down their arms or are otherwise *hors de combat*].

See, e.g., GC III, *supra* note 7, art. 3. One of the key provisions applicable to victims of "armed conflict not of an international character" is the right to be tried by a "regularly constituted court." *See id.* art. 3(i)(d). If, however, members of al-Qaeda do not qualify as victims of such a non-international conflict, they are not protected by Article 3, and the provisions of Article 3, including the court provision, do not apply to them.

17. The Geneva Conventions are agreements between sovereign *States*. Hence, it is what the *States* agreed to when negotiating the treaty which should carry the day when interpreting the provisions of a treaty. The International Committee of the Red Cross (ICRC) concurs in this view. When questions are directed to the ICRC as to how to interpret a specific article in one of the Conventions, the ICRC notes the following in the Foreword to each of the 1949 Convention Commentaries: "The Committee, moreover, whenever called upon for an opinion of a provision of an international Convention, always takes care to emphasize that *only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty*." *See* GC III CMT., *supra* note 12, foreword (emphasis added). *See also* COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, foreword [hereinafter, GC I CMT.]; COMMENTARY II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA, foreword [hereinafter, GC II CMT.]; GC IV CMT, *supra* note 15, at foreword.

II. HISTORICAL ANTECEDENTS TO CURRENT ARTICLE 3

Over the last century, international conventions have sought to regulate the incidents of war in order to protect, inter alia, the health, safety, and dignity of combatants who fell into the hands of the enemy.[18] Such conventions set forth rules to govern what is and is not permissible in war. Combatants who fall into enemy hands complying with the rules set forth in the conventions are afforded certain explicit legal rights and protections, whereas captives who violate such rules enjoy only basic humane standards of treatment according to the customs of war.[19]

The development of the law of war, and especially the extending of certain rights and protections to both combatants and noncombatants alike, has been an iterative process,[20] one which has historically sought to remedy for future conflicts the problems and abuses identified in previous ones. Developing and adopting measures to protect those taken captive during wartime is of relatively recent vintage. The first international effort to regulate the status of prisoners of war was drafted in Brussels in 1874.[21] Yet, "it was not until the Peace Conferences of 1899 and 1907 that States first agreed to limit as between themselves their sovereign rights over prisoners of war."[22] "The Regulations annexed to the Hague Conventions of 1899 and 1907 concerning the Laws and Customs of War on Land gave prisoners of war a definite legal statute to protect them from arbitrary treatment by the Detaining Power."[23]

During World War I, however, the Hague Regulations "proved [to be] too

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Even the Supreme Court of the United States has misunderstood and misapplied Article 3. A five-Justice majority in the recent decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), appears to accept—with little, if any, independent research or analysis—the arguments made and positions taken by Petitioner Hamdan and his *amici* regarding Article 3, even though such arguments and positions contradict the text and negotiating history of the Article. As this paper shows, even a cursory reading of the Final Record of the 1949 Geneva Conference reveals that no delegation at Geneva agreed to the currently claimed meaning and reach of Article 3. *See infra* Part III, As such, one may not legitimately argue that *Common Article 3* guarantees to al-Qaeda captives any rights at all, much less trial by a "regularly constituted court." *See* GC III, *supra* note 7, art. 3. Because the Supreme Court opinion reflects the arguments and reasoning of Petitioner Hamdan and his *amici*, this paper focuses primarily on their reasoning.

18. *See, e.g.*, 85 INT'L REV. OF THE RED CROSS June 2005, inside front cover (noting ICRC mission "to protect the lives and dignity of victims of war").

19. *See, e.g.*, GC III, *supra* note 7, art. 142, ¶ 4; GC III CMT., *supra*, note 12, at 16 (noting that "in case of denunciation of the convention," "usages established among civilized peoples, . . . the laws of humanity and the dictates of public conscience" still govern treatment of captives); *id.* at 648.

20. GC III CMT., *supra*, note 12, at 9-10 (regarding protection for prisoners of war, "[t]he Regulations annexed to the Fourth Hague Convention of 1907 contained seventeen Articles relative to prisoners of war, the 1929 Convention constituted a code of almost one hundred articles, and . . . the present 1949 Convention contains 143 articles.").

21. *Id.* at 5.

22. *Id.* at 4.

23. *Id.* at 5.

indefinite[,] and the belligerents were compelled to sign temporary agreements amongst themselves [e.g., the Berne agreements of 1917 and 1918] on disputed points."[24] Having learned many lessons from the experience gained during World War I, following the war, the International Committee of the Red Cross (ICRC) sought "to improve the conditions of prisoners of war by giving them a regular statute."[25] In 1921, at the Xth International Red Cross Conference, representatives of both the participating Governments and National Red Cross Societies requested that the ICRC draft a new Geneva Convention to correct the shortcomings of previous efforts and to provide improved protections for prisoners of war.[26]

The ICRC completed its draft of the proposed new Convention in 1923.[27] The 1923 draft served as the point of departure for the 1929 Diplomatic Conference, held in Geneva from July 1-27, 1929.[28] "The [1923] draft was presented to the 1929 Diplomatic Conference, was adopted and the 'Geneva Convention of July 27, 1929, relative to the Treatment of Prisoners of War' . . . thus came into being."[29] It was the 1929 Convention that applied to World War II prisoners of war.[30] Despite the fact that the 1929 Convention "provided prisoners of war with effective protection and treatment far better than that which they had received during the 1914–1918 conflict," "[i]t nevertheless became apparent to those who benefited from it as well as those who had to apply it, that the 1929 Convention needed revision on a number of points because of changes in the conduct and the consequences of war. . . ."[31] Hence, "[e]ven before the end of hostilities [in World War II], the [ICRC] . . . embarked on a study of revising the 1929 Convention."[32]

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24. *Id.* at 3, 5. Despite serious shortcomings in the Hague Conventions, the ICRC did its best to prove by practical measures the interest shown by the Red Cross in prisoners of war. . . . [O]n its own initiative it opened an International Prisoners of War Agency which within a short time had 7 million individual cards in its card-indexes. . . . Moreover, by sending delegates to the camps, it was able not only to bring the comfort of a friendly visit to prisoners of war, but also to make an impartial judgment of the treatment accorded to them and to persuade the Detaining Powers to make the improvements which were called for by the tenets of the Red Cross.

Id. at 3-4.

25. *Id.* at 4.

26. *Id.*

27. *Id.* at 5.

28. *Id.*

29. *Id.* at 4.

30. *Id.* at 4-5.

During the Second World War, [the 1929] Convention applied to millions of prisoners of war; it provided the basis for action by the [ICRC] in their behalf and made it possible to carry out over 11,000 camp visits, to send relief at the rate of 2,000 freight cars per month from 1943 on and to build up a card-index containing 30 million cards.

Id. at 4.

31. *Id.* at 5-6.

32. *Id.* at 6.

The revision of the 1929 Convention proceeded as follows:

> The available literature was gathered together and the points on which the law needed expanding, confirming or modifying brought out. Draft Conventions were then drawn up with expert help from Governments, National Red Cross Societies and other relief Societies. Several meetings were convened in Geneva for this purpose, the most important being the Preliminary Conference of the National Red Cross Societies in 1946, and the Conference of Government Experts in 1947 . . . . The [ICRC] then drew up complete texts and presented them to the XVIIth International Red Cross Conference at Stockholm in 1948. They were adopted there with certain amendments.
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> After passing through these various stages, the draft texts were taken as the only working document for the Diplomatic Conference which . . . met at Geneva from April 21 to August 12, 1949. . . .[33]

The 1949 Diplomatic Conference established four primary Committees, each of which would focus on one of the following issues:

> (a) Revision of the First Geneva Convention and the Hague Agreement of 1899 which adapts that Convention to maritime warfare,
> (b) Revision of the Prisoners of War Convention,
> (c) Preparation of a Convention for the protection of civilian persons in time of war, and
> (d) Provisions common to all four Conventions.[34]

As one of the provisions "common to all four Conventions," Article 3 was dealt with by the latter Committee.

Common Article 3 is fundamentally different from all the rest of the articles in the four 1949 Conventions because "the whole of the rules applying to *non-international* conflicts are concentrated" in that single article.[35] As the

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33. *Id.*

34. *Id.* at 7. Note that the working drafts suggested the creation and adoption of four separate Conventions, to wit, Geneva Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention (II) For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 7; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

35. GC III CMT., *supra* note 12, at 28 (emphasis added).

ICRC Commentary aptly notes, "[u]p to 1949, the Geneva Conventions were designed to assist only the victims of wars *between* States."[36] Nevertheless, "the Red Cross ha[d] long been trying to aid the victims of *civil wars and internal conflicts*, the dangers of which are sometimes even greater than those of international wars."[37] One of the major hindrances to extending protection to victims of internal conflicts was that,

> [i]n a *civil war*, the lawful Government . . . tends to regard its adversaries as common criminals. . . . [Hence, a]pplications by a foreign Red Cross Society or by the [ICRC] for permission to engage in relief work have more than once been treated as unfriendly attempts to interfere in the domestic affairs of the country concerned.[38]

Despite this resistance, the Red Cross was, nevertheless, able to provide assistance in some civil conflicts.[39] In 1921, at the Xth International Red Cross Conference, the ICRC was able to garner support for a resolution "affirming the right of all victims of *civil wars or social or revolutionary disturbances* to relief in conformity with the general principles of the Red Cross."[40] By means of that resolution, the ICRC was able "in at least two cases—the civil war at the time of the 1921 plebiscite in Upper Silesia and the [1936] civil war in Spain—to induce both sides to give some kind of undertaking to respect the principles of the Geneva Convention."[41]

As a result of the successful interventions in Upper Silesia and Spain, the ICRC was encouraged "to reconsider the possibility of inserting provisions relating to *civil war* in[to] the Conventions themselves."[42] In 1946, at the Preliminary Conference of National Red Cross Societies, the ICRC "proposed

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36. *Id.* (emphasis added).

