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Dominic Hoerauf

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10 YEARS AFTER 9/11: AND STILL FIGHTING NEW WARS WITH OLD WEAPONS

WHY AND HOW THE GENEVA CONVENTIONS MUST
BE AMENDED TO COVER AL QAEDA

DOMINIC HOERAUF*

I. INTRODUCTION

The saying “Without security, there is no freedom”¹ by the state philosopher *Wilhelm von Humboldt* is more topical today than ever. The 9/11 attacks manifested a change of menaces to our security, speaking with *Humboldt*, and hence to our fundamental freedoms and liberties. These threats, posed by new asymmetric and denationalized warfare aimed at inducing a state of terror, present new challenges for the defense of western democracies, specifically to state concepts based on the consent of the governed (states of consent²). Although it has been ten years since 9/11, the United States still has not managed to fully grasp the unique character of the “new wars” of the 21st century.³ Neither the United States nor other western governments have generated a consensus on the general nature of the enemy we face.⁴ Yet, answering this question is a prerequisite for the determination of which weapons should be used in order to tackle this phenomenon. As a result, we still try to fight these new wars with tried and trusted “old war” methods of 20th century *nation-state* wars instead of adjusting our weaponry to the new nature of the enemies: *denationalized* terrorist networks such as *al Qaeda*.

Unsurprisingly, this incompatibility of our weapons and the nature of our enemies compromises our contemporary warfare efforts and has essentially dragged the US into one of the longest con-

* Dominic Hoerauf is a Fulbright and Ambassadorial Scholar, and 2012 LL.M. candidate focusing on Human Rights and the War on Terror at Columbia Law School. He holds a law degree and a Ph.D. from Humboldt University Berlin/Germany.

1 See BARON WILHELM VON HUMBOLDT, STAATES 51 THE SPHERE AND DUTIES OF GOVERNMENT 52 (Joseph Coulthoud, trans., John Chapman 1854) (1792) (describing the necessity of state security in a democratic society).

2 PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 182 (2008).

3 See MARY KALDOR, NEW & OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 169-170 (2d ed. 2007) (analyzing the characteristics of “new war” methodology).

4 See PAUL BERNAN, DEFENDING AND ADVANCING FREEDOM: A SYMPOSIUM 23 (2005) (emphasizing the lack of clarity surrounding the new enemy encompassed under the heading of “terrorism”).

flicts ever.⁵ The tools currently at hand, which evolved primarily in the context of conflicts *between* nation *states*, do not readily apply to a war on terror that is induced by transnational *non-state* actors.⁶ Not only challenge these shortcomings the effectiveness of military operations and their supporting intelligence activities (warfare in a narrower sense); they also, and perhaps more importantly, deprive our domestic as well as international legal tools⁷ of their legitimacy and of their effectiveness putting at risk the cornerstones of our constitutional order.⁸

Since the Supreme Court's decision in *Hamdan v. Rumsfeld*, in which it had to determine whether and to what extent the Geneva Conventions ("GC") protected alleged *al Qaeda* captives,⁹ this incompatibility of tools and tasks became apparent. Although more than five years have passed, neither the outgoing nor the incoming administration has demonstrated the political will to push forward possible solutions to close this gap.¹⁰ Even though President Obama ordered in 2009 to treat Guantanamo detainees in accordance with the Geneva Conventions¹¹ (yet as a matter of policy rather than as a matter of law), which after all *is* a positive step, the administration refused to address or even acknowledge the pressing need to overhaul the laws of war.¹² More recently, it was not only this reluctance to introduce an initiative leading to the reform of the Geneva Conventions, but also the administration's deliberate leveraging of this gap by signing into law the National Defense Authorization Act of 2012 ("NDAA") on December 31st, 2011.¹³ Section 1021 of this Act authorizes indefinite military detention without any charge or trial, which, given that the military commissions reintroduced by Subsection (c)(2) do not represent an adequate trial substitute,¹⁴ amounts to nothing but a blatant breach of Common Article 3 GC.¹⁵

One might ask how that is to be reconciled with President Obama's Executive Order 13,492

5 See *Boumediene v. Bush*, 553 U.S. 723, 770, 797-98 (2008) (noting that the current conflict "is already among the longest wars in American history").

6 IN RE GUANTANAMO BAY DETAINEE LITIGATION, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, at 18, Misc. No. 08-442 (Mar.13, 2009), [hereinafter Respondent's Memorandum] USDC DCDC 08-442 (D.D.C filed Aug. 1, 2008) (No. 1689).

7 Eventually, law (and adherence to it) is what makes this system stable and strong; law is our ultimate weapon of war. See Charles J. Dunlap, Prepared for the Humanitarian Challenges in Military Intervention Conference, LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS (Nov. 29, 2001) (defining the term "lawfare" as the "use of law as a weapon of war").

8 See generally, BOBBITT, *supra* note 2, at 523-24.

9 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

10 See Respondents' Memorandum, *supra* note 6, at 1, 6 (highlighting the Obama administration's acknowledgment that the laws of war are "less well-codified with respect to our current, novel type of armed conflict against . . . al-Qaida" and noting that "instead of proposing an amendment, the government only talks about how domestic provisions should be interpreted in light of this dilemma).

11 See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 § 6 (January 22, 2009).

12 See Respondents' Memorandum, *supra* note 6, at 1, 6.

13 National Defense Authorization Act of (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2012) [hereinafter NDAA].

14 See *Boumediene*, 553 U.S. at 729.

15 See, e.g., Jessia Jewell, *NDAA violates American Rights* (Jan. 23, 2012), DAILY SUNDIAL, <http://sundial.csun.edu/2012/01/ndaa-violates-american-rights/>.

