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Miles P. Fischer*

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Abstract

This Essay briefly reviews the application of the Geneva Conventions of 1949 (the “Conventions”) in the so-called war on terror since September 11, 2001 (“9/11”), highlighting a few current issues of particular interest; notably, the concept of “armed conflict,” the role of Common Article 3, the impact of the MC Act, screening by “competent tribunals,” and enforcement of the Conventions in courts martial and against Central Intelligence Agency (“CIA”) operatives.

APPLICABILITY OF THE GENEVA CONVENTIONS TO “ARMED CONFLICT” IN THE WAR ON TERROR

*Miles P. Fischer**

What a roller-coaster ride it has been! Human rights advocates emerged from a black hole of international lawlessness to the exhilaration of victory in the U.S. Supreme Court’s *Rasul v. Bush*¹ and *Hamdan v. Rumsfeld*² decisions in June 2004 and June 2006, only to fall back to political reality upon the adoption of the Military Commissions Act of 2006³ (the “MC Act”) in October, 2006. And the ride goes on.

This Essay briefly reviews the application of the Geneva Conventions of 1949⁴ (the “Conventions”) in the so-called war on terror since September 11, 2001 (“9/11”), highlighting a few current issues of particular interest; notably, the concept of “armed conflict,” the role of Common Article 3,⁵ the impact of the MC Act, screening by “competent tribunals,” and enforcement of the Conventions in courts martial and against Central Intelligence Agency (“CIA”) operatives.

Applying the Conventions in the war on terror comes as no surprise to us now. Yet ten years ago, this title would have sounded at best odd, at worst irrelevant, to any real concern—ten years ago, governments had rarely conceived of terrorism as

* Former Chair, Committee on Military Affairs & Justice, Association of the Bar of the City of New York (“ABCNY Military Committee”); Member, Advisory Board of the National Institute of Military Justice. The author is in private practice with Wohabe Law Offices LLP, New York, NY. This Essay is based on a condensed presentation by the author at *Guantanamo, a Colloquium*, sponsored by the Stein Center on Law and Ethics, Fordham University School of Law on November 29, 2006. The views stated herein are the author’s and do not necessarily represent the views of any organization with which he may be associated.

1. 542 U.S. 466 (2004).

2. 126 S. Ct. 2749 (2006).

3. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

4. Of the four Conventions, this Essay refers to the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (the “Third Convention” or “GC III”) and the 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 (the “Fourth Convention” or “GC IV”).

5. It is called “Common Article Three” because it is common to each of the four Geneva Conventions. See John T. Rawcliffe, *Changes to the Department of Defense Law of War Program*, August 2006 ARMY LAW. 23, 25.

armed conflict or terrorists as combatants. Absent armed conflict, the indispensable predicate for the Conventions, they were simply irrelevant to terrorism.

I. OVERVIEW OF GENEVA CONVENTION ISSUES SINCE 9/11

Soon after 9/11, applicability of the Conventions surfaced in Afghanistan as an issue in a full-fledged armed conflict conducted with the whole panoply of modern weaponry. The breaking news wasn't whether the United States was treating terrorists as combatants, but that it was not giving effect to the Conventions in extended military operations. The United States took the nuanced position that the Conventions applied in principle to the conflict with the Taliban as a *de facto* State party, though without conferring prisoner of war ("POW") status on its members under Geneva Convention III ("GC III").⁶ Nor did the Administration find GC III to be applicable at all to what it considered a separate conflict with Al Qaeda, a non-State actor. And the brief application of Geneva Convention IV ("GC IV") to civilians went largely ignored.⁷

Thereafter, the Conventions came to the fore during the invasion of Iraq and the ensuing occupation, when the United States recognized their application without qualification, although their observance left much to be desired, to put it mildly. A notable question involved the treatment of security detainees.⁸

6. See *Hamdan*, 126 S. Ct. at 2795. According to the Government, "Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan is not a 'High Contracting Party'—*i.e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan." *Id.*

7. The Fourth Convention, other than Common Article 3, applied in Afghanistan, in the author's view, only during the invasion and until international recognition of the Karzai government. In the author's view, there was no occupation of the country within the meaning of GC IV. If there had been an occupation of the country, the occupying power would have been NATO or its members whose troops were in Kabul, not the United States, which never had military control of the capital or an Afghan government.

8. Neither the Administration nor Central Command has articulated its understanding of permissible "derogation" from GC IV as to "security detainees" during occupation. The provisions of Article 4 of GC IV on security detainees are beyond the scope of this Essay. Suffice it to say that during occupation, the only derogative effect of Article 4 is to permit security detainees to be held incommunicado for some period of time; all other rights, including the right against coercion, continue unabated. See Attachment to Letter Dated August 10, 2005, from ABCNY Military Committee to Sens. Warren and Levin, Armed Services Committee, U.S. Senate (on file with author).

Attention focused on detainees from the Afghan conflict and, significantly, from third countries, held at Guantanamo Bay Naval Station, Cuba ("Guantanamo") and other locations. Should these detainees be held as prisoners of war under GC III? Or, if only Common Article 3 applies rather than the main body of the Conventions, are the methods of detention, interrogation, and possible trial by military commission consistent with that Article? How could the detainees enforce any applicable rights?

The issues arising at Guantanamo led to a series of cases finding their way to the U.S. Supreme Court, including the Conventions' premiere before the Court in the recent *Hamdan* decision.⁹ First, in *Rasul*, the Court recognized that even non-citizens have a statutory right to habeas corpus at Guantanamo given exceptional U.S. control of that location.¹⁰ In response, habeas petitions bloomed like flowers after a desert rainfall. Then *Hamdan* was a blockbuster: (a) Common Article 3 applied to the Afghan conflict with al-Qaeda;¹¹ and (b) military commissions as then conceived were invalid because they violated Common Article 3¹² and, therefore, did not comply with the law of war as required by the Uniform Code of Military Justice ("UCMJ").¹³

Common Article 3 had not been the centerpiece of many pro-detainee briefs. Some focused on alleged POW status, others on the statutory law of military commissions or detention, and a few were constitutional in emphasis. Yet a plurality of the Court recognized the applicability of at least Common Article 3 in the Afghan conflict and the central role of the Conventions in the "law of war," as that term is used in the UCMJ with regard to military commissions.¹⁴ That in turn led to intense congressional attention and finally to legislation in the MC Act.¹⁵ The

9. See *Hamdan*, 126 S. Ct. at 2793-99.

10. See *Rasul v. Bush*, 542 U.S. 466, 480-82 (2004).

11. See *Hamdan*, 126 S. Ct. at 2794-99.

12. See *id.* at 2796-99.

13. See *Hamdan*, 126 S. Ct. at 2790-99; see also 10 U.S.C. §§ 801-946 (2006). The UCMJ conditions the President's use of military commissions to try accused combatants on, *inter alia*, the Geneva Conventions. See 10 U.S.C. § 821; see also *Hamdan*, 126 S. Ct. at 2786.

