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SEPTEMBER 11 AND THE LAWS OF WAR

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If international law is at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.

—Hersch Lauterpacht[1]

INTRODUCTION

What law applies to the September 11 terrorist attacks? Many characterize the atrocities as "acts of war" against the United States—suggesting that the "laws of war" apply. Of course, as a conceptual matter, this characterization is problematic because "war" traditionally involved formally-declared hostilities between sovereign states. The attacks nevertheless resemble "acts of war" in that they were: extraordinarily severe; orchestrated from abroad by an organized enemy; and directed against the United States as such. Critics of this view maintain that although the attacks constituted aggravated crimes (such as "crimes against humanity" or "international terrorism"), they do not implicate the laws of war. This debate involves much more than descriptive accuracy. Indeed at stake is the proper direction of transnational antiterrorism law and policy; and, more specifically, whether and to what extent the rule of law might guide the collective

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[1] Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 360 (1952).

response to what Harold Hongju Koh has called "the globalization of terror."[2]

It is clear that humanitarian law governs the conduct of hostilities in non-international conflicts—even when confined to the territory of one state. The central difficulty is how best to define the scope and content of international humanitarian rules applicable in non-international armed conflict. In this Article, I argue that the September 11 attacks violated the laws of war; and that this determination has important consequences for both U.S. antiterrorism policy and international humanitarian law. The laws of war offer a proven, durable mode of imposing principled constraints on organized violence. This widely-accepted, fully articulated normative framework should guide efforts to fashion an effective, humane response to new forms of organized violence—including catastrophic terrorism.

The argument proceeds as follows. In Part I, I outline the central issue under examination: whether terrorist attacks implicate the laws of war. I also summarize many of the broader questions implicated by this inquiry including whether the contemplated U.S. military commissions have subject matter jurisdiction over the attacks. In Part II, I examine the potentially applicable laws of war; and conclude that only the laws of war applicable to internal armed conflicts could govern such attacks. I model the conditions under which this regime applies in Part III; and conclude that the laws of war govern the September 11 attacks. I also suggest that violations of these laws constitute "war crimes" subjecting individual perpetrators to criminal liability. Finally, in Part IV, I offer some concluding remarks on the implications (and normative appeal) of the model proposed in Part III.

I. THE LAWS OF WAR AND SEPTEMBER 11

Debates about the direction of anti-terrorism law and policy have increasingly concerned the most appropriate means of prosecuting or otherwise meting out justice to suspected terrorists. These debates center on three related issues: (1) the most appropriate forum for prosecuting individuals responsible for the September 11 attacks;[3] (2) the international legal status of combatants captured in Afghanistan;[4] and, more generally, (3) the most appropriate role for law—both international humanitarian law and criminal law—in any

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[2] Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L. J. 23, 26 (2002).

[3] *See, e.g.*, Harold Hongju Koh, *We Have the Right Courts for Bin-Laden*, N.Y. TIMES, Nov. 23, 2001, at A39 (arguing that any such trials should be conducted in federal district court); Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23 (arguing that the U.N. Security Council should establish another ad hoc tribunal); Paul R. Williams & Michael P. Scharf, *Prosecute Terrorists on a World Stage*, L.A. TIMES, Nov. 18, 2001, at M5 (suggesting that the statute of the International Criminal Tribunal for the Former Yugoslavia be amended to confer jurisdiction over the September 11 attacks); Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A1 (supporting military commissions of the sort envisioned in President Bush's Military Order); Laura Dickinson, *Courts Can Avenge Sept. 11: International Justice—Not War—will Honor our Character while Ensuring our Safety*, LEGAL TIMES, Sept. 24, 2001, at 66 (supporting "internationalized" trials in other national jurisdictions).

[4] The controversy concerns whether detained al-Qaeda and Taliban fighters qualify for "prisoner of war" (POW) status under the Geneva Conventions. *See* Geneva Convention Relative to the Treatment of Prisoners of War, entered into force Oct. 21, 1950 75 U.N.T.S. 135 [hereinafter Geneva Convention III]. *See, e.g.*, Inter-American Commission on Human Rights (2002); Coalition of Clergy et al. v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (denying habeas petition brought on behalf of Camp X-Ray detainees); John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings*, ASIL INSIGHTS (Jan. 2002), *available at* http://www.asil.org; Alfred P. Rubin, *Applying the Geneva Conventions: Military Commissions, Armed Conflict, and al-Qaeda*, 26 FLETCHER F. WORLD AFF. 79 (2002).

comprehensive strategy against international terrorism.[5]

Naturally, the starting point in these debates is President Bush's Military Order providing for the trial of suspected terrorists by military commissions.[6] The Order characterizes the events of September 11 as an attack "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces."[7] As part of the administration's overall response to the crisis, it authorizes the trial of non-citizens "for violations of the laws of war and other applicable laws by military tribunals."[8]

The Order, needless to say, has occasioned no small measure of controversy.[9] Although much of this controversy centers on the constitutional constraints on the President's power to issue the Order[10] and the minimum constitutional requirements for a fair trial in these commissions,[11] international law considerations are central to the applicability and substantive scope of the Order.[12] By its terms, the Order extends to persons accused of violating the "laws of war,"[13] a term of art describing the positive and customary international rules of

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[5] *See generally* Abraham D. Sofaer & Paul R. Williams, *Doing Justice During Wartime: Why Military Tribunals Make Sense*, 111 POLICY REV. 3 (Feb./Mar. 2002); Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002); Ruth Wedgwood, *The Rules of War Can't Protect Al Qaeda*, N.Y. TIMES, Dec. 31, 2001 at A11.

[6] MILITARY ORDER, NOVEMBER 13, 2001, DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [to be codified at ?] [hereinafter MILITARY ORDER]. The Department of Defense (DOD) has implemented the Order by issuing the rules of procedure and evidence for the commissions. *See* DEPARTMENT OF DEFENSE, MILITARY COMMISSION ORDER NO. 1, PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM, Mar. 21, 2002 [hereinafter DOD RULES]. The use of military commissions in U.S. history is well documented. *See generally* David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825 (1993); WILLIAM E. BURKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 351-69 (3d ed. 1914); GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 307-13 (2d ed. 1901); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 832-34 (2d ed. 1920).

[7] MILITARY ORDER, *supra* note 6, § 1__ .

[8] *Id.* § 1(E).

[9] *See, e.g.*, Neal K. Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); George P. Fletcher, *On Justice and War: The Contradictions of the Proposed Military Tribunals*, 25 HARV. J. L & PUB. POL'Y. 635 (2002); George P. Fletcher, *Bush's Military Tribunals Haven't Got a Legal Leg to Stand On*, THE AMERICAN PROSPECT (Jan. 1-14, 2002); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002); Abraham D. Sofaer & Paul R. Williams, *Doing Justice During Wartime: Why Military Tribunals Make Sense*, 111 POLICY REV. 3 (Feb./Mar. 2002); Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002) [hereinafter Note, *Responding to Terrorism*]; Akhil Reed Amar, *War Powers: Is Bush Making History?*, TIME, Dec. 3, 2001, at 62; Jack M. Balkin, *Using Our Fears to Justify a Power Grab*, L.A. TIMES, Nov. 29, 2001, at B15; Alan M. Dershowitz, *Bring Him to Justice in the U.S.*, L.A. TIMES, Nov. 19, 2001, at B11; Harold Hongju Koh, *We Have the Right Courts for Bin-Laden*, N.Y. TIMES, Nov. 23, 2001, at A39; Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23; Jonathan Turley, *Secret Court: Legal System in a Burka*, L.A. TIMES, Nov. 15, 2001, at B15.

[10] *See, e.g.*, Amar, *supra* note 9; Bradley & Goldsmith, *supra* note 9; Katyal & Tribe, *supra* note 9; Balkin, *supra* note 9.

[11] *See, e.g.*, *Oversight of the Dep't of Justice:Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the House Comm. on the Judiciary*, 107th Cong. (Dec. 4, 2001) (statement of Cass Sunstein), *available at* http://judiciary.senate.gov/ ; Katyal & Tribe, *supra* note 9; Aryah Neier, *Military Tribunals on Trial*, N.Y. REV. BOOKS, Feb. 14, 2002; American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions (Jan. 4, 2002), *available at* www.abstract.org/poladv/letters/exec/militarycomm_report.pdf. In response to this controversy, Congress is now considering legislation that would prescribe the procedures applicable in military commissions. *See* Military Tribunal Authorization Bill of 2002, S. 1941, 107th Cong. 2002); .

[12] *See, e.g.*, Bradley & Goldsmith, *supra* note 9; Katyal & Tribe, *supra* note 9.

[13] MILITARY ORDER, *supra* note 6, § 1(E); *see also infra* Section I.B. As discussed at length below, the Order is unclear on the scope of subject matter jurisdiction in the contemplated military

armed conflict.[14]

The scope of subject matter jurisdiction in commissions convened pursuant to the Order is, therefore, a function of international law. Despite their centrality, the relevant international legal considerations are poorly understood and all too often ignored. Is the "law of war" applicable to the events of September 11? If applicable, did the September 11 attacks violate any of these rules? And, assuming that applicable international rules were violated, does the "law of war" impose individual criminal liability on the perpetrators of the unlawful acts? In short, were the terrorist attacks "war crimes?"

These are questions of broad significance for law and policy. First, these issues implicate U.S. anti-terrorism policy. In a narrow sense, the applicability of the "laws of war" to these circumstances helps define the scope of the contemplated criminal proceedings against captured al Qaeda and Taliban fighters.[15] If the attacks are outside the purview of the laws of war, then the attacks themselves arguably could not serve as a basis for criminal charges before a military commission.[16] It is also important to note that the limited federal habeas

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commissions. *See, e.g.*, Katyal & Tribe, *supra* note 9; *Oversight of the Department of Justice: Hearing Before the Senate Committee on the Judiciary*, 107th Cong. (2001) (statement of Phillip Heymann, Professor of Law, Harvard Law School). One important issue is how best to interpret the Order's "any other applicable law" clause. MILITARY ORDER, *supra* note 6, § 1(E). As I argue below, this clause is best read as a reference to any current or future statutory provision authorizing trial by military commission for particular offenders or offenses. *See infra* text accompanying notes ___ - ___; *see also* 10 U.S.C. § 904 (2002) (stating that military commissions may impose the death penalty for the crime of "aiding the enemy"); 10 U.S.C. § 906 (2002) (stating that military commissions may try the crime of spying during wartime); Military Tribunal Authorization Bill of 2002, S. 1941, 107th Cong. § 3(b) (introduced Feb. 13, 2002) (establishing military tribunal jurisdiction over "crimes against humanity targeting against United States persons").

[14] *See generally* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 226-32 (2001) (providing an excellent, brief analysis of the development and sources of the "laws of war").

[15] *See, e.g.*, DAVID SHAPIRO, ET AL., HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1999), SUPPLEMENT ON MILITARY COMMISSIONS, Jan. 29, 2002 [hereinafter HART & WECHSLER'S SUPPLEMENT ON MILITARY COMMISSIONS] (on file with author) ("Insofar as military tribunals might be constituted to try suspected terrorists in the United States, any constitutional justification would apparently need to depend on the proposition—crucial in *Quirin*—that the defendants are alleged to have violated 'the law of war.'"); DEP'T OF ARMY, JUDGE ADVOCATE GENERAL'S HUMANITARIAN LAW HANDBOOK 25 (2002) (stating that UCMJ "authorizes the use of military commissions, tribunals, or provost courts to try individuals for violations of the law of war"); Bradley & Goldsmith, *supra* note 9, at 256 (stating that "the jurisdiction of military commissions extends (at least) to violations of the international laws of war"); Katyal & Tribe, *supra* note 9, at 1284-87 (arguing that only "unlawful combatants" under the laws of war may be subject to trial by military commission); Abraham D. Sofaer & Paul R. Williams, *Doing Justice During Wartime: Why Military Tribunals Make Sense*, 111 POL'Y REV. 3 (Feb./Mar. 2002) (arguing that military commissions are appropriate to try suspects for "war crimes … in times of war"); Gonzales, *supra* note ___, at A27 (arguing that persons subject to trial by military commission "must be chargeable with offenses against the international law of war."); *The President's Order on Trials By Military Tribunals: Hearings of the Senate Armed Services Comm.*, 107th Cong. (2001) (LEXIS, Nexis Library, Federal News Service File) (statement of Paul Wolfowitz, Deputy Secretary of Defense) [hereinafter Wolfowitz Testimony] (defending the use of military commissions to try "unlawful belligerents in times of war").

[16] *See infra* Sections I.B., I.C. This proposition requires further clarification. I do not mean to suggest that U.S. law authorizes trial by military commission only for violations of the "laws of war" as such. Congress has expressly authorized military commissions to try other offenses. *See* 10 U.S.C. § 904 (1994) (stating that military commissions may impose the death penalty for the crime of "aiding the enemy"); 10 U.S.C. § 906 (1994) (stating that military commissions may try the crime of spying during wartime). Nevertheless, the question whether the attacks violated the laws of war is central to the scope of the subject matter jurisdiction of the military commissions. First, the President's Order does not reference these other provisions as sources of authority to establish commissions. *See* MILITARY ORDER, *supra* note 6, prmbl. Second, the Bush administration has repeatedly suggested that only persons accused of war crimes will face trial by military commission. *See, e.g.*, Gonzales, *supra* note __, at A27; Wolfowitz Testimony, *supra* note 15. Third, the other provisions recognizing military commission jurisdiction are inapplicable to the

review of convictions under the Order, if available at all,[17] would reach the merits of jurisdictional challenges[18]including whether the "laws of war" proscribe the charged conduct.[19] In addition, the applicability of the "laws of war" to the attacks may have bearing on the legality of the U.S. military action in Afghanistan[20]—which is predicated on the claim that the September 11 attacks constituted or foretold subsequent "armed attacks" within the meaning of the U.N. Charter.[21] More fundamentally, the issues addressed here go to whether the rule of law and legal institutions are to play any meaningful role in the otherwise highly militarized U.S. response to terrorism.[22] Preserving some role for legal institutions might be critical in fashioning a durable transnational coalition against terrorism. Moreover, the "laws of war" provide a widely accepted normative and legal framework within which deep political divisions can be negotiated and reconciled.[23]

Second, the applicability of the laws of war also implicates debates about the constitutionality of the President's Order.[24] For example, whether the Military

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attacks. Moreover, these provisions would, in any case, only apply in the context of a war or armed conflict. *See* 10 U.S.C. § 904 (1994) (pertaining to "aiding the *enemy*"); 10 U.S.C. § 906 (1994) (applying only "in time of war"). Because the United States has been engaged in an international armed conflict since the initial airstrikes in Afghanistan, these other provisions could well authorize trial by military commission for individuals violating their terms. In fact, the "aiding the enemy" provision arguably would have authorized the trial of the "American Taliban," John Walker Lindh, before a military commission.

[17] By its terms, the Order purports to preclude habeas or other appellate review. The Order states:

> (1) [M]ilitary tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

MILITARY ORDER, *supra* note 6, § 7(b). The Order also requires the submission of the trial record and any conviction "for review and final decision" by the President or Secretary of Defense. *Id.* § 4(c)(8). The administration has, however, subsequently made clear that the Order does not foreclose all habeas review. *See* Gonzales, *supra* note ___ (suggesting that the "[o]rder preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried *in the United States* by a military commission will be able to challenge the lawfulness of the commission's *jurisdiction* through a habeas corpus proceeding in a federal court") (emphasis added). The carefully crafted analysis offered by the White House Counsel suggests that the Order contemplates habeas review as envisioned in *Quirin*; and as limited in *Eisentrager*.

[18] *See Ex parte* Quirin, 317 U.S. 1, 24-25 (1942) (holding that the Court retains habeas jurisdiction to review whether the petitioners were lawfully subjected to trial by military commission); *see also In re* Yamashita, 327 U.S. 1, 9 (1946) (stating that Congress "has not withdrawn [jurisdiction], and the Executive branch of the Government could not, unless there was suspension of the writ [of] . . . habeas corpus"); *id.* at 30 (Murphy, J., dissenting) (stating that the majority "fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent" by affording rights of habeas corpus and rejecting the "obnoxious doctrine asserted by the Government").

[19] *See Quirin*, 317 U.S. at 24-25 (limiting the habeas inquiry, given the scope of congressional authorization, to the determination of whether the petitioners were charged with violations of the laws of war).

[20] *See, e.g.*, Mark A. Drumbl, *Responsibility, Accountability, and Innocence: Judging the September 11 Attack*, 24 HUM. RTS. Q. 323 (2002) (suggesting that the legality of U.S. military strikes in Afghanistan turns on the characterization of the September 11 attacks. Drumbl states that it is "necessary . . . to ascertain whether the September 11 attacks constitute an armed attack (traditionally referred to as an "act of war") or a criminal attack. This categorization is relevant to determining the legality of the military strikes that began against Afghanistan on October 7, 2001.") *Id.*

[21] *See id.* ("If the September 11 attacks constitute an armed attack . . . then there may be room to justify the strikes under the language of the Charter of the United Nations . . . . However, if the attacks are instead categorized as criminal attacks, then they would be addressed by the machinery of criminal law. The use of force against Afghanistan would then appear more problematic.").

[22] *See infra* Part IV.

[23] *See id*.

[24] *See infra* Section II.B.