of 2009, which demanded strict compliance with Common Article 3 GC?¹⁶ What is the underlying rationale of the administration's decision not to veto this bill? And what was Congress's motive to come up with an act at least in the shadow of international law? Upon closer examination, the Geneva Conventions themselves give a possible explanation. Since this framework was obviously not designed to deal with transnational actors in the first place and thus to date does not provide mechanisms tailored to the specific problems associated with *a*-national threats, its regulatory reach is highly questionable with respect to *al Qaeda*.¹⁷ The result is an international legal grey area that poses more questions than it answers. Whereas President Bush saw no reason to apply the Geneva Conventions to *al Qaeda* fighters,¹⁸ the Supreme Court adopted a different position¹⁹ that the Obama administration, at least at first, seemed to share.²⁰ Given that Congress has just passed the NDAA, it must be inferred that Congress by contrast holds another view.²¹ In light of the *Charming Betsy* canon,²² Congress most likely considers the Geneva Conventions not to stand in the NDAA's Section 1021's way. President Obama for some reason apparently now has yielded to Congress's pressure, given up his initial plan to veto the bill, and essentially endorsed Congress' view by signing the NDAA into law.²³ He has taken advantage of the confusion already surrounding the relationship of the Geneva Conventions and *al Qaeda* to avoid further domestic disputes, even though this effectively adds to the puzzlement already surrounding the relationship of the Geneva Conventions and *al Qaeda*.²⁴

Yet, as this piece argues, a better strategy might have been to push for an amendment of the Ge-

16 See *supra* note 11, § 3(a) (Subsection heading: "Common Article 3 Standards as a Minimum Baseline").

17 See *infra* at III.B. (discussing the fractioned decisions in *Hamdan* and the effect of the splintered discourse).

18 John D. Rockefeller IV, Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program 13 (April 22, 2009).

19 See generally *Hamdan*, 548 U.S. at 567 (holding that Guantanamo detainees are protected by the Geneva Conventions).

20 *Supra* note 11, § 6.

21 See, e.g., Marty Lederman and Steven Vladeck, The NDAA: The Good, the Bad, and the Laws of War-Part II, LAWFARE BLOG (Dec. 2011), <http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii/> (overviewing the background and legislative history surrounding the NDAA).

22 See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (holding that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); see also *Al-Bihani v. Obama*, 619 F.3d 1, 32-36 (D.C. Cir. 2010). See generally, Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1135 (1990) (explaining the history of the *Charming Betsy* canon).

23 NDAA, 125 Stat. 1298 (2011); see Mark Lander, *After Struggle on Detainees, Obama Signs Defense Bill*, NEW YORK TIMES (Dec 31, 2011), available at <http://www.nytimes.com/2012/01/01/us/politics/obama-signs-military-spending-bill.html>.

24 The European Parliament, for instance, has adopted a resolution (B5-0066/2002) stating that *al Qaeda* terrorists "do not fall precisely within the definitions of the Geneva Conventions." The Bush administration took a similar view declaring that they "do not have any rights under the Geneva Convention." Office of Asst. Sec'y of Def. News Transcript: DoD News Briefing (Jan. 11, 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031>. Contrary to this, the Supreme Court held in *Hamdan*, that at least Common Article 3 of the Conventions applies. *Hamdan*, 548 U.S. at 567.

neva Conventions once and for all.²⁵ For that is what coping with *al Qaeda* requires us to do: adapt our hitherto applied categories to new realities, leave the dubious shadow of the law, and look for a new international legal approach designed to deal with the nature of the new enemy²⁶ without abandoning the cornerstones of our constitutional orders.²⁷ Ultimately, the war on terror is nothing but a war for the preservation of our constitutional values and the rule of law.²⁸ That is why amending the laws of war is the only way we can obtain results that both meet today's challenges to national security and *at the same time* leave our democratic, rule-of-law oriented heritage untouched.²⁹ Indeed, security and liberty are not irreconcilable at all—as some still assert³⁰—but are in fact, as *von Humboldt* recognized, mutually depending on each other.³¹ Reconciling national security with the protection of basic rights is paramount and insofar predetermining the design of that new legal category we should be looking for when revising the Geneva Conventions. After all, it is terror that we are fighting and not simply the terrorists.³²

In an attempt to show not only why but also how the old weapons need to be overhauled, Part I of this piece first introduces the nation states' international legal tools derived in the period of *inter-* and later also *intra-* nation state wars of the 20th century. Part II then analyzes how courts have tried to apply these tools, most notably in *Hamdan*, and why this exercise was bound to fail. Part III demonstrates why sticking to those tools was and is still not an option for rule-of-law based democracies, and why this in fact makes us all the more vulnerable to terrorism. Finally, Part IV suggests a solution that both adequately addresses the nature of the enemy and conforms with our constitutional principles. This ought to clarify both the scope and content of the Geneva Conventions regarding transnational actors with the goal of removing this grey area of the laws of war that allowed the passage of NDAA's Section 1021.

25 See, e.g., BOBBITT, *supra* note 2, at 532 (“Because current international law has not caught up with the changes in the global strategic context, it seems to present states with an intolerable choice: either follow the rule of law and sacrifice one war aim . . . or dispense with law and sacrifice the legitimacy of the war effort The answer to this dilemma is to reject it; law must be reformed.”).

26 *Id.*

27 *Id.* at 541 (stating that “[w]e should not abandon the constitutional restraints on the executive that distinguish states of consent”).

28 *Id.* at 152.

29 Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 755, 761 (2004) (discussing “twin goals”). We pursue this second goal for our own sake, not for the sake of the terrorists. Therefore, it is misguided to argue that al Qaeda members do not deserve due process since they are fighting against those very values. See Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 75, 117 (David Wippman & Matthew Evangelista eds., 2005).

30 FLORIDA INTERNATIONAL UNIVERSITY, AT WAR WITH CIVIL RIGHTS AND CIVIL LIBERTIES, A CONSTITUTIONAL SYMPOSIUM (2006).

31 VON HUMBOLDT, *supra* note 1, at 51.

32 BOBBITT, *supra* note 2, at 391.

II. THE NATION STATES' INTERNATIONAL LEGAL TOOLS FOR THE NATION STATE WARS' CHALLENGES

A. International Humanitarian Law— Concept and History

Although wars have been fought throughout the existence of mankind, they repeatedly shake our societies' cornerstones—both from a humanitarian and legal standpoint.³³ With this in mind, and in order to mitigate human plight during wartime, a broad consensus has been reached on a regime comprised of international treaties and customary international law stipulating rules for extraordinary times of war (*jus in bello*).³⁴ They recognize that no matter how exceptional a situation becomes, there can be no exception to certain human rights. That way, those laws of war try to preserve core values even in times of war.³⁵

The most prominent set of such rules is laid down in the four 1949 Geneva Conventions. Their overarching goal is to protect the wounded, prisoners of war and civilians.³⁶ To that end, they define the status, rights, and duties of enemy nations and of enemy individuals with respect to wounded³⁷ or captured soldiers³⁸ as well as civilians³⁹. Special attention should be given to “Common” Article 3. As a provision common to all four Conventions, Common Article 3 establishes non-derogable rules prescribing (limited) due process guarantees for wartime detainees by requiring qualified procedures for sentencing captives in order to prevent arbitrary military detention.⁴⁰ Common Article 3 is different from the rest of the Conventions' provisions in that it lacks any condition with respect to reciprocity.⁴¹ Hence, each party has to observe its requisites even if its opponent does not abide to them.

