

NOT SO EXTRAORDINARY CIRCUMSTANCES: THE MARGINALIZATION OF INTERNATIONAL LAW IN AMERICAN COUNTERTERRORISM POLICY

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I. Introduction

A. Background

The War on Terror, known formally today as the War Against Al Qaeda and its Affiliates, premised on upholding the values of freedom, integrity, and democracy, has been tarnished by some of the most abhorrent practices known to humankind. Among such practices, torture remains at the forefront. While numerous states continue to practice torture despite their international obligations, nothing has been so shocking, so damning, so alarming in the struggle to eradicate torture than the graphic images of U.S. run prisons and accounts provided by their detainees. While we live in an era of the germinating phase of ostensibly a “new” form of war-making where it is unclear whether the laws of war apply, the fact that the leading state of the free world has been able to carry out tortuous practices contradicts the very notion of a “war on terror.” For example, the U.S. military had approved, among other forms of torture, hooding, sleep deprivation, use of dogs, sensory deprivation, nudity, and the placement of prisoners in painful positions for extended periods.² Prisoners also complained in domestic federal court that American soldiers had caused them severe physical pain that sometimes resulted in permanent physical injury.³ Indeed, as one anonymous U.S. official stationed in Afghanistan stated, if “you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”⁴ Torture has been prevalent not only at detention centers in Iraq and Afghanistan, but also in Guantanamo Bay, Cuba where, according to a 2003 report by the International Committee of the Red Cross (“ICRC”), psychological and physical coercion “tantamount to torture” was used on

prisoners.⁵ Perhaps most controversially, the Central Intelligence Agency (“CIA”) has also admitted to its use of the internationally banned practice of waterboarding.⁶ Rather than carrying out such activities in secret, the United States crafted a painstakingly detailed account of the law in the early stages of the conflict and used legal acrobatics to overcome the barriers preventing torture. The product of such efforts, known as the “torture memos,”⁷ will be addressed throughout this paper. The torture memos are a set of three legal memoranda drafted by John Yoo in his position as Deputy Assistant Attorney General of the United States, and signed by Assistant Attorney General Jay S. Bybee, head of the Office of Legal Counsel of the United States Department of Justice. They advised the presidential administration that the use of “enhanced interrogation techniques” such as mental and physical torment and coercion, including prolonged sleep deprivation, binding in stress positions, and waterboarding might be legally permissible.⁸ These memos formed the backbone of the U.S. policy regarding interrogations during the Bush era. The United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UN CAT”) and the Geneva Conventions stand out among the barriers these memos sought to overcome. Unlike the UN CAT, the language used in the Geneva Conventions emphasizes an absolute prohibition on physical pain. However, the Geneva Conventions apply solely in situations of armed conflicts. For this reason, to evade scrutiny through the lens of the Conventions, the U.S. attempted to categorize the conflict as falling outside both international armed conflicts (“IACs”) and non-international armed conflicts (NIACs), thus precluding the application of Geneva law.

While much of the legal framework used to justify torture within the United States is no longer considered part of U.S. policy and the United States has

since abandoned the practice of torture,⁹ there is still merit in analyzing these policies as there are no safeguards against a return to a torture regime, nor any recognition that the “enhanced interrogation”¹⁰ used by the United States during the past decade violated international law.¹¹ The War on Terror does not fit “neatly” within the traditional types of armed conflict. Moreover, the Secretary of Defense continues to hold the power to, if he or she pleases, introduce evidence obtained through torture in courts of law.¹² This paper considers the scope of international law in regulating non-traditional, asymmetrical warfare and attempts to clarify the misperceptions regarding application of international legal instruments prohibiting torture to these conflicts.

B. Framework

While the era of torture seemingly ended with the Bush Administration, it is clear that, without a fundamental shift in the way that conflict is conceptualized, the existing legal framework remains insufficient to prevent a future American torture regime. The primary reasons for this are the misunderstanding of the application of human rights law during armed conflict and the misconceptualization of the Geneva Conventions. To adequately preclude the use of any form of torture during conflict, four important statements regarding warfare and derived from customary international law must be asserted. First, international human rights law (“IHRL”) must apply co-extensively with international humanitarian law (“IHL”) during armed conflicts. Second, war must exist within the confines of temporal and spatial boundaries at all times. Third, transnational actors including terrorist groups may not be considered combatants outside of traditional armed conflicts. Finally, within armed conflict, there is no detainee “twilight zone” in the Geneva Conventions. The adoption of these maxims offers greater permanence than does the change in policy from one presidential administration to the next.

This paper is divided into six parts. Part II will consider the applicability of international human rights law instruments during warfare, particularly the United Nations Convention Against Torture. Part III will demonstrate how political rhetoric has been used to eradicate the temporal boundary of war. Warfare requires the existence of a possible end-point, and the dissolution of this end-point antagonizes compliance with Geneva Law. Part IV argues that the supposed non-existence of spatial boundaries during warfare, an argument crafted

by U.S. legal rhetoric, is incorrect. A correct geographical framework of the Law of Armed Conflict will be put forward, and outside of these boundaries, terrorism must be neutralized through law enforcement. From this, Part V notes that transnational terrorist organizations can never, independent of other conflicts, be considered belligerent forces with which a state may wage war for the purposes of the Geneva Conventions. Finally, part VI argues that there is no twilight zone in conflicts. Thus, individuals who are detained receive protection under either the Third or Fourth Geneva Convention and, *ipso facto*, always retain protection from torture. This paper makes the following overall conclusions: that (1) IHRL is co-extensive with IHL, but is limited through the principle of military necessity; (2) states must adhere to the temporal and spatial boundaries of war, and avoid using rhetoric to derogate human rights; (3) terrorists are never lawful combatants, and are only unlawful combatant when directly participating in active theaters of traditional wars; and (4) those persons within such an armed conflict that do not qualify for POW status must still be treated humanely in accordance with the Third Geneva Convention.

II. The UN Convention Against Torture and its Relationship to the Geneva Conventions

The United States has put forward two arguments for finding that the UN CAT does not apply during the War against Al Qaeda and its affiliates. While this paper focuses predominantly on the armed conflict paradigm, some discussion will be dedicated to the UN CAT specifically because this paper finds the UN CAT applies during armed conflict situations as well, and thus the UN CAT is therefore relevant to the present discussion. The UN CAT is applicable to the prevention of torture in the context of war because (1) the definition of torture is not narrow enough to bar the US’s application of physical abuse and (2) international human rights law is co-extensive with the law of armed conflict; the two sources of law are not mutually exclusive.