Order exceeds the President's constitutional authority turns, in part, on whether the Order is consistent with the Uniform Code of Military Justice (UCMJ).[25] And, as previously discussed, the jurisdictional provision of the UCMJ invoked by the President contemplates only prosecutions under the laws of war.[26] An understanding of important post-World War II developments in the laws of war might also inform the interpretation of earlier constitutional practice and doctrine. For example, the Supreme Court's decision in *Quirin* predates the United Nations Charter,[27] the Geneva Conventions,[28] and the establishment of the International Military Tribunal at Nuremberg.[29] That is, the Supreme Court's most significant analysis of the constitutionality of military commissions preceded many of the century's most important developments in the laws of war. Several of these developments might shed new light on *Quirin*. For instance, the applicability of the laws of war no longer requires a formal declaration of war–suggesting that *Quirin*'s application arguably should not be limited to these circumstances.[30] Also, the Geneva Conventions and the development of international criminal law clarified the scope of "war crimes" by identifying a limited number of "grave breaches" of the laws of war–suggesting that the alleged wrongdoing in *Quirin* might no longer constitute a violation of the laws of war.[31]

Third, these issues implicate important debates about the scope and content of international humanitarian law. Despite remarkable progress in the definition and enforcement of humanitarian norms,[32] critical areas of ambiguity persist in the laws of war.[33] As discussed below, it is unclear the extent to which international humanitarian law regulates internal strife and non-state actors.[34] The

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[25] 10 U.S.C. § 801 et seq.

[26] 10 U.S.C. § 821 (1994).

[27] *See* U.N. CHARTER art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); *Id.* Art 51 (authorizing the use of force in self-defense); *Id.* Art 55(c), 56 (establishing the obligation to respect and ensure respect for human rights).

[28] *See* Geneva Conventions of 1949 for the Protection of War Victims, Aug. 12, 1949, 6 U.T.S. 3114, 75 U.N.T.S. 3 [hereinafter Geneva Conventions]. The Geneva Conventions consist of four treaties: 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 Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; 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 Geneva Convention III]; 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 Geneva Convention IV].

[29] *See* Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government for the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280 (hereinafter LONDON CHARTER); International Military Tribunal (Nuremberg), Judgment and Sentences (Oct 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 331-33 n.13 (1947).

[30] *See* Geneva Conventions, *supra* note 28, art. 2; *see also* ADAM ROBERTS & RICHARD GEULFF, DOCUMENTS ON THE LAWS OF WAR 2 (2000) ("The application of the laws of war does not depend upon the recognition of the existence of a formal state of 'war,' but (with certain qualifications) comprehends situations of armed conflict whether or not formally declared or otherwise recognized as 'war.'").

[31] "Grave breaches" are serious violations of the law of war committed against "protected persons" under the Geneva Conventions of 1949. *See* Geneva Convention I, *supra* note 28, art. 50; Geneva Convention II, *supra* note 28, art. 51; Geneva Convention III, *supra* note 28, art. 130; Geneva Convention IV, *supra* note 28, art. 147.

[32] *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001); JORDON PAUST, ET AL., INTERNATIONAL CRIMINAL LAW (2d ed. 2001); KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2001).

[33] *See infra* Part II.

[34] *See infra* Sections III.A, III.C.

September 11 attacks are, then, an important case study in the application of the laws of war to acts and actors traditionally considered beyond the scope of humanitarian law.[35] The importance of these issues is accentuated because this is an extraordinary moment in the development of international humanitarian law. The violations of the norms governing internal armed conflict now serve as a basis for individual criminal liability in a number of fora including national courts,[36] the ad hoc international criminal tribunals established by the U.N. Security Council,[37] and the International Criminal Court Treaty.[38]

In this Article, I examine these issues by analyzing the triggering conditions and substantive reach of the laws of war. The central inquiry of this Article therefore is whether the September 11 attacks violated the laws of war; and, if so, whether these violations constitute war crimes. United States law—as reflected in Supreme Court precedent, the Uniform Code of Military Justice (UCMJ), and the Military Order itself—authorizes military commissions to try individuals accused of violating the laws of war.[39] While the September 11 attacks were unquestionably serious crimes under domestic and international law, many commentators maintain that they were not violations of the law of war.[40] These

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[35] *See infra* Parts III, IV.

[36] *See infra* Sections I.C.2; II.C.

[37] *See* U.N. S.C. Res. 808, *annexed to* Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Report by the Secretary-General, 48th Sess., Annex, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

[38] *See* Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 52d Sess., Annex II, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., 1998) (hereinafter ICC Statute). On July 17, 1998, a Statute for an International Criminal Court was adopted by a vote of 120 to 7, with twenty-one countries abstaining. *See* Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, *in* THE INTERNATIONAL CRIMINAL COURT 1, 14-39 (Roy S. Lee ed., 1999) (describing the Rome Conference). For an account of the vote, see Lee, *supra*, at 26. The Rome Statute entered into force in July 2002, after the deposit of the sixtieth instrument of ratification. *See* Rome Statute, *supra*, art. 126(1).

[39] As previously discussed, military commission jurisdiction extends beyond law of war violations. *See, e.g.*, 10 U.S.C. § 904 (1994) (stating that military commissions may impose the death penalty for the crime of "aiding the enemy"); 10 U.S.C. § 906 (1994) (stating that military commissions may try the crime of spying during wartime); MILITARY ORDER OF NOVEMBER 13, 2001, *supra* note 6, § 1(E) (referring to the application of "other applicable laws by military tribunals"); *see also* Bradley & Goldsmith, *Validity of Military Commissions*, *supra* note 9, at 257 . None of these more specialized provisions, however, seems applicable to the events of September 11. *See id.*

[40] *See,e.g.*, Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 346-49 (2002); *Oversight of the Department of Justice: Preserving our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. Of the Judiciary*, 107th Cong. (2001) (statement of Neal Katyal), *available at* http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=72 ("The question of whether a terrorist can even qualify as a belligerent or engage the machinery of the 'laws of war' is itself not clear."); Drumbl, *supra* note 20; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, MICH. J. INT'L L. 677, 685 (2002) (arguing that the "al Qaeda attacks on the United States on September 11th (before the international armed conflict in Afghanistan began) cannot be privileged belligerent acts but also cannot be prosecuted as war crimes because the United States and al Qaeda cannot be 'at war' under international law."); Jordon J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH J. INT'L L. 1 (2001); INTERIGHTS, RESPONDING TO SEPTEMBER 11: THE FRAMEWORK OF INTERNATIONAL LAW (2001), *at* http://www.interights.org; Michael Howard, *What's in a Name*?, 81 FOREIGN AFF. 8 (Jan./Feb. 2002); Michael Ratner, Speech at the NYC National Lawyers Guild Meeting, *Crime Against Humanity and Not War* (Oct. 3, 2001), *available at* http://www.humanrightsnow.org; Allan Pellet,

views are certainly plausible in that the non-state actors carried out the attacks outside the context of formally declared hostilities. This view reflects the conventional wisdom that "war crimes" are typically committed by state actors in the context of formal, inter-state hostilities (or, at times, in civil wars). Unfortunately, debates about the applicability of the law of war in this context have centered on two types of questions: (1) whether the attacks are properly characterized as criminal acts or "acts of war" and (2) whether terrorist acts as such come within the purview of the laws of war. Both questions obscure more than they reveal about the scope of international humanitarian law.[41]

I argue that the laws of war applicable in non-international armed conflict govern the September 11 attacks and that the attacks violated these laws. Specifically, I claim that the nature and quality of the attacks, as well as the reaction these hostilities prompted in international organizations and national governments, strongly suggest that the attacks initiated or confirmed the existence of an "armed conflict" between the United States and an organized armed group, al Qaeda. Furthermore, I maintain that the substantive provisions of Common Article 3 of the Geneva Conventions bind the parties to this conflict and that violations of these rules constitute "war crimes." On this view, the September 11

No, This is not War!, EUR. J. INT'L L., Forum, The Attack on the World Trade Center: Legal Responses, *available at* http://www.ejil.org/forum_WTC/ny_pellet.html (2001); Robinson O. Everett; *The Law of War: Military Tribunals and the War on Terrorism*, 48 FED. LAWYER 20 (Nov./Dec. 2001) (arguing that the acts constitute violations of the law of nations but not the laws of war); *Oversight of the Department of Justice: Preserving our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. Of the Judiciary*, 107th Cong. (2001) (Nov. 28, 2001) (statement of Scott L. Silliman), *available at* http://judiciary.senate.gov/ ("My concern with regard to the legal predicate for the application of the President's military order is that violations of the law of war—the jus in bello—do not occur within a vacuum; they must by definition occur within the context of a recognized state of armed conflict. . . . [W]ith regard to the attacks of September 11th, the principal event prompting our armed response in self-defense against Osama bin Laden and the al-Qaeda organization in Afghanistan, these are clearly acts of terrorism in violation of international law, but not necessarily violations of the law of war."); Peter Spiro, *Not War, Crimes* (Sept. 19, 2001), FINDLAW'S LEGAL COMMENTARIES , *at* http://writ.corporate.findlaw.com/commentary/20010919_spiro.html (last visited on Oct. 4, 2002); ; Steven R. Ratner, The CRIMES OF WAR PROJECT, *Terrorism and the Laws of War: September 11 and its Aftermath* (Sept. 21, 2001), *at* http://www.crimesofwar.ors/expert/attack-ratner.html (last visited on Oct. 4, 2002) [hereinafter CRIMES OF WAR PROJECT] ("The events of September 11 . . . might be viewed as an armed attack on the United States. International law does not use the term *war*, since in the past that suggested the need for a declaration of war by one or both parties. The problem with calling it an armed attack is that traditionally that term has been defined as an act committed by a state or by state agents."); David Turns, Terrorism and the Laws of War: September 11 and its Aftermath (Sept. 28, 2001), THE CRIMES OF WAR PROJECT, *at* http://www.crimesofwar.org/expert/attack-turns.html (last visited on Oct. 4, 2002) ("Individuals or groups cannot be 'at war' with States, for the same reason that the September 11 attacks cannot be regarded as an 'act of war' in any legally meaningful sense. In the parlance of international law, 'armed conflict' requires two or more State belligerents, or a conflict within one State, but with a high threshold of intensity."); Marc Cogen, Terrorism and the Laws of War: September 11 and its Aftermath (Nov. 7, 2001), THE CRIMES OF WAR PROJECT, *at* http://www.crimesofwar.org/expert/attack-cogen.html (last visited on Oct. 4, 2002) (arguing that terrorists are not combatants and thus not covered by the laws of armed conflict); Surya Narayan Sinha, Terrorism and the Laws of War: September 11 and its Aftermath (Nov. 7, 2001), THE CRIMES OF WAR PROJECT, *at* http://www.crimesofwar.org/expert/attack-sinha.html(arguing that the acts are not governed by the laws of war unless attributable to a state); Gary Hart, *Sept. 11 Has Scrambled Our Concept of War*, BOSTON GLOBE, Feb. 11, 2002, at A15 ("The already fragile distinction between war and crime disappeared last September. We are now trying to fight terrorism with traditional weapons of war. But terrorism is not war; it is crime on a mass scale.").

[41] I use the terms "laws of war," "laws of armed conflict," and "international humanitarian law" interchangeably. The terms are synonymous subject to one qualification. *See* ROBERTS & GUELFF, *supra* note 30, at 1 (stating that the term "laws of war" refers to the "rules governing the actual conduct of armed conflict"). "International humanitarian law" is arguably a broader concept that includes the crimes of "genocide" and "crimes against humanity." Note that the international criminal tribunals have subject matter jurisdiction over certain "serious violations of humanitarian law" including war crimes, genocide, and crimes against humanity. *See* ICC Statute, *supra* note 38; ICTY Statute, *supra* note 37; ICTR Statute, *supra* note 37.

attacks violated the laws of war irrespective of whether another state was involved and irrespective of whether terrorism as such is governed by these laws.

Given this analysis, the military commissions contemplated in the President's Military Order have subject matter jurisdiction over any individual accused of violating the dictates of Common Article 3—the provision of the Geneva Conventions covering non-international armed conflicts—in connection with the attacks of September 11.[42] The analysis offered here suggests, however, that the Order must be construed narrowly so as not to cover "terrorism" in general. Moreover, the case for the Order's constitutionality is strongest if military commissions try only individuals accused of war crimes. I also maintain that the characterization of the attacks as "war crimes" supports a number of prosecutorial options—both domestic and international.

II. THE POTENTIALLY APPLICABLE "LAWS OF WAR"

Do the laws of war govern the September 11 attacks? Did the attacks constitute "war crimes"? These questions are difficult because they touch upon complex legal problems involving deep conceptual ambiguities in international humanitarian law. First, it is unclear under what conditions the laws of war apply. This ambiguity arises from the combination of two related developments in the laws of war: (1) The laws of war now govern *de facto* as well as *de jure* warfare and (2) the laws of war now govern internal as well as international armed conflict. Under the Geneva Conventions of 1949, the laws of war apply to any "armed conflict" between states irrespective of whether either state has formally declared war.[43] Additionally, the Geneva Conventions, in Article 3 common to the four conventions,[44] explicitly regulate internal armed conflicts—that is, conflict between states and non-state armed groups.[45] Although the regulation of *de facto* warfare necessarily involves subjective case-by-case assessments, these determinations have not proven difficult with respect to inter-state conflicts. In the context of internal conflicts, however, this ambiguous threshold of application has caused acute classification problems.[46] The central difficulty is determining the point at which an internal disturbance becomes an "armed conflict" within the meaning of international law.

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[42] *See infra* Part III. A two-step analysis is required to determine whether the conduct at issue constitutes violations of the laws of war for which, under the laws of war, individuals may be prosecuted. *See* Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001) (analyzing language in Article 18 of the UCMJ which establishes court-martial jurisdiction for violations of the laws of war). Aldykiewicz and Corn explain the nature of the jurisdictional inquiry for violations of the laws of war:

> As evident from this language, the grant of jurisdiction is not limited by the nationality of the accused, the nationality of the victim, the military status of the accused, the parties to the conflict in which the offense was committed, or the time when the offense was committed. The only requirements to trigger this grant of jurisdiction are that the act in question must be a violation of the law of war, and the law of war must provide for individual criminal responsibility for such a violation.

Id. at 81-82.

[43] *See* Geneva Conventions, *supra* note 28, art. 2.

[44] The provision is referred to as "Common Article 3" because the third article of each of the four Geneva Conventions is identical. *See id.* art. 3.

[45] *See id.* (making clear that the provision applies to conflicts involving only one state). The provision also governs conflict between two non-state armed groups. *See id.*

[46] *See, e.g.*, LINSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 67-88 (2002); JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 80-137 (1974); GEOFFREY BEST, WAR AND LAW SINCE 1945 (1994).

Moreover, it is unclear whether individual criminal liability attaches to all violations of the laws of war. Because the laws of war now prescribe a detailed code of conduct,[47] only serious violations of the laws of war are considered "war crimes."[48] Prior to the conclusion of the Geneva Conventions, the major international humanitarian law treaties did not designate whether violation of any particular provision constituted criminal conduct under the laws of war. The Geneva Conventions substantially clarified matters by identifying a number of "grave breaches" of humanitarian law, the violation of which would subject individual actors to criminal liability.[49] These provisions, however, do not explicitly cover acts committed in internal armed conflict. Nor do they govern the means and methods of waging war as such.

International and U.S. law suggest three potentially viable sources of individual criminal responsibility under the laws of war:[50] (1) "grave breaches" of the Geneva Conventions;[51] (2) serious violations of the Hague Conventions concerning the means and methods of warfare;[52] and (3) violations of Common Article 3 of the Geneva Conventions.[53] Although the September 11 attacks

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[47] *See* Yves Sandoz, *Penal Aspects of International Humanitarian Law*, *in* 1 INTERNATIONAL CRIMINAL LAW 393 (M. Cherif Bassiouni, ed., 2d ed. 1999).

[48] *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 80-110 (2nd ed. 2001); THEODOR MERON, WAR CRIMES LAW COMES OF AGE (1998); INGRID DETTER, THE LAW OF WAR 419-27 (2nd ed. 2000)

[49] *See* "Grave breaches" are serious violations of the law of war committed against "protected persons" under the Geneva Conventions of 1949. *See* The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 4, opened for signature Aug 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (Geneva Convention I); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, art. 4, opened for signature Aug 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (Geneva Convention No. II); Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, opened for signature Aug 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (Geneva Convention No. III); Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, opened for signature Aug 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (Geneva Convention No. IV). Regarding simple breaches of the respective conventions, all four conventions contain the following language: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than grave breaches defined in the following Article." Geneva Conventions I-IV, Grave Breach Provisions, *supra*.

[50] This list of war crimes is not exhaustive. Other aspects of the laws of war are clearly inapplicable under the circumstances. For example, many international instruments prohibit or limit the production, distribution and use of certain types of weapons (or weapon systems). *See, e.g.*, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight [St. Petersburg Declaration], Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474 (entered into force Dec. 11, 1868); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, reprinted in 14 I.L.M. 49 (entered into force with respect to each party to the Protocol upon the date of deposit of its ratification or act of accession) (entered into force with respect to the United States April 10, 1975); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Appendix C, [Protocol II], Oct. 10, 1980, U.N. Doc. A/CONF.95/15 (1980) (entered into force Dec. 2, 1983) (entered into force with respect to the United States Sept. 24, 1995), reprinted in 19 I.L.M. 1529; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997); Protocol [IV to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects] on Blinding Laser Weapons, Oct. 13, 1995, 35 I.L.M. 1218 (1996)

[51] Geneva Convention I, *supra* note 28, art. 49; Geneva Convention II, *supra* note 28, art. 50; Geneva Convention III, *supra* note 28, art. 129; Geneva Convention IV, *supra* note 28, art. 146. *See also* Sandoz, *supra* note 47.

[52] *See, e.g.*, Regulations Respecting the Laws and Customs of War on Land, Art. 1, annexed to Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [*hereinafter* HAGUE REGULATIONS IV].