33 MARCO SASSOU & ANTOINE A. BOUVIER ET. AL., HOW DOES LAW PROTECT IN WAR 84 (2d. ed. 2003) (citing Frederic Maurice: “War anywhere is first and foremost an institutional disaster, the breakdown of legal systems, a circumstance in which rights are secured by force. Everyone who has experienced war, particularly the wars of our times, knows that unleashed violence means the obliteration of standards of behaviour and legal systems. Humanitarian action in a war situation is therefore above all a legal approach which precedes and accompanies the actual provision of relief.”).

34 INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS, PRELIMINARY REMARKS 1-2, 5 (1949).

35 SASSOU & BOUVIER, *supra* note 33, at 342.

36 INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 34, at 2.

37 The Geneva Convention 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] and the Geneva Convention 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].

38 The Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

39 The Geneva Convention 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].

40 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 60 (3d. ed. 2008).

41 Int'l Comm. of the Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 35 (J. Pictet gen.ed. 1958) [hereinafter Third Geneva Convention Commentary].

B. 1977: Responding to Altered Realities

Adopted in post-World War II, the Geneva Conventions were originally designed to regulate conflicts *between* armed forces of nation states, in other words traditional *inter-nation* states wars.⁴² However, in the two decades following their adoption, more and more *intra-nation* states armed liberation conflicts arose.⁴³ As Common Article 3 provided only limited protection in these cases, an additional protocol (AP) to the 1949 Conventions was adopted in 1977. Covering non-international armed conflicts, it was exclusively devoted to clashes “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces”, Article 1(1) AP II.⁴⁴ Just like in Common Article 3 and Article 102 GC III, passing valid sentences under AP II calls for a due process minimum provided by courts offering the essential guarantees of independence and impartiality.⁴⁵

III. NEW WARS, NEW CHALLENGES—WHY THE OLD WEAPONS NO LONGER WORKED

A. Today’s Challenges for the Geneva Conventions

Although the Conventions and its Additional Protocols have successfully governed several centuries of armed hostilities *between* and *within* nation states, transnational terrorist networks such as *al Qaeda* have suddenly confronted the international regime with new challenges. As a globally acting non-state actor, whose goals (to induce a state of terror)⁴⁶ are fundamentally different from those of traditional warfare, *al Qaeda* raises at least three important questions with regard to the Geneva Conventions’ applicability: (1) whether the Geneva Conventions are after all applicable to the war against *al Qaeda*, and if so, whether (2) whether detained *al Qaeda* fighters are entitled to Prisoner-of-War status under Article 4A GC III or rather only to Common Article 3 guarantees, and; (3) if the Conventions apply, whether the process provided by the Combatant Status Review Tribunal (CSRT) is sufficient to fulfill their requirements?

B. Hamdan v. Rumsfeld

In *Hamdan v. Rumsfeld*, these questions were explored by a U.S. court for the first time.⁴⁷ Hamdan, a citizen of Yemen, was captured in 2001 by Afghan militia forces and turned over to U.S.

42 IN RE GUANTANAMO BAY DETAINEE LITIGATION, *supra* note 6, at 1.

43 INTERNATIONAL COMMITTEE OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL CONFLICTS, FOREWORD (2008).

44 Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 30-31 (1983).

45 Art. 6(2) AP II.

46 See KALDOR, *supra* note 3, at 9, 165, 167 (“[T]he main effect of these attacks is to increase the sense of insecurity”)

47 *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006).

military forces, which transported him to the Guantanamo Bay.⁴⁸ Initially, he was held in the general detention facility until 2003, when the President determined that there was reason to believe that Hamdan was a member of *al Qaeda* or otherwise involved in terrorism directed against the U.S..⁴⁹ Due to this finding, Hamdan was placed in solitary confinement as an enemy combatant.⁵⁰ In response to the Supreme Court's decision in *Hamdi v. Rumsfeld*,⁵¹ Hamdan received a formal hearing before a CSRT that affirmed his status as an enemy combatant and authorizing his further detainment.⁵² In 2004, Hamdan petitioned for habeas relief asserting, *inter alia*, that being tried solely by military commission violated his individual rights as a Prisoner of War protected by Article 102 (in conjunction with Article 4) GC III or, if he was not entitled to Prisoner-of-War ("POW") status, his rights set forth in Common Article 3.⁵³

1. *Al Qaeda and the applicability of the Geneva Convention*

The District Court of the District of Columbia held that, contrary to what the government believed, the Geneva Conventions applied to *al Qaeda* fighters just as they applied to the *Taleban*.⁵⁴ Despite what the President claimed,⁵⁵ the war against the *Taleban* was in no way distinguishable from the war against *al Qaeda*.⁵⁶ And since the *Taleban* was at that time governing Afghanistan, a party to the Conventions, the conflict between the U.S. and Afghanistan constituted war of international character and the Geneva Conventions covered *Taleban* as well as *al Qaeda* captives.⁵⁷

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), however, took a different view and denied the applicability of the Conventions.⁵⁸ It concluded that the Geneva Conventions contemplated only two types of armed conflicts (an *international* conflict and a civil war confined to a *single* country), neither of which resembled the one at issue.⁵⁹ Since an international conflict requires hostilities *between* two or more High Contracting Parties, and *al Qaeda* as a non-state actor is neither a state nor a High Contracting party, the court held that the war in

48 *Id.* at 557; *see also* Hamdan v. Rumsfeld, 415 F.3d 34, 35 (D.C. Cir. 2005).