A. The Scope of “severe pain or suffering”

From the very start of the War on Terror, the term “torture,” as applied in the UN CAT, was quickly redefined by Department of Defense lawyers to read the use of torture out of the law.¹³ While the UN CAT addresses both torture and inhumane or degrading

treatment, only torture is punishable.¹⁴ Consequently, the U.S. has a strategic interest in narrowing the scope of the convention so that it can engage in acts that are otherwise generally understood to be torture. Controversially, the torture memos found that to inflict torture, physical pain “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹⁵ While these memos were eventually superseded, policy changes were based only on domestic, rather than international law.¹⁶ Such a shocking interpretation of the law is possible only because the definition of torture found within the UN CAT is not as strong as the language used in the Third Geneva Conventions – which allows no physical pain at all.¹⁷ The UN CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.”¹⁸ However, reading the language in such a narrow fashion confines torture to only sadistic acts or deprivations, a reading some have found to be incompatible with the purpose of preventing torture.¹⁹ The torture memos stated that the United States and the United Kingdom proposed stronger language.²⁰ However, they fail to note that a majority of states rejected strengthening the language.²¹

Moreover, outside of armed conflict and within the law enforcement paradigm, other important limitations make up for, or otherwise limit, the use of physical force far in advance the preposterous levels suggested by the drafters of the torture memos. For example, according to the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, “[w]henver the lawful use of force . . . is *unavoidable*, law enforcement officials shall (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and *respect* and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons *at the earliest possible moment*.”²² The reasoning behind the use of the term “severe” is far more comprehensible within the context of law enforcement; of course law enforcement should be allowed to use some physical force in detaining or apprehending suspects and a bright-line rule against any physical force would be detrimental to law enforcement efforts – even within the context of interrogations. Within the context of armed conflict, however, this same type of reasoning does not hold.

The practices used by the United States, including several forms of deprivation, are nowhere found to be legal in the *travaux préparatoire* of the UN CAT.²³ Indeed, in the *Greek Case*, which some commentators hold was one of the main inspiration for the definition of torture under Article One of the Convention,²⁴ the court found that “the failure of the Government of Greece to provide food, water, heating in winter, proper washing facilities, clothing, medical and dental care to prisoners constitutes an ‘act’ of torture”²⁵ The UN Commission Against Torture has also often made specific findings of torture in situations that did not include “severe” physical pain as defined by the United States, but included factors such as long hours of isolation, inadequate ventilation, cramped rooms, and no light.²⁶ It is under the backdrop of this jurisprudence that the findings of the torture memos become so shocking. For these reasons, the US is bound not only by domestic law, but also by international law and custom, to ensure that during armed conflict no form of torture is administered to detainees.

B. *The Applicability of International Human Rights Law During Armed Conflict*

The United States has argued that the UN CAT does not apply during a situation of armed conflict, because during a time of conflict, the law of war supersedes international human rights law. According to the Committee Against Torture, the United States has argued that the law of armed conflict is the exclusive applicable law.²⁷ The Committee Against Torture has responded to this argument by noting that the Convention applies at all times, whether in peace, war, or armed conflict, in any territory under its jurisdiction, and that the application of the Convention’s provisions are without prejudice. The Committee points to the wording of the Convention, which stated that “[t]he provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment of which relates to extradition or expulsion.”²⁸

The notion that human rights law, and thus the UN CAT, apply during armed conflict is not novel. In its 2004 *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, the International Court of Justice (“ICJ”) found that IHL and IHRL are co-extensive. In the words of the Court:

[T]he protection offered by human rights conventions does not cease in

case of armed conflict As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.²⁹

Thus, IHRL does not automatically cease to be law as soon as armed conflict erupts. The question of when a situation may be governed exclusively by IHRL remains to be determined.

Some commentators have argued that during an armed conflict, IHRL simply acts as a sort of “benchmark” to IHL.³⁰ However, this line of reasoning does not incorporate the distinctly tripartite test set out by the ICJ, generally considered to have been established under customary conceptions of international law.³¹ The analysis of when IHL applies, rather, should be founded on the application of IHL itself since it is the *lex specialis*.³²

IHL and the use of force are guided almost exclusively by the fundamental principles of warfare. The first and founding principle is the principle of military necessity. Military necessity requires states to confine the use of force to military objectives only. It was codified in the preamble to the Saint-Petersburg declaration, which stated that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”³³ Christopher Greenwood, the British judge of the ICJ, defines military necessity, in part, as a belligerent applying “only that amount and kind of force necessary to defeat the enemy.”³⁴ In short, military necessity is the only justification that may abrogate human rights. The other three fundamental principles, those of distinction, proportionality, and humanity, act as a counter-balance to the principle of military necessity.³⁵ A state should only deviate from IHRL when permitted by the principle of military necessity. For example, the International Covenant on Civil and Political Rights (“ICCPR”) guarantees the right to life and freedom from the arbitrary deprivation of life.³⁶ Despite this, states are undoubtedly allowed to kill combatants during warfare. Moreover, as long as the principles of distinction, proportionality, and

humanity have been adhered to, a state may also legally deprive civilians of their lives (as, for example, collateral damage in a drone strike). Thus, it is this type of calculus with which foreign policy attorneys must engage in order to determine when a treaty, particularly one as important as the UN CAT, may be abrogated.

In the War on Terror, it seems entirely unlikely that the requirements of military necessity would allow for the derogation of the freedom from torture provided by the UN CAT. While part of the torture memos’ argument is loosely based on the requirements of necessity,³⁷ this is regular necessity, related not to military objectives, but to the protection of civilians. Furthermore, even if there was some sort of military necessity, the abrogation of the freedom from torture cannot withstand the principle of humanity, which finds that the ability of states to injure the enemy is “not unlimited” and that states are prohibited from “employ[ing] arms, projectiles, or material calculated to cause unnecessary suffering.”³⁸ Torture is always unnecessary because it does not weaken enemy forces nor constitute the force necessary to defeat the enemy. Additionally, the suffering caused by torture is immense. As one commentator explained, “pain is just a useful method [during torture] for reducing the individual to nothing more than a physical body; a self that cannot make rational decisions or have any concept of its own personality and individuality.”³⁹ It is for this reason that torture is viewed by almost all states⁴⁰ as a particularly serious offense that cannot be justified by military necessity. Since the two sources of international law are clearly co-extensive, and the law of armed conflict under the principles of IHL do not allow for the derogation of the general law in regards to torture, the UN CAT applies during armed conflicts.

III. Armed Conflicts: Temporal Boundaries & Political Rhetoric

A. *Historical Significance of Temporal Boundaries of Warfare*

A temporal limitation on warfare is of paramount importance for the law of war should never obscure or obfuscate *lex generalis*, the law of peacetime, during which no partial revocation of human rights is permitted. Historically, the concept of spatial limitations to warfare was taken for granted; war was always

considered to have been temporally limited. Thus, the wording of the Third Geneva Convention states that detainees may be detained for as long as hostilities are ongoing.⁴¹ The law of war is premised on compromise and based on the notion that the fundamental human rights of peacetime cannot be preserved during war. It is the “special law” because it is well understood that placing limits on warfare such as the prohibition of killing would make the law unworkable. Thus, to preserve international human rights law, the law of war is allowed, within specific temporal constraints, to derogate human rights for the purposes of waging war. By dissolving the temporal boundary, however, we allow the law of war to creep into the law of peacetime, gradually dissolving fundamental rights.