[53] Geneva Conventions, *supra* note 28, art. 3.

violated many of the substantive prohibitions of these rules,[54] the character of the hostilities arguably places the attacks outside the field of application of these legal regimes.[55] In general, the laws of war are applicable only in the context of an international armed conflict–that is, an armed conflict between two or more nation states.[56] The full protections of the Geneva Conventions, for example, apply only to cases of "armed conflict which may arise between two or more of the High Contracting Parties."[57] The "grave breach" provisions of the Geneva Conventions, therefore, arguably apply only in the context of an "international armed conflict."[58] Similarly, the Hague Conventions (and their annexed Regulations) are applicable only "in case of war between two or more of [the Contracting Powers]."[59] Because there is no clear evidence establishing a sufficient nexus between al Qaeda and a third state (nor does the U.S. assert this claim),[60] the attacks on September 11 did not initiate an "international armed conflict;"[61] and therefore do not trigger the Geneva Conventions writ large or the Hague Conventions.

Absent proof that al Qaeda acted on behalf of a state[62] or that a state has

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[54] The September 11 attacks involved many transgressions of the substantive prohibitions of the laws of war. For example, the attacks targeted civilians as such; and, in this way, clearly violated the substantive prohibitions of: (1) the grave breach provisions by killing "protected persons" under the Geneva Conventions, Geneva Convention IV, *supra* note 28, art. 146; (2) the Hague Regulations by inflicting unnecessary death and suffering on the target population, HAGUE REGULATIONS IV, *supra* note 52, art. 23; and (3) Common Article 3 by purposely killing non-combatants. Geneva Conventions, *supra* note 28, art. 3.

[55] *See infra* text accompanying notes ___ - ___ .

[56] *See generally* EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION (1992).

[57] Geneva Conventions, *supra* note 28, art. 2.

[58] *See* DETTER, *supra* note 48, at 419-23

[59] HAGUE REGULATIONS IV *supra* note 52, art. 2.

[60] *See* Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946, *at* http://www.un.int/usa/s-2001-946.htm. The Security Council meeting is reported in Christopher S. Wren, *U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5. In addition, the United States had a strong incentive to demonstrate that al Qaeda acted on behalf of the Taliban—such a link to the state would have made the case for U.S. military intervention much stronger. In fact, the United Kingdom Foreign Office tried to make the factual case since the United States had not done so. *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001* (Nov. 14, 2001), *at* http://www.fco.gov.uk/news/newstext.asp?5556. This updated a previous report of the same title (Oct. 4, 2001), *at* http://www.number-10.gov.uk/news.asp?NewsId=2686. It contained no direct information linking Afghanistan or terrorist groups in that country to the September 11 attacks. *See* Warren Hoge, *Blair Says New Evidence Ties bin Laden to Attacks*, N.Y. TIMES, Nov. 15, 2001, at B5; Patrick E. Tyler, *British Detail bin Laden's Link to U.S. Attacks*, N.Y. TIMES, Oct. 5, 2001 at A1; *Britain's Bill of Particulars: 'Planned and Carried out the Atrocities'*, N.Y. TIMES, Oct. 5, 2001 at B4; *NATO Calls Evidence About Bin Laden Solid*, N.Y. TIMES, Oct. 2, 2001 at A2; John F. Burns with Terence Neilan, *Pakistan Says the Evidence Ties bin Laden to the Attacks*, N.Y. TIMES (Oct. 4, 2001).

[61] Geneva Conventions, *supra* note 28, art. 2.

[62] States are not strictly liable for wrongs emanating from their territory. SIR ROBERT JENNINGS QC AND SIR ARTHUR WATTS QC, I OPPENHEIM'S INTERNATIONAL LAW 502-03 (9th ed. 1992). The actions of non-state actors may, nevertheless, be attributed to states if the state exercises "effective control" over the private actors. *See* Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, at paras. 86-93; Prosecutor v. Tadic, Case No. IT-94-1-A (Judgment on Appeal) (Int'l Crim. Trib. For Former Yugoslavia [Appeals] Chamber July 15, 1999), paras. 137-38 (adopting an "overall control" test); Draft Articles on Responsibility of States for internationally wrongful acts, art. 8, available at http://www.un.org/law/ilc/texts/state_responsibility/responsibility_articles(e).pdf (last visited Oct. 14 2002), vi ("The conduct of a person or group of persons shall be considered an act of a State under international law if: the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority."). Although the United States has repeatedly suggested that the Taliban "harbor" and "facilitate" al Qaeda, these assertions do not amount to the formal attribution of al Qaeda's acts to the Taliban. *See* Mark A. Drumbl,

recognized al Qaeda as a "belligerent,"[63] the only potentially applicable body of law is the law of war governing internal armed conflicts. Principally embodied in Common Article 3 of the Geneva Conventions, these rules define the minimum humanitarian norms applicable in "armed conflicts not of an international character."[64] Although a casual reading of the provision strongly suggests that it governs the September 11 attacks, several complications arise in the course of sustained analysis.

Indeed, many commentators have explicitly or implicitly argued that Common Article 3 does not cover such situations. Three types of criticisms predominate. First, the events of September 11 arguably did not occur in the context of an "armed conflict" within the meaning of the Geneva Conventions.[65] Second, Common Article 3 arguably does not govern internal armed conflict between a foreign terrorist organization and a state.[66] Third, Common Article 3, even if applicable, arguably does not impose individual criminal liability; and, thus, could not serve as the basis for prosecuting the perpetrators of the September 11 attacks.[67]

Assuming that the U.S. cannot demonstrate that al Qaeda acted on behalf of Afghanistan (or any other state), might the law of war nevertheless prohibit the September 11 attacks? Although the laws of war unquestionably govern the conduct of hostilities in non-international armed conflicts to some extent, the central problem is whether this regime reaches the September 11 attacks. That the laws of war cover some instances of internal armed conflict is established and reflected in numerous positive sources of law including Common Article 3 of the Geneva Conventions,[68] Additional Protocol I to the Geneva Conventions,[69] Additional Protocol II to the Geneva Conventions,[70] the statutes of the ad hoc international criminal tribunals established by the U.N. Security Council,[71] the statute of the International Criminal Court,[72] formal U.S. military policy,[73] and

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Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries in the International Legal Order, 81 N.C. L. REV. 1, 27-30 (2002).

[63] Traditionally, the international law doctrine of "recognition of belligerency" triggered the application of the laws of war in non-international armed conflicts. *See infra* text accompanying notes 80-88. In its classical formulation, this doctrine transformed an internal conflict into an international conflict if a state formally recognized the non-state group. *See* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 270-272 (1947). No state has, needless to say, recognized al Qaeda; and, moreover, any such recognition would arguably constitute an act of aggression against the United States.

[64] Geneva Conventions, *supra* note 28, art. 3.

[65] *See supra* note 40 (collecting citations); *infra* Sections III.A, III.B.

[66] *See infra* Section III.C.2.

[67] *See infra* Section III.C.1.

[68] *Id.*

[69] *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1(4), 1125 U.N.T.S. 3, 7 [hereinafter Protocol I].

[70] *See* Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

[71] *See* ICTY Statute, *supra* note [37], art. 4; ICTR Statute, *supra* note [37], art. 3. *See, e.g.*, Prosecutor v. Tadic (a/k/a "Dule"), Case No. IT-94-1-AR72, para. 87 (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) (Int'l Crim. Trib. For Former Yugoslavia Appeals Chamber [hereinafter Tadic Appeal], *reprinted in* 35 I.L.M. 32 (1996); Prosecutor v. Jelisic, Case No. IT-95-10 (Judgment) (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber Dec. 4, 1999), *available at* http://www.un.org/icty/brcko/trialc1/judgement/jel_ tj991214e.htm; Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Judgment) (Int'l Crim. Trib. For Rwanda Trial Chamber Sep. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998); Prosecutor v. Case Kambanda, No. ICTR-97-23-S (Judgment and Sentence) (Int'l Crim. Trib. For Rwanda Trial Chamber Sept. 4, 1998), *reprinted in* 37 I.L.M. 1411 (1998); Prosecutor v. Furundzija, Case No. IT-95-17/1-T (Judgment) (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber Dec. 10, 1998 Dec. 10, 1998) , *reprinted in* 38 I.L.M. 317 (1999).

[72] *See* ICC Statute, *supra* note 38, art. 8.

U.S. legislation prohibiting war crimes.[74] The weight of legal authority strongly suggests that the applicability of humanitarian law in internal conflicts is now customary international law.[75]

Much of this law, however, is arguably inapplicable, as a formal matter, in criminal prosecutions brought by the U.S. government under the laws of war. Of course, some of these sources do not purport to regulate directly the conduct at issue.[76] Moreover, some of the identified treaty law is not binding on the United States–that is, the U.S. is not party to either of the Protocols to the Geneva Conventions;[77] nor is it party to the International Criminal Court.[78] The U.S. is, of course, a party to the four Geneva Conventions, making Common Article 3 of these treaties an unassailable source of the laws of war applicable in the military commissions. Indeed, the U.S. War Crimes Act specifically authorizes federal criminal prosecutions of non-nationals for violations of Common Article 3.[79]

Traditionally, the laws of war did not apply to non-international armed conflicts.[80] Prior to the 1949 Geneva Conventions no international agreements purported to regulate internal conflicts.[81] That is, these conflicts—even when involving sustained, organized, and intense violence—were exclusively governed by domestic law.[82] Indeed, any interference by another state in such matters would have been deemed an unlawful intrusion into the internal affairs of the state[83] and might have been considered an act of war.[84] There was, in fact, only one exception to this "radical separation" between international and internal armed conflicts.[85]

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[73] See DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (Dec. 9, 1998). The directive states, in part: "The heads of the DOD Components shall: Ensure that the members of their Components comply with the law of war during all conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations." *Id.* paras. 5.1, 5.3. *See also* Timothy P. Bulman, *United States Law of War Obligations in Military Operations Other than War*, 159 MIL. L. REV. 152 (1999).

[74] *See* War Crimes Act, 18 U.S.C. § 2441(c) (2000) (criminalizing violations of Common Article 3).

[75] *See* Theodor Meron, *War Crime Law Comes of Age*, 92 AMER. J. INT'L L. 462 (1998).

[76] For example, the ICC Statute entered into force in July 2002, and, by its terms does not have retroactive effect. *See* ICC Statute, *supra* note [38] . In addition, neither of the ad hoc tribunals would have jurisdiction over these acts since their jurisdiction is limited territorially. *See* ICTY Statute, *supra* note [37], art. 1; ICTR Statute, *supra* note [37], art. 1.

[77] The U.S. has not ratified the Additional Protocols. *See* Letter of Transmittal of Protocol II to the Senate by President Reagan, S. TREATY DOC. NO. 2, 100th Cong. at III (1987), *reprinted in* 81 AMER. J. INT'L L. 910 (1987); Abraham D. Sofaer, *Agora: The U.S. Decision Not To Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (cont'd)*, 82 AMER. J. INT'L L. 784 (1988); George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AMER. J. INT'L L. 1 (1991).

[78] The U.S. is not a party to the ICC treaty, nor is it likely to be. *See* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW (Sarah B. Sewall & Carl Kaysen eds., 2000); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999) (outlining the Clinton Administration's objections to the Rome Statute).

[79] 18 U.S.C. § 2441(c) (2000).

[80] *See, e.g.*, Rosemary Abi-Saab, *Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern, in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 209, 210-11 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

[81] *See* MOIR, supra note 46, at 19 ("Before the mid-twentieth century . . . no international agreement applied to anything other than purely international conflicts."); *see also* G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 16-17 (1958); Georges Abi-Saab, *Non-International Armed Conflicts, in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 217 (1988).

[82] *See* MOIR, *supra* note 46, at 4 ("No international restraints on conduct were applicable, and the rebels had no rights or protection in international law . . . ."); HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 23-24 (1988); Richard A Falk, *Janus Tormented: The International Law of Internal War, in* INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 197 (James N. Roseneau ed., 1964)

[83] *See, e.g.*, Abi-Saab, *supra* note 81, at 217.

[84] *See, e.g.*, ERIK CASTRÉN, CIVIL WAR 175-81 (1966).

[85] Abi-Saab, *supra* note 81, at 217.

Under customary international law, the laws of war governed internal conflicts only if an established state recognized the "belligerency" of the non-state armed group.[86] This doctrine of "recognition of belligerency," however, applied to a narrow range of internal conflicts[87] and was very rarely invoked.[88]

Although states resisted any international regulation of internal strife,[89] the sharp legal distinction between international and internal armed conflicts belied the humanitarian reality that internal conflicts were "no less frequent, brutal, or devastating" than international conflicts.[90] Moreover, the normative foundations of the laws of war were shifting in the late nineteenth and early twentieth centuries. In this period, principles of humanity and concern for human rights assumed a fundamental role in the development of the laws of war.[91] This "humanization of humanitarian law" made it increasingly difficult to justify the distinction between international and internal conflicts.[92]

This regulatory gap nevertheless persisted until the end of World War II despite the considerable efforts of the International Committee of the Red Cross (ICRC) and the Institute of International Law (IIL) to draft and promote rules applicable in all armed conflicts.[93] The atrocities perpetrated by the Nazi regime before and during World War II clearly demonstrated that internal matters presented grave threats to humanitarian principles.[94] The Spanish Civil War, which broke out in 1936, also made clear that the "recognition of belligerency" doctrine inadequately regulated internal armed conflicts.[95] Against the backdrop of these events and the general humanitarian trajectory of the laws of war,[96] broad support for some sort of international regulation of internal armed conflicts crystallized prior to the Diplomatic Conference in Geneva.[97]

The remaining questions were: (1) which internal conflicts merited international protection, and (2) how much. The final text of Common Article 3 reflects the preferences of states on these two issues. Proper interpretation of the text and its drafting history requires analysis of the negotiations concerning each of these concerns. Proposals submitted to the Diplomatic Conference vary along both axes; as a consequence the rejected drafts of the provision have two moving parts: (1) the field of application (to which conflicts should the provision apply); and (2) the substantive obligations applicable within this field (what rules should apply in these conflicts).

The original draft of what would become Common Article 3, as proposed by the ICRC, would have made the entirety of the Geneva Conventions applicable

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[86] *See* MOIR, *supra* note 46, at 3-18.
[87] *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 249 (H. Lauterpacht ed., 1.
[88] MOIR, *supra* note 46, at 14-21; James W. Garner, *Recognition of Belligerency*, 32 AM. J. INT'L L. 106 (1938).
[89] MOIR, *supra* note 46, at 21.
[90] Abi-Saab, *supra* note 81, at 217.
[91] *See generally* MERON, *supra* note 48.
[92] *See, e.g.*, Meron, *supra* note 75; MOIR, *supra* note 46, at 18-21.
[93] *See* COMMENTARY ON III GENEVA CONVENTION REALATIVE TO THE TREATMENT OF PRISONERS OF WAR at 31-34 (Jean S. Pictet ed., 1960) [hereinafter ICRC COMMENTARY III]; Abi-Saab, *supra* note 81, at 218-20; MOIR, *supra* note 46, at 19-22.
[94] *See, e.g.*, RATNER & ABRAMS, *supra* note 32, at 5-14 (describing the importance of these events for the development of international humanitarian law).
[95] *See* NORMAN J. PADELFORD, INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE 18 (1939); Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398 (1937); LAUTERPACHT, *supra* note 63, at 270-74.
[96] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).
[97] *See, e.g.*, Abi-Saab, *supra* note 81, at 219 (stating that prior to the drafting of the Geneva Conventions, "[i]t was strongly felt that a minimum of humanitarian legal regulations should apply in all armed conflicts, regardless of their internal or international character.").

to all internal armed conflicts.[98] In fact, this version was proposed not as a discrete article but rather as the final paragraph of Common Article 2 (the provision defining the Conventions' scope of application). The original ICRC draft provided:

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status.[99]

The Diplomatic Conference rejected this "maximalist" approach because it insufficiently protected the sovereign prerogatives of states.[100] This approach, it was argued, "would amount to [a] mandatory and automatic recognition of belligerency."[101] States, it was clear, were unwilling to eliminate the legal distinction between internal and international conflicts altogether. Delegations proposed two types of alternatives to the initial ICRC draft.[102] One approach sought to limit the application of the provision to a very narrow range of conflicts, while retaining the broad substantive scope of the ICRC draft.[103] On this view, the normative commitments of the Conventions should apply to internal conflicts that closely resembled inter-state conflicts (such as the Spanish Civil War). A second approach sought to apply a more limited set of substantive principles to a much broader range of conflicts.[104] On this view, certain core principles of the Conventions should apply to all armed conflicts. In short, some proposals adopted the ICRC draft's approach on applicable rules but made these rules applicable in only the most severe internal conflicts. Other proposals adopted the ICRC draft's approach on scope of application but identified only a few core principles applicable in these conflicts.

The Diplomatic Conference, in the final text of Common Article 3, adopted the latter approach.[105] It provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to

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[98] *See, e.g.*, ICRC COMMENTARY III, *supra* note 93, at 31; Abi-Saab, *supra* note 81, at 219.
[99] ICRC COMMENTARY III, *supra* note 93, at 31.
[100] Abi-Saab, *supra* note 81, at 220; *see also* ICRC COMMENTARY III, *supra* note 93, at 32-33.
[101] Abi-Saab, *supra* note 81, at 220; *see also* ICRC COMMENTARY III, *supra* note 93, at 33.
[102] There were other approaches, though these proposals did not receive significant support in the Conference. *See* ICRC COMMENTARY IV, *supra* note 28, at 31-33.
[103] *See* II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE, *supra* note 212, at 34-54; *see also* Abi-Saab, *supra* note 81, at 218-21; MOIR, *supra* note 46, at 21-31.
[104] *Id.*
[105] Geneva Conventions, *supra* note 28, art. 3; ICRC COMMENTARY III, *supra* note 93, at 31-34.