37. GC III CMT., *supra* note 12, at 28 (emphasis added). The term "civil war" is generally understood to mean "any *internal* armed conflict between persons of [the] same country." BLACK'S LAW DICTIONARY 247 (6th ed. 1990) (emphasis added). *See also* The New Lexicon Webster's Encyclopedic Dictionary of the English Language 181 (Deluxe ed. 1991) (defining civil war as "war between the citizens of one country").

38. *Id.* at 28-29 (emphasis added).

39. *Id.* at 29.

40. *Id.* (emphasis added). Each category of conflict listed—to wit, civil wars or social or revolutionary disturbances—reflected a type of armed conflict between some segment of a State's population and the ruling government of that State. Given the timeframe, the ICRC doubtless had in mind, inter alia, the violent events in post-World War I Germany and the Bolshevik Revolution (and ensuing civil war) in Russia when it drafted the 1921 resolution; hence, the terms used.

41. *Id.* (citing XVIth International Red Cross Conference Document No. 12, International Committee of the Red Cross, *General Report of the International Committee of the Red Cross on its Activities from August 1934 to March 1938*; XVIth International Red Cross Conference Document No. 12bis, International Committee of the Red Cross, *Supplementary Report by the International Committee on its Activities in Spain*).

42. *Id.* at 30 (emphasis added).

that, *in the event of civil war*, the contending parties should be invited to declare their readiness to apply the principles of the Convention on a basis of reciprocity."[43] The National Red Cross Societies sought to expand the ICRC proposal by recommending that the following text be inserted at the beginning of each of the Conventions: "In the case of armed conflict *within the borders of a State*, the Convention shall also be applied by each of the adverse Parties, unless one of them announces expressly its intention to the contrary."[44] The foregoing statement represented the view of the Red Cross movement.[45]

When the proposed text was presented to the Conference of Government Experts in 1947, those experts narrowed the language and reach of the proposal and instead "recommended . . . a partial application of the provisions of the Convention *in the case of civil war*."[46] In turn, the Government Experts revised the article to state that "the principles of the Convention were to be applied *in civil wars* by the Contracting Party, subject to the adverse Party also conforming thereto."[47] Thus, as feared by the ICRC, the proposal of the Government Experts "fell a long way short of that of the Red Cross Societies."[48]

Nevertheless, based on the views expressed at the 1946 and 1947 Conferences and on the reality that any extension of the reach of the Conventions had to be acceptable to the State Parties,[49] the ICRC added the following text as the fourth paragraph to Article 2 of the draft Conventions:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend

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43. *Id.* (emphasis added).

44. *Id.* (citing INT'L COMM. OF THE RED CROSS, REPORT ON THE WORK OF THE PRELIMINARY CONFERENCE OF NATIONAL RED CROSS SOCIETIES FOR THE STUDY OF THE CONVENTIONS AND OF VARIOUS PROBLEMS RELATIVE TO THE RED CROSS 14 ff, 51 (1947)) (emphasis added).

45. *Id.*

46. *Id.* at 31 (emphasis added).

47. *Id.* (emphasis added) (citing INT'L COMM. OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS 8 (1971)).

48. *Id.* This demonstrated the divergent interests of the ICRC and National Red Cross Societies, as humanitarian advocates of individual rights and protections on the one hand, and State Parties, as protectors of sovereign rights on the other. Such a divergence, however, was not unforeseen by the ICRC. *See id.* at 30 ("There was reason to fear that there might be objections to the idea of imposing international obligations on States in connection with their *internal affairs*. . . .") (emphasis added).

49. *See, e.g.*, 2-B FINAL RECORD, *supra* note 1, at 336-37 (noting that, "[i]n a Diplomatic Conference . . . realistic and practical views must be taken, and the [ICRC] was aware from the outset . . . that the [Stockholm] text . . . had no chance of being adopted by Governments and that a *compromise solution should accordingly be sought*") (emphasis added).

> on the legal status of the Parties to the conflict and shall have no effect on that status.[50]

It was this text that was subsequently discussed at the XVIIth International Red Cross Conference in Stockholm in 1948. Following lengthy discussion of the draft text, the Stockholm Conference "adopted the proposals of the [ICRC] for the First and Second Conventions, and in the case of the Third and Fourth Conventions made the application of the Convention subject to the proviso that the adverse Party should also comply with it."[51] Thus, the proposal came to the 1949 Diplomatic Conference in Geneva.

III. DISCUSSIONS AND DECISIONS AT THE 1949 GENEVA CONFERENCE

What ultimately became Common Article 3 in the 1949 Geneva Conventions was one of the most controversial sections of the ICRC draft proposals dealt with at the 1949 Diplomatic Conference:

> From the very outset, divergences of views became apparent. A considerable number of delegations were opposed, if not to any and every provision *in regard to civil war*, at any rate to the unqualified application of the Convention to such conflicts. The principal criticisms of the Stockholm draft may be summed up as follows. It was said that it would cover all forms of insurrections, rebellion, and the break-up of States, and even plain brigandage. Attempts to protect individuals might well prove to be at the expense of the equally legitimate protection of the State. To compel the Government of a State *in the throes of internal conflict* to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition. There was also a risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention,

50. GC III CMT., *supra* note 12, at 31. The resulting ICRC draft appears to constitute an intentional ICRC attempt to broaden the language and reach of the proposal presented to the 1948 Stockholm Conference from the terms suggested at the 1947 Conference of Government Experts. The ICRC, as an advocacy organization, admits it tries to "push the envelope" on occasion. *See* GC IV CMT., *supra* note 15, at 27 (noting that the ICRC encountered obstacles "*as always* when endeavoring to go *a step beyond* the text of the Conventions") (emphasis added).

51. GC III CMT., *supra* note 12, at 31.

> representing their crimes as "acts of war" in order to escape punishment for them. A rebel party, however small, would be entitled under the Convention to ask for the assistance and intervention of a Protecting Power. Moreover, it was asked, would not the *de jure* Government be compelled to release captured rebels as soon as order was re-established, since the application of the Convention would place them on the same footing as prisoners of war? Any such proposals giving *insurgents* a legal status, and consequently support, would hamper the Government in its measures of legitimate repression.[52]

As indicated in the above quotation and as will be shown from the Final Record of the Diplomatic Conference, discussions by the various national delegations on what ultimately became Article 3 dealt *exclusively* with the use of armed force *internally* within a State. Nowhere in the Final Record is there any indication that any of the national delegations foresaw that Article 3 would cover instances of the use of armed force between a Contracting State and a non-State entity from without—*or that they had agreed to such a proposition.*

"[A]t the Plenary Meeting on 26 April 1949, the Articles common to all four Conventions were referred to the Committee known as the Joint Committee."[53] At the very first meeting of the Joint Committee to consider extending legal protections to victims of non-international conflicts, the Stockholm Draft's call for applying the Conventions' provisions to "*all cases of armed conflict* which are not of an international character" elicited a number of concerns. The Representative from the United Kingdom noted that paragraph 4 of Article 2 "would appear to give the status of belligerents to *insurgents*, whose right to wage war *could not be recognized.*"[54] The British Delegation argued further that "application to *civil war* would strike at the root of national sovereignty and endanger national security . . . ."[55] The Representative from Norway noted: "As to *civil war*, the term 'armed conflict' should not be interpreted as meaning 'individual conflict', or 'uprising'. *Civil war* was a form of conflict resembling international war, *but taking place inside the territory of a State.*"[56] Hence, from the outset, the delegations understood clearly that the thrust of the proposed language dealt with extending rights and protections to those engaged in certain domestic armed conflicts. As a result, the discussions revolved solely around the issues of insurgency and internal strife.

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52. *Id.* at 32 (emphasis added).

53. 2-B FINAL RECORD, *supra* note 1, at 128.

54. *Id.* at 10 (emphasis added). Note that the term "insurgent" means "a rebel against a lawful government or civil authority." THE NEW LEXICON WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 502 (Deluxe ed. 1991).

55. 2-B FINAL RECORD, *supra* note 1, at 10 (emphasis added).

56. *Id.* at 11 (emphasis added).

At the second meeting of the Joint Committee, the Canadian Representative noted that Canada understood the fourth paragraph of the proposed article[57] to apply to civil wars and rebellions.[58] The Representative from Switzerland opined "that Article 2 raised interesting problems, [but] that only that relating to the application of the principles of the Convention to *civil war* [i.e., the fourth paragraph of Article 2] was controversial."[59] The Representative from Burma countered that "[t]he proposed Convention should not give legal status to *insurgents* who sought by undemocratic methods to overthrow a legally constituted Government by force of arms."[60] Once again, the various delegations remained concerned solely with extending rights and protections to those affected by insurgency and internal strife.

In light of the initial discussions and the strong views expressed from the very outset, it was decided to form a Special Committee of the Joint Committee to draft proposed language regarding "armed conflict not of an international character." One of the points of concern expressed by the British Representative was "the position of vanquished *insurgents* after a *civil war* was over."[61] This was of concern to the British delegation because they feared that full application of the Geneva Conventions' protections to cases of civil war would, once the armed conflict ended, compel the de jure Government to forego punishing the insurgents and to release them.[62]

In light of the focus on internal conflicts, the Representative from Monaco "considered it indispensable to distinguish between rebellion, which was more than an uprising but had not yet taken on the proportions of a *civil war*. . . ."[63] In reply to Monaco, the Representative from Australia opined "that in international law, there were well-defined principles as to the meaning of civil war. He added that in his view the Conventions should not apply to local uprisings."[64] Here, the discussions dealt solely with the potential types of *domestic* conflicts to which international norms should apply. No delegation expressed any understanding that what the various delegations were discussing involved anything but internal conflicts.

Because of delegates' concerns about the breadth of the Stockholm proposal, the Committee decided to abandon the Stockholm language—to wit,

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57. *I.e.*, Article 2. What ultimately became Article 3 was originally the fourth paragraph of Article 2. *See supra* note 16.