This is precisely what has begun to occur with the War on Terror targeting Al Qaeda and its affiliates.⁴² The judicial branch of the United States has consistently found that the War on Terror may be not limited in a temporal way. For example, in *Hamdi v. Rumsfeld*, the Supreme Court refused to establish temporal parameters for the conflict.⁴³ In *Hamdan v. Rumsfeld*, the Court maintained that position.⁴⁴ In Justice Thomas’ dissent, he affirmed that the Court should not and would not use time as a limiting factor in assessing the scope of the conflict.⁴⁵ These decisions were made in the context of determining whether or not detainees could be held indefinitely (since detention is permitted only until the end of hostilities). However, there is a more sinister effect to the avoidance of a temporal limitation on warfare: the dissolution of the temporal boundary of warfare, combined with wartime rhetoric, has allowed the executive branch to gain substantial latitude in using force and diminish international human rights.

B. Political Rhetoric as a Weapon

In understanding how political rhetoric has transformed, among other elements though perhaps most saliently, the temporal boundary of warfare, we must first turn to a general discussion on political rhetoric. As one commentator correctly questioned, “who is the enemy? If it is Al-Qaeda, how do we identify a member of Al-Qaeda? Where does Al-Qaeda operate? Do any sort of borders in fact confine Al-Qaeda? Are its self-professed affiliates also enemies?”⁴⁶ However, we must first ask the question “why don’t we care?” Why hasn’t there been a bigger backlash

that would first attempt to define any of these terms before sliding into an endless war paradigm? Political rhetoric is, in large part, the answer to that question.⁴⁷ Some of the more ardent detractors of the use of political rhetoric to define warfare have categorized political rhetoric as a form of terrorism that targets civilians, generates fear, and causes political change.⁴⁸

Terrorism is merely a term used to describe a small subset of actions that fall within the larger category of political violence.⁴⁹ For political actors, terrorism could be used to define and condemn any actions of the enemy.⁵⁰ It does not end with any person, idea, or thing. Indeed, as initially defined by Donald Rumsfeld, the US was at war with “terrorism’s attack on our way of life.”⁵¹ The torture memos, discussed in Section II, *supra*, often turned to political rhetoric to justify many of their outlandish claims regarding torture, scrupulously ensuring to “at the outset, make clear the nature of the threat posed”⁵² Even though the present administration has moved away from defining terror itself as the enemy,⁵³ the notion that the United States is fighting terrorism everywhere lingers. Declaring a war on a concept that is too vague to be meaningful allows policy makers to justify any global military activity.⁵⁴ Its real effect is to transform *lex specialis* into *lex generalis*. Armed with this understanding of the power of political rhetoric, it is easy to see how political rhetoric has changed the temporal conception of warfare.

C. Political Rhetoric and the Dissolution of Time

The United States’ fixation with fighting terrorism everywhere has led to the destruction of the temporal element of warfare. This destruction, in turn, has contributed to the abandonment of fundamental guarantees of warfare found in the Geneva Conventions, including freedom from torture. According to the Third Geneva Convention, those detained by war are to be tried for war crimes or released at the cessation of hostilities “without delay.”⁵⁵ Today, the guarantee against indefinite detention is a *jus cogens*⁵⁶ violation of international law. The frequent violation of such a guarantee contributes to the overall denigration of detainees and is in this manner a foundation for other violations, including torture. According to one scholar, in the absence of traditional evaluations of warfare, citizens “look to the leader for evaluation.”⁵⁷ This is because the erosion of clear temporal boundaries leads

to a slippery slope that blurs the lines between war and peace and obfuscates what is and is not legal. As some commentators have concluded, this slippery slope allows those in power to blur even the areas of the law that remain relevant and clear, allowing war-makers to mystify war to the degree necessary to turn obvious legal conclusions – such as the prohibition of torture – into disarray.⁵⁸

The deferral to the leadership by the citizenry is also of primary importance in stymieing resistance to objectionable conduct such as torture. This has become most salient, as noted earlier, in the judiciary's constant deferral to the executive in determining the temporal boundaries or warfare. Phrased eloquently by George Orwell in his classic 1984, "war, however, is no longer the desperate, annihilating struggle that it was in the early decades of the 20th century. It is warfare of limited aims between combatants that are *unable to destroy one another*, have no material cause for fighting, and are not divided by any genuine ideological difference."⁵⁹ Indeed, unlimited war-making, as found in Orwell's dystopian society, is a terrifying interpretation of the war with no end being waged against Al Qaeda, its affiliates.

IV. Armed Conflicts: Spatial Boundaries & Legal Rhetoric

A. U.S. Conceptualization of Space and War

The application of the Geneva Conventions must be fundamentally based in IHL. To sidestep the application of the Geneva Conventions, then, the U.S. primarily relies, rather calamitously, on a restricted concept of the law of war. The first paradigm the U.S. adopted was that there exists neither an IAC nor a NIAC between the United States and individuals belonging to Al Qaeda, but is still another sort of armed conflict exempt from the requirements of the Geneva Conventions.⁶⁰ The U.S. Supreme Court eventually rejected the dubious interpretation that the war against Al Qaeda and its affiliates fell outside the purview of both NIACs and IACs and found the proposed legal justification that the war was a non-international conflict of international scope to be unsatisfying.⁶¹ This interpretation of international law is flawed because it ignores the fundamental importance of a geographical interpretation of the law.

The framework used to combat terrorism remains ambiguous today. Warfare has not traditionally had explicit limits founded in geography. While IHL does not explicitly delineate spatial boundaries to a conflict,⁶² Common Article 2 and Common Article 3, governing the application of IACs and NIACs respectively, take a geographical approach to armed conflicts.⁶³ For NIACs in particular, the reference to location is quite evidently stated. Common Article 3 refers to conflict "occurring in the territory of one of the High Contracting Parties,"⁶⁴ suggesting that the state in which the conflict takes place forms at least part of the geographic area of the conflict.⁶⁵ IACs, however, have not traditionally been seen to be geographically limited; under IACs, wherever the enemy goes, "[a state is] entitled to follow and attack him as a combatant."⁶⁶ However, an increasing number of advocates have theorized that the concept of a "global" armed conflict, even as it relates to IACs, runs contrary to international law.⁶⁷ Christopher Greenwood, a former ICJ judge, stated that "it cannot be assumed – as in the past – that a state engaged in an armed conflict is free to attack its adversary anywhere in the area of war."⁶⁸ For example, while Harold Koh and John Brennan have referenced the targeted killing of Japanese General Yamamoto during World War II as a justification for worldwide targeted killings,⁶⁹ some commentators have argued that even the U.S. shooting down of Yamamoto's plane in World War II would today be illegal under IHL.⁷⁰

While this notion is fiercely controversial,⁷¹ the United States has also demonstrated some adherence to the importance of location in the use of force. Significant judicial decisions have recognized the principle distinction between areas falling within an active theater of war and those falling outside of this theater. Among them, in *Al Maqaleh v. Gates*, the Court of Appeals for the DC Circuit distinguished between Afghanistan, "a theater of active military combat," and areas outside of Afghanistan, considered "far removed from any battlefield."⁷² In *Boumediene v. Bush*, the US Supreme Court recognized the territory of the United States as not being within any "active theater of war."⁷³