> the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[106]

This provision, the "Convention within the Conventions"[107] or the "Convention in miniature,"[108] establishes minimum humanitarian protections applicable in "armed conflicts not of an international character."[109] It prohibits certain acts—including murder, torture, and inhuman treatment—directed against "persons taking no active part in hostilities."[110] Although the protections are limited and described only in general terms, the prohibitions unquestionably capture much of the most heinous conduct that has characterized armed hostilities.[111] The provision requires that parties collect and provide care to the wounded and sick.[112] It also provides for international supervision of internal conflicts.[113] In addition, it is important to note that the provision does not purport to regulate, in any direct way, the means and methods of warfare; nor does it proscribe "terrorism" as such.

By its terms, Common Article 3 imposes these obligations on *all parties to the conflict*, including non-state armed groups.[114] Although there is no meaningful dispute on this point,[115] the legal rationale for imputing this obligation to non-state

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[106] Geneva Conventions I-IV, *supra* note 28, art. 3.
[107] Abi-Saab, *supra* note 81, at 221.
[108] *Id.*; Gerald I.A. D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 264 (1983).
[109] Geneva Conventions, *supra* note 28, art. 3.
[110] Therefore, in one sense Common Article 3 identifies a category of "protected persons." That is, the conceptual structure of the provision is similar to that of the Conventions as a whole (which establish an elaborate code protecting certain categories of "protected persons, such as "prisoners of war," and "civilians"). This similarity prompted the United States to suggest that the "grave breach" provisions of the Conventions, which criminalize certain acts directed against "persons protected by the Conventions," are also applicable to Common Article 3 violations. *See* Amicus Curiae Brief of the United States submitted to the ICTY in the *Tadic* case (1995) (on file with author). Despite the textual plausibility of this view, the drafting history of Common Article 3 and many commentators suggest otherwise. *See generally* MOIR, *supra* note 81, at 31-67.
[111] *See, e.g.*, Tom Farer, *Humanitarian Law and Armed Conflicts: Toward a Definition of "International Armed Conflict*," 71 COLUM. L. REV. 37 (1971).
[112] Geneva Conventions, *supra* note 28, art. 3(2).
[113] *Id.* art. 3(3).
[114] *Id.* art. 3.
[115] *See* MOIR, *supra* note 46, at 53-54.

actors may imply other limits on the type of actors subject to the provision.[116] The difficulty is in identifying an adequate legal basis for imposing obligations directly on actors not party to the treaty—indeed, actors without international legal personality.[117] The prevailing view is that the treaty obligations of private armed groups are derivative of the state's treaty obligations.[118] That is, the state's consent to the treaty regime binds all actors subject to the authority of the state. Although some commentators suggest that a state's acceptance of treaty obligations binds only its *nationals*, this limitation seems unwarranted. The "nationality principle" is, after all, but one ground upon which a state may exercise lawful authority over individuals or organizations. For example, states may exercise criminal jurisdiction over acts committed on its territory or directed against its nationals.[119]

The text of Common Article 3 also makes clear that its applicability in no way affects the "legal status" of the parties to the conflict. That is, the application of the provision does not constitute, as a formal matter, "recognition of the belligerency" of the armed group. Moreover, the applicability of the provision does not confer on the non-state armed group "combatant" status. As a consequence, states may subject members of the armed group to domestic criminal prosecution *for mere participation in hostilities*, even if the conflict is conducted in accordance with the laws of war.[120]

* * * * * *

The September 11 attacks clearly violated the substantive provisions of Common Article 3. Although these provisions do not prohibit "terrorism" as such, many "terrorist acts" may also be classified as violations of Common Article 3. Common Article 3 therefore provides a potentially viable basis for characterizing the September 11 attacks as war crimes. The unresolved issues are: (1) whether Common Article 3 is applicable to the attacks, and (2) whether Common Article 3 establishes individual criminal liability for the perpetrators. In this Section, I address each of these issues. I will also address several common objections to the sort of expansive reading of Common Article 3 advanced here. One conceptual difficulty is how best to characterize these objections. Most of these objections either go to the nature of the conflict (the material field of application of Common Article 3), the status of the participants in the conflict (*ratione personae*), or the status of the provision itself in international criminal law (the legal consequences of prohibited conduct).

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[116] *See id*. at 52-53.

[117] For a summary of the debate, see id. at 52-58 (summarizing the debate).

[118] *See, e.g., id.* at 53 (characterizing this view as the "legal justification most commonly advanced").

[119] The nationality and "passive personality" principles are two examples of recognized jurisdictional doctrines. *See* RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 402(2), cmt. a (1987) ("International law recognizes links of ... nationality, Subsection (2), as generally justifying the exercise of jurisdiction to prescribe."); *Id.* cmt. g. ("The passive personality principle asserts that a state may apply law--particularly criminal law--to an act committed outside its territory by a person not its national where the victim of the act was its national.").

[120] Although Common Article 3 does not preclude such prosecutions, neither does it authorize them. As a consequence, any such prosecution would be brought under domestic law and not under the laws of war. This is an important point because it suggests that the law of war applicable in internal armed conflicts does not proscribe the very act of taking up arms against the state. Therefore, absent proof of an international armed conflict, al Qaeda terrorist could not be prosecuted *under the laws of war* for attacking the United States as "unlawful combatants." Whether the laws of war applicable in international armed conflicts classifies such conduct as a "war crime" is, in my view, an open question. The question is whether the Geneva Convention concerning Prisoners of War (and the grave breaches regime in general) supercedes or otherwise clarifies the "unlawful combatant" regime of the Hague Conventions. *See* Geneva Convention III, *supra* note 4, art. 4.

Objections to the applicability of Common Article 3 often conflate—or worse yet, confuse—these distinct issues. Moreover, many common assertions of law underspecify the grounds justifying the stated conclusion. For example, the claim is often advanced that non-state actors cannot commit violations of the laws of war. This claim is difficult to parse because it could derive in part from any of the following (demonstrably false) premises: (1) hostilities involving non-state actors do not constitute "armed conflict" within the meaning of the law of war; (2) non-state actors are not accountable as such under the law of war; or (3) non-state actors are not criminally liable under the law of war.

So as to minimize confusion, I will assess the case for Common Article 3 subject matter jurisdiction through a systematic examination of the elements of such a claim. I will, therefore, address potential objections as they pertain to the existence or non-existence of an essential element of the case for Common Article 3. I will not, for example, address in just one section of this paper the relevance of non-state actors or the absence of a "civil war." Because these issues arise in a number of contexts (in slightly different form and with varying degrees of plausibility), I will organize my remarks around the affirmative case for Common Article 3 subject matter jurisdiction and address relevant criticisms as necessary.

Toward this end, I will first discuss whether the necessary conditions for the application of Common Article 3 are present in this case. Thereafter, I will discuss whether the group responsible for the attack is the sort of organizational entity governed by Common Article 3. Finally, I will assess whether individuals committing violations of Common Article 3 are subject to individual criminal liability under prevailing international humanitarian law.

III. COMMON ARTICLE 3 AND SEPTEMBER 11

Two contextual requirements define the field of application of Common Article 3: (1) the existence of an armed conflict; and that (2) this armed conflict is "not of an international character."[121] Although it may appear that only the first of these issues merits sustained reflection (after all, one may suggest that armed conflict–once established–must be either "international" or "not international"), this is arguably an oversimplification. Several common objections to expansive interpretations of Common Article 3 should be addressed. For example, some evidence suggests that Common Article 3 applies only to civil wars.[122] Furthermore, textual ambiguity in the provision raises some questions about whether it applies to transnational armed conflict.[123]

A. The Existence of an "Armed Conflict"

The first issue is whether the September 11 attacks were the initiation of an "armed conflict" within the meaning of the Geneva Conventions. Clearly, the attacks do not fit neatly in prevailing conceptions of "war" or "armed conflict." The attacks were carried out by a transnational criminal organization that does not appear to act on behalf of any state. The attacks were sporadic and infrequent, even if intense and intricately planned. The armed group responsible for the attacks does not seek to administer or control any part of U.S. territory, nor have they articulated any specific political objectives (other than the "destruction of the United States").

The difficulty of classifying the attacks is made clear by organizing these considerations under important jurisdictional categories in humanitarian law.

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[121] Geneva Conventions, *supra* note 28, art. 3.
[122] *See infra* Section III.B.1
[123] *See infra* Section III.B.2.

Because al Qaeda did not act on behalf of a state, the conflict was not an "international armed conflict" on September 11.[124] Because al Qaeda neither controls nor seeks to control territory in the United States, the conflict is not a classical "internal" armed conflict.[125] Moreover, because al Qaeda neither challenges the legitimate authority of the United States government within its territory nor suggests that the United States exercises illegitimate dominion over any other territory, the hostilities are not part of a "war of national liberation."[126]

In addition to the conceptual complications, characterizing the hostilities as an "armed conflict" within the meaning of humanitarian law raises serious policy concerns. Ascribing "belligerent" or "combatant" status to al Qaeda might invest members of the group with certain rights and privileges under the laws of war.[127] The "armed conflict" characterization might also symbolically aggrandize al Qaeda by suggesting that the United States considers the armed group much more than a sinister criminal organization.[128] Finally, the "armed conflict" characterization might immunize al Qaeda members from prosecution for proportional attacks directed against military targets.[129]

Because of these considerable complications, the attacks are not easily classified under either classical conceptions of "war" or contemporary conceptions of "armed conflict." Nevertheless, the attacks do exhibit several characteristics of armed conflict including their purpose, coordination, and intensity. It is important to note that the complications encountered in this case are arguably endemic to the *de facto* classification regime of the Geneva Conventions.

There is, as yet, no settled definition of "armed conflict" in international law and unguided case-by-case analysis has often produced unsatisfying results. These problems are most acute in the context of putative internal armed conflicts (or conflicts "not of an international character") because internal unrest is commonplace and states resist the application of international humanitarian law in domestic matters.[130] Indeed, the coherence of the "armed conflict" concept turns on the viability of the distinction between internal disturbances or insurrections and internal armed conflicts–the former being governed by domestic law (as conditioned by international human rights law) and the latter governed by the laws of war.[131]

In this Part, I identify and analyze several factors bearing on the classification of hostilities between a state and an armed group. These factors include: the reactions of the parties to the hostilities; the international community's reaction; the nature and quality of the hostilities; and the organizational characteristics of the armed group. Systematic application of these factors strongly supports classifying the September 11 attacks as the initiation of an "armed conflict."

1. The Ambiguity of the "Armed Conflict" Threshold

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[124] *See supra* text accompanying notes 62-63.
[125] *See generally* CASTRÉN, *supra* note 84 (providing many examples).
[126] *See generally* WILSON, *supra* note 82 (describing these hostilities).
[127] *See, e.g.*, David J. Scheffer, *Reality Check on Military Commissions*, CHRISTIAN SCI. MONITOR, Dec. 10, 2001, at 11.
[128] *See id.*
[129] *See, e.g., id.*
[130] *See, e.g.*, MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA (1999); DONALD M. SNOW, UNCIVIL WARS: INTERNATIONAL SECURITY AND THE NEW INTERNAL CONFLICTS (1996).
[131] *See, e.g.*, Farer, *supra* note 111.

By its terms, Geneva law is applicable in situations amounting to "armed conflict." Common Article 2 provides that the Geneva Conventions are applicable in all cases of international armed conflict.[132] Common Article 3 provides that in "armed conflicts not of an international character" each party to the conflict shall observe certain minimum standards.[133] The laws of war, however, do not provide an authoritative definition of "armed conflict."[134] Substantial evidence suggests, in fact, that the drafters of the Geneva Conventions purposely avoided any rigid formulation that might limit the law's field of application.[135] In the context of Common Article 2, this purposeful ambiguity has not presented significant difficulties.[136] Hostilities between states are, for the most part, governed by the laws of war irrespective of the intensity, duration, or scale of the conflict. The application of Common Article 3, on the other hand, has proven problematic.[137]

Despite the textual similarity between the two provisions, divergent patterns of state practice and sound policy concerns necessitate reading the "armed conflict" requirement of Common Article 3 somewhat more stringently. Common Article 2 purports to regulate only conflicts between two or more entities with international legal personality–namely, states and, perhaps, "recognized belligerents." Common Article 3, on the other hand, purports to regulate conflicts between states and sub-state armed groups even if the conflict is confined to the territory of one state. Because Common Article 3 purports to regulate internal matters, the conditions of its applicability should be carefully construed to extend only to matters of international concern.

Of course, there is considerable legal authority establishing that the promotion and protection of fundamental human rights are always and everywhere matters of international concern. Moreover, there has been considerable convergence between the substance of international humanitarian law and international human rights law.[138] Nevertheless, defining the threshold of applicability for the laws of war presents several unique concerns because international humanitarian law differs from human rights law in several important respects. First, the humanitarian ambitions of the laws of war are far more modest than those of international human rights law.[139] That is, the laws of war aspire to protect humanitarian values within the context of organized hostilities typically involving intense and sustained violence. Unquestionably, human rights law has a much more ambitious regulatory agenda. Second, the laws of war directly regulate the conduct of non-state actors.[140] Although substantial evidence suggests that human rights law is evolving to cover private conduct in some circumstances,[141] current human rights treaties directly regulate state action.[142]

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[132] Geneva Conventions, *supra* note 28, art. 2.

[133] *Id.* art. 3.

[134] MOIR, *supra* note 46, at 31-34 ; ICRC COMMENTARY III, *supra* note 93, at 31-33.

[135] ICRC COMMENTARY III, *supra* note 93 (stating that there was a "deliberate avoidance of a definition in Article 3"); CASTREN, supra note 84, at 85 ("The Convention deliberately avoids defining a conflict devoid of international character, primarily because this could lead to restrictive interpretation.").

[136] ICRC COMMENTARY III, *supra* note 93, at 31.

[137] *See* MOIR, *supra* note 46, at 31; Abi-Saab, *supra* note 81, at 221; G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 264 (1983); BOND, *supra* note 46, at 80-81.

[138] *See* Meron, *Humanization of Humanitarian Law*, *supra* note 96.

[139] *See, e.g.*, *id.*; JEAN S. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 14-15 (1975).

[140] *See, e.g.*, Geneva Conventions, *supra* note 28, art. 3; Geneva Convention I, *supra* note 28, art. 49; Geneva Convention II, *supra* note 28, art. 50; Geneva Convention III, *supra* note 4, art. 129; Geneva Convention IV, *supra* note 28, art. 146; ICC Statute, *supra* note 38, art. 8.

[141] *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001); David Weissbrodt, *Principles Relating to the Human Rights Conduct of Companies: Working Paper*, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., para. 16, U.N. Doc.

Third, serious violations of the laws of war give rise to individual criminal liability.[143] And, finally, violations of the laws of war come within the subject matter jurisdiction of special national[144] and international tribunals.[145]

The definition of "armed conflict" in Common Article 3, as the factual predicate for the operation of the laws of war in non-international hostilities, should both reflect the Geneva Conventions' humanitarian purposes *and* respect the national sovereignty of states. Balancing these often competing objectives is necessary because the international regulation of internal armed conflict is both necessary and potentially problematic. An international regime is necessary because of the prevalence and intensity of internal armed conflicts.[146] Indeed, the "evils of war" are now most often wrought in non-international hostilities.[147] The humanitarian mission of the laws of war clearly requires the inclusion of internal armed conflict in its material field of application. An international regime is, nevertheless, potentially problematic because over-application of these rules may erode the sovereign right of each state to suppress internal disturbances and maintain public order.[148] Recall that the applicability of the laws of war has important legal and political consequences, including: (1) direct international supervision;[149] (2) symbolic designation of an armed opposition group as a "party" under international humanitarian law;[150] (3) potential displacement of domestic criminal law;[151] and (4) the triggering of international criminal jurisdiction[152] (including perhaps "universal" criminal jurisdiction).[153] The nature of the regime and the interests it protects makes under- and over-regulation normatively unattractive.

The question, however, remains: What conflicts does Common Article 3 cover? As previously discussed, the text of the provision provides little guidance. In fact, the ambiguity of the phrase has proven frustrating for international jurists. As one noted scholar remarked: "One of the most assured things that might be said about the words 'armed conflict *not of an international character*' is that no one can say with assurance precisely what meaning they were intended to convey."[154] Indeed, the text is useful only in that it identifies the type of conflicts it does not cover—identifying its field of application as "armed conflicts *not* of an international character."[155]

E/CN.4/Sub.2/2000- WG.2/WP.1 (2000).

142 *See, e.g.*, International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 1 (1978), 999 U.N.T.S. 171, art. 2(1).

143 *See, e.g.*, Geneva Conventions, *supra* note 28, art. 3; Geneva Convention I, *supra* note 28, art. 49; Geneva Convention II, *supra* note 28, art. 50; Geneva Convention III, *supra* note 4, art. 129; Geneva Convention IV, *supra* note 28, art. 146; ICC Statute, *supra* note 38, art. 8.

144 *See infra* Part IV.

145 *See id*.

146 MOIR, *supra* note 46 at 1-2; DOWNS, *supra* note ___ at 2-4; KALDOR, *supra* note 130;

147 Draper, *supra* note 137 at ___ ; *see also* PICTET, HUMANITARIAN LAW, *supra* note 139, at __.

148 *See, e.g.*, Draper, *supra* note 108.

149 The Geneva Conventions provide for international supervision even in the case of non-international conflict. *See, e.g.*, Geneva Conventions, *supra* note 28, art. 3 (providing for international supervision in internal armed conflicts). Moreover, serious violations of humanitarian law may trigger more intrusive Security Council action under Chapter VII of the UN Charter. *See, e.g.*, ICTY Statute, *supra* note 37 .

150 Common Article 3 does not formally alter the status of the Parties, but the political implications might be more pronounced. *See, e.g.*, Farer, *supra* note 111; CASTRÉN, *supra* note 84; Draper, *supra* note 108.

151 Lawful combatants may be charged only under the "laws of war" for their participation in the conflict. *See, e.g.*, ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR (1976) (summarizing "combatant immunity").