49 *Hamdan*, 548 U.S. at 572.

50 *Id.*

51 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

52 *Hamdan*, 415 F.3d at 36.

53 *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 156, 159 (D.D.C. 2004).

54 *Id.* at 161.

55 Memorandum from the President, to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), *available at* http://www.library.law.pace.edu/research/020207_bushmemo.pdf.

56 *Id.* (citing Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM.J. INT'L. L. 345, 349 (2002)) (referring to the common understanding).

57 *Hamdan*, 344 F.Supp.2d at 160-161; *see also* David Wippman, *Introduction: Do New Wars Call for New Laws?* in NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 1, 6 (David Wippman & Matthew Evangelista eds., 2005).

58 *Hamdan*, 415 F.3d at 41-42 (deferring to the President's judgment). Two Judges held that the Conventions did not in any event apply to Hamdan. *Id.* at 40-42.

59 *Id.*

question could not be categorized as an international conflict.⁶⁰ Simultaneously, however, it was *not* a “conflict not of an international character occurring in the territory of *one* of the High Contracting Parties”⁶¹ as the war against *al Qaeda* was a global one.⁶² Yet, this ruling was overturned by the Supreme Court.⁶³ According to its interpretation of the Geneva Conventions, there was nothing to bar its application to alleged *al Qaeda* captives.⁶⁴

2. Level of protections for *al Qaeda* captives?

Having affirmed the applicability of the Geneva Conventions to *al Qaeda* detainees, the District Court as well as the Supreme Court were forced to decide which provisions to apply,⁶⁵ should the captives be entitled to POW status and thus enjoy the full range of privileges the third Convention entails?⁶⁶ This, however, required the captives to meet the test established by Article 4A(2) GC III: to wear a fixed distinctive sign recognizable at a distance, not to carry arms openly and to operate under the laws and customs of war.⁶⁷

Although it is questionable whether *al Qaeda* fighters fulfill those criteria,⁶⁸ the District Court did not rule on that issue.⁶⁹ Instead, it relied on Article 5 GC III to hold that when in doubt about the POW status of a captive⁷⁰ a prisoner shall enjoy the POW protections until determined otherwise by a competent tribunal. And since the District Court considered the CSRT to not be such a competent tribunal, it held that Hamdan was entitled to POW status.⁷¹ By contrast, the Supreme Court’s decision is silent on the question whether Hamdan is entitled to POW status.⁷² Therefore, neither the District Court nor Supreme Court fully resolved whether *al Qaeda* captives are covered by Article 4A GC III.⁷³

But what did the courts say about Common Article 3? Do at least those “elementary consider-

60 *Id.*

61 *Hamdan*, 415 F.3d at 41 (emphasis added).

62 *Id.*

63 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

64 *Id.* at 562.

65 The Supreme Court chose Common Article 3, *id.*, at 562 (holding that “[t]he Court need not decide the merits of this argument because there is at least one provision of the Geneva Conventions [referring to Common Article 3] that applies here) whereas the District Court applied Article 4 GC III, *see* 344 F.Supp.2d 152, 162 (D.D.C. 2004) (finding that “Hamdan has, and must be accorded, the full protections of a prisoner-of-war” under Article 4 GC III until a competent tribunal decides otherwise)

66 *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 161-162 (D.D.C. 2004).

67 *See* Article 4A(2) GC III.

68 Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 75, 84 (David Wippman & Matthew Evangelista eds., 2005); *see also* *Hamdan v. Rumsfeld*, 415 F.3d 34, 40 (D.C. Cir. 2005).

69 *Id.*

70 And in this case the Army’s regulations 190-8 provide that *Hamdan’s* status was in doubt due to his assertion of his entitlement of POW status.

71 *Hamdan*, 344 F.Supp.2d at 173.

72 *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 n.61 (2006).

73 *Id.*; *Hamdan*, 344 F.Supp.2d at 173.

ations of humanity⁷⁴ apply to detained *al Qaeda* operatives? Contrary to what the U.S. government asserted, the District Court held that Article 3 does not only cover domestic conflicts.⁷⁵ Rather, referring to the context in which it was adopted and to statements of the ICJ, it concluded that the U.S. must abide by Common Article 3, regardless of whether the conflict is international or non-international.⁷⁶ The D.C. Circuit took the opposite position, applying Common Article 3 exclusively to conflicts of *non*-international character “confined to a single country”.⁷⁷ Though it refused to second-guess the President’s judgment that the war against *al Qaeda* is a conflict distinct from the *inter*-nation state conflict with the *Taleban*, it confirmed that the former was clearly international in scope and thus would not fit the Common Article 3 definition.⁷⁸

The Supreme Court, however, considered this reasoning to be erroneous.⁷⁹ The phrase “not of an international character” was only used as a contradistinction to a conflict between nations.⁸⁰ Common Article 3 thus covers all kinds of clashes between a signatory and a *non*-state *non*-signatory in the territory of a signatory,⁸¹ hence the war against *al Qaeda*, too. Since at least Common Article 3 applies, the Supreme Court refused to decide the questions of whether the war against the *al Qaeda* is distinct from the war with convention signatory Afghanistan, and whether—as a consequence—Hamdan is a prisoner of war.⁸²

3. Do CSRT procedures satisfy Common Article 3?

With respect to whether the CSRT hearings provided the level of procedural protection required by Common Article 3, the District Court did not adopt a clear position.⁸³ It concluded that the CSRT did raise due process concerns, insofar as the defendant could be excluded from his trial in order to protect classified evidence and that evidence may be used which the defendant never gets to see.⁸⁴ However, the Court refused to decide whether the CSRT met the standards Common Article 3 prescribes.⁸⁵

74 *Nicaragua v. United States*, I.C.J. 14, 114 (1986).

75 *Hamdan*, 344 F.Supp.2d at 162-163.

76 *Id.*

77 *Hamdan*, 415 F.3d at 41-42.

78 *Id.* at 42.

79 *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006).