B. Reinterpreting the *Tadić* Test

It is worth addressing, here, the *Tadić* armed conflict test. The *Tadić* test, crafted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to determine when armed conflict exists, has been

embraced wholeheartedly by American policymakers for finding that the United States is engaged in a NIAC with Al Qaeda in which the bulk of the Geneva Conventions do not apply.⁷⁴ The *Tadić* decision holds tremendous influence in determining where IHL applies.⁷⁵ According to that opinion, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁷⁶ However, the *Tadić* factors, which consist of evaluating the intensity of the violence occurring as well as the organization of the forces,⁷⁷ have often been used erroneously to argue that the United States is in a NIAC with Al Qaeda since Al Qaeda is an organized armed group fighting with significant intensity.⁷⁸

Unfortunately, proponents of this mistaken characterization fail to read the following sentence of trial court’s decision, which stated that “in an armed conflict of an *internal or mixed* character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry . . . or *terrorist activities*, which are not subject to IHL.”⁷⁹ Thus, not only do the *Tadić* factors apply exclusively in situations of internal or *mixed* character,⁸⁰ but the trial court specifically severs terrorist activity from application of this test. Instead, the *Tadić* test must be construed geographically if it is to be understood correctly. Then, if the minimum threshold of violence that defines an armed conflict is satisfied, IHL should apply within that geographical area. This is because the test *does not* purport to allow a determination of the existence of a NIAC against a terror organization or any transnational actor, but an armed conflict within a confined geographical space, regardless of that organization’s extraterritorial affiliations. This interpretation is far more functional with the reality that, unlike the irregular forces and non-state actors noted in the *Tadić* decision, Al Qaeda and its affiliates can shift “unpredictably and irregularly between acts characteristic of wartime and those characteristic of not-wartime.”⁸¹

C. *Subsuming Al Qaeda within Armed Conflict*

This brings us to the obvious question of how, given the spatial requirement of warfare, the United States could ever be at war with a transnational actor. The simple answer is that it cannot, ever, be directly at war with a transnational actor. However, there are three ways

in which the U.S. can be engaged, indirectly, in an armed conflict with Al Qaeda and other like organizations without dispensing of the spatial requirement. All three will be addressed, and a conclusion will be made regarding the application of the Geneva Conventions. First, states, through consent, *internationalise* an armed conflict by joining with a state to fight armed groups meeting the *Tadić* test within the consenting state. Second, states may, while already engaged in an armed conflict, attack or detain units in a neutral territory under certain conditions. Finally, a state may invoke self-defense and attack a state-sponsor of terrorism.

War may be waged against ‘transnational’ actors by joining national (that is, non-international) armed conflicts. A state involved in a NIAC with an armed group can consent to the use of force within its territory by another state. Thus, if Pakistan was engaged in a NIAC with terror groups within Pakistan, the United States could lawfully be involved in the conflict though Pakistan’s consent.⁸² The consenting state is a necessary element of the existence of a NIAC given the phrase “internal or mixed” noted earlier, which logically makes “internal” a fundamental component of the test. This *internationalizes* the conflict, for the purposes of the Geneva Conventions, between the intervening state and the armed group.

Legally, the right to attack units within a ‘neutral’ territory arises only when that territory is unwilling or unable to neutralize belligerents. The offending state is thus no longer neutral, but “non-belligerent,” and the United States may violate that state’s sovereignty and perform the defensive actions the neutral state should have performed itself.⁸³ However, this concept, codified in the Hague Convention V and adopted in 1907, was ratified in a time where states did not envision war against a transnational actor. Arguably, this preventive duty should not apply to transnational actors whose actions in the neutral state are more akin to a private person rather than leaders of a military operation, such as employing terror tactics rather than waging war.⁸⁴ Thus, it is more reasonable to find that the U.S. may invoke this principle only if it is at war with a state (such as Afghanistan) or in a NIAC within its own territory, since, again, there must be an internal component.

The intervening state may also invoke self-defense to attack the host state (implying state-sponsoring of terrorism) and target hostile enemies. The right to use force against the host state arises when “the state is tightly interwoven with or otherwise

exercises effective control over” an active group of enemies within the host state.⁸⁵ This is inferred from the seminal *Tadić* Appeal Chamber “overall control” test.⁸⁶ Several ICJ decisions have also found that the attacks of enemy groups must be attributable to a state for an attack on that state’s territory to be lawful. The ICJ has a different interpretation based on a stricter “effective control” test, which the Court used in several decisions. For example, in *Dem. Rep. Congo v. Uganda*,⁸⁷ the ICJ found that Uganda could not justify the use of force in Congo given that Congo was not responsible for the attacks in Uganda of non-state actor groups.⁸⁸ In the *Oil Platforms* case,⁸⁹ the ICJ found that the US could not justify its acts against Iran as self-defense because it had not discharged its burden of proof to establish Iran’s responsibility for attacks against the United States.⁹⁰ In the *Case Concerning the Military and Paramilitary activities in and against Nicaragua*,⁹¹ it found that the right to self-defense requires an armed attack by a state or attributable to a state by “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack regular Armed Forces, or its substantial involvement therein.”⁹²

Since the use of force is *per se* an acknowledgement of the existence of an armed conflict, the Geneva Conventions must apply at all times to those ‘combat zones’ in which individuals are killed or detained. Aside from three exceptions noted earlier, there are no other situations in which an armed conflict may arise between a transnational force and a state. Thus, the Conventions may not be regarded as optional or as a matter of ‘good policy’ and the United States must apply the Geneva Conventions within the geographical confines of combat zones at all times. As such, any person detained within a combat zone should be treated in accordance with the norms of the law of armed conflict, regardless of who they are. Of course, it is not always possible to determine who is a combatant and who is a civilian, whether they are engaged in hostilities or not. This dilemma will be addressed in the following section.

IV. Al Qaeda: Belligerency and POW Status

Even when captured in a foreign territory, members of Al Qaeda and its affiliates will virtually

never qualify for POW status. It is important to distinguish between the concept of a combatant and the lawfulness of the combatant. Combatants are those individuals who participate in hostilities. Lawful combatants are those who fall under the combatant status designation of the Third Geneva Convention.⁹³ Unlawful combatants are those who do not. In designating Al Qaeda and its affiliates as unlawful combatants, the United States, in its bid to deny POW status to these detainees, has focused far more on why Al Qaeda and its affiliates are *unlawful* rather than why they are combatants at all.⁹⁴ This has contributed to notion of a ‘twilight zone’ in the Geneva Conventions discussed in Section VI, *infra*. The reality is that members of Al Qaeda, in the absence of any other belligerent force, are not combatants to begin with. There are two important reasons for the US to deny Al Qaeda and its affiliates the legal status required for POW treatment. First, it unnecessarily endangers the rights of civilians and exaggerates the scope of executive power. Second, it glorifies the status of those criminals themselves who are bestowed combatant status.

According to Article 4(a) of the Third Geneva Convention, only members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces qualify for POW status.⁹⁵ Members of other militias and volunteer corps, including those of organized resistance movements, belonging to a party to the conflict will only qualify if they have the following characteristics: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; and (d) that of conducting their operations in accordance with the laws and customs of war.⁹⁶ Al Qaeda and its affiliates, of course, do not satisfy these qualifications – they are not members of the armed forces of any state, nor do they have a fixed, distinctive sign or carry arms openly. They certainly do not conduct their operations in accordance with the laws and customs of war because Al Qaeda is a violent political organization that is not directly affiliated with any nation-state.⁹⁷ Failing to qualify for combatant status means that they Al Qaeda’s members are not lawful combatants – and a war without any lawful combatants is, in reality, no war at all.

