CHAPTER VI Appraisal of Domestic Measures under International Law

The domestic model chosen for discussion and analysis in this paper is the United States. Consequently, when scrutinizing the domestic measures adopted to counter terrorism under international law, we have to bear in mind that the United States is a party to the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT) as well as the four Geneva Conventions of 1949. The U.S. is not a party to the Inter-American Convention on Human Rights (IACHR), though the Inter-American system of human rights protection remains relevant in light of the fact that the Inter-American Declaration on Human Rights, which enshrines many of the provisions included in the convention, has largely come to be considered at least regional customary international law. In any event, the U.S. is bound by universal customary international law, which, as documented in previous chapters, provides for quite a number of due process guarantees. Additionally, the study up to now has revealed circumstances that deal with a complexity of criminal proceedings stemming from war or war-like events as well as normalcy situations, albeit a heavily charged normalcy as it relates to criminal activity. Consequently, in addition to human rights law referred above, the laws of war, i.e., humanitarian law standards may also come into play.

A. The Applicable Legal Regime: General Framework

After September 11, 2001, the U.S. President declared a Global War on Terror. In this particular context, however, the laws of war as written down in the Hague and Geneva conventions have been argued not to apply to the conflict with Al Qaeda, with which allegedly most of the Guantánamo detainees are affiliated. The Administration reasons as follows:

1. The Geneva Conventions generally do not apply. With the exception of common Article 3, they apply only to international armed conflicts, i.e. conflicts between states, and al Qaeda is not a state.
2. The Third Geneva Convention on the treatment of prisoners in time of war does not apply, more specifically, because the requirements of its Article 4 are not fulfilled. Thus, they are not to be considered lawful combatants.
3. The Fourth Geneva Convention is said not to apply because the terrorists are not part of the protected civilian populations but they are to be considered unlawful combatants.
4. Common Article 3 of all four Geneva Conventions does not apply as this is an international conflict and not a “non-international” armed conflict.

According to the logic of the U.S. Administration, there is thus a legal vacuum, which is only filled with a relatively vague promise of “humane treatment,” which was further circumscribed by the precept of “military necessity,” which allowed “the gloves to come off.” In *Hamdan v. Rumsfeld*, the U.S. Supreme Court has, however, considered Common Article 3 to be applicable to the war on terror. Right after that decision, Deputy Secretary of Defense Gordon England sent a memorandum to all military branches mandating that all DOD personnel adhere to Common Article 3 standards. The view that Article 3 applies, as a minimum, to all armed conflicts, is shared by a high-ranking official of the ICRC, who also considers Article 3 part of not only customary law, but also *jus cogens*.

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1 Cofer Black, former director of the CIA’s Counterterrorism Center, testifying before a joint session of the Senate and the House Intelligence Committees, September 26, 2002. Referred to in Kenneth Roth, *Justifying Torture*, in 184 *Torture* 184, 192 (Kenneth Roth & Minky Worden eds., 2005).

2 126 S.Ct. 2749, 2795-96 (2006): “The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character’ ... That reasoning is erroneous. The term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations. ... Common Article 3 ... affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict ‘in the territory of’ a signatory. ... Common Article 3, then, is applicable here.”

3 “The Supreme Court has determined that Common Article 3 of the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda....You will ensure that all DOD personnel adheres to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3.” Memo quoted in Howard Ball, *Bush, the Detainees, and the Constitution: The Battle over Presidential Power in the War on Terror* 84 (2007).

4 Hans Peter Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct*, 28 Int’l Rev. Red Cross, Jan.-Feb. 1988, at 38, 44-45: “[T]he substance of common Article 3, based on customary law, is part of *jus cogens* ... binding on all states. Consequently, the obligations stated under Article 3 transcend that article’s field of application; they are valid for all forms of armed conflict. The International Court of Justice...confirmed this in its judgment in the case of *Nicaragua versus the United States* ... [where] it reached the conclusion that Article 3, as part of customary law, constitutes a ‘minimum yardstick’ applicable to all armed conflicts.” Other scholars have joined the opinion that the core of Article 3 might have attained the status of *jus cogens*, while they disagree with the methodology used by the International Court of Justice in arriving at the conclusion that Article 3 constitutes customary law. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int’l L. 348, 357-358 (1987).