80 *Id.*

81 *Id.*

82 *Id.* at 562 (“The Court need not debate the merits of that argument here because there is at least one provision . . . that applies here even if the relevant conflict is not between signatories.”).

83 344 F.Supp.2d 152, 166 (2004). It only held that the CSRT was not a competent tribunal as prescribed under Article 5 GC III, *id.* at 173.

84 *Hamdan v. Rumsfeld*, 344 F. Supp.2d 152, 166 (D.D.C. 2004).

85 The District Court only found that the CSRT was not a competent tribunal to determine Hamdan’s status under the Geneva Conventions, *see* 344 F. Supp.2d 152, 162 (“There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees’ status under the Geneva Conventions.”).

By contrast, the Supreme Court made its views on that issue known.⁸⁶ In its opinion, the military commission not only lacked jurisdiction,⁸⁷ it also failed to respect the essential guarantees required by Common Article 3.⁸⁸ Although Common Article 3 does not define “all the judicial guarantees . . . recognized as indispensable by civilized peoples . . . it must be understood to incorporate at least the barest of the trial protections recognized by customary international law.”⁸⁹ Denying a detainee the opportunity to be present during the course of his own trial and denying his ability to see all evidence introduced against him indisputably violates customary international law both in structure and procedure. Thus, the CSRTs fall short of the standard practices of customary international law established by Common Article 3.⁹⁰

C. Open Questions

Despite this clear statement regarding the CSRTs shortcomings and its lack of jurisdiction, the Supreme Court unfortunately did not answer all the questions presented by this case in a fully persuasive manner.

First, it is unclear why the Supreme Court has not ruled on the question of whether Article 4 applies. Though the Court concluded that Common Article 3 applies,⁹¹ such does not exempt the Court from reviewing the applicability of Article 4 GC III. Lower courts have disagreed on which provision to apply.⁹² Besides, due to the different levels of protection, it does make a difference whether *Hamdan* is entitled to POW status (or only to the “minimum” guarantees of Common Article 3).⁹³ Even though it is hard to believe that *Hamdan* could make a case insofar (owed to his affiliation with *al Qaeda* rather than with the *Taliban*), the Supreme Court should have addressed that issue.

Second, despite the fact that the Supreme Court held that alleged *al Qaeda* captives were pro-

86 See *Hamdan*, 548 U.S. at 560 (holding that “[t]he military commission at issue lacks the power to proceed because its structure and procedures violate . . . the four Geneva Conventions signed in 1949”).

87 *Id.* at 563-64 (due to the absence of an offense against the laws of war committed in the theater of war).

88 *Id.* at 564 (stating that “[t]he procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need, and thus fail to afford the requisite guarantees”).

89 *Id.* at 564.

90 *Id.*

91 *Hamdan*, 548 U.S. at 562 (holding that “[t]he Court need not decide the merits of this argument [whether the conflict against al Qaeda constituted a different conflict from the one against the Taliban and therefore whether Hamdan was entitled to POW status under Article 4 GC III] because there is at least one provision [Common Article 3] of the Geneva Conventions that applies here even if the relevant conflict is not between signatories.”).

92 Compare the District Court’s holding (344 F.Supp.2d 152, 162 applying Article 4 GC III) with the D.C. Circuit’s holding (415 F.3d 33, 40 (D.C. Cir. 2005)) (finding that “One problem for Hamdan is that he does not fit the Article 4 definition of a ‘prisoner of war’ entitled to the protection of the Convention. He does not purport to be a member of a group who displayed ‘a fixed distinctive sign recognizable at a distance’ and who conducted ‘their operations in accordance with the laws and customs of war.’”).

93 See *Hamdan*, 548 U.S. at 629-30 (discussing the distinction between Convention protections for a detainee captured pursuant to the war against the Taliban and one captured in the war against al Qaeda).

ted by Common Article 3,⁹⁴ it failed to provide persuasive reasoning why. While the conventions should be broadly interpreted in accordance with its object and purpose,⁹⁵ One cannot ignore the fact that neither the language of Common Article 3 nor its history supports the Supreme Court's interpretation. As the Supreme Court points out, the goal of Common Article 3 was "to furnish minimal protection to rebels involved in one kind of 'conflict not of an international character,' *i.e.*, a civil war."⁹⁶ Therefore, the term "conflict of *non*-international character" must be understood to cover domestic conflicts only.⁹⁷ This interpretation is supported by the plain language of Common Article 3, which states that according to which it is to apply exclusively to non-international conflicts "occurring *in the territory of one* of the High Contracting Parties."⁹⁸ This clearly limits the very "general" and "vague" scope of the expression "conflict not of an international character"⁹⁹ and ties Article 3 to *domestic* hostilities.¹⁰⁰ Concededly, the Supreme Court is right in saying that "further limiting language that would have rendered Article 3 applicable especially [to] cases of civil war, colonial conflicts, or wars of religion" was omitted from the final version,¹⁰¹ suggesting a broad scope of application so as to include transnational hostilities.¹⁰² Nevertheless, one cannot ignore that the parties also refrained from removing the narrowing criteria "occurring in the territory of one of the High Contracting Parties," which, if Common Article 3 was not intended to be limited to domestic conflicts, was not necessary.¹⁰³

Article 3's limitation to domestic conflicts can also be inferred from the examples provided in the Commentary on the Geneva Conventions.¹⁰⁴ In providing examples to be covered under Article 3, the Commentary exclusively describes situations where insurgents or rebellions fight a *de jure* government *inside* the government's territory.¹⁰⁵ Taking a closer look at the drafting history and the motives for Common Article 3 further supports this conclusion: first the "[p]arty in revolt" needed "an authority responsible for its acts . . . [and must be] acting within a determinate territory [with] the means of respecting . . . the Convention"¹⁰⁶ Another requirement set forth in the Commentary was "[t]hat the insurgent civil authority exercise *de facto* authority over persons within a determinate

94 *See id.* at 562 ("Common Article 3, by contrast, affords some minimal protection . . . to individual associated with neither a signatory nor even a nonsignatory who are involved in a conflict 'in the territory of' a signatory.").

95 *See id.* at 631 (citing the Third Geneva Convention Commentary 36-37).