In situations of armed conflict, there is always a risk that civilians directly participate in hostilities (DPH).

It is these civilians who, for such time as they participate in hostilities, are considered unlawful combatants (and do not benefit from any combatant immunity).⁹⁸ However, a situation involving civilians who DPH can only arise within the context of an already existing conflict – indeed, it would be an intolerable feature of warfare to find that a war can exist wherein one side of the conflict has no lawful combatants at all. The war against Al Qaeda and its affiliates is a war against civilians.

States have opposed broadening the scope of combatant status to include terrorists because of the risk it poses civilians. Indeed, while there are a limited number of international treaties dealing with terrorism, non-state actors are almost exclusively regulated under national law. The most important reason for not broadening the scope of combatant status is that it would unnecessarily obfuscate the distinction between civilians and combatants. In the 1980s, President Ronald Reagan strongly opposed the provision of the First Additional Protocol to the Geneva Conventions which would have granted combatant status “to irregular forces even if they do not satisfy the traditional requirements” because “this would endanger civilians among whom terrorists and other irregular attempt to conceal themselves.”⁹⁹ Reagan, of course, spoke here of awarding combatant’s privilege, including POW status, and not being a combatant *per se*. However, the argument remains true regardless: civilian lives are certainly endangered by over-broadening the meaning of “combatant” to include terrorists who seek to blend in with the civilian population, regardless of the status they are awarded. Thus the United Kingdom understood the First Additional Protocol to mean that “the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.”¹⁰⁰

While the U.S. has chosen to include terrorists as combatants in order to derogate their rights, many states have chosen to avoid calling terrorists combatants in order to delegitimize their actions. Many states, including Spain, Portugal, the United Kingdom, Indonesia, and Kenya, all use law enforcement to combat terror threats against their states. In fact, the United States, too, has traditionally used a law enforcement paradigm instead of resorting to armed conflict to combat terror and has employed this in response to attacks perpetrated by Al-Qaeda

in 1993, 1998, and 2000.¹⁰¹ Politically, war has always meant a loss of control, while law enforcement displays a firm grip on control.¹⁰² This is not simply an act of political manipulation: while there are clear legal benefits to the failure to recognize the enemy as combatants, recognizing terrorists as combatants give unwarranted legitimacy to their actions. This notion has been well encapsulated by Christopher Greenwood. According to Greenwood,

[i]n the language of international law there is no legal basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.¹⁰³

Indeed, terrorism must be de-legitimized and disassociated from lawful objectives. As Mary Ellen O’Connor argues, “fostering healthy states through the principle of non-intervention, the prohibition of force, respect for proportionality in the use of coercion, and promotion of human rights” through a global law-enforcement effort would be a far better policy towards ending the threat of terrorism while still protecting basic human rights.¹⁰⁴ The Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights echoed this view in a 2009 report,¹⁰⁵ which argued that the current human rights legal framework is sufficiently adaptable to combat any current or future threat.¹⁰⁶ The report further concluded that even in the face of “unprecedented” threats, the risk of temporary measures becoming permanent, as well as the dissolution of fundamental human rights, are too high a cost for the derogation of human rights law to combat terrorism.¹⁰⁷

V. The Myth of the Geneva Conventions’ Twilight Zone

A. Defining the Twilight Zone

Arising from the armed conflict paradigm is another significant problem: the myth of a “twilight zone” of the Geneva Conventions where those individuals detained are neither civilians nor combatants, thus making the Geneva Conventions inapplicable. Such a

problem can ostensibly arise in two situations: within an armed conflict against non-state actors (such as Al-Qaeda) and in armed conflicts against state actors where non-state actors intervene as unlawful combatants (such as the war in Afghanistan and within the border areas of Pakistan). The former situation has already been dispensed with: there can be no war with Al Qaeda and its similar organizations for reasons of reasons of spatiality, temporality, and belligerency.¹⁰⁸ The following section will thus deal with the latter situation.

The United States has made the assumption that, during an armed conflict, those captured who do not qualify for combatants' privilege but who are still belligerents fall under a "twilight zone" of the law whereby neither IHRL nor the Geneva conventions apply to them. Moreover, US has argued that it is not bound by customary international law.¹⁰⁹ Foremost, it should be noted that even unlawful combatants, under Geneva law, are given a fair trial and cannot be subjected to coercive interrogation.¹¹⁰ There are quasi-legal (political) arguments for the "twilight zone" status determination made by the United States as well as legal reasons.

The political rationale is simple – terrorists will not follow the rules laid out in the Geneva Conventions. Thus, the United States would be placed at a significant disadvantage if it had to follow these rules. International law, this argument goes, is based on rational self-interest. That is, states follow the rules of Geneva law based on the understanding that other states will do so as well. However, this argument is patently untrue, and may be dispensed with quickly because the Geneva Conventions do not have a "release clause" that relinquishes parties from following the law because the other side engages in illegal conduct (even if terrorists could be considered belligerents under the law).

B. ICTY Jurisprudence: A Comparison

The Geneva Conventions do, however, have a mechanism for determining the status of a detainee. Found in the Third Geneva Convention, this is known as a "status" or "Article 5" tribunal. These tribunals are meant to be a temporary legal forum for determining the status of an individual involved in a conflict. The ICTY has had to deal with such situations in the *internationalized* conflict of the Bosnian War. The Bosnian war was a non-international conflict between Bosnian Serbs and Bosniaks. Serbia and Croatia intervened in this conflict, thus *internationalizing* it, much like the United States

would *internationalize* a conflict by joining a NIAC. In the context of the ICTY, based on a finding of an *internationalized* armed conflict,¹¹¹ the court has been weary of finding individuals that do not clearly meet the requirements set forth in Article 4(a) of the Third Geneva Convention¹¹² warranting combatant's privilege in relation to their detention. In *Deladic*, the court recognized that categorization under Article 4(a) sets rather stringent requirements for the achievement of prisoner of war status, given it was drafted in light of the experience of World War II and reflects the conception of an international armed conflict current at that time. Thus, the various categories of persons who may be considered prisoners of war are narrowly framed.¹¹³ A detaining power is required, under Article 5 of the Geneva Convention, to determine the status of the person being detained (in an "Article 5 tribunal"), and to impart on that person the protections of the Third Geneva Convention until a determination is made.¹¹⁴

An analysis of how the ICTY has chosen to interpret customary international law in the context of war crimes provides some interesting insight on the understanding of customary law. Primarily, most detention centers where violations occurred during the Bosnian War were really "collection" centers and comprised of both civilians and true prisoners of war. This may indeed be similar to the American example. In the *Sikirica et. al.* sentencing judgment,¹¹⁵ the court found that investigations of the detaining power sought to establish which detainees had been involved in the fighting or where they came from and then categorize the detainees based on their answers.¹¹⁶ However, notwithstanding this procedure, the court still found all detainees to fall under the category of "civilians," and based violations against them on the Fourth Geneva Convention, noting that the aforementioned method was an inadequate means of determining the status of detainees.¹¹⁷ The United States currently employs CSRTs (Combat Status Review Tribunals), but the adequacy of such review boards remains to be determined as they have yet to be legally tested.