152 *See, e.g.*, ICC Statute, *supra* note 38.

153 *See, e.g.*, M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and State Practice*, 42 VA. J. INT'L L. 81 (2001).

154 Farer, *supra* note 111 at 43.

155 Geneva Conventions, *supra* note 28, art. 3.

Moreover, the drafting history of the Geneva Conventions makes clear that the "open texture" of the provision was purposeful.[156] The Diplomatic Conference rejected several proposed definitions of "armed conflict" on the grounds that (1) precision would risk exclusion,[157] and (2) under-specification would encourage application of the rules in questionable cases.[158] That is, the absence of a definition of "armed conflict" would, it was thought, push the threshold of application lower for Common Article 3.[159] In this way, the drafting history of Common Article 3 provides some evidence of the meaning of "armed conflict"—the textual ambiguity notwithstanding. The authoritative International Committee of the Red Cross (ICRC) Commentary to the Geneva Conventions reinforces this conclusion.[160] Because of the provision's humanitarian purpose, the Commentary suggests that the scope of application of Common Article 3 must be as "[wide] as possible."[161] The Commentary concludes that the provision applies to all organized hostilities excluding from its material field of application "mere act[s] of banditry or . . . unorganized and short-lived insurrection[s]."[162]

These points clarify the general character of hostilities covered by Common Article 3, but the Commentary's interpretive propositions are themselves fraught with ambiguities.[163] Nevertheless, the guiding principles of Common Article 3 inhere in these deceptively simple propositions. First, Common Article 3 covers hostilities that constitute a severe threat to humanitarian values. Warfare in the traditional sense constituted such a threat because it involved the organized protracted and intense application of force. Similarly, organized (as opposed to "unorganized") and protracted (as opposed to "short-lived") internal hostilities pose this sort of threat. This point justifies applying Common Article 3 "as wide[ly] as possible."[164] Second, the Commentary's statements also imply that the state's sovereign authority to suppress internal violence is the principle limiting the application of Common Article 3. States may legitimately assert the right to regulate and suppress "mere acts of banditry" and low-intensity insurrections through domestic law enforcement procedures. These points suggest that Common Article 3 has a *broad, but limited* field of application—the precise contours of which require further explication.

2. Other Important Legal Developments on the Definition of Internal "Armed Conflict"

Subsequent legal developments have arguably clarified the definition of non-international "armed conflicts." Three important developments merit scrutiny: Protocol II to the Geneva Conventions,[165] the judgment of the ICTY Appeals Chamber in the *Tadic* case,[166] and the statute establishing an International

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156 MOIR, *supra* note 46, at 32.
157 CASTREN, *supra* note 84, at 85.
158 PICTET, *supra* note 139, at 16-17. In fact, the ICRC, drawing on the provision's ambiguity, would eventually argue that it is applicable in all cases of civil unrest. *See id.*
159 *See id*.
160 The ICRC Commentary is widely viewed as the informal legislative history of the Conventions. *See, e.g.*, JAG, HUMANITARIAN LAW HANDBOOK, *supra* note 15, at ("[The ICRC] 'Commentaries' provide critical explanations of many treaty provisions, and are therefore similar to "legislative history" in the domestic context."); Bradley & Goldsmith, *supra* note 9, at 258 (acknowledging that the Commentary's interpretation of the Geneva Conventions is "authoritative").
161 I COMMENTARY ON GENEVA CONVENTION 50 (Jean S. Pictet ed., 1952) [hereinafter ICRC COMMENTARY I].
162 *Id.*
163 *See, e.g.*, MOIR, *supra* note 46, at 33.
164 ICRC COMMENTARY I, *supra* note 161, at 50.
165 Protocol II, *supra* note 70.
166 *See* Prosecutor v. Tadic, No. IT-94-1-AR72, (Decision on the Defence Motion for

Criminal Court (ICC).[167] Each of these developments arguably offers a more rigid conception of "armed conflict;" and, as a consequence, narrows Common Article 3's material field of application.[168] After assessing each, I conclude that these developments, although important, do not narrow, or otherwise modify, the scope of application of Common Article 3.

a. Protocol II to the Geneva Conventions

Protocol II to the Geneva Conventions, pertaining to internal armed conflict, arguably resolved much of the controversy surrounding the definition of armed conflict in Common Article 3. Because of clear deficiencies in the international legal machinery regulating internal armed conflict, the ICRC and many states party to the Geneva Conventions undertook efforts to "reaffirm and develop" the scope and substance of humanitarian law.[169] These efforts culminated in two additional protocols to the Geneva Conventions. Protocol I expanded the definition of international armed conflict to include internal "wars of national liberation;"[170] and clarified many important substantive provisions of the Geneva Conventions.[171] In an effort to "develop and supplement" Common Article 3,[172] Protocol II expanded the rules applicable in internal armed conflicts.[173] As previously mentioned, Protocol II also arguably clarified the meaning of internal "armed conflict" by providing a more developed definition of the concept in the treaty's text.[174]

On its terms, Protocol II is applicable to armed conflicts between forces of a High Contracting Party and other armed forces that are "under responsible command, [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[175] The scope of Protocol II is further clarified in Article 1(2), which

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Interlocutory Appeal on Jurisdiction), (Int'l Crim. Trib. For Former Yugoslavia Appeals Chamber, Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996) [hereinafter Tadic Jurisdiction Appeal].

[167] ICC Statute, *supra* note 38 .

[168] The issue is not whether these developments, as a matter of customary international law, materially alter the Common Article 3 regime. Rather, the issue is whether these developments exhibit an emergent, widely-shared interpretation of the "armed conflict" requirement in international humanitarian law.

[169] *See* MOIR, *supra* note 46, at 89-90; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4359-61 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY, PROTOCOL II]. *See id.* ¶ 4361 ("Although common Article 3 lays down the fundamental principles of protection, difficulties of application have emerged in practice, and this brief set of rules has not always made it possible to deal adequately with urgent humanitarian needs.").

[170] Protocol I, *supra* note 69, art. 1(4); *see also* WILSON, *supra* note 82. Article 1(4) provides:

> The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self- determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Protocol I, *supra* note 69, art. 1 (4).

[171] *See* Christopher Greenwood, *Historical Development and Legal Basis of Humanitarian Law, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 24-26 (Dieter Fleck, ed., 1999) [hereinafter HANDBOOK OF HUMANITARIAN LAW] (summarizing important developments in Protocol I); FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 84-131 (1987) (providing a more elaborate review of developments reflected in Protocol I).

[172] Protocol II, *supra* note 70, prmbl., art. 1.

[173] *See* KALSHOVEN, *supra* note 171, at 132-38; ICRC COMMENTARY, PROTOCOL II, *supra* note 169; MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS 604-705 (1982) [hereinafter BOTHE COMMENTARY]; David P. Forsythe, *The Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT'L L. 272 (1978).

[174] *See* Protocol II, *supra* note 70, art. 1.

[175] Article 1 provides:

> 1. This Protocol, which develops and supplements Article 3 common to the Geneva

provides: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[176] Because Protocol II purports, on its face, to supplement Common Article 3 "without modifying its existing conditions of application,"[177] the rigidly defined field of application in the Protocol arguably clarifies as a formal matter the situations in which Common Article 3 applies. In short, Protocol II arguably provides a positive, concrete definition of "armed conflict not of an international character."

Although this view enjoys a surface plausibility, the best reading of Protocol II is that it has a much more narrow field of application than Common Article 3. The text of the two provisions,[178] the drafting history of Protocol II,[179] subsequent state practice,[180] and the consensus of commentators support this conclusion.[181] As a result of the two Protocols, the Geneva Conventions now recognize and regulate four distinct categories of armed conflict: inter-state armed conflict under Common Article 2; internal "wars of national liberation" as defined in Protocol I; "civil wars" proper as defined in Protocol II; and "armed conflicts not of an international character" under Common Article 3. Common Article 3, therefore, establishes the lowest threshold of application for the laws of war.

b. ICTY Judgment in Prosecutor v. Tadic *(Appeal on Jurisdiction*)

Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has arguably clarified the definition of "armed conflict" in international humanitarian law.[182] Established to prosecute individuals for serious violations of humanitarian law, the ICTY has subject matter jurisdiction over war crimes,[183] crimes against humanity,[184] and genocide.[185] In *Prosecutor v. Tadic*,[186] the

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> Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Id.

[176] *Id.* art. 1(2).

[177] *Id.* art. 1(1).

[178] *Compare* Geneva Conventions, *supra* note 28, art. 3 (applying to all "armed conflicts not of an international character") *with* Protocol II, *supra* note 70, art. 1 (limiting field of application sharplyand implying that the provision applies to some subset of non-international armed conflicts). *See also infra* text accompanying notes ___-___ (detailing the drafting history of Common Article 3).

[179] *See, e.g.*, BOTHE COMMENTARY, *supra* note 173, at 622-29 (explaining that the Conference elected to draft an expanded body of rules and make these rules applicable to a more narrow range of conflicts).

[180] *See* MOIR, *supra* note 46, at 100-09 (explaining that states widely view Protocol II as establishing a higher threshold of application than Common Article 3); *id.* (providing examples of circumstances in which Common Article 3 applied irrespective of the inapplicability of Common Article 3).

[181] *See, e.g.*, BOTHE COMMENTARY, *supra* note 173, at 623-24; ICRC COMMENTARY, PROTOCOL II, *supra* note 169; MOIR, *supra* note 46, at 100-03; HANDBOOK OF HUMANITARIAN LAW, *supra* note 169; Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U. L. REV. 9 (1983).

[182] *See* ICTY Statute, *supra* note 37; VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

[183] ICTY Statute, *supra* note 37, arts. 2, 3.

[184] *Id.* art. 5.

[185] *Id.* art. 4.

[186] Prosecutor v. Tadic, Case IT-94-1-AR72 (Appeal on Jurisdiction) (Int'l Crim. Trib. For

Tribunal's first case,[187] the Appeals Chamber defined the contours of the "armed conflict" requirement within the meaning of the Geneva Conventions.[188] Specifically, the Appeals Chamber held that:

> [A]rmed conflict exists whenever there is a resort to armed force between States or protracted armed violence between. . .such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[189]

Two aspects of this definition arguably clarify the definition of "armed conflict." First, the definition arguably implies that an "armed conflict" exists only if the armed group exercises control over a portion of the state's territory. Second, the definition arguably classifies internal hostilities as an "armed conflict" only if the armed violence is "protracted." Both requirements would represent important restrictions on the conditions under which Common Article 3 applies. Although this definition has proven quite influential,[190] a careful reading of the Tribunal's reasoning makes clear that it does not narrow the scope of Common Article 3's application.

First, the Tribunal's definition does not require that armed groups exercise control over territory within the state. The Tribunal defines the circumstances in which international humanitarian law applies by carefully parsing its general material field of application (all "armed conflicts"); territorial field of application (all territory affected); and temporal field of application (from the initiation to the cessation of hostilities). In defining the territorial field of application for internal armed conflicts, the Tribunal only makes clear that humanitarian law applies (1) even in territory no longer under the control of the state; and (2) throughout such territory.

Second, the "protracted" armed violence requirement, properly understood, does not restrict the application of humanitarian law in any appreciable way. The nature of the finding contemplated by the ICTY Appeals Chamber suggests that most instances of internal strife would satisfy this requirement. Whether internal armed violence is "protracted" or not is assessed by reference to the entire period from the initiation to the cessation of hostilities.[191] Few, if any, putative internal armed conflicts would fail to satisfy this requirement so conceived. In addition, the laws of war apply to all acts committed in an armed conflict even if committed prior to the point at which the "protracted" threshold was crossed.[192]

Former Yugoslavia Appeals Chamber) Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 54 (1996).

[187] *See* MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG (1996).

[188] The hostilities in the former Yugoslavia were difficult to classify in that they were at various times and in various places international and non-international in character. As a consequence, the ICTY was required, early in its case law, to address the "armed conflict" threshold. *See* Theodor Meron, *The Classification of Hostilities in the Former Yugoslavia*, AM. J. INT'L L. (1996).

[189] *Prosecutor v. Tadic*, 35 I.L.M. at 54, para. 70.

[190] *See* MOIR, *supra* note 46, at 42-5.

[191] Of course, in the case of hostilities between al Qaeda and the United States, the conflict began (at the latest) on September 11 and continues to the day of this writing—clearly these hostilities involve "protracted" armed violence.

[192] The jurisprudence of the ICTR is instructive on this point. The relevant "armed conflict" in

That is, the "protracted" requirement does not immunize acts committed in the early stages of an internal armed conflict.[193] In short, the "protracted" armed violence requirement is best understood as little more than a restatement of the general rule excluding "isolated and sporadic acts of violence" (disorganized and short-lived) from the scope of humanitarian law.[194] Moreover, jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) established that armed violence extending over only a few months satisfies the "protracted" requirement and given the intensity of the violence, it constituted an "armed conflict" within the meaning of Common Article 3.[195]

c. International Criminal Court Statute

The International Criminal Court (ICC) Statute also provides a more elaborate definition of internal "armed conflict" than Common Article 3. The ICC Statute identifies several acts as war crimes when committed in internal armed conflict. Specifically, the Statute criminalizes "serious violations of Common Article 3"[remove italics for footnotes] committed in "armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[196] The Statute also criminalizes a much broader range of conduct characterized as "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law[.]"[197] The criminal prohibitions identified in this ambitious provision apply in "armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted* armed violence between governmental authorities and organized armed groups or between such groups."[198]

Several aspects of the ICC Statute's approach should be emphasized. First, the Statute adopts the general framework (wrong word) of the Geneva Conventions in that it offers no affirmative definition of "armed conflict." Second, the Statute codifies the ICRC Commentary's view (ww) that internal "armed conflicts" within the meaning of Common Article 3 do not include "situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence."[199] Third, the Statute adopts the ICTY's "protracted armed violence" formulation *but does not apply this requirement to Common Article 3 conflicts*.[200] Moreover, the wording of Article 8(2)(f) itself suggests that it applies to one type of internal armed conflict—armed conflicts where there is protracted armed violence.[201]

Rwanda lasted a total of six months. Applying the ICTY definition, the tribunal held Common Article 3 applicable to the conflict, finding that the "armed conflict" existed from the initiation of the hostilities even if the existence of an armed conflict could only be discerned after the violence had become "protracted." *See, e.g.*, Prosecutor v. Akayesu, Prosecutor v. Kambanda**.**

193 Consider, as an illustration, the case of Rwanda. Assume, for the sake of argument, that the hostilities are "protracted" only if sustained for at least two months. On this reading of the requirement, the hostilities in Rwanda would qualify as "protracted." *See* Prosecutor v. Akayesu. This would not, however, mean that atrocities committed in the first two months of the hostilities were not "war crimes" because they took place outside the context of an "armed conflict." *Id.*

194 *See* ICRC COMMENTARY III, *supra* note 93, at 31.

195 *See*, *e.g.*, Prosecutor v. Akayesu, *reprinted in* 37 I.L.M. 1401 (1998)..

196 *Id.* at Art. 8 (2)(d).

Why is this quote repeated in a footnote if it is in text?

198 *Id.* at Art. 8(2)(f) (emphasis added).

199 ICRC COMMENTARY III, *supra* note 93, at 31.

200 *Compare id.* art. 8 (2)(d) *with id.* art. 8(2)(f).

201 *Id.* art. 8(2)(f).

Because these legal developments have not clarified the material field of application for Common Article 3,[202] defining internal "armed conflict" requires grappling with the ambiguous regime established in the 1949 Geneva Conventions.

3. Defining "Armed Conflict": Identifying the Relevant Criteria

Although delegations at the Diplomatic Conference rejected the idea of defining "armed conflict" in the text of Common Article 3, review of the *travaux preparatoires* reveals several criteria that state thought relevant to the classification of hostilities. The ICRC Commentary identifies a number of "convenient criteria"[203] drawn from proposed definitions that were favorably received at the Diplomatic Conference:[204]

> 1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> 3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
> (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
> 4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
> (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory.
> (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[205]

These criteria provide a useful, if not indispensable, general framework for evaluating the applicability of Common Article 3 to any given situation. Indeed, the Commentary's criteria have been extraordinarily influential with courts and commentators. The International Criminal Tribunal for Rwanda, for example, relied in part upon the guidelines in determining that an internal "armed conflict" had existed in Rwanda.[206] Moreover, many commentators emphasize the importance of these criteria in defining the scope of Common Article 3.[207]

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[202] To the contrary, as the previous analysis makes clear, the identified legal developments explicitly or implicitly adopt the general approach of the Geneva Conventions.

[203] IV COMMENTARY ON GENEVA CONVENTION 35 (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY IV].

[204] *See* II.B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 121.

[205] ICRC COMMENTARY IV, *supra* note 203, at 35-36.

[206] *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, at ¶ 619 (Judgment) (Int'l Crim. Trib. for Rwanda Trial Chamber II), *available at* http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgment/akay001.htm.

[207] *See, e.g.*, LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 34-36 (2002); Bradley & Goldsmith, *supra* note 9, at 258 (relying on Commentary criteria); JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE RULES OF WAR (1974); Draper, *supra* note 81; Ai-Saab, *supra* note 81; Farer, *supra* note 111.

Although a useful starting point, the ICRC criteria are nevertheless arguably under-determinative. Because few cases of internal strife will satisfy each of the criteria, some analytic ordering as between the criteria is necessary. The Commentary, however, offers no methodology to guide the systematic application of these factors. Hard cases will (and do) present difficulty precisely because they do not exhibit all the classical characteristics of "armed conflict," and it is in such cases that the criteria are, arguably, least helpful. If, for example, cases satisfy some criteria (or only one criterion) and not others, the ultimate classification of the hostilities turns on whether the ICRC criteria are understood as: (1) factors to balance in determining whether to classify the hostilities as an "armed conflict"; or (2) independently sufficient grounds to establish the existence of an "armed conflict."