96 *Id.*

97 *Id.*

98 Int'l Comm. of the Red Cross, Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 28 (emphasis added).

99 Third Geneva Convention Commentary, at 35.

100 Wippman, *supra* note 57, at 5.

101 *Hamdan*, 548 U.S. at 631.

102 *Id.*

103 GC III, *supra* note 38, at art. 3.

104 Third Geneva Convention Commentary, at 36.

105 *Id.* at 35.

106 *Id.* at 36.

portion of the national territory”¹⁰⁷. Absent a traditional command hierarchy, *al Qaeda* fulfills neither of the criteria appearing to be tailored to domestic insurgent groups.¹⁰⁸ The reasons for drafting Common Article 3 further underline this finding. The Commentary reads: “. . . “the Red Cross has 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.”¹⁰⁹ This emphasis on domestic conflicts clearly indicates that the Red Cross, the architect of the Geneva Conventions, intended the *terminus technicus* “conflict not of an international character” to be interpreted as hostilities taking place within one country only.

Based on those criteria, the war against *al Qaeda*, taking place not only in the U.S. but also in Afghanistan, Pakistan, and Yemen, can hardly be categorized as a Common Article 3 conflict for it is not confined to one country.¹¹⁰ However, as this is exactly what Common Article 3 requires, the Supreme Court’s decision in *Hamdan* is, from a purely legal standpoint, arguably questionable.¹¹¹

D. Interim Finding

These deliberations reveal unsatisfying regulatory gaps between tried and trusted frameworks and new realities, all of which raise crucial questions about whether the Geneva Conventions are in fact still suited to cope with this new kind of war.¹¹² As this analysis concludes: they are not. Even the Supreme Court’s attempt to use nation states’ weapons for transnational threats is, as demonstrated, far from being convincing.¹¹³ That is not to say, however, that *al Qaeda* fighters should not be treated in accordance with Common Article 3. Policy-wise and through the lens of the state of consent, the Supreme Court has made the right decision. But given the nature of Common Article 3, under the separation of powers doctrine this was not its call to make.¹¹⁴ The 1949 Geneva Conventions, as of today, simply do not apply to transnational terrorist groups.¹¹⁵

107 *Executive Power – Military Commissions – D.C. Circuit Upholds the Constitutionality of Military Commissions for Guantanamo Bay Detainees* – *Hamdan v. Rumsfeld*, 119 HARV. L. REV. 1606, 1612 (2006).

108 *See, e.g.*, Third Geneva Convention Commentary 28 (discussing “a certain number of conditions on which the application of the Convention would depend”).

109 *Id.* at 28 (emphasis added).

110 *See, e.g.*, President George W. Bush, Address from the White House (Sept. 6, 2006) (announcing a *global* war on terror: “To win the war on terror, we must be able to detain . . . terrorists captured here in American and *on the battlefields around the world*”) (emphasis added).

111 *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *see also* GC III, *supra* note 41, at art. 3.

112 *See* Newton, *supra* note 29, at 84 (“September 11 did serve to highlight a gap in the law between lawful combatants, who are governed by clear legal norms, and innocent civilians, whom international law seeks to protect to the maximum degree feasible from the effects of armed conflict.”).

113 *Hamdan*, 548 U.S. at 557.

114 As Charles-LOUIS MONTESQUIEU-LOUIS MONTESQUIEU, DE L’ESPRIT DE LOI, L.XI, chapter VI (1748), put it, the Judiciary is just the mouth of the law, not its creator (“les juges de la nation ne sont . . . que la bouche, qui prononce les paroles de la loi.”). DE L’ESPRIT DES LOIS, 149 (1748). It thus has no competence to deliver judgments outside the law.

115 Newton, *supra* note 29, at 84 (“As private terrorists waging war against the sovereign states of the world, *al Qaeda* members do not meet the criteria in the Third Geneva Convention for status as prisoners of war. At the same time, they do not qualify for the protections accorded innocent civilians under the Fourth Geneva Convention.”).

IV. WHY NEW CONSTITUTIONAL ORDERS CALL
FOR NEW LEGAL TOOLS

So what, if anything, needs to be done? We need to craft new weapons for new wars. Instead of operating outside the law and watching the Judiciary struggle to apply outdated weapons to new wars' challenges, the Executive and the Senate should consider refining the laws of war and amending the Conventions to cover *al Qaeda* captives. This is particularly necessary since conflicts involving transnational actors are only incompletely governed by customary international law.¹¹⁶ Congress, together with the Executive must therefore construct new legal tools required by challenges posed by the current conflict.¹¹⁷

And even in the meantime, the U.S. is well-advised to refrain from authorizations such as the Sec. 1021 NDAA and to return—as it first did under President Obama—to the practice of previous administrations that applied Article 3 as a matter of policy.¹¹⁸ This is what our rule-of-law heritage requires us to do. This is what our constitutional order as states of consent require us to do, and this is what distinguishes us from the terrorists.¹¹⁹ Our system, guided by the rule of law, provides individuals whose rights are infringed upon by the state with some kind of due process.¹²⁰ And “due process does not perish when war comes”.¹²¹ In fact, preserving the state of consent against forces advocating a fundamental departure from the mechanisms that ensure our current *ordre public* essentially means upholding the former's cornerstones: our democratic and rule-of-law-influenced moral and ethical principles. Holding on to those principles is therefore especially crucial in rough times.¹²² In order to achieve that, “our means must be guided by our ends”.¹²³ As consequentialist *Machiavelli* might have put it: Do not compromise our values! For abandoning our values is equivalent to giving up the state of consent,¹²⁴ yielding to terror, and giving in to terrorism. In the end, we are rather fighting terror (the terrorists' aim, which is the collapse of our constitutional order), as mentioned earlier, than we are fighting terrorists (actors).¹²⁵ Terror is achieved either when people

116 Wippman, *supra* note 28, at 6 (“First, some academics and human rights activists . . . have expressed concern that recent trends have exposed inadequacies in the protection afforded civilians.”).

117 *See id.* at 6 (“ . . . human rights activists view with alarm U.S. tactics in the fight against terrorism, and some seek modifications to the law that would constrain possible excesses in that fight.”).