The ICTY has been very careful in using the term "detainees" rather than prisoners of war. Detainees are not given combatant's privilege, and thus violations of IHL are violations under the Fourth, rather than the Third, Geneva Convention. It is for similar reasons that the United States continues to label those captured as detainees. Given the ICTY's narrow interpretation of prisoners of war, and the Article 5 requirement noted

above, the ICTY has also found that, notwithstanding the complexity of distinguishing between them in detention camps, all detainees are afforded the protection of either the Third or Fourth Geneva Convention in regards to detention.¹¹⁸ Surprisingly, the court also found that all detainees were protected under common Article 3 notwithstanding the requirement that those victims take no part in active hostilities, because the chamber was satisfied that “in the present case, the victims were all civilians or prisoners of war, and as such were not or no longer taking part in the hostilities.”¹¹⁹ In *Prosecutor v. Naletilic*, the court held that, where there is doubt between whether one is a prisoner of war or a civilian, and since the application of the regime laid out in the Third Geneva Convention is often more favorable to the accused than the protection afforded to civilian detainees under the Fourth Geneva Convention, it should apply the lower standard relating to the labor of prisoners of war as laid out in the Third Geneva Convention to all detainees (since the Fourth Convention has a higher standard relating to labor).¹²⁰ The court stressed that its opinion was predicated on the view that there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war, he or she necessarily falls within the ambit of the Fourth Convention, meaning that no person falls *outside the law*.¹²¹ Thus, there cannot be a ‘twilight zone’ even where individuals do not fit neatly into either status; at the very least, the lower standard must always apply to every person victimized by warfare.

VI. Conclusion

If torture is ever to be completely eradicated, all states must adhere to several international principles. First, where warfare begins, human rights do not end. The UN CAT and other international agreements do not simply cease in their entirety at the outbreak of warfare, but continue to supplement those areas of the law left ambiguous by the Law of Armed Conflict. Second, war itself must be recognized as an abhorrent practice. If the Geneva Conventions are always to be obeyed, the notion of traditional warfare cannot be derogated from if a state seeks to use force against any threat to its security or existence. Thus, traditional notions of spatiality and temporality must withstand the rise of new forms of warfare. Members of transnational terrorist groups, while

often vicious, insidious, and in need of neutralization, may never make up a belligerent force with which a state may go to war. Thus, the full scope of human rights always applies to terrorists not participating directly in a conflict. Nonetheless, when terrorists do participate in armed conflicts, they do not forfeit their treatment as human beings. As the jurisprudence indicates, they are always afforded protection under either the Third or Fourth Geneva Conventions.

As the United States has argued, this indeed puts the United States, or any state combating the new threat of international terrorism, at a strategic disadvantage. However, through the adherence of such principles, and the respect for the founding ideologies of freedom and democracy, the sole path to victory against those who seek to destroy these values is presented. As one court noted, this is a plight unique to democracies; “not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law constitute[s] an important component of its understanding of security.”¹²² The prohibition of torture is a fundamental building block of modern civilization. The values of this civilization should never get lost in the furor and rhetoric of warfare; states should therefore adhere to the restraints of the Geneva Conventions and of the UN Convention Against Torture.

(Endnotes)

¹ Samit is currently pursuing a joint degree at American University’s School of International Service and the Washington College of Law. During his time at American University, Samit has pursued studies related to war crimes, international humanitarian law, and the general intersection of international politics and the law.

² See Hearing on Iraqi Prisoner Abuse Before the S. Armed Servs. Comm., 108th Cong. (May 11, 2004); 2004 WL 1053885 (testimony of Stephen Cambone, Undersecretary of Defense for Intelligence) (stating that the use of harsh interrogation techniques were approved at the command level in Iraq).

³ Joshua Decker, *Is the United States Bound by the Customary International Law of Torture?*, 6 CHI. J. INT’L L. 803, 806 (2005) (recounting the assertions of one plaintiff whose right eardrum had been ruptured by battery causing permanent deafness, and of another who asserted he had endured sleep deprivation and stones thrown at him as well as other detainees).

⁴ Dana Priest and Barton Hellman, *U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, Wash Post A1 (Dec 26, 2002).

⁵ Neil Lewis, *Red Cross Finds Detainee Abuse*, N.Y. TIMES, Nov. 30, 2004, at A1.

⁶ *CIA Finally Admits to Waterboarding*, THE AUSTRALIAN, Feb. 07, 2008, <http://www.theaustralian.com.au/news/cia-finally-admits-to-waterboarding/story-e6frg6t6-111115490483> (“General Michael Hayden’s comments before a Senate committee yesterday were the first time a Bush administration official had confirmed publicly that the CIA had subjected terror suspects to waterboarding.”).

⁷ Sometimes also called the “Bybee memo,” drafted by Assistant Deputy Attorney General John Yoo.

⁸ These memos can be accessed at <http://www.aclu.org/accountability/olc.html>.

⁹ President Obama repudiated, in an executive order, the “torture memos” permanently ending the overt use of torture by the United States. See *Executive Order: Interrogation*, USA TODAY, Jan. 22, 2009, http://usatoday30.usatoday.com/news/washington/2009-01-22-execorder-interrogation_N.htm (“All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order.”).

¹⁰ Enhanced interrogation refers to the use of torture during interrogations. See, e.g., *The torture mystery; troubling questions remain about how far the CIA can go with its ‘enhanced’ interrogation methods*. L.A. TIMES, July 26 2007, <http://articles.latimes.com/2007/jul/26/opinion/ed-executive26>.

¹¹ The repudiation of the torture memo came with the reasoning that torture is banned by domestic law. The revision by the Office of Legal Counsel during the Obama administration did not clarify in sufficient detail U.S. obligations under international law. See Steven G. Bradbury, *Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*. (Jan. 15, 2009) (“Federal prohibition on torture, 18 U.S.C. §§ 2340-2340A, is constitutional, and I believe it does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President’s Commander in Chief authority”). President Obama did, however, assure his administration would comply “with the treaty obligations of the United States, including the Geneva Conventions.” See *Executive Order: Interrogation*, *supra* note 9.

¹² Cherif Bassiouni, *The Institutionalization of Torture by the Bush Administration*, 136 (“the Secretary of Defense retains the right to enact rules which permit coerced statements and hearsay evidence”).

¹³ *Id.* at 112.

¹⁴ Fatima Kola, *Torture and Terrorism: A Case Study* 2007 Supplement UCL Jurisprudence Rev. 85, 90 (2007).

¹⁵ Decker, *supra* note 3 at 91

¹⁶ See *supra* note 11 and accompanying text.

¹⁷ The language of the Third Geneva Convention is much stronger than the protection afforded under international human rights law. *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6.3 U.S.T. 3316 art. 4, 75 U.N.T.S. 135. Art. 17 [hereinafter GC III] (“No physical or mental torture, nor

any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind”).