The source and nature of the criteria as well as the dual purposes they serve suggest a few important interpretive guidelines. First, the Commentary makes clear that the criteria are not exhaustive[208] and that internal hostilities may constitute an "armed conflict" even if *none* of the criteria are satisfied.[209] Second, the criteria do not purport to exclude any cases from application of the Article. Recall that the Diplomatic Conference elected not to define "armed conflict" and the ICRC criteria are extracted from *rejected* amendments to Common Article 3.[210] These rejected amendments could not provide a legitimate basis for *excluding* any situation from the scope of the Article. Third, the criteria themselves are pitched in general terms and should be interpreted broadly. In short, the criteria are best understood as independently sufficient grounds to establish the existence of an "armed conflict." Indeed, the drafting history of Common Article 3 supports this conclusion.[211] The list of criteria closely tracks an influential amendment offered by the Australian delegation at the Diplomatic Conference.[212] And this amendment plainly forwarded the criteria as *alternative modes* of establishing the existence of an armed conflict.[213] In addition, the criteria loosely track situations in which the laws of war were potentially applicable in pre-Geneva Conventions law and practice. For example, prior to 1949, the laws of war were arguably applicable if a *de jure* state engaged in sustained hostilities with a *de facto* state, and the first and fourth criteria reflect this well-accepted view.[214] The laws of war were also potentially applicable if a state recognized the non-state group as a belligerent, and the second and third criteria reflect aspects of this traditional view.[215]

More fundamentally, the criteria—read with these points in mind—also clearly reflect the dual purposes of Common Article 3: the minimization of human suffering and the respect for state sovereignty. Some circumstances pose such substantial risks to humanitarian values that international regulation is justified irrespective of the resultant constraints on state autonomy. As a consequence, two important sets of considerations pertain to (1) the intensity of the violence; and (2)

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[208] *See* ICRC COMMENTARY III, *supra* note 93, at 30-34.

[209] *See, e.g.*, MOIR, *supra* note 46, at 35 (arguing that the criteria "are merely guidelines to assist in judging the existence of internal conflict, however, and may in fact set a far higher threshold of application than is actually required by the Article itself").

[210] ICRC COMMENTARY III, *supra* note 93, at 30-34.

[211] *See, e.g.*, Elder, *supra* note 213 (documenting the drafting history on the "armed conflict" threshold); Farer, *supra* note 111 (describing the drafting history, and suggesting that the Delegates resisted all attempts to concretize the definition of armed conflict).

[212] II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 40-44 (1951) [hereinafter FINAL DIPLOMATIC RECORD OF 1949].

[213] *Id.* at 43; Elder, *supra* note 213, at 43.

[214] *See* MOIR, *supra* note 46, at 14-17.

[215] *See supra* text accompanying notes ___ -___ (discussing the role of "recognition of belligerency" in the laws of war) .

the capacity and willingness of the parties to carry out sustained, coordinated hostilities. In addition, concerns about state sovereignty are not significant in circumstances where the state itself accepts or invokes application of the laws of war. Therefore, another important set of criteria concerns the reaction of the state to the hostilities. In addition, the reaction of the international community straddles these categories, and, as a consequence, may provide evidence relevant to both sets of criteria.

Table 1. Existence of an "Armed Conflict": Humanitarian Concerns and State Sovereignty

Humanitarian Costs Sovereignty Costs	**High Intensity (organized, protracted)**	**Low Intensity (disorganized, short-lived)**
State Asserts Sovereign Prerogative; Denies Humanitarian Law Applicable	Yes	No
State Accepts Applicability of Humanitarian Law	Yes	Yes

Cases of internal strife constitute "armed conflict" within the meaning of international humanitarian law if (1) the conditions pose an aggravated threat to core humanitarian values (an objective standard); *or* (2) the state party to the hostilities interprets them as an "armed conflict" (a subjective standard). These two circumstances are separate methods of establishing the existence of an "armed conflict." Therefore, any situation satisfying the objective criteria constitutes an "armed conflict" irrespective of the views of the state party to the conflict. Likewise, any hostilities characterized by the state party as an "armed conflict" should be understood as such, irrespective of the objective conditions. There is, after all, no indication that Common Article 3 was drafted so as to enable international actors to second-guess a state's classification of internal hostilities as an "armed conflict." To the contrary, the Article was exhaustively debated and repeatedly revised because of disagreement about the conditions under which the laws of war apply to internal conflicts despite opposition from the state.[216]

Table 2. Summary of Criteria.

[216] The most important consideration defining the "armed conflict" threshold was state sovereignty. *See, e.g.*, MOIR, *supra* note 46; ICRC COMMENTARY III, *supra* note 93, at 31-33; BOND, *supra* note 46; Farer, *supra* note 111.

AGGRAVATED THREAT TO CORE HUMANITARIAN VALUES	***LIMITED INFRINGEMENT OF STATE SOVEREIGNTY***
1. Intensity of the hostilities 2. Organizational capacity to engage in sustained hostilities 3. Intention to engage in sustained hostilities 4. Third party state or states recognize the armed group as a "belligerent"	1. State recognition of armed group as a "belligerent" 2. State invokes "rights of belligerency" 3. State submits the matter to the UN Security Council for Chapter VII action 4. State otherwise asserts applicability of the laws of war 5. Third party state or states recognize a state of belligerency

4. Application of the Factors to the September 11 Attacks

The systematic application of these factors to the September 11 attacks suggests that these acts constituted the initiation or confirmation of an "armed conflict." The attacks were coordinated applications of force resulting in enormous property destruction and an astonishing loss of life. Al Qaeda, an armed group with the organizational capacity to engage in sustained hostilities on a global scale, carried out the attacks. Substantial evidence suggests that al Qaeda considered itself "at war," and that the attacks were part of an extended, escalating military campaign against the United States. The United States characterized the attacks as an "armed attack" and as "acts of war," and subsequently launched an international military campaign against al Qaeda and its supporters. Moreover, the international community condemned the attacks and recognized the United States' inherent right to self-defense against such armed aggression. These factors, considered in light of the values underlying Common Article 3, justify classifying the hostilities as an "armed conflict" within the meaning of the Geneva Conventions.

a. Views of the State Party: U.S. Interpretation of the Attacks

The United States interprets the terrorist attacks as the initiation of an "armed conflict." Although the President's declaration of a "war on terrorism" is in many respects a rhetorical campaign reminiscent of the "war on drugs," this analogy mischaracterizes the U.S. policy response to the attacks. The government's unambiguous reaction to the events of September 11 indicates that the United States considered the attacks to be a serious military threat to the national security of the country.

During the attacks, the United States responded militarily by deploying attack aircraft to intercept and destroy, if necessary, hijacked civilian airliners.[217] In the immediate aftermath of the attacks, the Bush administration described them as "an act of war."[218] The President also invoked his emergency powers by

[217] *See* Bradley Graham, *Military Alerted Before Attacks; Jets Didn't Have Time to Intercept Hijackers, Officials Say*, WASH. POST, September 15, 2001, at A18 (explaining that NORAD deployed F-16 interceptor aircraft to defend the United States against an apparent air attack).

[218] *See, e.g.*, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347 (Sept. 20, 2001) [hereinafter Address on U.S. Response] ("On September 11th, enemies of freedom committed an act of war against our country."); S.J. Res. 22, 107th Cong. (2002((enacted) (declaring that the United States is "entitled to respond [to the attacks] under international law" and referring to a

declaring a state of national emergency.[219] The United States actively sought U.N. Security Council action on the matter[220] and the Security Council passed multiple resolutions condemning the attacks and recognizing the "inherent right" to self-defense in the U.N. Charter.[221] Congress subsequently authorized the President to use force against those responsible for the September 11 attacks.[222] Pursuant to this authorization, the President deployed U.S. armed forces against al Qaeda and the Taliban regime in Afghanistan.[223] From this point, the conflict between the United States and Afghanistan (and al Qaeda) has been, without question, an "international armed conflict" in which the laws of war apply.[224] Following the initiation of hostilities in Afghanistan, the United States formally invoked before the Security Council its right to self-defense under Article 51 of the U.N. Charter.[225] And the U.S. self-defense claim was predicated on its characterization of the September 11 attacks as "armed attacks" within the meaning of the Charter.[226]

b. Views of the Non-state Belligerent: Al Qaeda's Intentions

Moreover, al Qaeda intended the attacks as "acts of war" against the United States. Long before September 11, the leadership of al Qaeda had declared a "holy war" on the United States.[227] Usama Bin Laden had issued multiple *fatwah*

"war" against terrorism).

[219] *See* Proclamation No. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks, 37 WEEKLY COMP. PRESS DOC. 1310 (Sept. 14, 2001).

[220] *See, e.g.*, Christopher S. Wren, *U.S. Advises U.N. More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5 (summarizing efforts of the United States and Britain to persuade the U.N. that strikes were justified).

[221] *See* S.C. Res. 1368 (Sept. 12, 2001); *see also* S.C. Res. 1373 (Sept. 28, 2001).

[222] *See* Joint Resolution: To Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.")

[223] *See, e.g.*, Patrick E. Tyler, *U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps*, N.Y. TIMES, Oct. 8, 2001, at A1.

[224] Some commentators have suggested that the United States is at war *in* Afghanistan, but not *with* Afghanistan. *See, e.g.*, Fitzpatrick, *supra* note 40. The argument is that the United States is not at war with the recognized government of Afghanistan; in fact, the U.S. is allied with the recognized government in its conflict with al Qaeda and the Taliban regime. Irrespective of the descriptive accuracy of this claim, it does not render the Geneva Conventions inapplicable to the conflict in Afghanistan. Indeed, both the United States and the Taliban interpreted the conflict as an international armed conflict. *See* Geneva Conventions, *supra* note 28, arts. 2, 3 Indeed, the United States formally invoked before the U.N. Security Council the right to act in self defense against the Taliban. Moreover, the United States has indicated that it views the Geneva Conventions as applicable to its hostilities with the Taliban. *See* Katharine Q. Seelye, *Detainees Are Not P.O.W.'s, Cheney and Rumsfield Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (summarizing U.S. position).

[225] *See* Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946, *available at* http://www.un.int/usa/s-2001-946.htm.The letter stated:

> In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my government, to report that the United States of America, together with other states, has initiated actions in exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States on September 11, 2001.

Id.

[226] *See id*; *see also* Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835 (2001).

[227] *See Responsibility for the Terrorist Atrocities in the United States, 11 September 2001* (Nov. 14, 2001), *at* http://www.fco.gov.uk/news/newstext.asp?5556 [hereinafter U.K. Government, *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001*]; PETER L. BERGEN, HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN (2001); YOUSSEF

instructing Muslims to kill U.S. citizens.[228] The September 11 attacks were also part of a pattern of escalating violence linked to al Qaeda and directed against U.S. military and civilian targets[229] including: the 1993 attacks on the World Trade Center,[230] the 1994 killings of eighteen U.S. military personnel in Somalia,[231] the 1996 attack on the U.S. military barracks in Saudi Arabia,[232] the 1998 attacks on the U.S. embassies in Kenya and Tanzania,[233] and the 2000 attack on the USS *Cole*.[234] Of course, law enforcement officials thwarted many other planned attacks.[235]

c. Views of the International Community

The reaction of the international community further supports the finding that the September attacks initiated an "armed conflict." Following September 11, several important inter-governmental organizations took steps that expressly or impliedly interpreted the attacks as "armed conflict."

The United Nations Security Council determined that the attacks constitute a threat to international peace and security triggering its Chapter VII powers; and recognized the right of the United States to act in self-defense consistent with Article 51 of the U.N. Charter. [236] Because the Charter requires an "armed attack" as the factual predicate for the lawful exercise of self-defense, the Security Council's invocation of Article 51 necessarily implies that it classified the September 11 attacks as such.[237] The references to Article 51 in Security Council Resolutions 1368 and 1373 represent an important shift in Council practice concerning terrorist attacks.[238] For example, the Security Council made no

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BODANSKY, BIN LADEN: THE MAN WHO DECLARED WAR ON THE UNITED STATES (1999); STEVEN EMERSON, AMERICAN JIHAD: THE TERRORISTS LIVING AMONG US 147-48 (2002).

[228] *See, e.g.*, U.K. Government, *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001*, *supra* note 227; Sean D. Murphy, *Terrorist Attacks on the World Trade Center and the Pentagon, Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 239 (2002) (quoting the various *fatwah* at length, such that "the killing of Americans and their civilian and military allies is a religious duty for each and every Muslim and calling on Muslims to "launch an attack on the American soldiers of Satan").

[229] *See generally* Karen DeYoung & Michael Dobbs, *Bin Laden: Architect of Global Terror*, WASH. POST, Sept. 16, 2001, at A8 (summarizing Bin Laden's terrorist activities); BERGEN, *supra* note 227 (same).

[230] Several members of al Qaeda were tried and convicted of conspiring to bomb the World Trade Center in 1993. *See* Richard Bernstein, *4 Are Convicted in Bombing at the World Trade Center That Killed 6, Stunned U.S.*, N.Y. TIMES, Mar. 5, 1994, at 1; Benjamin Weiser, *Driver Gets 240 Years in Prison for Bombing of Trade Center*, N.Y. TIMES, Apr. 4, 1998, at B2; Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES, Jan. 9, 1998, at A1.

[231] *See* YONAH ALEXANDER & MICHAEL S. SWETNAM, USAMA BIN LADEN'S AL-QAIDA: PROFILE OF A TERRORIST NETWORK 33 (2001); BERGEN, supra note 227; BODANSKY, *supra* note 227.

[232] *See* ALEXANDER & SWETNAM, *supra* note 231, at 33.

[233] Al Qaeda members were also convicted of the embassy bombings. *See* Benjamin Weiser, *4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa; Jury To Weigh 2 Executions*, N.Y. TIMES, May 30, 2001, at A1.

[234] *See* ALEXANDER & SWETNAM, *supra* note 231, at 33.

[235] *See, e.g.*, Rohan Gunaratna, *Terrorism & Insurgency: Al-Qaeda's Infrastructure*, JANE'S INTELL. REV., Jan. 1, 2002, *available at* 2002 WL 2100674 (describing thwarted attacks).

[236] *See* SC Res. 1368 (Sept. 12, 2001); *see also* SC Res. 1373 (Sept. 28, 2001).

[237] *See, e.g.*, Charney, *supra* note 226, at 836-37; Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 842 (2001).

[238] The Security Council did not explicitly characterize the September 11 attacks as an "armed attack" (as required by Article 51), describing the events instead as a "terrorist attack." *See, e.g.*, SC Res. 1368 (2001); SC Res. 1373 (2001). This ambiguity is arguably important in that the Council typically links its invocations of Article 51 with an express finding of an "armed attack." *See, e.g.*, SC Res. 661 (1990) para. 6 (affirming "the inherent right of individual or collective self-defence, in response to the *armed attack* by Iraq against Kuwait, in accordance with Article 51 of the Charter") (emphasis added). This textual ambiguity suggests that the Security Council was unsure how best to classify the September 11 attacks, but nevertheless held the view that they arguably came within the ambit of Article 51.

such finding in the aftermath of the 1998 attacks on U.S. embassies in Africa,[239] even though the United States officially invoked Article 51 as the legal justification for missile strikes against Sudan and Afghanistan.[240] Although the Security Council did not expressly authorize the use of force,[241] Article 51 requires no such authorization for states to act in self-defense.[242] Moreover, the reactions of states[243] and the U.N. Secretary-General[244] to the U.S. strikes strongly suggest that the resolutions implicitly authorized—or at least condoned—the use of force.[245]

The North Atlantic Treaty Organization (NATO) also formally interpreted the September 11 attacks as "armed attacks" directed against the United States. Upon determining that the attacks were directed from "abroad," NATO invoked the collective self-defense provision of the alliance's founding treaty.[246] By its terms, the invocation of this provision presupposes an "armed attack" directed against an alliance member.[247] NATO Secretary-General Lord Robertson summarized the organization's findings:

> We know that the individuals who carried out these attacks were part of the worldwide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taliban. On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.[248]

Similarly, the Organization of American States (OAS) interpreted the attacks as acts of "armed attacks;" recognized the inherent right of the United States to act in self-defense; and invoked the collective self-defense provision of

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[239] *See* SC Res. 1189 (Aug. 13, 1998) (condemning the "indiscriminate and outrageous acts of international terrorism that took place on 7 August 1998 in Nairobi, Kenya and Dar-es-Salaam, Tanzania," but limiting its statement to the reaffirmation that "every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territories directed towards the commission of these acts").

[240] In a letter dated 20 August 1998, the United States notified the Security Council that the attacks on Afghanistan and Sudan were carried out "pursuant to the right to self-defence confirmed by Article 51 of the Charter of the United Nations." *See* UN Doc. S/1998/780 (1998). *See also* Michael Reisman, *International Legal Responses to International Terrorism*, 22 HOUSTON J. INT'L L. 3, 47 (1999). On the U.S. attacks, see also Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559 (1999).

[241] Charney, *supra* note 226, at 835 (2001).

[242] *See, e.g.*, Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 57 (2001).

[243] *See, e.g.*, Siobhan Roth, *A United Front?*, LEGAL TIMES, Oct. 15, 2001 (citing Pakistani President Pervez Musharraf that "[t]his is a resolution for war against terrorism"); Suzanne Daley, *European Leaders Voice Support*, N.Y. TIMES, Oct. 8, 2001 (reporting on European leaders' support for military operations in Afghanistan).

[244] *See Secretary-General's Statement on the Situation in Afghanistan*, Oct. 8, 2001, *available at* http://www.un.org/News/ossg/latestsm.htm (stating that the United States and the U.K. "have set their current military action in Afghanistan in th[e] context [of Security Council Resolutions].").