58. 2-B FINAL RECORD, *supra* note 1, at 13.

59. *Id.* at 15 (emphasis added). Note that Switzerland understood the fourth paragraph of Article 2 (i.e., what ultimately became Article 3) to apply to *civil war*.

60. *Id.*

61. *Id.* at 45 (emphasis added).

62. *See* GC III, *supra* note 7, art. 118 (requiring that prisoners be released once the conflict ends).

63. 2-B FINAL RECORD, *supra* note 1, at 45 (emphasis added). Here, it appears that the delegation of Monaco was trying to discern when an internal conflict would achieve a level of intensity sufficient to justify providing internationally sanctioned protections in domestic conflicts.

64. *Id.*

that the Convention would apply "in *all cases* of armed conflict which are not of an international character"[65]—and to define more clearly to which cases of armed conflict not of an international character the Conventions should apply. In reply, the Representative of France opined "that *civil war* was a political and not a legal concept . . . [and that t]he Conference was not competent to define civil war, nor to confer competency on a body of a political character."[66] Still, the discussions remained focused solely on internal armed conflict.

At the Special Committee meeting on May 18, 1949, the Representative from Monaco continued the critique of the expansive Stockholm draft language, arguing that the "Stockholm text was unsound in aiming at applying to *civil war* all the provisions of the Conventions. He proposed [instead] that the Working Group should . . . determine which provisions of the Conventions would be applicable in the case of civil war."[67] The British Representative supported that proposal and then raised again the issue of the anomaly of "protect[ing] insurgents . . . during the rebellion and treat[ing] them as traitors at the close of it."[68] Still, the discussions remained fixed on civil war and other internal conflicts.

At the meeting of the Special Committee on June 14, 1949, the Committee Chairman noted that there were special problems regarding Article 3 and the *Fourth* Geneva Convention. He stated that it would be impractical to list specific articles of the Fourth Convention, "which would be inapplicable in the case of *civil war.*"[69] Instead, "the Working Party considered it advisable to impose on the Contracting States only one obligation; that of complying in all cases with the underlying humanitarian principles of the [Fourth] Convention."[70] Regarding the other three Conventions, "the Working Party considered that *certain civil wars* were sufficiently akin to international wars to justify application of the provisions of these three Conventions as a whole. However, it *would be necessary to define these civil wars..*"[71] Here again, the entire focus and thrust of the discussions centered on *internal* armed conflict.

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65. GC III CMT., *supra* note 12, at 31 (emphasis added).

66. 2- B FINAL RECORD, *supra* note 1, at 45 (emphasis added).

67. *Id.* at 49 (emphasis added). This proposal suggests that Article 3 should not only not apply to *all* non-international armed conflicts, but that all of the Conventions' provisions should *not* apply to such conflicts either. Hence, both the types of conflicts to be covered and the provisions applicable to such conflicts were being narrowed, not expanded. *Id.*

68. *Id.* This reconfirms that the focus was on civil wars and other domestic conflicts, since an individual cannot be a "traitor" to other than his own sovereign. Hence, the British understanding excluded the possibility of non-State actors from without the State.

69. *Id.* at 76 (emphasis added).

70. *Id.*

71. *Id.* (emphasis added). Defining the various types of civil war became a sticking point and led to the idea that one should not have to debate, once an internal armed conflict begins, what "type" of civil war it is before knowing whether any of the provisions of the Conventions applies; this led, in turn, to the French proposal to focus on applying humanitarian principles rather than debating types of civil war. *See id.* at 93 (French representative noted that France could only support a draft "which confined itself to the application of humanitarian principles *in the case of civil war*" (emphasis added)).

At the meeting of the Special Committee on June 15, 1949, the French Representative was concerned that the draft language

> still contained some dangerous elements from the very nature of the subject it dealt with. The French Delegation considered that signatory Governments who were *confronted with an insurgent movement* would be in a dilemma: either they would never apply the clauses of the Conventions, or they would implicitly recognize that the adverse party had a character which was tantamount to that of a State.[72]

In turn, the Representative from the United States noted with approval that "[t]he draft proposed by the Working Party included a definition of the restricted circumstances in which the Conventions would apply to *civil war*. . . ."[73] The British Representative continued to express concern that "application of the Conventions to *civil war* created a new situation, containing many pitfalls."[74] Notwithstanding the diverse views, the discussion remained centered only on internal conflicts.

At the meeting on June 24, 1949, the French Representative explained that the Working Party "considered that it was not appropriate to mention deportation, [because that concept] was *irrelevant in the case of civil war*."[75] As the discussion continued, the United States Representative opined that "it would be unfortunate if the obligations were not laid upon the Contracting States to apply the Conventions *in certain cases of civil war*."[76]

Following the proposal wherein the Conventions' provisions would apply in full to *certain types of civil war* but not to others, the French Representative stated that his delegation "could only support a draft based on the proposal of the Second Working Party which confined itself to the application of humanitarian principles *in the case of civil war*."[77] He also wished to "place on

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72. *Id.* at 78 (emphasis added). This fear ultimately led to the inclusion of the final sentence in Article 3: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." *See e.g.*, GC III *supra* note 7, art. 3.

73. 2-B FINAL RECORD, *supra* note 1, at 78 (emphasis added).

74. *Id.* at 79 (emphasis added).

75. *Id.* at 83 (emphasis added). "Deportation" would have been relevant if other types of armed conflicts not of an international character, such as those involving persons from outside the effected State's borders, had been under consideration. Thus, France's comment is yet another indicator that such a possibility was not being considered by the Working Party or France. *Id.*

76. *Id.* (emphasis added).

77. *Id.* at 93 (emphasis added). *See also supra* note 71. Many of those who argue that Article 3 should be interpreted broadly misunderstand what France was advocating and what the various delegations agreed upon. France made its proposal to focus on applying humanitarian principles in response to the Working Party's suggestion that "*certain types* of civil war" should be covered by international protections while other types of civil war should not. *See id.* at 76 (emphasis added). The French suggestion dealt only with the inherent difficulty in classifying types of civil war and, hence, in no way broadened Article 3's reach to cover all types of armed

the record the great difficulty which existed in applying the rules of international warfare to cases of *civil war*."[78] The Representative of Italy proposed deleting "the word 'captivity,' which implied the status of a prisoner of war and was incompatible with the idea of *civil war*."[79] The Burmese Representative expressed anew that the Asian "countries he represented in the Special Committee could not agree to an extension of the Conventions to *civil war*."[80] Once again, the focus of the various delegations remained fixed on dealing only with internal conflicts.

In order to clarify further under what specific conditions Article 3 would apply, various delegations sought to add complementary conditions to the draft text. The Representative of France "proposed to restrict the application of the provisions of the Convention . . . to the case when the adverse party possessed an organized military force, an authority responsible for its acts acting within a determinate territory and having the means of respecting and ensuring respect for the Convention."[81] The Representative of Spain supported the French proposal but preferred the following language: "[T]he Conventions should only be applied in cases where the legal government was obliged to have recourse to the regular armed forces against insurgents organized as military and in possession of a part of the national territory."[82] The Australian Delegation suggested that the phrase "civil war in any part of the home or colonial territory of a Contracting Party" replace the expression "non-international conflict."[83] The United States Representative also proposed adding complementary conditions to determine when the Conventions would apply:

- that the insurgents must have an organization purporting to have the characteristics of a State;
- that the insurgent civil authority must exercise *de facto* authority over persons within a determinate territory;
- that the armed forces must act under the direction of the organized civil authority and be prepared to observe the ordinary laws of war; [and]
- that the insurgent civil authority must agree to be bound by the provisions of the Convention.[84]

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conflict not of an international character.

78. *Id.* at 94 (emphasis added).

79. *Id.* (emphasis added). "Prisoner of War" applies only to those categories of persons meeting the conditions enumerated in Article 4 of the Third Geneva Convention. GC III, *supra* note 7, art. 4. Moreover, the concept only applies to international conflicts. *Id.* Thus, like France, Italy did not consider that Article 3 applied to conflicts outside a respective nation's borders.

80. 2-B FINAL RECORD, *supra* note 1, at 102 (emphasis added).

81. *Id.* at 121.

82. *Id.*

83. *Id.*

84. *Id.*

The various proposals had the following understanding in common: "that it would be dangerous to weaken the State when confronted by movements caused by disorder, anarchy and banditry, by compelling it to apply to them, in addition to its peacetime legislation, Conventions which were intended for use in a state of declared or undeclared war."[85] Further, none of the proposals would protect persons involved in banditry, rioting, or general social disorder, which was a continuing concern of many delegations. Nonetheless, as the foregoing attests, the attention of the various national delegations remained focused solely on internal armed conflicts.

Following the deliberations of the Joint Committee on the various Articles under its purview, the Joint Committee presented its Report to the Plenary Assembly. The portion of the Report dealing with what ultimately became Article 3 read, in pertinent part, as follows:

> In the Stockholm Draft, the fourth paragraph of Article 2 stipulated that, in all cases of armed conflict not of an international character, each of the Parties to the conflict should be bound to implement the provisions of the Conventions.
>
> At the present Conference, the question immediately arose of deciding what was to be understood by "armed conflict not of an international character which may occur in the territory of one of the High Contracting Parties." *It was clear that this referred to civil war*, and not to a mere riot or disturbances caused by bandits. States could not be obliged as soon as *rebellion arose within their frontiers*, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied. But *at what point should the suppression of the rising be regarded as a civil war*? What criterion should be adopted?[86]

The Report continued:

> The first solution considered was to impose the application of this Convention only when the rebellion had asserted and organized itself with enough strength and coherence to represent several of the features of a State (the existence of an army, an authority responsible for its actions, a specified area of territory, etc.). A further possible solution was to make the

85. *Id.*

86. *Id.* at 129 (emphasis added). Once again, there is no mention at all of any other understanding as to the reach of the Article beyond civil wars and *similar internal conflicts*. Instead, the issue was how to determine when an internal armed conflict had risen to the level where international intervention would become appropriate.