14. See *Hamdan*, 126 S.Ct. at 2785-99; see also 10 U.S.C. § 821.

15. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

roller coaster went up and then, in the eyes of many, came roaring down.

II. TERRORISM AS ARMED CONFLICT

Throughout this drama the Administration of President George W. Bush has lost battles, but it may have won a key phase of the legal war in the characterization of the events. From the Administration's viewpoint, such controversial questions as whether Taliban or al-Qaeda detainees are prisoners of war under the Third Convention or the meaning of non-international conflict in Common Article 3 may be highly important, but they are subject to the overarching view of the entire War on Terror as "armed conflict." Without that characterization, the other questions would not even arise: the Conventions, including Common Article 3, apply expressly only in "armed conflict," the term used in 1949 to replace the outmoded concept of "war."¹⁶

The 1949 treaties did not define "armed conflict." According to the International Committee of the Red Cross *Commentary* edited by Dr. Jean Pictet, "speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war"¹⁷ There has been little precedent to define those terms.

The paucity of precedent on these problems exists in large part because only the United States and Israel¹⁸ have dealt with

16. "Law of war" is used in U.S. statutes like 10 U.S.C. § 821, which concerns "offenses that by . . . the law of war may be tried by military commissions," and case law like *Ex parte Quirin*, 317 U.S. 1 (1942). Although there may be nuances in the terminology, this presentation assumes that the "law of war" and the "law of armed conflict" are the same. For collectors of military acronyms, the Armed Forces sometimes refer to the "law of armed conflict as LOAC. See Rod Powers, Law of Armed Conflict (LOAC), <http://usmilitary.about.com/cs/wars/a/loac.htm> (last visited Feb. 4, 2007).

17. III JEAN DE PREUX, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 37 (trans. A.P. de Henry, 1960) (emphasis in original).

18. On December 11, 2006, the Israeli Supreme Court upheld certain targeted killings by Israeli Defense Forces on the basis that:

Between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip . . . a continuous situation of armed conflict has existed since the first *intifada*. The Supreme Court has discussed the existence of that conflict in a series of judgments (*see* HCJ 9255/00 *El Saka v. The State of Israel* (unpublished); HCJ 2461/01 *Kna'an v. The Commander of IDF Forces in the Judea*

terrorism as “armed conflict.” Accordingly, only they have had to deal with the application of the Conventions to terrorism.

Other countries steer far away from applying the “armed conflict” label to terrorism or any internal conflict and thus seek to avoid consequent recourse to the Conventions.¹⁹ They are assisted in this approach by the 1977 Protocol II to the Conventions.²⁰ Protocol II is decidedly limiting when applied to terrorism. In order for Protocol II to apply in non-international armed conflict, the non-State opponents must be “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”²¹ It has been cynically suggested (well before 9/11) that Protocol II was ratified so soon by so many countries precisely because that limiting definition suited their convenience in keeping distance between their internal conflicts and the Protocols and

and Samaria Area (unpublished); HCJ 9293/01 *Barake v. The Minister of Defense*, 56(2) PD 509; HCJ 3114/02 *Barake v. The Minister of Defense*, 56(3) PD 11; HCJ 3451/02 *Almandi v. The Minister of Defense*, 56(3) PD 30 (hereinafter “*Almandi*”); HCJ 8172/02 *Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished); HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel* (unpublished, hereinafter – *Mara’abe*). In one case I [A. Barak] wrote: “Since late September 2000, severe combat has been taking place in the areas of Judea and Samaria. It is not police activity. It is an armed conflict” (HCJ 7015/02 *Ajuri v. The Military Commander of the Judea and Samaria Area*, 56(6) PD 352, 358; hereinafter “*Ajuri*.”

HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel [2005], ¶ 16, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM.

19. See *id.* ¶¶ 29-37; see also Jennifer Van Thiel, *Good for the Nation, Good for the Administration: Why the Courts Should Hear the Guantanamo Bay Detainee Cases and How It Will Have Positive Effects*, 27 WHITTIER L. REV. 867, 868 (2006) (discussing the arbitrary classification of detainees and the escape routes to avoid prosecution under laws governing armed conflicts).

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. The United States is neither a party to Protocol II, nor to the accompanying Protocol I, but it accepts much of the Protocols as customary law. See Rawcliffe, *supra* note 5, at 25 n.13.

21. Protocol II, *supra* note 20, art. 1, ¶ 1. Paragraph 2 goes on to specify that “[t]his 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.* art. 1, ¶ 2. Putting the two paragraphs together, Paragraph 1 relates to armed conflicts to which the Protocol applies, while Paragraph 2 describes situations that are not armed conflict. The Protocol does not characterize cases falling between these definitions, which may or may not be armed conflict, but in any event are apparently outside the scope of the Protocol as per Paragraph 1.

Conventions.²² While the Protocols expressly do not limit the application of the Conventions proper, they may well influence interpretation or contribute toward the understanding of “armed conflict” under customary international law.²³

The Protocols did not, however, influence the view of armed conflict by the International Criminal Tribunal for the Former Yugoslavia when, in the appeal in the case of *Prosecutor v. Tadic*, it held “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”²⁴ It came as no surprise when the Tribunal found that the Bosnian hostilities “exceed(ed) the intensity requirements applicable to both international and internal armed conflicts.”²⁵ Yet, the Tribunal also could have found that the opposing forces passed the test of Protocol II, based on the control each had over territory and the extent of military organization.

It would be difficult to find a terrorist network meeting the Protocol’s test. Terrorists tend to be short on territorial control. Nor is it likely, outside of Iraq and Afghanistan, that terrorist operations would be intense and prolonged under the *Tadic* wording, unless all such operations were globally aggregated, as the Bush Administration seeks to do.

Reviewing post-9/11 developments against these concepts of armed conflict, there have been at least three very different phases. The first of these was the full-scale offensives initially conducted in Afghanistan and Iraq, engaging the entire repertoire of military power in the air and on the ground, and even naval air support from aircraft carriers and from ships launching cruise missiles. This phase was treated by the United States as armed conflict between State parties—and properly so.

The second phase consists of ongoing asymmetric opera-

22. See George H. Aldrich, *The Law of War on Land*, 94 AMER. J. INT’L L. 42, 59-61 (2000) (discussing the faults of Protocol II).

23. See Rome Statute of the International Criminal Court art. 8(f), July 1, 2002, 2187 U.N.T.S. 90. Article 8(f) states that the article for certain war crimes in non-international armed conflict “applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

24. *Prosecutor v. Tadic*, Case No. IT 94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

25. *Id.*

tions in the same countries. These operations have been conducted by U.S.-led coalitions with armor, artillery, and air support, often on a battalion or higher scale (even assaults against entire towns, as in Falluja, Iraq), against insurgents themselves using sophisticated explosive devices, mortars, and automatic weapons.²⁶ These high-intensity and prolonged campaigns are, the author submits, “armed conflict” even if the opponents fail to meet the Protocol II definition without territorial control.