[245] *See, e.g.*, Jordan J. Paust, *Comment: Security Council Authorization to Combat Terrorism in Afghanistan*, ASIL INSIGHTS, Oct. 23, 2001, *available at* http://www.asil.org/insights.htm.

[246] *See Statement by the North Atlantic Council*, Sept. 12, 2001, *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm; *Invocation of Article 5 Confirmed*, Oct. 2, 2001, *available at* http://www.nato.int/docu/update/2001/1001/e1002a.htm.

[247] *See* The North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (referring to "an armed attack" against one or more of the members).

[248] *See Statement by NATO Secretary-General Lord Robertson of 2 October 2001*, *available at* http://www.nato.int/docu/speech/2001/s011002a.htm.

the Inter-American Treaty of Reciprocal Assistance.[249]

d. Nature and Quality of the Acts: The Systematicity and Intensity of the Attacks

The nature and quality of the attacks support the finding that they initiated or confirmed an "armed conflict." The attacks were extremely intense and highly coordinated. They were part of a series of serious attacks directed against U.S. targets.[250] The September 11 attacks alone killed more than 3000 people;[251] and caused billions of dollars in economic damage.[252] It is important to note that the ICRC Commentary to Common Article 3 provides only one concrete example of activities not amounting to "armed conflict": a handful of individuals rebel against the state and attack a police station.[253] The intensity, coordination, and pattern of al Qaeda attacks against the United States make clear that the September 11 attacks were not simply "isolated and sporadic acts of violence."[254]

e. Nature of the Actors: The Organizational Characteristics of Al Qaeda

Moreover, the organizational characteristics of al Qaeda suggest that the attacks amounted to an "armed conflict." Al Qaeda is a highly organized,[255] well-funded entity[256] with operational units in dozens of countries.[257] As previously discussed, the September 11 attacks involved the coordinated application of force, and demonstrated al Qaeda's capacity to project force globally (even against sensitive military and diplomatic targets).[258] Clearly, the organizational capacity of al Qaeda distinguishes it from "mere bandits."[259] Indeed, al Qaeda unquestionably possessed the *de facto* capability to conduct sustained armed hostilities against the United States.[260]

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In short, application of the previously identified criteria demonstrates that the September 11 attacks constituted the initiation of an "armed conflict" within the meaning of Common Article 3 of the Geneva Conventions. The scale and systematicity of the hostilities as well as the subjective assessments of the relevant actors support this conclusion. The attacks involved the coordinated application of lethal force by an organization with the capacity to engage in sustained, global hostilities. Moreover, the attacks themselves produced nothing short of a

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[249] *See Terrorist Threat to the Americas*, OAS Doc. RC.24/Res.1/01 (Sept. 21, 2001), *available at* http://www/oas.org/OASpage/crisis/RC.24e.htm. The special session of OAS foreign ministers invoked the collective security provision of the Rio Treaty which is triggered by an "armed attack" against an American state. *See* Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, T.I.A.S. No. 1838, art. 3.

[250] *See supra* text accompanying notes 229-235 (listing previous attacks against the United States attributed to al Qaeda).

[251] *See Dead and Missing*, N.Y. TIMES, Jan. 10, 2002, at A16.

[252] *See, e.g.*, CITY OF NEW YORK OFFICE OF THE COMPTROLLER, PRELIMINARY ESTIMATE: THE IMPACT OF THE SEPTEMBER 11 WTC ATTACK ON NYC'S ECONOMY AND CITY REVENUE 3 (2001) (estimating property damage at the World Trade Center site alone at $34 billion), *available at* http://www.comptroller.nyc.gov/BUREAUS/fiscal/reports/WTC_ Attack_Oct_4_final.pdf.

[253] ICRC COMMENTARY III, *supra* note 93, at 32.

[254] *Id.* at 33.

[255] *See generally* ALEXANDER & SWETNAM, *supra* note 231; BERGEN, *supra* note 227.

[256] *See, e.g.*, J.A.C. Lewis, *Islamic Terror Groups get $5 Billion Annually*, JANE'S INTEL. REV., Jan. 1, 2002, *available at* 2002 WL 2100656.

[257] *See, e.g.*, ALEXANDER & SWETNAM, *supra* note 231, at 3-27; Phil Hirshkorn, et al., *Blowback*, JANE'S INTEL. REV., Aug. 1, 2001, *available at* 2001 WL 10122260.

[258] *See, e.g.*, Rohan Gunaratna, *Terror from the Sky*, JANE'S INTEL. REV., Oct. 1, 2001, *available at* 2001 WL 10122390 (explaining the high levels of coordination required to execute the attacks).

[259] ICRC COMMENTARY III, *supra* note 93, at 32.

[260] *See* Hirschkorn, et al., *supra* note 257; BERGEN, *supra* note 227.

humanitarian disaster. In addition, the relevant parties to the conflict interpreted the hostilities as an "armed conflict." Al Qaeda intended the attacks as "acts of war;" the United States interpreted the attacks as an "armed attack" initiating an "armed conflict;" and the U.S. interpretation was endorsed by the U.N. Security Council, NATO, and the OAS.

B. "Not of an International Character"

By its terms, Common Article 3 applies to "armed conflicts *not of an international character*."[261] This qualification of the armed conflict requirement suggests that the provision governs only a limited range of armed conflicts.[262] Three interpretations of the provision find some support in its text, structure, and history. The plain meaning of the text suggests that the provision covers all armed conflicts not involving two or more states. The legislative history of the provision, on the other hand, provides some evidence that it applies only to "civil wars" proper. Moreover, some evidence suggests that the provision governs only those "armed conflicts" confined to the territory of one state. After assessing the viability of each view, I conclude that the best reading of Common Article 3 is that it applies to all armed conflicts not covered by Common Article 2 of the Geneva Conventions.

1. Applicable only in "Civil Wars"

Some evidence suggests that Common Article 3 was originally intended to apply only to "civil wars" proper. In its most robust form, this claim implies that Common Article 3 regulates only those internal armed conflicts that very closely resemble inter-state armed conflicts.[263] On this view, therefore, Common Article 3 applies to a very narrow range of "armed conflicts." This interpretation is endorsed by many commentators,[264] and finds some support in the drafting history of the provision.[265] Indeed, the debates at the Diplomatic Conference concerning Common Article 3 are replete with references to "civil wars."[266] Moreover, it was the atrocities of the Spanish Civil War that crystallized support for a formalized international regime regulating internal hostilities.[267]

This view, however, does not withstand close scrutiny. First, the wording of the provision does not support this interpretation. Recall that the Diplomatic

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[261] Geneva Conventions, *supra* note 28, art. 3.

[262] *See, e.g.*, BOND, *supra* note 46 at 56; Farer, *supra* note 111, at 44.

[263] *See, e.g.*, MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 619-27 (1959) (suggesting that Common Article 3 applies only to "insurgents" and "belligerents"); Jordan J. Paust, *Addendum: War and Responses to Terrorism*, ASIL INSIGHTS: TERRORIST ATTACKS ON THE WORLD TRADE CENTER AND THE PENTAGON (September 2001), *available at* http://www.asil.org/insights (arguing that Common Article 3 applies only if the non-state armed group constitutes an "insurgency"); Paust, *Antiterrorism*, *supra* note 40 (same); *see also* MOIR, *supra* note 46, at 17 ("Civil war is, after all, the very situation in which the struggle has attained such proportions as to make both parties analogous to belligerents in the international law sense.").

[264] *See, e.g.*, GREENSPAN, *supra* note 263; Paust, *Addendum: War and Responses to Terrorism*, *supra* note 263; RATNER & ABRAMS, *supra* note 32, at 95-97 (suggesting that provision applies in civil and colonial wars); Steven Ratner, *International vs. Internal Armed Conflict*, *in* CRIMES OF WAR 206 (Roy Gutman & David Rieff, eds. 1999); Steven Ratner, *Common Article 3*, *in* CRIMES OF WAR, *supra*, at 207; L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2d ed. 2000); KEITH SUTER, AN INTERNATIONAL LAW OF GUERILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING 16 (1984); BOND, *supra* note 46, at 57-58.

[265] Many of the factors considered relevant to classifying conflict suggest that the conference had in mind conflicts similar to classical civil wars. *See supra* text accompanying notes ___ - ___ . *See also* Bradley & Goldsmith, *supra* note 9, at *258 (suggesting that Common Article 3 was designed primarily to address civil wars).

[266] *See, e.g.*, II-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE, *supra* note 103, at 53-94 .

[267] *See, e.g.*, Draper, *supra* note 81, at 83; MOIR, *supra* note 46, at 18-21.

Conference eschewed all proposals to define more specifically the provision's material field of application. The Conference rejected a proposal by the U.S. delegation that would have established a similar threshold.[268] Second, this restrictive reading frustrates the general purposes of the provision. The analysis of the "armed conflict" requirement in the previous Section strongly suggests that the material field of application of Common Article 3 should be construed more broadly. Third, a systematic reading of the provision's drafting history indicates that its field of application is not so limited. The Diplomatic Conference specifically rejected a draft of the article that would have limited its application to civil wars. Specifically, the Conference rejected proposals that would have extended the full protections of the Conventions to a limited range of internal armed conflicts in favor of the final formulation that extends a limited range of protections to all internal armed conflicts.[269] Finally, it is difficult to determine with any precision the meaning of casual or unexplained references to "civil war" in the Diplomatic Conference. The academic and policy literatures recognize many formal definitions of "civil war."[270] And many of these definitions equate, implicitly or explicitly, "civil wars" with any form of non-international armed conflict.[271]

2. Applicable Only in Conflicts Wholly Confined to the Territory of One State

Another interpretation suggests that Common Article 3 applies only to armed conflicts within the territory of one state.[272] On this view, the "not of an international character" limitation renders the provision inapplicable to all armed conflicts with international or transnational dimensions. This interpretation draws on much of the same evidence supporting the "civil wars" interpretation previously discussed. That is, substantial evidence suggests that the drafters of the provision envisioned its application only in truly internal conflicts.[273] In addition, the full text of the provision offers some support for this reading—the Article covers only cases of "armed conflict not of an international character *occurring in the territory of one of the High Contracting Parties.*"[274]

Despite its textual plausibility, this reading of the provision is problematic. First, this interpretation would create an inexplicable regulatory gap in the Geneva Conventions. On this reading, the Conventions would cover international armed

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[268] The United States proposal emphasized several essential ingredients including that the insurgents must have an organization "purporting to have the characteristics of a State;" the insurgent civil authority must exercise *de facto* authority over person within a determinate territory; the armed forces must act under the direction of the organized civil authority and must be prepared to observe the ordinary laws of war; and the insurgent civil authority must agree to be bound by the provisions of the Convention. FINAL DIPLOMATIC RECORD OF 1949, *supra* note 103, at 121.

[269] The ICRC Draft included an additional paragraph in Common Article 2 that would have made the entire Conventions applicable to "civil wars," but the draft was rejected in favor of a draft with much more modest substantive commitments and a much lower threshold of application.

[270] *See* Stathis N. Kalyvas, *"New" and "Old" Civil Wars: A Valid Distinction?*, WORLD POLITICS, Oct. 2001, at 99 (surveying current debates); ERIK CASTRÉN, CIVIL WAR 26-36 (1966) (canvassing various definitions) .

[271] *See, e.g.*, RATNER & ABRAMS, *supra* note 32, at 97 (suggesting that the relevant distinction is between civil wars and internal strife that does not amount to conflict).

[272] *See, e.g.*, INTERIGHTS, INTERNATIONAL LAW AND SEPTEMBER 11 (2001) (emphasis added):

> If state control is not established, the question arises whether this is an 'internal' conflict between governmental authorities and groups within a state. If, in the circumstances, the conflict is not considered *to emanate from groups 'within a state'* (and not therefore to amount to an 'internal' conflict), it may be that the events of September 11 highlight a new hybrid type of armed conflict—between organised groups and foreign States. The law governing such a scenario is unsettled.

[273] *See supra* note 40 (collecting sources).

[274] Geneva Conventions, *supra* note 28, Common Article 3, para. 1 (emphasis added).

conflicts proper and wholly internal armed conflicts, but would not cover armed conflicts between a state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state. There is no principled (or pragmatic) rationale for this regulatory gap. Furthermore, ICTY jurisprudence implicitly rejects this interpretation by concluding that the armed conflict in the former Yugoslavia included both internal and international aspects—and that the applicable humanitarian law varied accordingly.[275] Finally, this reading of the provision misconstrues the considerations that limit the application of Common Article 3. As previously discussed, Common Article 3 was revolutionary because it purported to regulate wholly internal matters as a matter of international humanitarian law. If the provision governs wholly internal conflicts, as the "one state" interpretation recognizes, then the provision applies *a fortiori* to armed conflicts with international or transnational dimensions. The language of the provision limiting its application to the "territory of one of the High Contracting Parties" serves another, more subtle purpose—specifically, to make clear that application of the provision requires a nexus to the jurisdiction of a state party to the treaty.[276]

3. Applicable in All "Armed Conflicts"

Based on the foregoing analysis, the reading of the provision most faithful to its purpose and text is that Common Article 3 applies, as a formal matter, to all "armed conflicts" not covered by Common Article 2—the provision defining international armed conflict within the meaning of the Geneva Conventions. Moreover, as a practical matter, the provision governs all "armed conflicts" in the sense that *international* armed conflicts trigger protections equal to, and in most areas greater than, those accorded by Common Article 3. Therefore, because armed conflicts are either international or "not of an international character," the minimum humanitarian protections recognized in Common Article 3 extend to all armed conflicts. Of course, the classification question is an important one in that the full scope of Geneva and Hague law applies to "international armed conflicts" including the "grave breaches" regime criminalizing serious violations of the laws of war.[277] Nevertheless, the important point is that armed conflicts crossing the "upper threshold" of Common Article 3 do not fall outside the purview of the laws of war. To the contrary, such conflicts are subject to a more robust international legal regime.

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The September 11 attacks, if properly characterized as the initiation or confirmation of an "armed conflict" within the meaning of the Geneva Conventions, come within the material field of application of Common Article 3.[278]

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[275] Prosecutor v. Tadic, No. IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), (Int'l Crim. Trib. for former Yugoslavia Appeals Chamber Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

[276] *See supra* text accompanying notes ___ - ___ .

[277] *See supra* notes ___, ___.

[278] Moreover, irrespective of the applicability of Common Article 3, the acts in question arguably violated the laws of war in another respect so long as the September 11 attacks constituted an armed conflict within the meaning of humanitarian law. Although "crimes against humanity" as currently defined in international humanitarian law are not violations of the laws of war, "crimes against humanity" committed *in the context of and with a sufficient nexus to an "armed conflict"* are arguably violations of the laws of war. *See, e.g.*, Adam Roberts & Richard Guelff, *Introduction*, *in* ROBERTS & GUELFF, *supra* note 30; LONDON CHARTER, *supra* note 29, at art. 6; ICRC Commentary to Geneva Convention III, *supra* note 93, at art. 85 §2B; ICTY Statute, *supra* note 37 (including crimes against humanity as a "serious violation[ ] of humanitarian law"). As previously discussed, the September 11 attacks were arguably "crimes against humanity." *See supra* note ___. Recall specifically that the elements of "crimes against humanity" no longer

C. Individual Criminal Responsibility and Common Article 3

The analysis thus far suggests only that the September 11 attacks contravened the substantive terms of Common Article 3; and, as a consequence, the "laws of war." Because arguably not all violations of the laws of war constitute "war crimes,"[279] an important question is whether violations of Common Article 3 may, under the laws of war, serve as the basis for individual criminal liability.

Do violations of Common Article 3 constitute "war crimes?" Until recently, the weight of authority suggested not.[280] Indeed, substantial evidence supports the view that violations of Common Article 3, unlike other serious violations of humanitarian law, are not war crimes. The Geneva Conventions established a specific framework for the prevention and punishment of "grave breaches" of international humanitarian law,[281] but this regime does not cover violations of Common Article 3.[282] In fact, Common Article 3 includes no specific provision establishing individual criminal liability for violations of its substantive prohibitions.[283] Interestingly, there is no analogue to the "grave breaches" regime in Protocol II either.[284]

The text of Common Article 3, however, does not preclude the imposition of individual criminal liability; and, indeed, the wording of the provision suggests that it regulates the conduct of individuals.[285] For example, the specific prohibitions of Common Article 3 reference the acts of individuals;[286] and the Geneva Conventions generally obligate states to "ensure respect" for the provisions of humanitarian law (including the law governing internal armed conflicts).[287] Moreover, violations of humanitarian law may, as a conceptual matter, constitute "war crimes" even if they do not constitute "grave breaches" of the Geneva Conventions.[288] Review of several recent developments in

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include a nexus with an armed conflict. *See, e.g.*, ICC Statute, *supra* note 38; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL HUMANITARIAN LAW (2d ed. 1999).

[279] All violations of the laws of war are, as a matter of U.S. military policy, war crimes. DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL 27-10, ¶ 499 (1956) [hereinafter ARMY, FM 27-10].

[280] As recently as 1994, the U.N. Commission of Experts on Former Yugoslavia seems to have held this view. *See Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674 (Annex), 27 May 1994, p. 13, para. 42 (stating that "in general . . . the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification").

[281] *See* Geneva Convention I, *supra* note 28, art. 49; Geneva Convention II, *supra* note 28, art. 50; Geneva Convention III, *supra* note 3, art. 129; Geneva Convention IV, *supra* note 28, art. 146.

[282] *See, e.g.*, Tom Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law in Non-International Armed Conflicts*, 322 INT'L REV. RED CROSS 29 (1998). Graditzky explains the reticence of states to extend the scope of the grave breaches regime to internal conflicts:

> In 1949, it was generally considered that an extension of the system of grave breaches to cover internal conflicts would be viewed as an unacceptable encroachment on State sovereignty. When the Protocols additional to the Geneva Conventions were adopted, on 8 June 1977, States had not changed their stance in this respect. Furthermore, newly independent countries feared that their new partners would take advantage of any potential opening provided by the adoption of Protocol II (relating to non-international armed conflicts) to justify excessive interest in their internal affairs.