> criterion the recognition of the rebels as belligerents by the State in conflict with them or by other States. But in view of the enormous practical difficulties to which these differentiations would have given rise, and the *very thorny problems presented by the application to civil war of Conventions drawn up for international war*, an attempt was made to find another principle which might provide a solution, and it was proposed to restrict the obligations of the legitimate government *and the rebel authority* to the most obvious and imperious rules of the Conventions, that is, to humanitarian duties as a whole.[87]

The Report of the Joint Committee indicated quite clearly that the Article was universally understood by the national delegations to apply solely to civil wars and similar internal armed conflicts.

Following the presentation of the Joint Committee's Report to the Plenary Committee, the Plenary Committee then took up the debate. The Representative of the Soviet Union concurred in the need to extend the protections of the Conventions to the victims of civil and colonial wars.[88] In response, the Burmese Representative argued that "[t]o give international recognition to insurgency would certainly be as grave an error as recognition of aggression."[89] He criticized the Article because it "include[d] civil wars—domestic matters—in an international Convention."[90]

In subsequent discussion, the Representative of Venezuela stated: "We must be quite certain of what is meant by 'armed conflicts not of an international character.' There is no doubt that this does not apply to the exploits of bandits or to riots of any kind, but to *civil war* . . . ."[91] The Representative of Mexico also recognized that the term non-international wars applied to "civil wars, wars of resistance or wars of liberation."[92] The Swiss Representative noted that the Article concerned applying the principles of the Conventions to *civil wars* and that the text and reach of the Article were the result of compromise.[93] In response to various statements criticizing the proposed wording of Article 3, the Swiss Representative responded:

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87. *Id.* (emphasis added). Recall that a "rebel" is one who "opposes a lawful government by force of arms." THE NEW LEXICON WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 832 (Deluxe ed. 1991). Moreover, the juxtaposition in this paragraph of the phrases "the very thorny problems presented by the application to *civil war* of Conventions drawn up for international war" (emphasis added) and "the legitimate government and the *rebel authority*" (emphasis added) confirms a focus on *internal* conflict.

88. 2-B FINAL RECORD, *supra* note 1, at 325-26.

89. *Id.* at 327-28.

90. *Id.*

91. *Id.* at 333 (emphasis added).

92. *Id.* Each of these "wars" has in common that it is directed against a political authority ruling a specific piece of territory.

93. *Id.* at 334-35.

> On the one hand . . . we are told that it does not go far enough, while on the other . . . it is said it goes much too far. These two criticisms compensate each other. And to those who complain that the suggested solution does not go far enough, there is a pertinent reply: half a loaf is better than no bread.[94]

He continued: "A comparatively modest solution is certainly better than none. . . . [Moreover, t]his means that the [ICRC] will not be exposed to the risk of its services being refused by the Parties to a conflict in case of *civil war*."[95] When asked to comment on the proposed wording of the Article, the ICRC Representative responded as follows:

> The [ICRC] had no intention of speaking on a question which, in their opinion, comes within the exclusive competence of governments. As they have been asked to give their views, however, . . . the [ICRC] feel that they cannot refuse the invitation to speak on the matter. Their position is clear; the [ICRC] was in favour of the text which they themselves submitted to the Stockholm Conference and which provided for the full application of the Conventions in the event of conflicts not of an international nature.
>
> In a Diplomatic Conference, however, realistic and practical views must be taken . . . .
>
> The [ICRC] gave [the text adopted by the Joint Committee] their support and still give it today, because this text is simple and clear and has the merit of ensuring, *in the case of civil war*, at least the application of the humanitarian rules which are recognized by all civilized peoples. This text, therefore, without being a complete expression of the ideal which the [ICRC] has in view, ensures a minimum protection and—which is still more important—gives impartial international bodies, such as the [ICRC], means of intervention.[96]

94. *Id.* at 335. Note that this comment by the Swiss Representative confirms that the agreed-upon reach of Article 3 was *not* to every possible type of non-international armed conflict.

95. *Id.* (emphasis added). Once again, note the descriptive "modest," hardly an adjective one would choose if the reach were as wide-ranging as today's proponents of a broad application of Article 3 claim.

96. *Id.* at 336-37 (emphasis added). Even the ICRC representative understood that the delegates had decided to limit the reach of Article 3 to civil wars.

When the final vote on the Article was taken in Plenary session, the text that ultimately became Article 3 "was adopted by 34 votes to 12 with 1 abstention."[97]

During the entire Diplomatic Conference—whether in Plenary or Committee session—the national delegations' discussion about extending rights and protections to victims of "conflicts not of an international character" focused exclusively on civil wars and related *internal* conflicts. There is no evidence in the Final Record to indicate that the Parties to the Conference understood that they were agreeing to anything other than extending certain principles of humanitarian treatment to victims of civil wars and similar internal conflicts. Yet, that is not how Article 3 is being interpreted and applied today.

IV. HOW ARTICLE 3 IS BEING APPLIED TODAY

Despite the fact that the Final Record provides no indication that Article 3 dealt with—*or was intended by the High Contracting Parties to deal with*—anything other than civil wars and their close relations, such as rebellions, insurgencies, or colonial wars, commentators and jurists have expanded the reach and distorted the meaning of Article 3 until it is no longer recognizable. Instead of affirming that Article 3's terms (or any treaty's terms, for that matter) gain their meaning—and legitimacy—from what was mutually agreed upon by the High Contracting Parties,[98] today's commentators and jurists have placed a gloss on Article 3 such that, rather than applying only "[i]n the case of armed conflict *not of an international character occurring in the territory of one of the High Contracting Parties*,"[99] Article 3 now applies to *all* conflicts *everywhere*.[100]

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97. *Id.* at 339.

98. *See, e.g.*, GC III CMT., *supra* note 12, foreword ("The Committee, moreover, when called upon for an opinion of a provision of an international Convention, always takes care to emphasize that *only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty.*") (emphasis added); 2-B FINAL RECORD, *supra* note 1, at 336 (noting that determining the text and meaning of a treaty provision falls "within the exclusive competence of governments").

99. GC III, *supra* note 7, art. 3 (emphasis added).

100. *See, e.g.*, Brief of Professors Ryan Goodman et al. as Amici Curiae Supporting Reversal, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53970 at *2 (Geneva—Applicability) [hereinafter Goodman Brief] (arguing that "Common Article 3 provides the minimum humanitarian rules applicable in all armed conflicts—even those that also qualify as international armed conflicts within the meaning of Common Article 2"); Brief for International Human Rights Organizations Center for Constitutional Rights et al. as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184) 2006 WL 53982 at *18 [hereinafter Human Rights Brief] (arguing that Article 3 reaches "all persons in all conflicts"); Brief of International Law Professors Listed Herein as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 42058 at *6 n.3 (Commissions-Geographic Requirement) [hereinafter, Law Professors' Brief] (arguing that Article 3 applies "in an international armed conflict"); Brief for Petitioner,

Such a result is inconsistent with how United States courts normally construe treaties. Although "[t]reaties are to be *liberally construed* so as to effect the apparent intention of the parties . . . , [w]hen their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter and to their practical construction of it."[101] Granted, United States

> [c]ourts commonly declare that treaties are more "liberally construed" than contracts. *This does not mean, however, that treaty provisions are construed broadly.* Rather, this "liberal" approach to treaty interpretation merely reflects . . . the willingness of courts, when interpreting difficult or ambiguous treaty provisions, to "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Indeed, existing precedents—though sparse—suggest that treaty provisions should be construed narrowly rather than broadly. *As treaties establish restrictions or limitations on the exercise of sovereign rights by signatory States, courts should interpret treaty provisions narrowly—for fear of waiving sovereign rights that the government or people of the State never intended to cede.* Ambiguous provisions of a treaty should thus be interpreted to derogate minimally from the sovereign power of the State, which is the quintessential and most legitimate entity in international law.[102]

Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53988 at *49 [hereinafter Hamdan Brief] (arguing that "Article 3 binds all conflicts, and all parties"); Reply Brief for the Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 684299 at *19 [hereinafter Hamdan Reply Brief] (arguing that Article 3 applies to "all conflicts"). *But see* Jinks, *supra* note 6, at 20 (noting that evidence exists "suggest[ing] that Common Article 3 applies only to civil wars" and that "textual ambiguity in the provision raises some questions about whether [Article 3] applies to transnational armed conflict").

101. Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929) (emphasis added). The terms of Common Article 3 are anything but clear. *See infra* note 110.

102. Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638-39 (5th Cir.) *cert. denied*, 513 U.S. 1016 (1994) (quoting E. Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991)) (emphasis added). The Government's brief reflected the narrow interpretation because of the effect a broad reading would have on United States sovereignty. Brief for Respondents, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 U.S. S. Ct. Briefs LEXIS 292 at *24 (noting that the Geneva Convention neither "preclude[s] the trial of petitioner by military commission" nor "create[s] private rights enforceable in domestic courts"); *id.* at * 25 (noting that President has concluded that al-Qaeda not covered by Geneva Convention). Moreover, the Supreme Court noted the following in *Hirabayashi v. United States*:

> The war power of the national government is "the power to wage war successfully." . . . It extends to every matter and activity so related to war as substantially to affect its conduct and progress. . . . *Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those*

The view that Article 3 applies to more than civil wars (and similar domestic armed conflicts) derives from the following arguments:

(1) By its own terms, Common Article 3 applies to all armed conflicts not between two or more High Contracting Parties;[103]
(2) Narrowly Interpreting Common Article 3's reach is not faithful to the context and purpose of Article 3;[104] and
(3) Narrowly interpreting Common Article 3 would create an "inexplicable and unacceptable gap" in the Conventions' coverage.[105]

Each argument will be discussed in turn.