Meanwhile, the Administration has applied the same legal concepts to a third level of activity: Efforts to suppress individual terrorists or small groups of terrorists in the United States and third countries with, in almost all cases, arrests by civilian law enforcement authorities, most often foreign authorities. While F-16s circle from time to time over our cities, Coast Guard cutters cruise our harbors, and the National Guard patrols transportation hubs, there have been no terrorists or suspects apprehended in the United States by the Armed Forces. For example, Jose Padilla wound up in a Navy brig only after arrest at O’Hare and initial detention by civilian authority.²⁷ The weapons favored by terrorists are the traditional stuff of terrorism augmented by dramatic innovations such as the 9/11 attack, but rarely involving military armament. In other words, they look familiar in terms of the Oklahoma City bombing, or the experiences of Britain with the Irish Republican Army (“IRA”), or Spain with the Basque insurgents—that is, classic terrorism and antiterrorism. To the extent that these events do not involve “armed forces” on both sides (or perhaps on either side) engaged in “hostilities” as understood by Pictet, or the intensity or duration sought by *Tadic*, not to mention insurgent territorial control under Protocol II, these situations would be excluded from “armed conflict” under the Conventions and customary international law.

Do the horrifying destruction wreaked on 9/11, the terrible casualties in Madrid, London, and Bali and the potentially even more awesome threat of weapons of mass destruction, on top of

26. Dexter Filkins & Robert F. Worth, *The Conflict in Iraq: The Overview; U.S.-led Assault Marks Advance Against Falluja*, N.Y. TIMES, Nov. 10, 2004, at A1.

27. See Tony Karon, *Person of the Week: Jose Padilla*, TIME, June 14, 2002 (stating that Padilla, a U.S. citizen, was being held in a Navy brig as an “enemy combatant”); see also Jessica Reaves, *How Long Can We Detain the Alleged “Dirty Bomber?”*, TIME, June 13, 2002 (describing the conditions surrounding Jose Padilla’s arrest and detainment).

global networking, change the situation so drastically as to turn the current species of terrorism into “armed conflict” subject to the Conventions? Soon after 9/11 the world seemed to agree that something new had happened, which foreign and international leaders were prepared to agree with the United States was equivalent to war.

As noted above, however, other governments have not taken the same legal approach as the United States, nor would they have, in all likelihood, had they fallen victim to an attack on the scale of 9/11. Protocol II, to which most States are parties, narrowly defines “armed conflict,” and States don’t necessarily want to expand that definition. Whatever the reasons for that view, the Bush Administration saw the matter quite differently within the context of the U.S. legal system.

Approaching the situation as “armed conflict” arguably offers two legal advantages to the government not otherwise constitutionally available in the United States: detention of “combatants” without trial for the duration of the conflict, and trial by military commission under open-ended rules of procedure and evidence without civilian juries. Armed conflict has also been used in Israel to support the legality of targeted killings of terrorists.²⁸ Once these definitions are accepted, detention of combatants is claimed to be consistent with the laws and customs of war, while those same laws and customs, including GC III, are said to exclude terrorists from POW status as unlawful combatants, given their failure to satisfy the prerequisites of fighting openly in uniform and honoring those laws and customs.²⁹ Thus, in the Administration’s view, the captor could have his cake and eat it too—indefinite detention without either trial or POW status. Indeed, when the government desires trial, it can cite the *Quirin* decision³⁰ from World War II to support the legality of military commissions to try unlawful combatants, even citizens, without regard to trial by jury—simply define terrorism

28. See HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel [2005], available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM.

29. See Third Convention, *supra* note 4, art. 4(A). Persons who are excluded from POW status are “civilians” under the Fourth Convention, although not subject to the full protection thereof while taking an active part in hostilities. What it means to take “an active part in hostilities” is highly controversial and the primary reason for the U.S. refusal to join Protocol II.

30. See *Ex parte Quirin*, 317 U.S. 1 (1942).

as “armed conflict” and terrorist suspects as “unlawful combatants.” Moreover, the rubric of armed conflict or war opens the door to the targeting of individual enemy combatants and the assertion of broad wartime powers of the President as Commander-in-Chief.³¹

III. *COMMON ARTICLE 3*

Yet the same definitions that are so convenient for asserting executive power also open the door to the Conventions, at least Common Article 3, which other countries had avoided in their counterterrorism campaigns. The ongoing and future struggle against terrorism is unlikely to resume the form of State vs. State conflict. Probably it will resemble either the current phases in Iraq and Afghanistan or more likely the more or less classic anti-terrorism described above. In these phases the application of the Conventions turns on the meaning of Common Article 3’s reference to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” if it is armed conflict at all.³²

For almost five years after 9/11, the Bush Administration was able to resist application of Common Article 3 by arguing that the war on terrorism was “international in scope” and thus not within that Article.³³ This interpretation opened a gap between the main text of the Conventions for armed conflict be-

31. The Administration’s arguments emphasize both the unprecedented nature of al-Qaeda’s terrorism and the precedented basis for use of the law of armed conflict. On both aspects, consider the precedent of the 1916 raid on a U.S. border town and its Army post by more than 500 “unlawful combatants” for the express purpose of killing Americans and inflicting terror. They killed ten civilians (including men brutally executed in front of their families) and thirteen soldiers, and wounded more. President Woodrow Wilson responded with a punitive expedition of three cavalry and two infantry regiments (much of the available mobile regular army), supported with the latest technology (trucks and biplanes), to pursue the terrorists into the Mexican deserts and mountains. The newly created National Guard was called up along the border in support. Attacked by both sides of the Mexican revolution, the U.S. expedition failed to catch the charismatic leader, Pancho Villa, but captured some of his followers. The captives were not tried by military commission, court martial, or even federal court; they were turned over to state courts, tried for murder, and some were executed. Others were pardoned by the Governor of New Mexico on the grounds that they acted as soldiers under orders. See generally EILEEN WELSHOME, *THE GENERAL AND THE JAGUAR: PERSHING’S HUNT FOR PANCHO VILLA—A TRUE STORY OF REVOLUTION AND REVENGE* 111-135, 157-224, 233, 237-259, 263-269, 326 (2006).

32. See Third Convention, *supra* note 4, art. 3.

33. See Geoffrey S. Corn, *Hamdan, Common Article 3 and the True Spirit of the Law of*

tween States parties and Common Article 3, a legal “black hole.” That gap was closed by the U.S. Supreme Court in *Hamdan* when it found the Article’s “conflict not of an international character” to be used “in contradistinction to a conflict between nations.”³⁴ In this view, all armed conflict is either subject to the full Conventions or to Common Article 3—there is no gap. As will be shown, Congress relieved the Bush Administration’s anxiety about the consequences of this outcome to some degree, while leaving the interpretation of the Article as the Court declared it.