[283] Geneva Conventions, *supra* note 28, art. 3.

[284] *See* Protocol II, *supra* note 70.

[285] Geneva Conventions, *supra* note 28, art. 3.

[286] *Id.*

[287] *Id.* art. 1.

[288] The "grave breach" regime does not purport to exhaust the category of "war crime." The penal

international criminal law make clear that violations of Common Article 3 are war crimes.

There is no question that U.S. law classifies violations of Common Article 3 as war crimes. The War Crimes Act was amended in 1997 to cover expressly all violations of Common Article 3.[289] Every U.S. court to consider the issue, has also classified violations of Common Article 3 as "serious violations of international law" and "war crimes."[290] This view is also clearly endorsed in U.S. military law and policy.[291] Moreover, the U.S. has, as a formal matter, vigorously advocated this view before the United Nations[292] and in an *amicus curiae* brief submitted to the ICTY.[293]

In addition, several important developments in international humanitarian law confirm that violations of Common Article 3 are "war crimes." For example, the ICC Statute, perhaps the most authoritative expression of the current state of humanitarian law, specifically criminalizes violations of Common Article 3.[294] The ICTR Statute also imposes individual criminal liability for serious violations of the provision.[295] And although the ICTY Statute does not expressly cover violations of Common Article 3,[296] the tribunal held that the statute's provision concerning "other serious violations of the laws and customs of war" necessarily included violations of Common Article 3.[297] Finally, the criminal law[298] and

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repression regime of the Geneva Conventions makes clear that "simple breaches" of the Conventions may also constitute war crimes. *See, e.g.*, Geneva Convention IV, *supra* note 28, art. 146-48.

[289] *See* 18 U.S.C. § 2441 (2000) (amended in 1997 to replace the term "grave breaches" with "war crimes" and to include violations of Common Article 3 within the definition of war crimes). As initially passed, the War Crimes Act did not apply to crimes committed in internal armed conflicts and was limited in scope to grave breaches of the Geneva Conventions of 1949. The 1997 amendments expanded the scope of the Act to violations of Hague Regulation IV, Articles 23, 25, 27 and 28; violations of Common Article 3 applicable to internal armed conflicts; and willful killing or causing serious injury to persons "in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices ... when the United States is a party to such Protocol." *Id.*

[290] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992); Doe v. Islamic Salvation Front, 993 F.Supp. 3 (D.D.C. 1998).

[291] *See, e.g.*, ARMY FM 27-10, *supra* note 279, ¶ 499; U.S. ARMY, JUDGE ADVOCATE GENERAL, OPERATIONAL LAW HANDBOOK, *supra* note 15, at ch. 8 ("war crimes").

[292] The United States has argued:

> The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 [should be included in the ICC's jurisdiction] . . . . It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC jurisdiction.

U.S. Statement, U.N. Preparatory Committee on the Establishment of an International Criminal Court, Mar. 23, 1998, *quoted in* Theodor Meron, *War Crimes Law for the Twenty-First Century*, *in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 325, 327 (Michael N. Schmitt & Leslie C. Green eds., 1998).

[293] *See* Amicus Curiae Brief presented by the United States 26-36, Prosecutor v. Tadic, Case No. IT-94-1-T (Motion Hearing) (Int'l Crim. Trib. for Former Yugoslavia July 25, 1995) (on file with author).

[294] ICC Statute, *supra* note 38, art. 8. Articles 8(2)(c) and 8(2)(e) of the ICC Statute cover Common Article 3 and Article 4 of Protocol II, respectively. Article 8(c) explicitly references Common Article 3 and its prohibitions, whereas Article 8(e) addresses Protocol II, Article 4, and its prohibitions by implication. All acts prohibited in Common Article 3(1) and Protocol II, Articles 4(1) and 4(2), are prohibited by Articles 8(2)(c) and 8(2)(e) of the ICC Statute, respectively. *Id.*

[295] ICTR Statute, supra note 37, art. 4.

[296] ICTY Statute, *supra* note 37, art. 3.

[297] *See* Prosecutor v. Tadic, No. IT-94-1-AR72, ¶¶ 87-91 (Appeal on Jurisdiction) (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Oct. 2, 1995), *reprinted in* 35 I.L.M. 32 (1996).

[298] *See, e.g.*, *Código Penal*, Law 10/1995, of 23 November (Spain); *Penal Code of Finland* (translated by M. Joutsen), Chap. 1, Art. 3, para. 2.1, p. 17; Chap. 13, Arts 1 and 2, pp. 48-49; *Swedish Penal Code*, National Council for Crime Prevention, Stockholm, 1986, pp. 9 and 68;

military manuals[299] of many other states recognize violations of Common Article 3 as war crimes. Few propositions of law enjoy such support.

Table 3. Typology of Armed Conflicts and Applicable Criminal Law

Type of Armed Conflict	**Material field of application**	**Applicable Substantive Law**	**Source of Criminal Liability**
Common Article 2: International armed conflict	(1) Armed conflicts between 2 or more states party to GC; and (2) Armed conflicts between a state and a "recognized belligerent"	(1) "Grave breaches"; GC I-IV; and (2) Common Article 3	Conventional: Grave Breaches provisions in GC
Additional Protocol I: Wars of National Liberation	(1) International armed conflicts; and (2) Armed conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"	(1) "Grave Breaches"; GC I-IV; (2) API; and (3) Common Article 3	Conventional: Grave Breaches provisions in GC
Additional Protocol II: Civil Wars	Internal armed conflicts between a state and "organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."	(1) AP II; and (2) Common Article 3	(1) Domestic Law (2) Customary International Law
Common Article 3: Internal armed conflicts	Armed conflicts "not of an international character"	Common Article 3	(1) Domestic Law; and (2) Customary International Law: ICC, ICTY, ICTR, U.S. War Crimes Act of 1996

IV. CONCLUSION: THE LAWS OF WAR AND COUNTER-TERRORISM

Code pénal militaire, Federal Law of 13 June 1927, 321.0, Federal Chancellor's Office, 1995 (ICRC translation); *Ley de Código penal de la República de Nicaragua*, Bibliografías Técnicas, 1997, pp. 4 and 148; *Penal Code of the Federal Republic of Germany* (translated by J. Darby), *American Series of Foreign Penal Codes*, *op. cit.*, (note 41), Vol. 28, Art. 6, para. 9, p. 50; *Criminal Code of the Russian Federation*, No. 63-FZ of 13 June 1996, Garant-Service, 1996, Arts 12 and 356; *Código Penal Português* (anotado e comentado: M. Maia Gonçalves), Livraria Almedina, Coimbra, 1996, pp. 93, 727-728 (Portugal); *Penal Code of the Empire of Ethiopia*, Proclamation No. 158 of 1957, in *Negarit Gazeta*, Gazette Extraordinary, Addis Ababa, 1957, Arts 282-284, pp. 87-88; *Penal Code of the Socialist Federal Republic of Yugoslavia*, 1990, Art. 142-143; *Penal Code of Slovenia*, 1 January 1995 (unofficial translation by the Ministry of Justice), Chap. 35: Criminal offences against humanity and international law, pp. 117-118, Arts 374-377; *Militaer Straffelov* of 22 May 1902, No. 13, Art. 108 (as incorporated by the law of 26 November 1954, No. 6, and amended by the law of 12 June 1981, No. 65) (Norway); *Geneva Conventions Act*, 1962, No. 11, Sections 3 and 4 (Ireland).

[299] *See, e.g.*, (Deutsches) Bundesministerium der Verteidigung, *Humanitäres Völkerrecht in bewaffneten Konflikten*, Handbuch, August 1992, para. 1209 (also in English: Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts*, Manual, August 1992) (Germany); *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations*, NWP 9 (REV.A)/FMFM 1-10, Washington D.C., 1989, para. 6.2.5 (United States); Department of the Army, *The Law of Land Warfare*, FM 27-10, 1956, para. 499 (United States); Stato Maggiore della Difesa, *Manuale di diritto umanitario* (Vol. I: *Usi e Conventioni di Guerra*), Rome, 1991, p. 28, para. 85 (Italy); War Office, *The Law of War on Land*, Part III of the *Manual of Military Law*, 1958, para. 626 (United Kingdom); Canadian Forces, *Law of Armed Conflict Manual*, Second Draft, 1988, paras 1701-1704 (Canada).

As discussed in Part I, the characterization of the September 11 attacks as violations of the laws of war has important consequences for debates about the scope and validity of the contemplated military commissions, the viability of other prosecutorial options, the legality of the U.S. military response to the attacks, and perhaps most importantly, whether the international humanitarian law might play a meaningful role in the emerging global antiterrorism regime.

Nevertheless, many commentators have resisted the "war crimes" characterization. Because the September 11 attacks were, without question, *criminal* irrespective of whether they are characterized as war crimes, the purchase of the characterization is unclear. Unfortunately, debates about how best to characterize the attacks have been unnecessarily tethered to collateral issues. More specifically, the "war crimes" characterization arguably (1) legitimizes the U.S. decision to use military force against the Taliban regime in Afghanistan; and (2) strengthens the case for the validity (constitutional and statutory) of military commissions. The legality of *Operation Enduring Freedom* (under international law) turns in part on whether the September 11 attacks constituted "armed attacks." And the validity of U.S. military commissions turns in part on whether the attacks constituted "war crimes." To be sure, both claims have some merit. Nevertheless, there are good reasons to disaggregate these three discrete issues—the "war crimes" question, the "use of force" question, and the "military commissions" question.

The "war crimes" characterization, although important to any proper analysis of the other two questions does not settle them—in other words, it is under-determinative. First consider the "military commissions" question. Although U.S. law arguably authorizes the use of military commissions to try individuals for "violations of the laws of war," the "war crimes" characterization does not necessitate trials by military commission.[300] Indeed, "war crimes" prosecutions could be initiated in a number of fora including U.S. federal courts[301] and courts-martial.[302] Moreover, the proposed commissions may be unlawful even if they have subject matter and personal jurisdiction. For instance, the commissions may fail to satisfy the minimum procedural rights guarantees established in international human rights law[303] (and the laws of war).[304] And, as a matter of domestic law, the President may lack the authority to establish military commissions absent a formal declaration of war by the Congress.[305] In addition,

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[300] *See supra* Part I.

[301] The War Crimes Act provides district courts with jurisdiction to try persons for war crimes, if the perpetrator or the victim is a U.S. national or a member of the armed forces of the United States. It is also important to note that the Act defines war crimes in terms of international humanitarian law; and, specifically, makes clear that any conduct constituting a violation of Common Article 3 of the Geneva Conventions is a war crime. 18 U.S.C. § 2441 (2000). Interestingly, the legislative history of the act indicates that Congress did not intend to deprive military commissions or courts-martial of jurisdiction under the laws of war. *See* H.R. Rep. No. 104-698 at 12, 1996 USCCAN 2166, 2177 Congress reiterated this intention to preserve "law of war" jurisdiction for military commissions when extending the jurisdiction of the UCMJ in 2000. *See* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C § 3261(c).

[302] The UCMJ authorizes trial by courts-martial of non-U.S. military personnel in only two circumstances: (1) the individual allegedly violated the laws of war; and (2) the accused is subject to the authority of the United States under the laws of belligerent occupation. *See* 10 U.S.C. § 821 (1994); Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of Humanitarian Law in Internal Armed Conflicts*, 167 MIL. L. REV. 74, 94 (2001) ("offenders or offenses that by statute or by the law of war may be tried by military commissions" include non-U.S. military combatants).

[303] *See* Fitzpatrick, *supra* note 40; *see also* Derek Jinks, *International Human Rights Law and the War on Terrorism*, DENV. J. INT'L L. & POL. (forthcoming 2002) (summarizing these protections).

[304] *See* Cerone, *supra* note 4 (summarizing these procedural guarantees).

[305] *See, e.g.*, Katyal & Tribe, *supra* note 9, at 1266-77.

the Military Order providing for commissions may, on its face, violate the Equal Protection Clause of the U.S. Constitution;[306] and it may well offend several fundamental rules of constitutional criminal procedure.[307]

Next consider the "use of force" issue. The "war crimes" characterization—in that it presupposes a finding of "armed conflict"—clearly supports the U.S. claim of self-defense.[308] A valid self-defense claim, however, requires more. For instance, to justify the use of force against another sovereign state, the U.S. had to demonstrate that the state in question knowingly harbored those responsible for the attacks.[309] In addition, the force deployed must have been proportionate to, and immediately necessary to meet, the threat.[310]

The applicability of the laws of war follows from the characterization of the attacks as the initiation or confirmation of an "armed conflict." Whether the attacks constituted "international terrorism" or not is irrelevant to the proper characterization of the attacks under international humanitarian law. And although "terrorism" as such does not trigger the application of humanitarian law, the analysis offered here suggests that humanitarian law can play an important role in the struggle against terrorism. Moreover, several important policy considerations favor formally characterizing the acts as "war crimes" (irrespective of the chosen forum). As the United States seeks to build a durable and effective transnational coalition against terrorism, humanitarian law (including the laws of war) provides a stable, widely-endorsed normative framework for condemning the attacks.[311] This contrasts sharply with the fractiousness that has characterized efforts to develop a definition of "terrorism" acceptable to most states.[312] In fact, states strongly disagree on the proper definition of "terrorism," and these persistent disagreements will, it appears, block the conclusion of a comprehensive anti-terrorism treaty (the events of September 11 notwithstanding).[313] War crimes prosecutions would also set an important precedent for classifying certain acts of "terrorism" as serious violations of humanitarian law. Such a precedent would help define a meaningful role for international institutions in the "war on terrorism," including the considerable institutional machinery of international criminal law.

In Parts II and III, I addressed whether the laws of war are applicable to the September 11 attacks; and, if so, whether violations of these rules constitute "war crimes." Careful scrutiny of the treaty text, structure, and history of the potentially applicable laws of war strongly supports the conclusion that the terrorist attacks of September 11 constituted the initiation or confirmation of an "armed conflict" within the meaning of international law; and that the attacks were "war crimes." The dual concerns that animate the scope and content of Common Article 3—humanitarian protection and state sovereignty—are best served by this reading of "armed conflicts not of an international character." As discussed in Part I, that the September 11 attacks violated the laws of war has important implications for international humanitarian law, national military law and policy, and U.S. antiterrorism law and policy.[314]

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[306] *See, e.g., id.* at 1298-1303.
[307] *See, e.g., id.* at 1304-08.
[308] *See supra* Section III.A.4.c; *see also supra* text accompanying note 21.
[309] *See supra* note 62.
[310] *See, e.g.*, CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE (2000).
[311] *See generally* RATNER & ABRAMS, *supra* note 32.
[312] *See, e.g., Islamic Nations Fail to Define Terror, Leave to UN*, N.Y. TIMES, Apr. 2, 2002, at A2; U.N. Ad Hoc Committee on Terrorism, *Agreement on Comprehensive International Convention on Terrorism Elusive*, Press Release No. L/2992 (Jan. 29, 2002), *available at* http://www.un.org/News/Press/docs/2002/L2992.doc.htm.
[313] *See, e.g., id.*
[314] *See supra* Part I.

The attacks and the response to them strongly suggest that international humanitarian law can play a productive and important role in the fight against terrorism. If humanitarian law is to regulate intense, organized hostilities, this law should apply to much of the conduct traditionally characterized as "terrorism." The nature and quality of the September 11 attacks demonstrate that non-international armed conflicts can be highly organized and extremely intense—*even if not protracted, and even if the private armed group controls no territory*.

Common Article 3 is perhaps the most revolutionary aspect of the Geneva Conventions. In practice, states have (predictably) resisted application of international humanitarian law to "internal" hostilities—irrespective of their intensity, organization, or duration. Because Common Article 3 is cast in abstract terms, it has proven difficult to develop objective criteria for determining the existence of an armed conflict. Several important developments have, of course, elaborated the scope and content of the rules embodied in Common Article 3—including, most significantly, the Additional Protocols to the Geneva Conventions; numerous U.N. resolutions; the statutes and jurisprudence of the ad hoc international criminal tribunals; and the statute of the International Criminal Court. Despite these developments, the threshold of application for the laws governing non-international conflicts remains unclear.

Common Article 3 of the Geneva Conventions remains central in the international and domestic legal regimes governing armed conflict. As previously discussed, the high threshold of application found in the Additional Protocols precludes their use in most non-international conflicts. The International Criminal Court will have jurisdiction over crimes committed in non-international armed conflicts but the Court's founding statute offers very little to resolve the controversy surrounding the meaning of "armed conflict." Moreover, many national jurisdictions—including the United States—have criminal provisions expressly relying on Common Article 3 to define the prohibited conduct. And, this robust legal regime is, of course, applicable only in the context of an "armed conflict." The model proposed in this Article offers a normatively attractive framework—faithful to the text, structure, and history of the Geneva Conventions—within which to analyze the applicability of international humanitarian law in conflicts "not of an international character."

Because the analysis in Part III addresses persistent ambiguities in the scope and content of the laws of war, the framework proposed therein provides a model for analyzing future incidents that will likely present many of the same difficulties. Indeed, the September 11 attacks make clear that the very nature of organized violence is changing. Given the purposes of the laws of war, these new modes of projecting cataclysmic force present important challenges to both domestic and international law. As these challenges are addressed, it is important to take stock—thoroughly and sensibly—of the important recent developments in humanitarian law including (1) the regulation of non-international armed conflict; and (2) the criminalization of atrocities committed in these conflicts. These developments, motivated by the commitment to end such atrocities peacefully under the rule of law, address in part the vexing legal problems faced in the wake of September 11.