A. Argument That, By Its Own Terms, Common Article 3 Supports a Broad Interpretation and Application

Common Article 3 reads, in pertinent part: "In the case of an 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 . . . ."[106]

Proponents of a broad understanding of Article 3 typically parse the Article's initial clause into two parts and then analyze the parts independently of each other, as follows.

1. Meaning of the Phrase "Armed Conflict Not of an International Character"

Those who argue that Common Article 3 is *not* confined to civil wars (and similar internal conflicts) focus first on the phrase "of an international character."[107] They argue that "of an international character" "*clearly* refers to the party structure in a conflict—a conflict between two or more states."[108]

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branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

320 U.S. 81, 93 (1943) (internal citations omitted) (emphasis added). *See also* Haig v. Agee, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation"); Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) (finding that political branches accorded high level of deference in area of military affairs).

103. *See, e.g.*, Brief of the Association of the Bar of the City of New York and the Human Rights Institute of the International Bar Association as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53985 at *7-9 (Geneva—Common Art. 3) [hereinafter NYC Bar Brief]

104. *See, e.g.*, Goodman Brief, *supra* note 100, at *20 (citing GC III CMT., *supra* note 12, at 36).

105. *See, e.g., id.* at *22.

106. *E.g.*, GC III, *supra* note 7, art. 3.

107. *See* Goodman Brief, *supra* note 100, at *19.

108. *See id. See also* Hamdan Brief, *supra* note 103, at *49 ("[A]s Judge Williams recognized: 'the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., between nations.'"); NYC Bar Brief, *supra* note 103,

From this, they argue it follows that the phrase "not of an international character" must mean a conflict that is not between two or more states. Hence, it could include conflicts with non-State entities of all types, whether internal or external.

Although this approach might seem logical at first blush, it is seriously flawed. Such an approach not only neglects reading both parts of Article 3's initial clause as an integrated whole, it also presupposes that the respective Article 3 phrasing has a single defined meaning and is not subject to multiple interpretations. That is simply untrue.[109] To determine how those most intimately involved with Article 3 viewed the clarity of the Article's language, one should turn first to the ICRC commentaries.[110]

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at *8.

109. *See, e.g.*, GC III CMT., *supra* note 7, at 35 (admitting that the phrase "armed conflict not of an international character" is "vague"); BOND, *supra* note 12, at 51 (citing Tom Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37, 43 (1971)) ("One of the most assured things that might be said about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey."); Jinks, *supra* note 6, at 38-41 (noting that the record supports three plausible understandings of the phrase "armed conflicts not of an international character"); Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 COLUM. J. TRANSNAT'L L. 73, 94 (2004) (noting that Article 3's vagueness "has resulted in disagreement over the range of conflicts to which it is meant to apply" and that the "precise meaning" of "'armed conflict not of an international character' is unclear"); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 816 (2005) (noting that the reach of Article 3 has grown over time); Hamdan v. Rumsfeld, Brief of Human Rights First et al. as Amici Curiae, 126 S. Ct. 2749 (2006) (No. 05-184) 2006 WL 53968 at *23 [hereinafter Human Rights First Brief] (noting that Article 3 has evolved over time and is now considered a "'floor' below which parties may not go *in any armed conflict*" (emphasis added)).

The issue of multiple interpretations did not end at Geneva in 1949. The confusion continued during the negotiating of Protocal Additional II in 1977. *See* COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTING OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) (Yves Sandot et al. eds., 1987) [hereinafter PROTOCOL II CMT.] at ¶¶ 4448, 4450 (noting that because Common Article 3 did not define the term "armed conflict," "it gave rise to a great variety of interpretations"; in fact, "[s]ix variants were formulated, based on thirteen proposals" in an attempt to explain to which specific types of armed conflict Common Article 3 applied).

110. NYC Bar Brief, *supra* note 103, at *6 & n.3 (noting that Article 3 was described "in the official Red Cross Commentaries as 'one of [the] most important Articles' in the Conventions" and that the Red Cross Commentaries are "'widely recognized as a respected authority on interpretation of the Geneva Conventions [whose authors] were primarily individuals intimately involved with the revision of the Convention of 1929 and the drafting of the present Conventions.'").

Yet, when turning to any ICRC document on the 1949 Conventions, one must keep in mind several important points. First, as a non-State actor the ICRC was not, and indeed could not be, a High Contracting Party to the Conventions. As such, no ICRC member voted on either the text or the meaning of any treaty provision decided at Geneva in 1949. Second, the ICRC, consistent with its history as a humanitarian organization, represents a certain point of view about the law of war and what it hoped would be achieved at Geneva in 1949. However noble and enlightened the ICRC's views may be, only the motivation and understanding of the States Parties to the Conventions matter when determining what a treaty means. Third, the ICRC

In discussing the introductory sentence of Article 3, the ICRC Commentator for the Third Convention asked the following question: "What is meant by 'armed conflict not of an international character'?"[111] He then continued: "The expression is *so general, so vague*,"[112] that "many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry."[113] The ICRC

Commentaries on the 1949 Geneva Conventions are suffused with various statements representing the ICRC's positions on issues, many of which were aspirational in nature and did not reflect the meaning and reach of a specific article agreed to by the High Contracting Parties. *See, e.g.*, GC III CMT., *supra* note 12 at 10 (emphasis added):

> [T]he Commentary serves a useful purpose, for it sets out the motives for the decisions of the authors of the Convention [i.e., including the ICRC's motives, since it was the ICRC which authored the Stockholm text that served as the point of departure for the Conventions], specifies the conditions in which the various provisions are applicable, and frequently—*without any hesitation*—points out shortcomings observed in connection with numerous problems [i.e., where the ICRC believed participating States fell short of what the ICRC had hoped for].

See also id. at 26-27 ("[A]lthough the Convention, *as a concession to legal form*, provides that in certain circumstances a Contracting Party may legally be released from its obligations, its spirit encourages the Power in question to persevere in applying humanitarian principles, whatever the attitude of the adverse Party may be.") (emphasis added); *id.* at 36 (emphasis added):

> Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? *We [i.e., the ICRC] do not subscribe to this view. We think, on the contrary, that the scope of application of the Article must be as wide as possible.*

See also GC IV CMT, *supra* note 15, at 58 (noting "an important *and regrettable* concession to State expediency" (emphasis added)); *id.* at 23 ("*That may not be a strictly legal interpretation; it does not altogether follow the text itself; but it is in our [i.e., the ICRC's] opinion the only honourable and reasonable solution.*" (emphasis added)). *See also* Jinks, *supra* note 6, at 24 (noting that ICRC Commentaries' "interpretive propositions are themselves fraught with ambiguities"). As such, one must be careful to distinguish between when the ICRC is accurately relating what actually transpired at the Conference and when it is stating its independent views, no matter how noble and enlightened such views may be. Once again, the language and meaning of treaties are determined, not by the ICRC or what the ICRC would like them to be, but solely by the States that have negotiated and agreed to be bound by the treaties' terms.

This does not mean, however, that one may never legitimately rely on a Commentator's comments as being an accurate reflection of what actually transpired. For example, an ICRC statement may be relied upon when the ICRC Commentator describes or admits to an occurrence opposed to the ICRC's preferred result. *See, e.g.*, GC III CMT., *supra* note 12, at 35 (admitting that the phrase "armed conflict not of an international character" is "vague"). Such a statement is akin to the "statement against interest" exception to hearsay, *see* FED. R. EVID. 804(b)(3), which is based on the theory that a person would not make a statement against his or her interest unless the statement is likely to be true. *See id.* Advisory Committee's Note.

111. GC III CMT., *supra* note 12, at 35. *See also* GC I CMT., *supra* note 17, at 49 (same formulation of question).

112. GC III CMT., *supra* note 12, at 35. *See also* GC I CMT., *supra* note 17, at 49; GC II CMT., *supra* note 17, at 33; Canestaro, *supra* note 109 at 94 (noting that the "precise meaning of Common Article 3's reference to 'armed conflict not of an international character' is unclear"); Jinks, *supra* note 6, at 21 (noting that no one can say with assurance what meaning "armed conflict not of an international character" was meant to convey).

113. GC III CMT., *supra* note 12, at 35. *See also* GC I CMT., *supra* note 17, at 49; GC II

Commentator for the Fourth Convention posed exactly the same question, but answered it more emphatically:

> *That was the burning question which arose again and again at the Diplomatic Conference.* The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry.[114]

If, in fact, the issue of the meaning of the phrase "armed conflict not of an international character" was a "burning question" that "arose again and again" during the Conference, and the phrase was "so general, so vague" as to cause continuing concern among the Conference participants, one wonders how the identical Article 3 language can be so clear to commentators and jurists today[115] when it was not at all clear to those wrestling with the issue in 1949.

Given that the phrase was not considered to be clear by those at the Conference itself (as admitted by all of the ICRC Commentators),[116] in order to be intellectually honest, today's commentators and jurists should turn to the record itself to discover what the High Contracting Parties understood the phrase to mean. Only then can they begin to understand what the High Contracting Parties agreed to be bound by. Part III, *supra*, dealt in depth with the statements and views expressed by the various delegations, all of which confined themselves to dealing with civil wars and related internal conflicts.

The Brief of Professors Ryan Goodman et al. (Goodman Brief)[117] correctly noted that "Common Article 3 was *revolutionary* because it subjected *wholly internal matters* to international humanitarian law."[118] Despite that observation, the Goodman Brief nonetheless claims that the delegates to the 1949 Conference did, in fact, agree (despite total silence in the Final Record that such a topic was even entertained) to extend the reach of Article 3 beyond "wholly internal matters" (like civil wars) to all persons in all conflicts where a High Contracting Party is fighting an entity not a Party to the 1949

CMT. *supra* note 17, at 33. Note once again that no mention is made, even by the ICRC Commentators, of anything but internal types of conflict.