118 BOBBITT, *supra* note 2, at 463.

119 *Id.* at 541.

120 *See* U.S. CONST. amend. V.

121 *Ludecke v. Watkins*, 335 U.S. 160 (1948) (Douglas, J., dissenting).

122 *See Hamdi v. Rumsfeld*, 542 U.S. 507, 2648 (2004) (holding that “[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad”). Even “[i]n new wars, all sides violate the laws of war and human rights law. [Yet] the[t]he task of legitimate security forces is to . . . act in support of the rule of law.” KALDOR, *supra* note 3, at 174.

123 BOBBITT, *supra* note 2, at 531.

124 *See United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”).

125 BOBBITT, *supra* note 2, at 391.

are “dissuaded from doing what they have a lawful *right* to do”¹²⁶ (positive element) or when they or their institutions both intentionally and systematically breach their most fundamental *obligations* (negative element), which are essential to our system of social compact. Primarily the latter is at stake here. To put it differently, coping with *al Qaeda* has tempted the Bush administration to ignore the very fundamental obligation to stay true to our rule-of-law heritage. As *Bobbitt* observed, “[w]hat is threatened is threatened by our own actions when we are persuaded that compromises with our constitutional traditions of consent are necessary to protect us.”¹²⁷ We should not let this happen, as this means that have not only lost a battle against the terrorists, but the whole war.

V. HOW THE CONVENTIONS SHOULD BE AMENDED

With that being said, the goal that the revised Geneva Conventions need to pursue is sketched out: a return to the rule of law by amending the Geneva Conventions in a way to cover *al Qaeda*. Instead of squeezing this new phenomenon into existing boxes, the High Contracting Parties should create a new one, a third box of conflict categories: a transnational one¹²⁸ in addition to the international and domestic categories.¹²⁹ They should adapt the framework to altered realities and stop adding to the already existing confusion surrounding the reach of the Conventions with respect to *al Qaeda*, confusion caused by the incompatibility of tools and tasks.¹³⁰ This Third-box approach should be preferred over *Ehrenreich’s* suggestion to abolish all categories of conflict from the conventions,¹³¹ as the latter could not adequately satisfy needs for different protection levels in different kind of conflicts.

Such provisions on transnational conflicts need to stipulate rules that are tailored to the special character of transnational actors like terrorists and at the same time be consistent with state of consent’s foundations. The latter requires us to acknowledge that wars have changed: wars no longer have a clear-cut beginning and end,¹³² there is no precisely definable battlefield, enemy association (the central concept of the Geneva Conventions¹³³) is no longer evident, the dividing lines between civilians and soldiers have been blurred (inasmuch as has the distinction between internal and external conflicts¹³⁴), and the distinction between peacetime law and the laws of wars has become vague. As a result, coping with *al Qaeda* forces us to overcome the *dualism* of the latter two categories and

126 *Id.* at 352 (emphasis added).

127 BOBBITT, *supra* note 2, at 540.

128 Decoupled from the criterion “statehood.”

129 See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (stating that the Geneva Convention will apply to “declared war(s)” between countries).

130 See *supra* Part III.B.1.

131 Ehrenreich Brooks, *supra* note 29, at 755-56.

132 BOBBITT, *supra* note 2, at 455.

133 Robert Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 794 (2011).

134 KALDOR, *supra* note 3, at 123.

accept that there are now multiple layers in between.¹³⁵ Even within this war, it does make a difference, from a due process standpoint, if you arrest somebody on the hot battlefield in Afghanistan (*Hamdi*), in Bosnia (*Boumediene*) or in Chicago's O'Hare International Airport (*Padilla*).¹³⁶ Yet, as a general rule, the laws of (transnational) wars have to reduce its distance to (domestic) peacetime law,¹³⁷ insofar as their subjects (at least in *Padilla/Boumediene* constellations) resemble more and more subjects of peacetime law.¹³⁸ In concrete terms, this means that—in the detention context—the procedures prescribed internationally for detention during the war on terror should move closer to a basic standard of due process granted in cases of criminal detentions, particularly for captures far away from the hot battlefield.

Most importantly, this necessitates a heightened standard of detention review, for three primary reasons. First, the current provisions authorize detention of combatants “till cessation of conflict”.¹³⁹ Given the nature of the war on terror, this leads de facto to indefinite detentions—who can predict when, if ever, this war will definitely be over?¹⁴⁰ Second, in the absence of a well-defined battlefield or visible combatant features such as uniforms or openly carried weapons, it is increasingly difficult to identify the enemy for certain¹⁴¹ which carries a heightened risk of erroneous detention—unless, of course, the detainee is caught in the act of fighting. And third, assuming such an erroneous capture took place, the limited procedural options the detainee has at this point of time deprive him of his right to effectively challenge his detention: he does not get to see classified evidence,¹⁴² hearsay is accepted, the *some evidence* standard is applied, and he has no access to legal counsel.¹⁴³ In these three aspects, the new global and denationalized wars are remarkably different from nation state wars. Ignoring these differences by persistently applying nation states’ “one size fits all” tools leads to results outside of the law—especially in *Padilla* or *Boumediene* situations far away

135 See *The Place of Human Rights in the War on Terror* WAR 21ST (examining whether to apply criminal law during wars); Wippman, *supra* note 57, at 1-2. But see Wippman, *supra* note 29, at 6, 53-54.

136 See also “three part test” established by Justice Kennedy in *Boumediene v. Bush*, 553 U.S. 723, ___ (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

137 See Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1096 (2008). The Court appropriately calls this a “convergence pressure.” *Id.* at 1131.

138 In the absence of openly carried weapons and military uniforms, it is often difficult to distinguish terrorists from civilians and thus to identify the former as belligerents. Especially, when apprehensions take place far away from the battlefield, it can be challenging to prove a belligerency affiliation. Consequently, those persons are rather tried under criminal law. See Associated Press, *Jose Padilla sentenced on terrorism charges* (Jan. 1, 2008), available at <http://www.msnbc.msn.com/id/22784470/#.T1qaKnlDLs>, and for the case of Ali Saleh Kahlal al-Marri, who was arrested in Illinois, see John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. Times (Oct. 29, 2009), available at http://www.nytimes.com/2009/10/30/us/30marri.html?_r=1.