Meanwhile, the characterization of armed conflict was not addressed by the Court. The opinions in *Hamdan* assume that the underlying situation is “armed conflict,” as apparently did the parties. Detainees like Salim Ahmad Hamdan captured early in the Afghan conflict and seeking application of the full terms of GC III or at least Common Article 3 certainly had no interest in that context in disclaiming the existence of armed conflict, while the Bush Administration obviously had to maintain that view in order to support detention and trial by military commission. Nor would an Afghan detainee have likely prevailed on this issue, given the intensity of that conflict at the times in question and arguably still today.

It may be a different matter whether defendants apprehended in other countries and situations and charged with terrorism of a more classic nature will be able to contest the characterization of their activities as included in “armed conflict.” One might anticipate pleadings that the offenses charged were not “violations of the law of war,” and the defendants were not “combatants” and did not engage in “hostilities,” such that they could be held as “unlawful combatants” or tried by military commission.³⁵

War, JURIST, July 3, 2006, <http://jurist.law.pitt.edu/forumy/2006/07/hamdan-common-article-3-and-true.php> (last visited Apr. 10, 2007).

34. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006).

35. Apart from the Conventions, the existence of “armed conflict” could be of constitutional dimension for a non-citizen apprehended in the United States and thus entitled to constitutional rights, unlike non-citizens not within the country. See *United States v. Eisentrager*, 339 U.S. 763 (1950). The *Quirin* exception to the Sixth Amendment right to trial by jury applies to “unlawful combatants” charged with violation of the “laws of war.” *Ex parte Quirin*, 317 U.S. 1 (1942). The courts control those definitions for constitutional purposes, which are not changed by recent legislation. Defendants might also seek extension of the *Rasul* treatment of Guantanamo as effective U.S. territory to limit *Eisentrager*’s exclusion of constitutional rights for non-citizens abroad. See *Rasul v. Bush*, 542 U.S. 466 (2004).

This discussion of the legal concept of “armed conflict” is not relevant to United States policy that the Armed Forces apply the law of war “during all armed conflicts, however such conflicts are characterized, and in all other military operations.”³⁶ Of course, that policy begs the question of what law of war is applicable in particular circumstances.

IV. *IMPACT OF THE MILITARY COMMISSIONS ACT*

Whatever the prospects of such defenses may have been, except in the constitutional context,³⁷ they will now be measured against the MC Act.³⁷ Controversial provisions relating to the Conventions include (a) the definitions of lawful and unlawful combatants and the procedure for determining such status,³⁸ (b) exclusion of the Conventions as a source of rights,³⁹ (c) amendments to the War Crimes Act,⁴⁰ and (d) the procedures established for military commissions.⁴¹

A. *Definitions of Combatants*

The MC Act defines “lawful combatant” in terms paraphrasing Article 4(A) of GC III prescribing the categories of persons qualifying for treatment as POWs.⁴² Unfortunately, the statutory

36. Dep’t of Def., Directive 2311.01E, DOD Law of War Program § 4.1 (2006), available at http://www.fas.org/irp/doddir/dod/d2311_01e.pdf.

37. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

38. *Id.* § 3, 120 Stat. at 2601 (adding 10 U.S.C. § 948a(1)-(2)).

39. *Id.* § 3, 120 Stat. at 2602 (adding 10 U.S.C. § 948b(g)).

40. *Id.* § 6(a)-(b), 120 Stat. at 2632-36 (amending 18 U.S.C. § 2441 (2006)).

41. *Id.* § 3, 120 Stat. at 2608-19 (adding 10 U.S.C. § 949).

42. The MC Act states:

The term ‘lawful enemy combatant’ means a person who is (A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

Id. § 3, 120 Stat. at 2601 (adding 10 U.S.C. § 948a(2)). This is similar to GC III’s Article 4 definition of a “prisoner of war,” which states:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict

text changes those categories in subtle, but significant, respects from the treaty text.⁴³ The Convention's first category of POW-qualifiers includes "members of the armed forces of a Party to the conflict *as well as members of militias or volunteer corps forming part of such armed forces.*"⁴⁴ By contrast, the statute relegates members of militias or volunteer corps to a second category, where they become subject to the four qualifying tests of (i) responsible command, (ii) having fixed distinctive signs (sometimes called fighting in uniform), (iii) carrying arms openly, and (iv) conducting their operations in accordance with the laws and customs of war.⁴⁵ Under the treaty, militiamen run the gauntlet of such tests only if they do not form part of the State party's armed forces. This distinction is critical to the Taliban, whose combat-

and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war. 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. 4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. 5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law. 6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."

Third Convention, *supra* note 4, art. 4.

43. Compare the MC Act's definition to the Israeli statutory definition of "unlawful combatant" for purposes of administrative detention by the Israeli Defense Forces:

[A] person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.

The Imprisonment of Unlawful Combatants Law, 5762-2002, — LSI — (2002) (Isr.). The cross-reference in that statute avoids the garbled definition in the MC Act. *See* Military Commissions Act of 2006, § 3, 120 Stat. at 2601 (adding 10 U.S.C. § 948a(2)).

44. Third Convention, *supra* note 4, art. 4(1) (emphasis added).

45. *Id.* art. 4(2).

ants might conceivably be “regulars” or militias forming part of the Afghan armed forces, in which case they would not be subject under the treaty to the four tests as the Administration contends and the statute provides. It has even been argued that “foreign” infantry units were sufficiently integrated into the Taliban to escape the four tests,⁴⁶ a contention the author lacks sufficient facts to evaluate.

Under the MC Act, an unlawful combatant is essentially a person engaged in hostilities with the United States or its allies or who has purposefully and materially supported such hostilities and is not a lawful combatant. Members of the Taliban or al-Qaeda are defined *per se* as unlawful combatants. For them, the subtleties of defining lawful combatants do not matter; their status is sealed. Moreover, the definition includes as an unlawful combatant a person found by a Combatant Status Review Tribunal (or other competent tribunal) to be an unlawful combatant. In other words, if the government concludes you are an unlawful combatant, you are. End of story.

Well, not exactly. Because if you are a lawful combatant under the Conventions entitled to POW status under the view described above (for example, a Taliban infantryman), trial by military commission would arguably be a “grave breach” of the Third Convention. That is in turn a felony under the War Crimes Act, even as amended by the MC Act.⁴⁷ It is a fine point of law how a defendant could assert such an argument. Suffice it to say that the JAG officer serving as the law judge of a military commission might well find a way to avoid his personal commission of a felony by adjudicating that issue.

