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Abstract

This Article examines the arguments that led the Supreme Court to its landmark judgment, in particular: (i) the jurisdiction of federal courts to ascertain procedural challenges to the lawfulness of military commission proceedings; (ii) the relation to the Geneva Convention; (iii) the aspect of conspiracy as a (non-)legal basis for indictments issued before military commissions, especially in the argument raised by the defense in the Hamdan case; and (iv) the case law of the International Criminal Tribunal for the former Yugoslavia ("ICTY") with respect to the concept of conspiracy and joint criminal enterprise ("JCE"). The case law of the ICTY, as this Article argues, is also relevant to the interpretation of Common Article 3 of the Geneva Convention. This Article also addresses the legal, political, and international (criminal) law implications of the Hamdan decision and examines the proposed New Code of Military Commissions ("CMC") for its compliance with international law.

THE PROLIFERATION OF THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS WITHIN TERRORISM AND "UNLAWFUL" COMBATANCY TRIALS AFTER *HAMDAN v. RUMSFELD*

*Geert-Jan Alexander Knoops**

I. *THE ORIGIN OF THE MILITARY COMMISSION PROCEEDINGS IN* HAMDAN *v.* RUMSFELD

On June 29, 2006, the U.S. Supreme Court rendered an historical decision in the terrorism trials against detainees in Guantanamo Bay before the military commissions initiated by the President George W. Bush on November 13, 2001.[1] These commissions were established to try individuals who are not U.S. residents and who the U.S. President has reason to assume are members of Al Qaeda or have taken part in terrorist acts against the United States.[2] In the *Hamdan v. Rumsfeld* decision, the Supreme Court distinguished among three categories of military commissions that historically have been used in three different situations. Military commissions of the first category were substitutes for civilian courts in situations where "martial law has been declared."[3] Military commissions of the second category—occupied territory or military government commissions—were established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function."[4] The *Hamdan* case dealt with the third category of commission:

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1. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2760 (2006).
2. *See id.*
3. *Id.* at 2775.
4. *Id.* at 2776.

one that considers acts "incident to the conduct of war," and assesses whether disciplinary measures should be taken against enemies who have violated military law in relation to the United States.[5]

The *Hamdan* decision qualifies as a landmark ruling: for the first time, the U.S. Supreme Court was called upon to ascertain the legality of the terrorism trials before these military commissions, trials distinct from those before U.S. federal courts and U.S. court-martial proceedings. The *Hamdan* judgment addresses various subjects, such as compliance of military commission proceedings (of the third category) with the constitutionally-derived Rules of Procedure and Evidence that pertain to court-martial cases, as well as with international law standards—in particular the Third Geneva Convention of 1949 ("Geneva Convention") regarding the treatment of prisoners of war.[6]

The *Hamdan* decision was issued after one of the Guantanamo Bay prisoners, Salim Ahmed Hamdan, raised these legal challenges before the Supreme Court. Of Yemeni origin, Hamdan was arrested by militia in November 2001, after the U.S.-backed insurgency in Afghanistan overthrew the Al-Qaeda-associated Taliban regime, and was subsequently handed over to the U.S. military.[7] In June 2002, he was transferred to Guantanamo Bay.[8] Since January 2002, a total of 759 individuals from forty-nine countries have been detained, most of whom are from Afghanistan, Saudi-Arabia, Yemen, and Pakistan.[9] In 2006 this detention facility held 450 individuals.[10]

More than a year after Hamdan's arrest, President Bush determined that Hamdan should stand trial before a military commission.[11] Another year after that, he was formally charged with

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5. *Id.*

6. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

7. *See Hamdan*, 126 S. Ct. at 2759.

8. *See id.*

9. *See* Office of the Secretary of Defense/Joint Staff Freedom of Information Act Request Service Center, List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from Jan. 2002 through May 15, 2006, http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf (last visited Apr. 19, 2007).

10. *See* International Committee of the Red Cross ("ICRC"), U.S. Detention Related to the Events of 11 September 2001 and its Aftermath—The Role of the ICRC, http://www.icrc.org/Web/Eng/siteeng0.nsf/html/usa-detention-update-121205?OpenDocument (last visited Apr. 19, 2007).

11. *See Hamdan*, 126 S. Ct. at 2759.

conspiracy to commit the offenses of "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism."[12] In particular, the charge alleged that Hamdan had served as Osama Bin Laden's body guard and personal driver during the period from 1996 until November 2001.[13]

The Combatant Status Review Tribunal ("CSRT") held that Hamdan was to be considered as an enemy combatant, and consequently his detention was deemed lawful.[14] Hamdan subsequently challenged the lawfulness of these military commission proceedings. On November 8, 2004, the U.S. District Court for the District of Columbia ruled in Hamdan's favor.[15] It determined that the military commission that was to try Hamdan was set up contrary to regulations of the U.S. court-martial system as well as those of the Geneva Convention.[16] As these military commission proceedings do not exclude the possibility of convictions being founded on evidence that the accused is not able to have access to or even dispute, the Court concluded that such proceedings are unlawful.[17]

On July 14, 2005, the U.S. Court of Appeals for the District of Columbia reversed this decision on appeal, holding that Hamdan could not resort to the Geneva Convention in his defense.[18] According to the Court of Appeals, the Geneva Convention cannot be relied on in a criminal case.[19] The Court opined that the norms enshrined by the Geneva Convention do not constitute individual rights, enforceable by individual defendants, *i.e.*, unlawful combatants.[20]

This Article examines the arguments that led the Supreme Court to its landmark judgment, in particular: (i) the jurisdiction of federal courts to ascertain procedural challenges to the

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12. *Id.* at 2761.