139 See Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316 (1955).

140 *Boumediene v. Bush*, 553 U.S. 723, 2277 (2008).

141 Many captures are taking place in a civilian rather than in a combat setting, see Robert Chesney and Jack Goldsmith, *supra* note 137, at 1100.

142 And in the wars of the 21st century where the importance of intelligence increases and consequently more and more information is classified, it is more likely that the actual grounds for detention cannot be revealed.

143 *Hamdi v. Rumsfeld*, 542 U.S. 507, 527-28 (2004).

from the hot battlefield. Yet, as pointed out above, this is unacceptable in a state of consent. Interestingly, the Supreme Court seems to arrive at the very same conclusion when it held in *Hamdi*, and Hamdi was indeed caught on the hot battlefield(!), that the procedures then in place did not provide a ““meaningful opportunity to contest the factual basis of his detention”..”¹⁴⁴ Four years later, the Supreme Court reiterated its discontent with the standard of detention review in its *Boumediene* decision:¹⁴⁵

“At the CSRT stage the detainee has limited means to find or present evidence to challenge the Government’s case, does not have the assistance of counsel, and may not be aware of the most critical allegations that the Government relied upon to order his detention. His opportunity to confront witnesses is likely to be more theoretical than real, given that there are no limits on the admission of hearsay. The Court therefore agrees with petitioners that there is considerable risk of error in the tribunal’s findings of fact. And given that the consequence of error may be detention for the duration of hostilities that may last a generation or more, the risk is too significant to ignore.”

Even though the *Hamdi* and *Boumediene* rulings facially measure the *al Qaeda* detentions solely under US domestic law, they both can be described as decisions “rendered in the shadow of international law.”¹⁴⁶ Since the Supreme Court’s motives for establishing the three part test in *Boumediene*¹⁴⁷ was mainly countering the newly heightened risk of erroneous and indefinite detention, those guidelines are useful in our context, too (primarily the criteria locus of apprehension and practical obstacles to habeas review).

With this in mind, amendments to the Geneva Conventions not only need to create a category for transnational conflicts that provides for procedures reflecting the factual differences between transnational and nation states’ fighters, but also need take into account the different apprehension constellations global terrorism confronts us with. That means the transnational conflict category must provide for a range of due process levels. At a minimum, the guarantees under Common Article 3 must apply to all *al Qaeda* members caught on the hot battlefield (*Hamdi*). For apprehensions made on the outer boundaries of the “lukewarm” battlefield (*Boumediene*), there should be a category affording an intermediate level of due process. Finally, persons captured far away from the active theatre of war (*Padilla/ Al-Marri*) should be entitled to procedural guarantees similar to those afforded in criminal proceedings.

But who gets to decide which apprehension constitutes a hot, lukewarm, or offsite capture? Who gets to review the evidence supporting the authorization of detention? Since there is no dispute over the fact that there are state secrets that cannot be disclosed, special domestic courts should be set up (similar to the FISA Court) to hear those *habeas* cases in an effort to compensate for evidence that needs to remain classified but also to be reviewed by a neutral decision-maker. It should be this court to ultimately decide which of the three proposed levels of procedural safeguards is

144 *Hamdi*, 542 U.S. at 509.

145 *Boumediene*, 128 S.Ct. at 2269.

146 Due to the fact that the Supreme Court borrowed concepts in this decisions from international humanitarian and incorporated those into its own interpretation of the U.S. Constitution and statutes. See David D. Caron, *International Decisions*, 98 AM. J. INT’L L. 782, 786-287 (2004).

147 *Boumediene v. Bush*, 553 U.S. 723, 2236-38 (2008).

actually due.

VI. CONCLUSION

Granting procedural baseline guarantees even to our worst enemies is, *inter alia*, what distinguishes states of consent from those of terror, and is what constitutes the basis of our constitutional order. Applying the definition of terror introduced earlier, deviating from these state of consent standards ultimately amounts to a fundamental breach of our system-defining obligations and thus fulfills the second (the negative) criterion of the definition. Abandoning our fundamental values and rule-of-law achievements is not only delegitimizing our government, but equivalent to surrendering to the state of terror. This is why the U.S. should not unilaterally sacrifice rights and values fundamental to our constitutional order on the altar of national security,¹⁴⁸ as it did with NDAA's Sec. 1021, but initiate negotiations that ought to lead to the amendment of the Geneva Conventions. As President Roosevelt put it: "Freedom means the supremacy of human rights everywhere."¹⁴⁹

By demanding a de facto due process extension, the Supreme Court seems to have understood the need for convergence between peace- and wartime detention. But in the absence of modern, adequately adapted legal tools at hand, it overstepped its powers applying provisions that are in fact not applicable. This struggle perfectly demonstrates the urgent necessity of new legal mechanisms, of "new weapons" for the "new wars." This is why the U.S. government should introduce proposals for a reform of the Geneva Conventions in the aforementioned manner. In 1977, the Geneva Conventions were successfully amended to cope with new realities. Why should that not work again? As *Wippman* has put it: in the past century, the laws of wars have been substantially revised every 25 to 30 years by major new treaties; by that standard, we are now due for another revision.¹⁵⁰

Despite that the reality that national security is a key factor for the states of consent, and detention of *al Qaeda* captives remains critical, so too is the state's duty to ensure and respect individual rights and liberties (even those of our enemies), and to adhere both to the rule of law and to our moral principles. Of course, *von Humboldt* is right in saying that without security there is no liberty. But, particularly in a state of consent that defines itself by the protection of human rights and the adherence to the rule of law, it is also true that without fundamental freedoms—protected by mechanisms guaranteeing due process—security is only of very limited use.

148 *In Re Directives* (FISA Court of Review), 551 F.3d 1004, 1116 (2008).

149 FRANKLIN D. ROOSEVELT, THE FOUR FREEDOMS ADDRESS TO CONGRESS 77 *Cong. Record* 87, Pt. I. (1941), available at <http://www.fdrlibrary.marist.edu/pdfs/fftext.pdf>.

150 *Wippman*, *supra* note 29, at 1-3.