¹⁸ The UN CAT also further defines torture as “punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. See U.N. Doc. A/RES/39/46, available at <http://www.un.org/documents/ga/res/39/a39r046.htm>

¹⁹ Antonio Cassese, *Are International Human Rights Treaties and Customary Rules on Torture Binding Upon US Troops in Iraq?* 2 J. INT’L CRIM. JUST. 827, 875 (2004).

²⁰ Office of the Assistant Attorney General, *Memorandum for Alberto R. Gonzales Counsel to the President* [hereinafter *Torture Memos*] at 21 (“For example, the United States proposed that torture be defined as ‘including any act by which extremely severe pain or suffering . . . is deliberately and maliciously inflicted The United Kingdom suggested an even more restrictive definition.”).

²¹ Curiously, while the U.S. filed an understanding of the UN CAT that added a specific intent requirement for torture, in 2002 the U.S. representative to the Committee Against Torture, Harold Koh, pointed out that in the view of the United States, the U.S. understanding of the UN CAT “does not modify the meaning of Article 1.” See Cassese, *supra* note 19, n. 12.

²² *Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990. available at <http://www2.ohchr.org/english/law/pdf/firearms.pdf>. (emphasis added).

²³ Manfred Nowak, *What Practices Constitute Torture: US and UN Standards*, 28 HUM. RTS. Q. 809, 819 (2006).

²⁴ *Id.*

²⁵ *The Greek Case*, Y.B. Eur.Conv. on H.R. 461 (1969).

²⁶ Nowak, *supra* note 23 at 828.

²⁷ Comm. Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention* Thirty-sixth session ¶ 14, U.N. Doc. CAT/Ć/USA/CO/2 (25 July 2006).

²⁸ *Id.*

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004 I.C.J. 136 ¶ 106 (July 9).

³⁰ See, e.g., 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, 752 (2004) (finding that by killing terrorists, the United States *should* under human rights norms bear the burden of demonstrating that those killings were neither arbitrary nor unnecessary in concordance with the ICCPR).

³¹ Dominic McGoldrick, *Human Rights and Humanitarian Law in the UK Courts*, 40 ISR. L. REV. 527, 529 (2007) (“For all but the diehards the principle of joint applicability is now established international law.”).

³² *Lex specialis* refers to the “special law” of warfare, in contradistinction to *lex generalis*, the general law of peacetime.

³³ St. Petersburg Declaration, *available at* <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.

³⁴ Christopher Greenwood, *Historical Development and Legal Basis*, in *The Handbook of Humanitarian Law in Armed Conflicts*, 1, 30 (Dieter Fleck ed., Oxford Univ. Press 1995).

³⁵ Distinction, proportionality, and humanity are all extracted from international treaties and customary law. For a general discussion these fundamental principles, see Marshall Cohen, *Taylor's Conception of the Laws of War*, 80 *YALE L.J.* 1492 (1970).

³⁶ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *available at* <http://www2.ohchr.org/english/law/ccpr.htm>. The ICCPR also explicitly permits states to derogate from some of the rights laid out in the treaty, though not the right to life, but only “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”

³⁷ See torture memos, *supra* note 20 at 39.

³⁸ Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, art. 22, *available at* http://avalon.law.yale.edu/20th_century/hague04.asp, art. 23.

³⁹ Kola, *supra* note 14 at 89.

⁴⁰ For a discussion on torture as an international peremptory norm, see for example Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law*, 15 *EUR. J. INT'L L.* 97, *available at* <http://ejil.oxfordjournals.org/content/15/1/97.full.pdf>.

⁴¹ GC III, *supra* note 17, art. 4.

⁴² The Obama administration has since shifted from the language of “war on terror” and used “War against Al Qaeda and its Affiliates.”

⁴³ *Hamdi v. Rumsfeld*, 542 U.S. at 520 (2004) (plurality opinion).

⁴⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); See also Joshua Alexander Geltzer, *Decisions Detained: The Courts' Embrace of Complexity in Guantainamo-Related Litigation* 29 *Berkeley J. Int'l L.* 94, 101 (2011) (finding that the Supreme Court has consistently avoided finding a temporal basis for the war).

⁴⁵ *Id.* at 685 (Thomas, J., dissenting).

⁴⁶ Danielle Jeffers, *Battlefield Borders, Threat Rhetoric, and the Militarization of State and Local Law Enforcement*, *AMERICAN UNIV. NAT'L SEC. L. BRIEF, forthcoming* 12, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2125627.

⁴⁷ Other commentators have chosen to call this “threat rhetoric” or “collateral language.” While these certainly are accurate formulations of the phrase, “political rhetoric” is a more value neutral means of addressing the problem.

⁴⁸ John Collins and Ross Glover, Introduction, in *Collateral Language* (John Collins and Ross Glover, eds.), 2 (2002); See also Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 *COLUM. J. TRANSAT'L L.* 435, 446 (recognizing the tactic of using an unseen enemy to generate fear).

⁴⁹ John Collins, *Terrorism*, in *COLLATERAL LANGUAGE*, 155, 165 (John Collins and Ross Glover, eds., 2002).

⁵⁰ *Id.*

⁵¹ Donald Rumsfeld, *A New Kind of War*, *N.Y. TIMES*, Sept 21, 2001, A1.

⁵² Torture Memos, *supra* note 20, at 31.

⁵³ See *supra* note 39 and accompanying text..

⁵⁴ Ross Glover, *The War on _*, in *COLLATERAL LANGUAGE*, 207, 211 (John Collins and Ross Glover, eds., 2002).

⁵⁵ Brooks, *supra* note 30 at 726.

⁵⁶ *Id.*

⁵⁷ Wojtek Mackiewicz Wolfe, *Winning the War of Words* 45 (2008).

⁵⁸ See, e.g., Brooks, *supra* note 30 (finding that the erosion of clear boundaries allowed lawyers for the Bush administration to go from the legitimate legal conclusion that the Geneva Conventions cannot easily apply to modern conflicts to the “disingenuous and flawed” conclusion that there were therefore no legal constraints on interrogation practices).

⁵⁹ George Orwell, *1984* 193 (Penguin Press ed. 1949) (emphasis added).

⁶⁰ See Torture Memos, *supra* note 20.

⁶¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (finding the phrase “conflict not of an international character” in Common Article 3 is used in contradistinction to a conflict between nations, not between a state and a transnational actor).

⁶² Laurie Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 *GA. INT'L & COMP. L.* 1, 11 (2010).

⁶³ *Id.* See also Brooks, *supra* note 30 at 725 (“The laws of armed conflict traditionally conceptualize conflict as bounded temporally as well as spatially.”).

⁶⁴ See The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6.3 U.S.T. 3114, 3116, T.I.A.S. No.3362, at 3, 75 U.N.T.S. 31 art. 3.

⁶⁵ Blank, *supra* note 62, at 11.

⁶⁶ Kenneth Anderson, *Rise of the Drones: Unmanned Systems and the Future of War*, Written Testimony Submitted to Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, US H.R. Subcommittee Hearing, 111th Cong. 2nd sess. (2010). This determination is limited solely to the Law of Armed Conflict. Important bodies of international law not dealt with in this paper, including neutrality law and sovereignty law would ostensibly limit, if not prohibit, this legal authorization.