A subtle related issue is whether, notwithstanding the MC Act’s jurisdictional definitions of unlawful combatancy, a defendant could challenge his defined status solely for purposes of

46. See Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Condoleezza Rice, National Security Advisor (Jan. 28, 2002), <http://www.hrw.org/press/2002/01/us012802-ltr.pdf>. The letter states that:

[T]his four-part test would not apply to members of the Taliban’s armed forces, since the Taliban, as the de facto government of Afghanistan, was a Party to the Geneva Convention. The four-part test would also not apply to militia that were integrated into the Taliban’s armed forces, such as, perhaps, the Taliban’s “55th Brigade,” which we understand to have been composed of foreign troops fighting as part of the Taliban.

47. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat 2104 (1996) (codified as amended at 18 U.S.C. 2441 (2004)).

asserting the “combatant’s privilege” against a charge of murder or assault in combat against otherwise lawful targets. While statutory definitions for purposes of jurisdiction may escape the constitutional rules against bills of attainder and ex post facto laws,⁴⁸ defining a crime or excluding a defense against a crime retroactively and as to members of named organizations would be an unconstitutional ex post facto law and possibly a bill of attainder. Whether Guantanamo detainees could raise that assertion of unconstitutionality may be a different matter from whether they are constitutionally entitled to habeas corpus.⁴⁹

Bear in mind that advocates for a detainee could only claim POW status as a member of regular armed forces or a militia forming part of such forces. Detainees who deny any combatant status and are not charged with activities even arguably involving such forces or militias could not prevail on such claims.

B. Exclusion of the Conventions as Sources of Rights

Section 5(a) of the MC Act excludes recourse to the Conventions as a source of rights in United States litigation to which the Government or its personnel are parties.⁵⁰ Put another way, the Conventions are now clearly not “self-executing.” That much controverted issue had been finessed in *Hamdan*, which addressed the Conventions not as a direct source of rights but as an essential statutory element of the law of war referenced in the UCMJ.⁵¹ The amendments effected by the MC Act removed the statutory basis for the Court’s invocation of the Conventions through the UCMJ, while the Act simultaneously eliminates the argument in favor of self-execution. Much as advocates for human rights will regret that outcome, they will be hard pressed to find any legal objection to the effectiveness of this legislation.

A different matter is the bootstrapping declaration of Section 6(a)(2) that the provisions of the MC Act “fully satisfy” the

48. See U.S. CONST. art. I, § 9, cl. 3 (stating that “no bill of attainder or ex post facto Law shall be passed”).

49. See *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 19 n.15 (D.D.C. 2006) (stating that “[m]y ruling does not address whether and to what extent enemy aliens may invoke other constitutional rights; I find only that the Suspension Clause does not guarantee the right to petition for habeas corpus to non-resident enemy aliens captured and detained outside the United States.”).

50. Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631 (2006).

51. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794 (2006).

United States obligation to implement GC III to provide penal sanctions for grave breaches (once again ignoring GC IV and the other two Conventions) and the mandate that “[n]o foreign or international source of law shall supply a basis for a rule or decision in the courts of the United States in interpreting the prohibitions enumerated in” the amendments of the War Crimes Act discussed below.⁵² It is one thing to debate the influence of foreign precedent on United States domestic law, but the exclusion of international sources to understand a statute implementing an international obligation is absurd. To the extent that these extraordinary provisions interfere with judicial independence they raise constitutional issues of the separation of the branches beyond the scope of this Essay.

C. *Cutting Back the War Crimes Act*

Further, Section 6 amends the War Crimes Act retroactively to November 26, 1997 (the date when the War Crimes Act was amended to criminalize violation of Common Article 3)⁵³ to replace any violation of Common Article 3 as a defined felony with certain “grave breaches” of that Article. The MC Act’s concept of grave breaches is based on Article 130 of GC III and comparable provisions of the other Conventions which call for severe punishment of violations of that treaty’s core provisions (not including Common Article 3).⁵⁴

It took the United States a long time to implement its obligation under Article 129 “to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”⁵⁵ In 1996, the War Crimes Act was passed (unanimously in the Senate and by voice vote in the House), criminalizing grave breaches defined in the Conventions.⁵⁶ In 1997, as noted above, the statute’s scope was greatly expanded to, among other things, make any violation of

52. Military Commissions Act of 2006, § 6(a)(2), 120 Stat. at 2632.

53. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, Fiscal Year 1998, Pub. L. No. 105-118, § 583, 111 Stat. 2386, 2436 (1997).

54. Compare Military Commissions Act of 2006, § 6(b)(1)(B), 120 Stat. at 2633-35, with Third Convention, *supra* note 4, art. 130.

55. Third Convention, *supra* note 4, art. 129.

56. See R. Jeffrey Smith, *Detainee Abuse Charges Feared: Shield Sought from 1996 War Crimes Act*, WASH. POST, July 28, 2006, at A1.

Common Article 3 a felony.⁵⁷

When the Supreme Court in *Hamdan* surprised the Administration by holding that Common Article 3 applied in the Afghan campaign, and presumably throughout armed conflict in the war on terror,⁵⁸ there was much angst over the risk that United States personnel, notably CIA operatives, might be exposed to prosecution under the War Crimes Act for their interrogation practices arguably violating Common Article 3, especially "outrages upon personal dignity, in particular, humiliating and degrading treatment."⁵⁹

To reduce that exposure, the MC Act stepped back from making any violation of Common Article 3 a felony and substituted certain "grave breaches" of that Article.⁶⁰ Aside from covering the obviously severe offenses of "torture," "murder," "rape," and "hostage taking," among others, as grave breaches, the MC Act addresses "cruel or inhuman treatment."⁶¹ In doing so, the terms "outrages upon personal dignity," "humiliating," and "degrading" as used in Common Article 3, vanish; instead "cruel or inhuman treatment" becomes infliction of "severe or serious physical or mental pain or suffering," which terms are further defined to exclude even the most extreme humiliation that does not inflict physical pain.⁶² Further, the Act effectively immunizes pre-enactment conduct that inflicted pain, even severe pain, that was not prolonged.⁶³ Finally, the amendments

57. *See id.*

58. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794-99 (2006).

59. Third Convention, *supra* note 4, art. 3.

60. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(2), 120 Stat. 2600, 2632 (2006). The MC Act authorizes the President to deal administratively with violations of treaty obligations that are not "grave breaches." *Id.* § 6(a)(3)(A), 120 Stat. at 2632.

61. *Id.* § 6(b)(1), 120 Stat. at 2633.

62. Third Convention, *supra* note 4, art. 3; *see* Military Commissions Act, § 6(b)(1)(B), 120 Stat. at 2633.

63. *See* MICHAEL JOHN GARCIA, THE WAR CRIMES ACT: CURRENT ISSUES 7 (Cong. Res. Serv., 2006).