114. GC IV CMT., *supra* note 15, at 35 (emphasis added).

115. *See, e.g.*, NYC Bar Brief, *supra* note 103, at *7 (arguing that the United States Circuit Court panel's decision in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), "depart[ed] from the *plain language* of Common Article 3") (emphasis added). Yet, the ICRC commentary on Protocol II reveals that confusion as to the precise meaning and breadth of Common Article 3 existed well beyond Geneva in 1949. *See, e.g.*, PROTOCOL II CMT., *supra* note 109, at ¶¶ 4448, 4450.

116. *See supra* notes 109, 112-115.

117. Goodman Brief, *supra* note 100, at *21.

118. *Id.* at *21 (citing Joyce A.C. Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. Y.B. INT'L L. 294, 300-01 (1949)) (emphasis added). *See also* GC III CMT., *supra* note 12, at 28 ("Up to 1949, the Geneva Conventions were designed to assist only the victims of wars between States.").

Conventions.[119]

This raw assertion raises a number of questions. Why, for example, is it more likely that Parties to a treaty agreed on what was never discussed at all than on what was discussed at length at each of the sessions—*especially so when the Parties were discussing, for the first time ever, the limiting of the domestic reach of national sovereignty by an international treaty*?[120] In context, which is more likely: (1) that the High Contracting Parties to the 1949 Geneva Conference, sovereign States all, decided to proceed cautiously and deliberately in yielding to international monitoring and regulation a limited portion of what had hitherto constituted wholly internal matters (i.e., civil wars) or (2) that they agreed, the first time they were ever asked to do so, to freely yield broad sovereign rights to allow the international community to monitor and regulate not only civil wars but also all manner of unknown and unknowable future conflicts? Given the slow, painstaking process that was required to develop rules governing *international* armed conflicts, it is both illogical and absurd to believe that States would knowingly cede such broad sovereign rights regarding internal conflicts the first time they were requested to do so.[121]

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119. Goodman Brief, *supra* note 100, at *23-24. Note, however, that the 1949 Geneva Conference explicitly rejected the ICRC's draft language to apply protections in "all cases" of non-international armed conflicts. GC III CMT., *supra* note 12, at 31.

120. *See, e.g.*, Canestaro, *supra* note 109, at 93 ("States have resisted efforts to regulate conflict within their borders, fearing 'that any outside encroachments on their sovereignty might be a possible attempt on their territorial integrity and political independence'"); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 210 (1971) (noting that, because Article 3 "was a pioneer provision in a multilateral convention restricting States in their manner of quelling internal rebellion," "it was accepted with difficulty and considerable caution"); GC IV CMT., *supra* note 15, at 40 (noting that the 1947 Conference of Government Experts narrowed significantly the proposed Article 3 language preferred by the National Red Cross Societies and the ICRC) *see supra* notes 46-48 and accompany text; GC III CMT., *supra* note 12, at 30 ("There was reason to fear that there might be objections to the idea of imposing international obligations on States in connection with their *internal affairs* . . . ." (emphasis added)). *See also* Goodman Brief, *supra* note 100, at *21 ("Common Article 3 was revolutionary because it subjected *wholly internal matters* to international humanitarian law." (emphasis added)).

121. *See* GC III CMT., *supra* note 12, at 28 (noting that "[u]p to 1949, the Geneva Conventions were designed to assist only the victims of wars between States."); *id.* at 31 (noting that the proposal of the Government Experts at the 1947 Conference "fell a long way short of that of the Red Cross Societies"). The following description may help explain why the High Contracting Parties would proceed cautiously:

> The international law of war was primarily designed to govern a contest between two armed forces which carry on hostilities in a more or less open fashion. Analogously, the rules of football were designed to govern a contest between two uniformed teams, clearly distinguishable from the spectators. How well would those rules work, however, if one team were uniformed and on the field, the other hid itself among the spectators and the spectators wandered freely over the playing field?

BOND, *supra* note 12, at 82 (quoting Joseph B. Kelly, *Legal Aspects of Military Operations in Counterinsurgency*, 21 MIL. L. REV. 95, 104 (1963)).

From the Final Record, we know with certainty that the delegates to the 1949 Conference were concerned about civil wars and related *internal* conflicts, because such language suffuses their comments. We also know that impassioned arguments were made concerning how and to what degree certain provisions of the Geneva Conventions should apply to civil wars and related internal conflicts. Because no substantive topic other than civil wars/internal conflicts was discussed, there is no evidence whatsoever that the delegates agreed to anything beyond applying Article 3 to such internal conflicts. Extrapolating Article 3's reach to *all* armed conflicts (despite overwhelming evidence that the High Contracting Parties limited their agreement only to civil wars and similar domestic strife) is a gross, baseless, and illegitimate distortion of the Article's agreed-to meaning.[122]

2. *Meaning of the Phrase "Occurring in the Territory of One of the High Contracting Parties"*

After dealing with the phrase "armed conflict not of an international character," proponents of a broad reach for Article 3 then turn their attention to the phrase "occurring in the territory of one of the High Contracting Parties." Having concluded that the non-international conflicts language, in reality, means that Article 3 applies to all armed conflicts everywhere,[123] many of the proponents of Article 3's broad application do little, if any, analysis of the territorial clause.

The Goodman Brief, however, does discuss the territorial limit in some detail.[124] Goodman and associates argue against a narrow geographical reading because the proponents of a narrow interpretation "can point to no discussion in the drafting negotiations where such an astonishing limitation [i.e., limiting the reach of Common Article 3 to conflicts which occur *only* in the territory of one of the High Contracting Parties] . . . was contemplated, proposed, or debated."[125]

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122. *See, e.g.*, GC II CMT., *supra* note 17, at 33 (noting that Article 3 applies to conflicts "similar to an international war, but [which] take place within the confines *of a single country*" (emphasis added)). *See also* 2-B FINAL RECORD, *supra* note 1, at 336 (noting that it is "the exclusive competence of governments" to determine the meaning and reach of the Conventions' terms); Part III, *supra*.

123. *See supra* note 100.

124. Other briefs argue that the use of the word "one" in the phrase "occurring in the territory of one of the High Contracting Parties" merely serves to establish that a High Contracting Party must be involved in a conflict to trigger Article 3's application. *See, e.g.*, Hamdan Reply Brief, *supra* note 100, at *19. *But see* GC III CMT., *supra* note 12, at 31 (noting that the Parties specifically rejected the ICRC's proposed language: "which may occur in the territory of one *or more* of the High Contracting Parties" (emphasis added)); GC II CMT., *supra* note 17, at 33 (noting that Article 3 applies to conflicts which "take place within the confines of *a single country*" (emphasis added)); GC IV CMT., *supra* note 15, at 36 (same).

125. Goodman Brief, *supra* note 100, at *21. Ironically, for Goodman and his associates, the inverse can just as easily be argued: proponents of a broad reading can point to no

Yet, this argument fails for two reasons. First, as pointed out repeatedly in Part III, *supra*, the debate concerning Article 3 centered solely and exclusively on civil war and kindred internal conflicts, such as insurrection and rebellion. A civil war, by definition, is an "*internal* armed conflict between persons of [the] same country."[126] Similarly, an insurrection is a "rebellion, or rising of citizens or subjects in resistance to their government. [It] consists [of] any combined resistance to the lawful authority of the state . . . ."[127] A rebellion is "[d]eliberate, organized resistance, by force and arms, to the laws or operations of the government, committed by a subject."[128] Because each of these definitions describes activities by a state's citizens/subjects aimed against the political authority of that state, the use of such terms is a powerful indicator that the delegates understood that Article 3 applied only to domestic armed conflicts. Moreover, the ICRC Commentator for the Fourth Convention, when describing to what types of conflicts Article 3 applies, described Article 3's reach: "[I]t must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, *but take place within the confines of a single country*."[129]

Second, parsing Article 3's initial clause into two disconnected sections seems to be the crux of the interpretive problem. The combined text actually reads: "In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."[130] When one notes that the subject concerns a non-international conflict occurring in the territory of one State Party, it is not difficult to understand why the High Contracting Parties understood Article 3 to be applying solely to civil wars and other internal conflicts (as their discussions—and even ICRC Commentators—clearly indicate). The territorial language appears to be a significant and intentional limitation on the type of non-international armed conflict being considered and is not surplusage. The two parts of Article 3's initial clause

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discussion in the drafting negotiations where such an astonishing *extension* (i.e., to include conflicts in the territory outside of that of the respective High Contracting Party) was contemplated, proposed, or debated by the various delegations attending the Conference. In fact, most of the discussions centered on ensuring that *internal* conflicts like riots and banditry would not be covered within the understanding of *civil war*, which, as noted above, is commonly understood to take place in one country. *See, e.g.*, BLACK'S LAW DICTIONARY 247 (6th ed. 1990) (defining civil war as "any *internal armed conflict* between persons of [the] same country") (emphasis added). *See also supra* note 17. Further, the argument for reading Article 3 broadly overlooks the ICRC Commentator's observation that Article 3 applies to conflicts that "take place within the confines of *a single country*." GC II CMT., *supra* note 17, at 33 (emphasis added); GC IV CMT., *supra* note 15, at 36 (same).

126. BLACK'S LAW DICTIONARY 247 (6th ed. 1990) (emphasis added).

127. *Id.* at 808.

128. *Id.* at 1266.

129. GC IV CMT., *supra* note 15, at 36 (emphasis added). *See also* GC II CMT., *supra* note 17, at 33 (concurring in the observation that Article 3 applies to armed conflicts that "take place within the confines *of a single country*" (emphasis added)).

