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Common Article 3 of the Geneva Conventions and U.S. Detainee Policy

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The Geneva Conventions loom large over U.S. terrorist detainee policy—even when the conventions may not strictly, as a matter of law, apply. In addition to their legal force, the conventions carry the weight of moral authority. It is no small matter, then, to question whether U.S. detention efforts fall short of the standards of Article 3—an article that is common to all four Geneva Conventions (hence its designation as "Common Article 3," or CA3). But that was the implication when President Barack Obama ordered the secretary of defense to conduct an immediate 30-day review of the conditions of detention in Guantanamo to "ensure full compliance" with CA3.

What exactly such compliance requires is open to debate.

CA3: Already in Force. From the military's point of view, Common Article 3 has been in full force for over two and a half years at Guantanamo. In June 2006, the United States Supreme Court ruled in the case of *Hamdan v. Rumsfeld* that America's armed conflict with al-Qaeda was non-international in character and, as such, was governed by CA3.[1] Within a week of that ruling, Deputy Secretary of Defense Gordon England issued a department-wide memorandum requiring all Department of Defense components to comply with CA3. Shortly thereafter, all components of the Department of Defense reported that they were in full compliance; this included the Joint Task Force in charge of detention operations at Guantanamo Bay, Cuba.

On September 6, 2006, the Department of Defense issued a department-wide directive applicable to all detainees in DOD custody or effective control. That directive incorporated verbatim CA3 of the Geneva Conventions and required the entire Department of Defense, including Guantanamo, to comply with CA3.

Whether this September 2006 directive marks the end of the story depends on what the text of CA3 means. And that is not so straightforward an inquiry.

Defining CA3. Common Article 3 is the third article common to each of the four Geneva Conventions. The Geneva Conventions codify much, albeit not all, of the law regulating armed conflict and the humane treatment of persons detained during armed conflict. The four conventions, as most recently revised and expanded in 1949, comprise a system of safeguards that attempt to regulate the ways wars are fought and to provide protections for individuals during wartime. The conventions themselves were a response to the horrific atrocities of World War II. The first convention covers soldiers wounded on the battlefield, the second covers sailors wounded and shipwrecked at sea, the third covers prisoners of war, and the fourth covers civilians taken by an enemy military or otherwise impacted.

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What CA3 precisely requires and what it forbids is subject to debate. According to the actual language of CA 3, detainees "shall in all circumstances be treated humanely," but the term *humanely* is never defined. "[O]utrages upon personal dignity, in particular humiliating and degrading treatment," are strictly prohibited, whatever they may be. Also prohibited are "cruel treatment and torture," but again, there is no definition of these terms. CA3 is a good statement of principles, but aside from banning murder and hostage-taking, it provides no concrete guidance to anyone actually holding detainees.

Nonetheless, CA3 is a part of U.S. treaty and criminal law. Congress, in the 1999 amendments to the War Crimes Act, made it a crime to violate CA3. For certain acts, such as murder, taking hostages, and obvious acts of torture, the prohibited conduct should be clear, since Congress has defined the elements necessary to prove these crimes in statutory law.

But what exactly constitutes "outrages upon personal dignity, in particular humiliating and degrading treatment"? No universal or even national consensus as to the definition of these terms exists. There is, however, no doubt that what constitutes humiliation or degradation, as distinct from acceptable treatment, is highly context-specific and culture-dependent. For example, any custodial interrogation or incarceration entails elements of humiliation that would be unacceptable in other contexts. Likewise, some societies find placing women in a position of authority, as guards or interrogators, over detained individuals unacceptable; for other cultures that believe in basic gender equality, these practices are not even remotely humiliating. Even Jean Pictet, the world-renowned human rights attorney who helped draft the Geneva Conventions and led the International Committee of the Red Cross, noted that with respect to CA3, the drafters wanted to target those acts that "world public opinion finds particularly revolting." This is a highly uncertain guide.

Pictet also stated that the outrages upon personal dignity referenced by the treaty were of a sort "committed frequently during the Second World War." This too gives little guidance. Presumably, the prohibition would include forcing ethnic or religious minorities to wear insignia for purposes of identification, such as the infamous yellow star imposed by the Nazi regime on the Jewish population of Germany and occupied Europe. What else it may include is very much open to debate; the Axis Powers were ingenious in the area of humiliating and degrading treatment.

Principles of CA3. In interpreting this important provision, the United States would be justified in following some basic principles inferred from CA3.

First, CA3 imposes obligations on the parties to a conflict. This suggests that to violate the provision, the conduct must be both of a sort that world opinion finds "particularly revolting" and systemic, undertaken as a matter of policy rather than simply the actions of individual miscreants or criminals. Thus, although the treatment of some detainees by a few guards may have been outrageous, humiliating and degrading—and perhaps criminal—it would not violate CA3 unless it was ordered as a matter of policy or the responsible authorities failed to suppress and punish the conduct once it became known to them. All allegations of mistreatment are required to be investigated as a matter of written order.

Likewise, the use of the law of war paradigm cannot, by definition, be a violation of CA3, even if its specific application produces a less than ideal result. For example, detaining individuals believed to be enemy combatants is no violation of CA3, even if subsequent review concludes that their status classification was erroneous and they were not, in fact, enemy combatants. Under the same logic, and despite some oft-invoked but misguided criticisms of the U.S. detention policy, detaining captured enemy combatants for the duration of hostilities and not charging them with specific criminal offenses does not violate CA3.

1. *Hamdan v. Rumsfeld*, 126 S.Ct 2749 (2006). It is worth noting that, insofar as the *Hamdan* case dealt with the legality of military commissions, and the Court's observations about the applicability of the CA3 were raised in that context, the Bush Administration could have opted to read the case holding narrowly. However, the Administration and the Department of Defense chose to construe *Hamdan*'s teaching broadly and applied CA3 across the entire range of detention operations.

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Second, the purpose of CA3 was to compel compliance with the most basic requirements in the context of a civil war or other internal conflict, where it was acknowledged that the other provisions of the four conventions would not apply. Thus, it is a fair assumption that CA3 should not be interpreted as simply incorporating those other Geneva Convention provisions into the conflicts to which CA3 is applicable. Outrages upon personal dignity would not, therefore, include simply denying captives the rights and privileges of honorable prisoners of war under the third convention or of civilian persons under the fourth.

Third, CA3, like any other specific treaty provision, should be construed in the context of the overall treaty regime of which it is a part. In this regard, the overarching purpose of the 1949 Conventions (and all of the other laws of war-related treaty norms) has been to ensure that the popular passions aroused by war and even the consideration of military necessity do not vitiate the fundamental requirements of humane treatment. To suggest that, for example, the wartime standards of treatment should be fundamentally superior to the peacetime standards would turn this logic upside down and is untenable. Accordingly, such incarceration-related practices as single-cell confinement and involuntary-feeding—which, subject of course to appropriate safeguards, are used in civilian penal institutions of many Western democracies—cannot, by definition, infringe CA3.

There is no doubt that the intentions reflected in CA3 are laudable, but it is a less than perfect standard for the law of war, which must provide real and precise answers to an entire range of specific questions. Indeed, CA3's language is ambiguous, capacious, and difficult to apply in some circumstances. Fortunately, U.S. detention operations in general, and post-2006 in particular, have featured conditions for detainees that—structured in ways that provide more than sufficient compliance with CA3—compare favorably with any detention facilities in the history of warfare.

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