The type of mental pain and suffering constituting cruel treatment generally differs from the type rising to the level of torture, in that it only needs to be of a *serious* and *non-transitory* nature which *need not be prolonged*, as opposed to being of a *severe* and *prolonged* nature. However, the War Crimes Act, as amended, provides that with respect to conduct occurring *before* enactment of the Military Commissions Act, such pain and suffering must be of a prolonged nature.

Id.

omit trials conducted without the regularly constituted courts and judicial guarantees required by Common Article 3, a notable departure from the analogous grave breaches of the main body of GC III which penalize trials of POWs in violation of the applicable provisions.⁶⁴

Having narrowed the War Crimes Act to exclude “humiliation” alone as a basis for criminal liability, Section 6(c) then goes on to reenact, with minor changes, the provisions of the Detainee Treatment Act of 2005⁶⁵ in prohibiting (though without criminal sanction) “cruel, inhuman, or degrading treatment or punishment”, in turn defined to mean “cruel, unusual, and inhumane treatment or punishment” prohibited by the Fifth, Eighth, and Fourteenth Amendments.⁶⁶ This prohibition is to be enforced by the President administratively.⁶⁷

Section 6(b)(3) problematically excludes liability under the War Crimes Act for “collateral damage” in violation of Common Article 3. “Collateral damage” is not defined. If it is understood as the unintended damage inflicted on civilians and their property as a result of otherwise lawful attacks, the exclusion is understandable. If, however, it excludes all damage related to attacks, lawful or unlawful, the exclusion would be extreme and inconsistent with long-standing United States policy. Despite this troublesome definition, the exclusion may be of little relevance in practice for the military, the most likely perpetrator of collateral damage, which as noted below customarily charges its members with offenses under the Uniform Code of Military Justice, not the War Crimes Act.

D. Military Commissions

The MC Act’s provisions for military commissions are covered in this Colloquium by Prof. Trahan in her Article and will

64. See Third Convention, *supra* note 4, art. 102.

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

Id.; see HUMAN RIGHTS WATCH, BRIEFING PAPER ON U.S. MILITARY COMMISSIONS (June 25, 2003), available at <http://hrw.org/backgrounders/usa/military-commissions.pdf>.

65. Pub. L. No. 109-163, Title IX, § 1403, 119 Stat. 3136, 3475 [hereinafter “DTA”].

66. Military Commissions Act, § 6(c)(2), 120 Stat. at 2635.

67. See *id.* § 6(c)(3), 120 Stat. at 2635.

not be covered in detail here.⁶⁸ With respect to Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people,"⁶⁹ in the author's view, the statutory authorization of military commissions satisfies that requirement for a "regularly constituted court." The commissions are as regular in this respect as courts martial (which are convened ad hoc by commanders for specific defendants and specific charges) and no more "irregular" than ad hoc tribunals like the Hague tribunals for the former Yugoslavia and Rwanda, considered to be valid under international law and presumably to be regularly constituted. Whether commission procedures provide sufficient judicial guarantees is an altogether different matter.

The key procedural defect on which the Court in *Hamdan* found commissions to violate Common Article 3, the inability of the defendant to be privy to the evidence against him, has been substantially corrected by the MC Act.⁷⁰ Judge Robertson, who issued the original decision in favor of Salim Ahmed Hamdi, considered that Congress has acted "according to the guidelines laid down by the Supreme Court" and found it "difficult to see how continued habeas jurisdiction could make further improvements in his tribunal."⁷¹ While other objections have been raised (including before this Colloquium) to procedures for commissions that differ from those for courts martial, without discussing those objections fully here the author suggests that it may now be time to allow the commissions to proceed and establish a trial record on which the fairness of their procedures as applied can be assessed. For example, the MC Act requires consideration of the reliability and probative value of the hearsay evidence to which a party objects.⁷² It is doubtful that United States jury-based rules of evidence on hearsay or other matters are internationally required, provided that the commission gives the required consideration to reliability. A major change from

68. See Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 *FORDHAM INT'L L.J.* 780, (2007).

69. Third Convention, *supra* note 4, art. 3.

70. See Military Commissions Act, § 3, 120 Stat. at 2608-09 (adding 10 U.S.C. § 949a(b)(1)).

71. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d. 9, 18 (D.D.C. 2006).

72. Military Commissions Act § 3, 120 Stat. at 2609 (adding 10 U.S.C. § 949a(b)(2)(E)(ii)).

the original commission procedures permits judicial review up to the Supreme Court.⁷³ Counsel for defendants (and likely *amici* such as some participants in this Colloquium) will have much to say when that time comes.

V. SCREENING BY COMPETENT TRIBUNALS

Article 5 of GC III provides that “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”⁷⁴ As Article 5 has been implemented by the United States and other countries, such tribunals are not, nor do they resemble, courts, courts martial or military commissions. They provide field screening in a quick and summary manner not comparable to United States judicial proceedings, including habeas corpus.

The United States used such Article 5 tribunals to resolve the individual status of purported POWs in the Iraqi invasion, where POW status was conceded to members of the Iraqi armed forces,⁷⁵ but not in the Afghan conflict to determine whether Guantanamo or other detainees should enjoy POW status. The predicate for that decision as to Afghanistan was the Presidential finding that members of the Taliban or al-Qaeda could not qualify for POW status because of the overall failure of those forces to meet the supposedly applicable tests of Article 4 of GC III. Accordingly, “no doubt could arise” as to POW status.

Criticism of the lack of screening under Article 5, or its implementing United States Army Regulation, AR 190-8,⁷⁶ comes

73. *See id.* § 3, 120 Stat. at 2622 (adding § 950g).

74. Third Convention, *supra* note 4, art. 5.

75. *See, e.g.*, Press Release, Human Rights First, Human Rights First Urges United States to Refrain from Transferring War Captives Outside Iraq: Geneva Conventions Prohibit Transfer and Set Trial Requirements (Apr. 8, 2003), http://www.humanrightsfirst.org/media/2003_alerts/0408.htm (last visited Apr. 11, 2007).