130. *E.g.*, GC III, *supra* note 7, art. 3.

considered as a whole,[131] the ICRC's expressed desire to extend humanitarian coverage to victims of civil wars,[132] and the ICRC Commentators' observations that the non-international conflicts to which Article 3 applies take place within "a single country"[133] all make clear how the High Contracting Parties interpreted Article 3 and why.[134]

B. Argument that Narrowly Interpreting Common Article 3's Reach Is Not Faithful to the Context and Purpose of Article 3

The argument that a narrow interpretation of Article 3 runs afoul of the Article's basic context and purpose develops generally as follows: (1) "[Article 3's] drafting history makes clear that Article 3 was designed to balance the modest humanitarian goals of the Conventions with the sovereignty of states over internal matters";[135] (2) "The *purpose* of Common Article 3 justifies applying it 'as widely as possible'";[136] (3) "The drafters of the Conventions

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131. *Id.*

132. *See generally* Part II, *supra*. *See also* GC III CMT., *supra* note 12, at 33 (noting that until 1949, Geneva Conventions were designed solely to assist victims of international conflicts); *id.* (noting that the ICRC had long been trying to aid victims of *civil war* (emphasis added)); *id.* at 29 (noting that in 1921 the Xth International Red Cross Conference supported a resolution affirming that *civil war* victims should also enjoy rights and protections (emphasis added)); *id.* (noting that 1921 resolution was useful in helping to aid civil war victims in Upper Silesia and Spain); *id.* at 30 (noting that, following successes in Upper Silesia and Spain, ICRC sought to include *civil war* protections in Geneva Conventions (emphasis added)); *id.* (noting work done to include *civil war* protections at the 1946, 1947, and 1948 gatherings in preparation for 1949 Geneva Conference (emphasis added)).

133. *See, e.g.*, GC II CMT., *supra* note 17, at 33.

134. Despite the argument that civil wars often are influenced from without, *see, e.g.*, Goodman Brief, *supra* note 100, at *21 (noting that Spanish Civil War had "substantial transnational dimensions"), the ICRC nevertheless described its services as meeting the needs of victims of "civil war" and not as something far broader. *See, e.g.*, GC III CMT., *supra* note 12, at 29-30. *See also* 2-B FINAL RECORD, *supra* note 1, at 334-35 (where the Swiss delegate noted that "applying the principles of the Conventions to civil wars" was the result of compromise); *id.* at 335 (where the Swiss delegate described what was achieved as a "comparatively modest solution"). Hence, to argue that Article 3 cannot be limited to civil wars merely because such wars may be influenced from abroad is a non sequitur that does not reflect what transpired at the 1949 Conference.

135. Goodman Brief, *supra* note 100, at *20 (citing LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 23-36 (2003)).

136. *Id.* (quoting GC III CMT., *supra* note 12, at 36) (emphasis added). Jean Pictet, overall editor of the 1949 Geneva Commentaries, argued that Article 3 "should be applied as widely as possible. Pictet argue[d] that the protections article 3 affords . . . are so minimal that each state must already grant them to common criminals; therefore, they should be granted to insurgents as well." Major Robert W. Gehling, *Protection of Civilian Infrastructures*, 42 L. & CONTEMP. PROBS. 86, 119-20 (1978) (citing GC IV CMT., *supra* note 15, at 35-36). Yet, such arguments, noble as they are, overlook the following reality:

> Governments, by tradition and inclination, regard rebels and traitors as worse offenders than ordinary criminals . . . [even though] the soldier or civilian wounded or captured in a civil war is no less in need of care and decent treatment than the soldier wounded or captured in repelling an invader of his country.

purposely avoided any rigid formulation that might limit the applicability of Common Article 3";[137] (4) "The only limit on Article 3's application suggested in the drafting history, or even discernible in the abstract, was the sovereign prerogative of states to suppress unrest within their own territory";[138] and (5) "The principal issue was identifying the circumstances in which such 'internal' matters become a legitimate matter of international concern."[139] Using such reasoning, the Goodman Brief concludes that the United States Government interpretation of Article 3's meaning and reach[140] "is not faithful" to the Article's "context and purpose."[141] Yet, this argument, like the first, lacks a solid basis.

First, even proponents of a broad interpretation of Article 3 agree that Article 3 was intended to extend humanitarian protections and relief to victims of civil war.[142] Article 3 accomplished that purpose. Second, the 1949 Conference was the first attempt at a major international conference to convince sovereign States to voluntarily relinquish, by treaty, certain sovereign rights to allow the international community to provide humanitarian aid and protection to *future enemies* of the respective sovereign on that sovereign's own soil.[143] As such, the context at the Geneva Conference was political in nature and subject to intense negotiation and painful compromise.[144]

Moreover, those who believe that the High Contracting Parties agreed to a broad application of Article 3 simply dismiss the fact that it took *over seven decades* of on-again, off-again, negotiations and conferences (i.e., from the

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Id. at 120 (citation omitted). *See also* GC IV CMT., *supra* note 15, at 27 (noting that, in civil wars, governments tend to regard "adversaries as common criminals").

137. Goodman Brief, *supra* note 100, at *20 (citing GC III CMT., *supra* note 12, at 32-37).

138. *Id.* (citing MOIR, *supra* note 136, at 23-36).

139. *Id.*

140. Brief for Respondents, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184) 2006 WL 460875 at *48-49 & n.24 (arguing that Article 3's text, Article 3's drafting history, the President's interpretation of the Article, and the ICRC Commentary all support the proposition that Article 3 does not apply to the conflict with al-Qaeda because that conflict is international in character).

141. Goodman Brief, *supra* note 100, at *20.

142. This was the desire of the ICRC and the International Red Cross Societies from 1921 onward and was reflected in much of the work at the pre-1949 conferences held in Geneva and Stockholm. *See* Part II and note 132, *supra*. *See also* Goodman Brief, *supra* note 100, at *19 n.11.

143. *See* GC III CMT., *supra* note 12, at 28-29, 32. Although Article 3 was intended to provide protection to victims of non-international armed conflicts, it expressly includes within the definition of persons to be protected "*members of armed forces* who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause . . . ," *see, e.g.*, GC III, *supra* note 7, art. 3 (emphasis added), and persons who have taken up arms against the State qualify as enemies of the State.

144. *See, e.g.*, 2-B FINAL RECORD, *supra* note 1, at 336 (noting that it is "the exclusive competence of governments" to determine the meaning and reach of the Conventions' terms); *id.* at 334-35 (where the Swiss representative noted that the text and reach of Article 3 were the result of compromise). This includes the Parties' declining to adopt a more specific descriptive than "armed conflict not of an international character" and their rejecting the territorial reach language in the Stockholm draft.

initial attempt in 1874 in Brussels) for international humanitarian law to arrive at the level of the 1949 protections.[145] That the participating States in 1949 ultimately agreed to cede certain elements of their national sovereignty in time of civil war was a significant step at the time. Hence, Article 3 met the ICRC's desire to provide aid and protection to victims of civil war despite a natural reluctance on the part of States to part with their sovereign right to deal *exclusively* with their own citizens/subjects in open revolt against them. These achievements alone suffice to refute the charge of lack of faithfulness to Article 3's context and purpose.

Proponents of broad application also argue that Article 3's purpose justifies its application "'as widely as possible.'"[146] Yet, on that point, the proponents are simply parroting the view of the ICRC, not the position of the delegates who adopted the Article.[147] Hence, however noble (and otherwise desirable) the ICRC goal might be, it remains nonetheless merely an expression of ICRC desire, not what the Parties decided. With respect to Article 3, only the terms to which the Parties to the Conventions agreed matter.[148] As such, the ICRC's view should carry no weight whatsoever when arguing the meaning and reach of Article 3.[149]

In sum, the High Contracting Parties did, in fact, agree to cede elements of their national sovereignty to extend to victims of civil war the aid and protection of the international community, but nothing more.

C. Argument that Narrowly Interpreting Common Article 3 Would Create an "Inexplicable and Unacceptable Gap" in the Conventions' Coverage

Having argued that the United States Government has been unfaithful to the context and purpose of Article 3, the Goodman Brief then asserts that the Government's limited interpretation of Common Article 3 "would also create an inexplicable and unacceptable gap in the Conventions' coverage."[150] In support of their assertion, Goodman and associates argue:

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145. GC III CMT., *supra* note 12, at 5.

146. Goodman Brief, *supra* note 100, at *20 (quoting GC III CMT., *supra* note 12, at 36).

147. *See supra* note 110.

148. GC III CMT., *supra* note 12, at 3; 2-B FINAL RECORD, *supra* note 1, at 336-37 (noting that, "[i]n a Diplomatic Conference . . . , realistic and practical views must be taken, and the [ICRC] was aware from the outset . . . that the [Stockholm] text . . . had no chance of being adopted by Governments and that a *compromise solution should accordingly be sought*" (emphasis added)).

149. The ICRC rightfully admits that it attempts to "push the envelope," so to speak, whenever it can. *See, e.g.*, GC IV CMT., *supra* note 15, at 27 (noting that the ICRC encounters obstacles "*as always* when endeavoring to go a step *beyond the text of the Conventions*" (emphasis added)).

150. Goodman Brief, *supra* note 100, at *22. *See also* Human Rights Brief, *supra* note 100, at *22 & n.15 (arguing that Article 3 was meant to create "seamless" coverage and that the Government's position would create a "gap" in such coverage).

> Armed conflicts between states and non-state armed groups regularly involve substantial international dimensions with respect to location of armed forces, zones of hostility, and outside support given to the competing parties. According to a leading study, 51% of civil wars in *1946-2000* extended to or across the national border of the conflict-ridden country. . . .[151]

"Furthermore, according to a study of 74 insurgencies *since 1991*, '44 received state support that . . . was significant or crucial to the survival and success of the movement. . . . Other outside supporters were also active . . . .'"[152] Goodman's argument continues: "The world's most well-known non-international armed conflicts include major transnational dimensions."[153] From this data, Goodman and associates conclude:

> *Given the notoriety and frequency of such conflicts*, it is implausible that the drafters of Common Article 3 meant to exclude such a subset—indeed, any subset—of non-international armed conflicts. The Government offers no theory why the drafters would have excluded such conflicts from the scope of Common Article 3. Such a theory would have to be convincing on its own terms.[154]

The above argument is, at best, bizarre. Given that the vast majority of the data upon which the Goodman Brief relies comes from conflicts which occurred *after* the 1949 Geneva Conference adjourned, the argument that it is "implausible" that Article 3's drafters would exclude "any subset . . . of non-international armed conflicts" would appear to presuppose that such drafters were either prophets or psychics. The Goodman Brief also argues, based on no evidence whatsoever, that a narrow interpretation would create an "inexplicable and unacceptable" gap.[155]

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151. Goodman Brief, *supra* note 100, at *22 & n.14 (citing Halvard Buhaug & Scott Gates, *The Geography of Civil War*, 39 J. PEACE RES. 417, 415 (2002)) (emphasis added). Note that the data come from conflicts occurring between 1946 and 2000, whereas the Geneva Conference occurred in 1949. One could, therefore, infer that most of the cases cited post-date the 1949 Geneva Conference.