⁶⁷ Human Rights Watch, *supra* note 64.

⁶⁸ Christopher Greenwood, *Scope of Application of Humanitarian Law*, in *The Handbook of Humanitarian Law in Armed Conflicts*, 39, 53 (Dieter Fleck ed., Oxford Univ. Press 1995).

⁶⁹ Harold Koh, Legal Advisor, U.S. Dep't of State, Keynote Address at the American Society for International Law Annual Meeting: The Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>; John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Woodrow Wilson International Center for Scholars, *The Ethics of Efficacy of the President's Counterterrorism Strategy* (Apr. 30, 2012), *available at* <http://www.lawfareblog.com/wp-content/uploads/2012/04/WilsonCenterFinalPrepared1.pdf>.

⁷⁰ Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 *J. NAT'L SEC. L. & POL'Y* 343, 361 (arguing that the targeted killing of General Yamamoto would likely be in conflict with U.N. Charter as well as the Geneva Conventions).

⁷¹ Cf. Mary Ellen O’Connell. *Id.*; Michael Lewis, 47 TEX. INT’L L. J. 293, 301 (2012) (“the claim that there are legal restrictions on the employment of combat force during an international armed conflict based solely upon the distance from the ‘front lines’ finds no support in practice”).

⁷² Al Maqaleh v. Gates, 605 F.3d 84, 88 (D.C. Cir. 2010).

⁷³ Boumediene v. Bush, 553 U.S. 723, 770 (2008).

⁷⁴ Only Common Article 3 of the Geneva Conventions applies to NIACs as customary law (Additional Protocol II is also applicable to signatory states).

⁷⁵ This does not suggest that that *Tadić* decision has any binding authority in international law.

⁷⁶ Prosecutor v. Tadić, IT-94-1-T, Opinion and Judgment, May 7 1998 at ¶¶ 561-62.

⁷⁷ *Id.*

⁷⁸ See, e.g., Brennan, *supra* note 65 (“ . . . I am certain of one thing. We are at war . . . against a terrorist organization called Al-Qa’ida”); *Hamdan v. Rumsfeld*, *supra* note 44 at 631.

⁷⁹ Prosecutor v. Tadić, *supra* note 76, at 562 (emphasis added.)

⁸⁰ The war against a transnational entity lacks the internal element required in the concept of a “mixed” character.

⁸¹ Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSAT’L L. J. 1, 7 (2004).

⁸² This example is not intended to reflect the reality of the situation in Pakistan regarding U.S. military activity and the existence of Pakistani consent.

⁸³ Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflict* 293 (2008).

⁸⁴ Disputably, the actions of Al Qaeda and its affiliates thus fall under actions of private persons which neutral powers have no obligation to control in a law of war context. See *id.* (“[T]he state had no duty to interfere with private action, even if that action was contrary to the interests of a belligerent and would have been a violation of neutrality if performed by state authorities themselves.”).

⁸⁵ Matthew Waxman, *The Structure of Terrorism Threats and the Law of War*, 20 DUKE J. COMP. & INT’L L. 438 (2009).

⁸⁶ This test is different from the Armed Conflict factor tested noted earlier. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, para. 120 (July 15, 1999) (holding that acts of “armed bands of irregulars or rebels” are attributable to a state when “the group as a whole [is] under the overall control of the State”).

⁸⁷ *Armed Activities on the Territory of the Congo*, 2005 I.C.J. 168 (Dec. 19).

⁸⁸ *Id.*, para.146-47.

⁸⁹ *Oil Platforms*, 2003 ICJ 161 (Nov. 6).

⁹⁰ *Id.*, para. 51, 61.

⁹¹ *Case Concerning the Military and Paramilitary activities in and against Nicaragua*, 1986 ICJ 14

⁹² *Id.*, para. 195.

⁹³ See GC III, *supra* note 17.

⁹⁴ O’Connell, *supra* note 48 at 453.

⁹⁵ GC III, *supra* note 17 art. 4.

⁹⁶ *Id.*

⁹⁷ Kola, *supra* 14 at 92.

⁹⁸ The ICRC interprets the concept of directly participating in hostilities in some detail. Civilians who DPH are targetable

for “such time as they participate in hostilities”. The ICRC as also defines a “continuous combat function” for those civilians whose continuous function is to take part in hostilities, but even under this definition, individuals who reintegrate into civilian life are again considered civilians. See *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 33-34 (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

⁹⁹ Ronald Reagan, letter of Transmittal, The White House, January 29, 1987, available at <http://www.reagan.utexas.edu/archives/speeches/1987/012987b.htm>.

¹⁰⁰ O’Connell, *supra* note 70 at 348 (citing Understanding by the United Kingdom to art. 1, ¶ 4 of AP I, available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>).

¹⁰¹ O’Connell, *supra* note 70, at 347 (“After attacks by Al Qaeda on American targets in 1993, 1998 and 2000, the United States used the criminal law and law enforcement measures to investigate, extradite, and try persons linked to the attacks.”).

¹⁰² *Id.*

¹⁰³ Christopher Greenwood, *War, Terrorism and International Law*, 56 CURRENT LEGAL PROBLEMS 505, 529 (2004).

¹⁰⁴ O’Connell, *supra* note 48 at 457.

¹⁰⁵ Int’l Comm’n of Jurists, *Assessing Damage, Urging Action* (2009), available at <http://www.ifj.org/assets/docs/028/207/3e83f1c-fbfc2cf.pdf>.

¹⁰⁶ *Id.* at 24

¹⁰⁷ *Id.* at 24-25; See Also O’Connell, *supra* note 48 at 457.

¹⁰⁸ See Sections II, III, and IV, *supra*.

¹⁰⁹ Decker, *supra* note 3 at 806.

¹¹⁰ Kola, *supra* note 14 at 93.

¹¹¹ Based on the “overall control” test set forth in the *Tadić* decision, the court has found that the conflict has been internationalised by foreign control. See, e.g., *Prosecutor v. Naletilic*, IT-98-34-T (31 Mar. 2003) ¶ 196.

¹¹² See GC III, art. 4, *supra* note 17.

¹¹³ *Prosecutor v. Dedalic*, IT-96-21-T (16 Nov. 1998) ¶ 267.

¹¹⁴ GC III, *supra* note 17, art. 5 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”).

¹¹⁵ *Prosecutor v. Sikirica et. al.*, IT-95-8-S (13 Nov. 2001).

¹¹⁶ *Id.* ¶ 83.

¹¹⁷ *Id.* It is also important to note that civilians can also be detained (interned) if the security of the detaining power is involved and makes detention “absolutely necessary”. Conceivably, all unlawful combatants are detained under this provision. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 75 U.N.T.S. 287 art. 42 [hereinafter GC IV].

¹¹⁸ *Prosecutor v. Naletilic*, *supra* note 3, ¶ 229.

¹¹⁹ *Id.*

¹²⁰ *Id.*, ¶ 252.

¹²¹ *Id.* ¶ 271.

¹²² Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148 (2002).