76. Dep’t of the Army, Enemy Prisoners of War, Retained Personnel, Civilian Interests and Other Detainees, Army Reg. 190-8 (1997) [hereinafter AR 190-8], *available at* <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>. The regulation was adopted by the Army as AR 190-8 and by the other Armed Services. Tribunals under this regulation consist of three officers, one of field grade (major or above), with a fourth officer, preferably a military lawyer, as recorder. The record is reviewed by the next higher military lawyer. Decision is based on a preponderance of the evidence.

from two directions. (a) First, there is substantive disagreement with the characterization of the Taliban and al-Qaeda. As discussed above, that characterization is problematic at least as to the Taliban.⁷⁷ Accordingly, any detainee known to be a member of the Taliban arguably should have had POW status (without the need for a tribunal); if his membership in the Taliban were factually in doubt, that status should have been determined by a competent tribunal. (b) Second, it is argued procedurally that only an Article 5 tribunal, not the Administration (or even the President) could determine the status of the Taliban. Many observers have insisted that general principles of law and policy require at least minimal due process to hold a detainee indefinitely without criminal charges. Some have argued in favor of holding "competent tribunals" to determine detainee status,⁷⁸ while others have objected that such screening proceedings as have been held are woefully inadequate.⁷⁹

On the first point, as to the literal terms of Article 5, from the author's limited knowledge of the particulars of the Taliban forces, they seem to have been the regular army of Afghanistan to the extent that the Taliban government was the *de facto* government. However, it does not necessarily follow that it was procedurally improper for the United States to determine their collective status at the highest level of government and not in Article 5 tribunals. It can be argued that a theater commander with legal advice and resources at his command (and *a fortiori*, the President with the legal apparatus available to him) is far better positioned than a few middle level officers in the field to determine the status of an enemy force involving complex questions of international law and possibly the use of highly classified intelligence information about that force. Moreover, the treatment of members of a large force should be uniform and not depen-

Detainees may present evidence, but the military does not provide counsel for the detainee, nor is there any reference to civilian defense counsel. The tribunals determine status, not culpability for any offense. *See id.* chs. 1-6.

77. *See supra* Part IV.A.

78. *See, e.g.,* Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains The Power To Wage War Successfully*, 53 *DRAKE L. REV.* 851, 888 (2005); Paul Rosenzweig, *On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky*, 45 *WASHBURN L.J.* 29, 38 (2005).

79. *See* Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 *YALE L.J.* 667 (2006).

dent upon the variable determinations of diverse tribunals.⁸⁰ The author argues that, once such a determination has been made at a theater or national level, doubt has been resolved for purposes of Article 5 unless an individual detainee claims that he was a member of a unique organization not covered by the global finding, in which case a tribunal should resolve that claim. If there were an enemy force qualifying for POW status, the role of Article 5 tribunals would be to determine whether a given detainee was in fact a member of that force. Absent a force qualifying for POW status, there is no POW determination to make. The author thus objects not to the President's procedure, but to the substantive outcome of that procedure.

As to the members of al-Qaeda, similar questions arise regarding those allegedly members of units integrated with the Afghan armed forces. However, al-Qaeda members not so engaged would be subject to the four tests of Article 4 and, it seems, al-Qaeda would fail those tests beyond doubt. Thus, the author sees no need for Article 5 tribunals for such persons. As to detainees in the war on terror outside the Afghan and Iraq conflicts, GC III would not apply (other than Common Article 3) and POW status would not be possible. Therefore, no Article 5 tribunals would be needed. Thus, even if in principle such tribunals should have been held in Afghanistan, they would have had little application to most alleged members of al-Qaeda. Detainees not treated as POWs or given hearings before Article 5 tribunals under GC III would be entitled to certain review proceedings under GC IV.⁸¹ The right to these proceedings, like most

80. Consider hypothetically if in World War II it had been necessary to determine the POW status of the German *Waffen SS*, whose units committed numerous war crimes, including the murder of U.S. prisoners. Had GC III then applied, should the SS status have been determined at the field POW collection points or by the high command for the entire European Theater of Operations? It seems likely that the latter would have permitted a better informed and considered determination based on intelligence available at the theater level and greater legal resources. In fact, SS soldiers were treated as POWs despite their widespread war crimes until, in some cases, their trial for war crimes. Reportedly, however, many U.S. and Allied soldiers took matters into their own hands and refused to accept SS surrenders.

81. AR 190-8 requires Article 5 tribunals under GC III to determine the status only of detainees with potential POW status, but another provision relating to GC IV requires similar boards of officers to hear appeals from orders directing detention of civilian detainees as "spies or saboteurs," sometimes called security detainees, and periodically to review of their status. See AR 190-8, *supra* note 76, chs. 5-1(g). Detention as a spy or saboteur may be individually ordered by the theater commander without any proceeding. See Third Convention, *supra* note 4, art. 5-1(e).

issues relating to GC IV, has received little attention from either the Administration or human rights advocates.

Under pressure from the *Hamdi* decision, in which Justice O'Connor invited the Administration to use an Article 5 equivalent,⁸² potentially in lieu of habeas corpus, Combatant Status Review Tribunals ("CSRTs") were initiated. CSRTs are recognized by the Detainee Treatment Act, which provides limited judicial review of their decisions.⁸³ Suffice it to say that, as ably presented by Professor Denbeaux in this Colloquium,⁸⁴ CSRTs in practice fell woefully short of any meaningful due process for indefinite detention without charges. That is not because they violate either the Conventions or AR 190-8,⁸⁵ but because the Conventions and AR 190-8 do not require due process suitable for the situation at Guantanamo. The author believes that such due process cannot be found within the Conventions and can only be found under the Constitution or a new statutory enactment.

VI. ENFORCEMENT OF THE CONVENTIONS IN COURTS MARTIAL AND ON CIA PERSONNEL

A few words about the implementation of the Conventions by the United States Armed Forces are in order. While it is commonly understood that the Conventions are the basis for the law of armed conflict as interpreted by the United States military, it is also commonly overlooked that personnel charged before courts martial for what amount to the commission of war crimes have not been prosecuted under the War Crimes Act. In theory, the UCMJ permits charges under federal criminal law, like the War Crimes Act,⁸⁶ except for death penalty offenses.⁸⁷ The Af-

82. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004).

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.

83. See DTA, Publ. L. No. 109-163, Title IX, § 1405, 119 Stat. 3136, 3476-80 (2006).

84. See Professor Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney Client Relationship in Guantanamo Bay*, 30 FORDHAM INT'L L.J. XXX (2007).

85. See AR 190-8, *supra* note 76.

86. See 18 U.S.C. § 2441 (2007).

87. See 10 U.S.C. § 934 (2007). Under this section, the UCMJ permits court mar-

ghan and Iraq invasions, as the first large-scale operations since passage of the War Crimes Act, provided the first opportunities to test that statute in courts martial. The author is not aware of any court martial in which the War Crimes Act has been charged, despite numerous fact patterns indicating violations.⁸⁸ Instead military personnel have been prosecuted for common criminal offenses defined in the UCMJ, such as murder, rape, assault, cruelty, disobedience of orders, and even conduct unbecoming an officer.

Hamdan led to a Department of Defense memorandum and an ensuing directive⁸⁹ requiring compliance with Common Article 3 “as construed and applied by United States law.”⁹⁰ Violation of the directive might result in a charge of disobedience of

tial charges under federal criminal law unless the offense would be punishable by the death penalty. Military personnel are also subject to potential trial in federal criminal court, although that is exceedingly rare.