152. *Id.* at *22 (quoting DANIEL L. BYMAN ET AL., TRENDS IN OUTSIDE SUPPORT FOR INSURGENT MOVEMENTS 2 (2001)) (emphasis added). Every conflict cited in this study occurred *after* 1949.

153. *Id.* at *22-23 & n.15. In support of this point, Goodman cites to a manuscript dated 2005, which included the following non-international conflicts: Afghanistan, Cambodia, India, Nicaragua, Rwanda, Sierra Leone, Sudan, Tajikistan, Uganda, and Zimbabwe. The vast majority of these conflicts post-date the Geneva Conference.

154. *Id.* at *23 (emphasis added).

155. Similarly, the NYC Bar Brief argues that, "[a]lthough the other articles of the Conventions apply . . . only in international conflicts . . . [,] Common Article 3 was intended as a 'gap filler' for *all other conflicts*." NYC Bar Brief, *supra* note 103, at *3. The NYC Bar Brief makes this claim based on "Common Article 3's expansive language." *Id.* *But see* GC II CMT.,

But such an argument fails on a number of points. First, it simply disregards that each of the previous Conventions had, indeed, left gaps—which is why subsequent Conventions became necessary.[156] In that context, it also fails to explain why one should assume that the 1949 Conventions would be able to accomplish, *with respect to gaps*, what no previous Convention had been able to do.

Moreover, if the 1949 Conventions had closed all gaps (an implicit assumption in proponents' position[157]), the argument fails to explain why the international community decided that the two June 1977 Protocols Additional to the 1949 Geneva Conventions[158] were needed. What actually transpired at Geneva concerning Common Article 3 was not "inexplicable" at all; it accurately reflects the fact that human beings, despite the best of intentions, either do not anticipate every possibility when attempting to solve complex problems or choose to solve such problems piecemeal. To expect total resolution of complex problems when addressed the first time is both wishful thinking and naïve.

Second, the argument overlooks the fact that the 1949 Conference was a political event where the final result was based on negotiations and compromise.[159] As mentioned earlier, it was also the first time that States had been asked to cede sovereign authority to the international community to intervene on behalf of persons in open rebellion against the ceding authority, events that had hitherto been handled solely as domestic matters.[160] From the

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supra note 17, at 33 (noting that Article 3 only applies to conflicts that "take place within the confines of *a single country*" (emphasis added)).

156. *See, e.g.*, 2-A FINAL REPORT, *supra* note 1, at 9.

> Unfortunately, the Conventions of 1929 . . . proved inadequate to alleviate th[e] sufferings [of World War II]. It is our duty never to lose sight of the tragic experiences the world has seen and to remedy as far as possible the deficiencies [i.e., gaps] revealed in the texts of 1929.

Id. BOND, *supra* note 12, at 31 (noting that reformers fail to appreciate future challenges and hence cannot make rules to avoid future abuses).

157. *See, e.g.*, *supra* note 155 and accompanying text.

158. *See* PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, 8 JUNE 1977; PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, RELATING TO THE PROTECTION OF VICTIMS OF NON- INTERNATIONAL ARMED CONFLICTS, 8 JUNE 1977.

159. *See, e.g.*, 2-B FINAL RECORD, *supra* note 1, at 334-35 (where the Swiss Representative acknowledged that the text and reach of Article 3 were the result of compromise).

160. *See, e.g.*, GC III CMT., *supra* note 12, at 28 ("Up to 1949, the Geneva Conventions were designed to assist only the victims of wars between States."). Yet, the ICRC Commentaries on the Additional Protocols of 1977 admit that gaps in the 1949 Conventions, did, in fact, exist. *See, e.g.*, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at xxix (Yves Sandot et al. eds., 1987) (admitting that the 1949 Conventions "did not cover all aspects of human suffering" and "by the 1970's" "had exposed gaps and imperfections"); PROTOCOL II CMT., *supra* note 109, at ¶ 4364 (noting that Article 3's protections do not cover medical personnel or medical emblems); *id.* at ¶ 4366 (noting that Article 3's protections do not cover relief actions); *id.* at ¶ 4368 (admitting "imperfections and shortcomings" regarding Article 3's coverage); *id.* at ¶ 4658 (noting that Article 3 omitted a requirement to protect wounded and sick); *id.* at 4794 (noting that Article 3

Final Record, the evidence is overwhelming that the Parties to the Conventions understood that Article 3 was aimed at protecting the victims of civil war (and similar internal armed conflicts) and nothing else. Hence, limiting the reach of Article 3 to civil wars and similar internal conflicts was a fully *acceptable* solution to the Parties which adopted the Article, because it was on those very terms that it was agreed to.[161]

Third, the argument presupposes an all-or-nothing measure for success. Although Article 3 may not have closed every gap, it did close a major one—that of protecting the victims of civil war and similar internal armed conflicts. As such, it was not a failure. It was a significant first step. The Swiss Representative seems to have said it best:

> On the one hand . . . we are told that [Article 3] does not go far enough, while on the other . . . it is said it goes much too far. These two criticisms compensate each other. And *to those who complain that the suggested solution does not go far enough, there is a pertinent reply: half a loaf is better*

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had not dealt at all with the need "to guarantee humane treatment for all persons not participating in hostilities"); *id.* at ¶¶ 4848-49 (noting that Article 3 was silent on prohibiting "deportations, transfers and evacuations in or from occupied territories").

161. Yet, even here,

> state practice underscores the limited range of conflicts to which authorities believe Article 3 applicable. Though there has been . . . no absence of opportunities for the application of Article 3 . . . since its adoption, states have generally ignored it. . . .
>
> A few examples will illustrate . . . ample justification for [] pessimism. From 1946 until 1949, when the fighting ended, the Greek government, though it permitted the ICRC to perform limited humanitarian functions, denied that it was embroiled in a civil war and refused to abide by the laws of war. While Article 3 had not yet come into force, the ICRC did call the Greek government's attention to the work of the 1946 Preparatory Conference of the Red Cross Societies [which had called for applying humanitarian norms to civil wars]. Article 3 had certainly come into force when Biafra split from Nigeria, precipitating a bloody civil war. [Yet, t]he Nigerian government never admitted any legal obligation to adhere to [Article 3's] provisions . . . . The widely reported "night of the long knives" suggests that the military in Indonesia did not take seriously any restraints contained in Article 3. In [recent military actions by Pakistan and Sri Lanka] . . .[, n]either has publicly recognized any obligation under Article 3 . . . . [In another example,] Portuguese authorities . . . never admitted any obligation to apply the provisions of Article 3 to rebel forces in . . . Mozambique and Angola . . . .

BOND, *supra* note 12, at 58-59. Moreover, "[w]hatever the precise parameters of 'armed conflict not of an international character,' . . . states continue to insist that they may in internal conflicts deal with their own citizens as they wish without reference to external—that is, international—standards." *Id.* at 61. Given such widespread violations of Article 3's provisions, it is difficult to believe, as some maintain, that those provisions have become part of customary international law. *See, e.g.*, Hamdan Brief, *supra* note 100, at *49 (arguing that Article 3 applies "as a matter of customary international law").

than no bread.[162]

He noted further that a "*modest* solution is certainly better than none. . . ."[163] "Modest" is hardly an adjective one would choose if the decision were as wide-ranging as proponents of a broad reading of Article 3 claim, and it casts considerable doubt on the belief that Common Article 3 was to be broadly applied. Nevertheless, Article 3 was a significant achievement in its own right. Just because Article 3 was not intended to apply to every imaginable type of non-international armed conflict does not negate the fact that what Article 3 achieved was significant. In truth, the Government's theory—based as it is on the overwhelming evidence found in the Final Record of the 1949 Geneva Conference that Article 3's reach was limited to civil wars (and similar internal armed conflicts)—meets the Goodman Brief's challenge and is, in fact, fully "convincing on its own terms."

V. CONCLUSION

International agreements are political documents whose meaning and reach are often the product of intense negotiation and painstaking compromise. The 1949 Geneva Conventions were no exception. What the terms of the Conventions mean and to what conflicts they apply resulted from the give and take of the Parties to the negotiations. Despite ardent arguments to the contrary, the evidence is overwhelming that Common Article 3 was never meant to apply to every imaginable type of non-international conflict, much less to all conflicts everywhere.

Instead, Article 3 was intended solely to extend limited protections to victims of civil war and similar internal armed conflicts; it was never meant to apply to transnational conflicts with terrorist groups like al-Qaeda. Modern commentators and jurists—including five sitting Justices on the Supreme Court of the United States—have (whether knowingly or unknowingly) misinterpreted and misapplied Common Article 3, thereby violating the agreed-upon meaning and reach of the Article and subverting the rule of law internationally. Because the High Contracting Parties at the 1949 Geneva Conference never intended Article 3 to apply to armed conflicts outside of a single state, Article 3's provisions cannot legitimately serve as a basis to require that the United States Government resort to a "regularly constituted court" (as opposed to a military commission) for dispensing justice to members of al-Qaeda taken captive during the GWOT.

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162. 2-B FINAL RECORD, *supra* note 1, at 335 (emphasis added). This comment by the Swiss representative indicates that the agreed upon reach of Article 3 was *not* to every type of non-international armed conflict.

163. *Id.* (emphasis added).