Hamdan and the Law of War: The Applicability of the Geneva Conventions to the "Global War on Terrorism"

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There are three important reasons to question whether the GWOT is governed by the Conventions. These reasons, pitched at a high level of generality for the moment, are: (1) adverse legal and policy consequences might follow from characterizing the GWOT as a "war" in the legal sense; (2) terrorist organizations like al Qaeda are not states and conflicts with such entities are materially different from inter-state wars and civil wars; and (3) terrorist organizations enjoy no protection under the rules of war because they do not accept or observe these rules themselves. The balance of the Chapter is organized around a more sustained evaluation of each rationale. Focused analysis of these points helps illustrate the finer details of the rules under consideration here. I conclude that the Conventions govern some aspects of the GWOT irrespective of the fact that hostilities are directed in substantial part against nonstate actors, irrespective of the fact that hostilities are not formally declared, irrespective of whether the "war model" of counter-terrorism is advisable, and irrespective of whether the terrorist groups accept or observe the rules of war themselves.