88. See generally Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1 (2005).

89. See Memorandum from Deputy Sec’y of Def. Gordon England on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Dep’t of Def. (July 7, 2006), <http://www.washingtonpost.com/wp-srv/nation/nationalsecurity/genevaconvdoc.pdf> (last visited Apr. 10, 2007); Dep’t of Def., Directive 2310.01E, DOD Detainee Program (2006), available at http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf. The Directive provides:

2.1 This Directive applies to [in addition to the obvious Department of Defense components]:

2.1.2. DoD contractors assigned to or supporting the DOD Components engaged in, conducting, participating in, or supporting detainee operations.

2.1.3 Non-DoD personnel as a condition of permitting access to internment facilities or to detainees under DoD control

4.2 All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee’s legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949 . . . as construed and applied by U.S. law, and those found in Enclosure 4, in the treatment of all detainees, until their final release, transfer out of DoD control or repatriation.

Id. §§ 2.1, 2.1.2, 2.1.3, 4.2; see also DEP’T OF THE ARMY, HUMAN INTELLIGENCE COLLECTION OPERATIONS (Field Manual No. 2-22.3, 2006), available at www.fas.org/irp/doddir/army/fm2-22-3.pdf. In late 2005, the Department rejected a similar determination on policy grounds. See, e.g. Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 33.

90. See Dep’t of Def., Directive 2310.01E, § 4.2. It might be argued that this reference incorporates the limitations provided in the War Crimes Act, but as stated in § 6(d)(5) of the MC Act, the MC Act does not modify the U.S. obligations under the Conventions: “The definitions in this subsection are intended only to define the grave breaches of Common Article 3 and not the full scope of United States’ obligations under that Article.” Military Commissions Act, Pub. L. No. 109-366, § 6(b)(1)(B), 120 Stat. 2600, 2635 (2006); see 18 U.S.C. § 2441, ¶ (3)(D)(5) (2007).

orders under UCMJ Article 92.⁹¹ Thus Common Article 3 indirectly became criminally binding on the Armed Forces, at the same time that the War Crimes Act was diluted as to the likely civilian defendants. However, this indirect military effect would trigger minor penalties. While UCMJ penalties for the more serious common criminal offenses like murder or rape can be severe,⁹² including capital punishment, penalties drop to the equivalent of civilian misdemeanors for certain other offenses like disobedience of orders.⁹³ The author agrees with the suggestion of Maj. Ohman that the War Crimes Act be enacted as a punitive article under the UCMJ so that members of the military could be charged in courts martial with war crimes under that label and with suitable penalties for the gravity of the offense.⁹⁴

Personnel of the Central Intelligence Agency will be subject to the War Crimes Act as amended, which going forward prohibits infliction of even briefly experienced severe pain.⁹⁵ Moreover, the author submits that the policy of the United States now forbidding cruel, inhuman, or degrading treatment, to the extent prohibited by the Constitution,⁹⁶ will influence the advice provided by the Agency's in-house counsel, who are regularly consulted by the operations directorate, and further, that conduct contrary to such advice may well be career-terminating for the participants, whether or not prosecuted. In the real world, security considerations make it extremely unlikely that CIA personnel would be prosecuted in federal court, given the security issues often permitting defendants to "gray mail" their way out of criminal liability. That does not mean, however, that their behavior would not be influenced in other, very practical ways,

91. Disobedience of orders is charged under UCMJ Art. 92, Dereliction of Duty. See 10 U.S.C.A. § 892. The section says:

Any person subject to this chapter [UCMJ] who— (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

92. See 18 U.S.C. §§ 2441(a), (d)(1)(D), (d)(1)(G) (2007).

93. See 10 U.S.C. § 892; see also 10 U.S.C. § 934 (2007).

94. See Ohman, *supra* note 88, at 4, 45, 59-80.

95. See 18 U.S.C. §§ 2441(d)(1)(a), (2)(E)(ii).

96. It was suggested in the Colloquium discussion that the Central Intelligence Agency ("CIA") had already modified its interrogation practices by February 2006, shortly after passage of the Detainee Treatment Act and well before the *Hamdan* decision.

such as administrative discipline and unwritten career sanctions. Apart from those considerations, it is noted that the Department of Defense Directive described above requiring compliance with Common Article 3 applies to “non-DOD personnel” (notably CIA) “assigned to or supporting DOD Components” in detainee operations.⁹⁷

A wild card for the CIA is the passage concurrently with the MC Act of a statute extending court martial jurisdiction “in time of declared war or a contingency operation” to “persons serving with or accompanying an armed force in the field,” which would appear to include notably CIA operatives working with the military in situations like those in Afghanistan or Iraq.⁹⁸ While a court martial of CIA personnel seems unlikely, its operatives would be similarly unlikely to want to risk providing the precedent-setting case. Finally, many CIA field operatives are military personnel assigned to the Agency while remaining fully subject to military justice. It would not be at all surprising to see such assigned personnel charged before courts martial in appropriate circumstances.

REPRISE OF UPS AND DOWNS OF CONVENTION LAW SINCE 9/11

Where has the roller-coaster ride brought us?

- The MC Act barred private enforcement of the Conventions and foreclosed the creative indirect use of the Conventions by the Supreme Court in *Hamdan*. This result, along with the exclusion of international interpretation of the Conventions from use in United States courts, is a major disappointment.
- Some see any prospect of criminal prosecution under the War Crimes Act for detainee abuse for violation of Common Article 3 as diminished by the MC Act’s amendments, but before June’s *Hamdan* decision there was no judicial authority that Common Article 3 even applied. Thanks to *Hamdan*, there is a stronger legal basis now to prosecute egregious conduct than before *Hamdan*, despite those cramped amendments.
- Military commissions are back on track. While their proce-

97. Dep’t of Def., Directive 2310.01E, §§ 2.1.2, 2.1.3.

98. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 552, 120 Stat. 2083, 2217 (2007).

dures do not conform to court martial procedures as some had hoped, they are subject to improved rules including change of the provision that most troubled the *Hamdan* plurality, the ability of defendants to see the evidence against them. Other procedural aspects remain problematic until applied in practice. Military commission decisions can be appealed to the federal courts on the law, where these rules will surely be tested.

- Going forward, the Armed Forces acknowledge full application of Common Article 3 to all armed conflict (without modification by the MC Act). Yet courts martial have virtually ignored the Conventions and will likely continue to do so unless violation of the War Crimes Act becomes a punitive offense under the UCMJ.
- All United States agencies are subject worldwide to the prohibition of cruel, inhuman, or degrading treatment violating constitutional standards, which the author submits will have practical effects despite the lack of criminal penalties under that standard (except arguably minor penalties for military violation of the DOD Directive).
- And we have yet to see whether the Administration's view that the entire war on terror is an armed conflict will prevail. Without that threshold characterization, the Conventions would not apply at all, nor would indefinite detention of enemy combatants or military commissions. The courts have not yet addressed this issue in a context other than the Afghan conflict.

Given pending military commission proceedings, court cases and proposed Congressional reconsideration of the MC Act, not to mention the overall course of the current conflicts, the ride is far from over. Buckle your seat belts!