13. *See id.*

14. The Combatant Status Review Tribunal ("CSRT") was established on July 7, 2004, after the U.S. Supreme Court determined in 2004 that Guantanamo Bay prisoners were entitled to petition the U.S. federal courts to assess the lawfulness of their detention. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004); Rasul v. Bush, 542 U.S. 484 (2004); *see also* Rumsfeld v. Padilla, 542 U.S. 426 (2004) (petitioner employed mechanism of petition via the CSRT).

15. *See Hamdan*, 126 S. Ct. at 2761.

16. *See id.* at 2762.

17. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 168 (D.D.C. 2004).

18. *See* Hamdan v. Rumsfeld, 425 F.3d 33, 40 (D.C. Cir. 2005).

19. *See id.* at 39.

20. *See id.*

lawfulness of military commission proceedings; (ii) the relation to the Geneva Convention; (iii) the aspect of conspiracy as a (non-)legal basis for indictments issued before military commissions, especially in the argument raised by the defense in the *Hamdan* case; and (iv) the case law of the International Criminal Tribunal for the former Yugoslavia ("ICTY") with respect to the concept of conspiracy and joint criminal enterprise ("JCE"). The case law of the ICTY, as this Article argues, is also relevant to the interpretation of Common Article 3 of the Geneva Convention. This Article also addresses the legal, political, and international (criminal) law implications of the *Hamdan* decision and examines the proposed New Code of Military Commissions ("CMC") for its compliance with international law.

II. *THE UNCONSTITUTIONALITY AND CONTRA-LEGEM NATURE OF THE COMMISSION PROCEEDINGS IN THE GUANTANAMO BAY CASES*

In *Hamdan v. Rumsfeld*, the U.S. Supreme Court reversed the Court of Appeals decision by a majority of 5-3,[21] heralding major implications for the future of terrorism and unlawful combatancy proceedings. It held that the military commission proceedings instituted to try detainees held at Guantanamo do not provide basic procedural and substantive legal safeguards.[22] Additionally, the applicable rules of procedure and evidence were disqualified as being contrary to norms of customary international law.[23]

The decision was occasioned after Hamdan had petitioned for habeas corpus relief within the Federal Courts, arguing that the military commissions as such were not authorized to try him for the following reasons:

> (i) Congressional authorization is absent for a military commission to initiate a trial for conspiracy in connection with violations of the law of war;
>
> (ii) The rules of procedure and evidence operational before military commissions promulgated by the Bush admin-

21. Chief Justice Roberts did not participate in the deliberations or decision because he had participated in the *Hamdan* decision while serving as a member of the Court of Appeals for the District of Columbia ("D.C. Circuit").

22. *See Hamdan*, 126 S. Ct. at 2807.

23. *See id.* at 2797-98.

> istration are in contravention to evidentiary norms upheld by court-martial proceedings and embedded within international law, including the principle that a suspect should have access to and be able to challenge the evidence against him; and
>
> (iii) The conspiracy charge lodged against Salim Hamdan does not constitute a violation of the law of war in accordance with principles of international law.[24]

These three arguments will be dealt with below.

A. *Federal Court Jurisdiction over Hamdan's Claims*

With respect to the first argument, it is important to observe that the establishment of the military commissions by President Bush in 2001 was not accompanied by explicit U.S. congressional authorization. For Hamdan, this formed the first argument to have his trial before this commission declared unconstitutional.[25] The U.S. Government's defense was that such legal intervention would rupture the constitutional doctrine of separation of powers. The Government argued that the President has inherent authority to convene the commissions as Commander in Chief and, furthermore, that the power to establish the military commissions originated indirectly from a joint resolution of Congress.[26] Recourse was made to a resolution, the Authorization for Use of Military Force, ("AUMF") authorizing the President "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 . . . ."[27] It was argued that the term "force" encompassed the authority for the President to establish military commissions.[28]

This reasoning was firmly rejected by the Supreme Court.[29] The justices ruled that the AUMF and the Uniform Code of Military Justice ("UCMJ")[30] can, at the most, only be seen as an over-

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24. *See id.* at 2759.
25. *See id.*
26. *See id.* at 2773-74.
27. S.J. Res. 23, §2(a), 107th Cong. (2001) (enacted).
28. *See Hamdan*, 126 S. Ct. at 2774-75.
29. *See id.* at 2775.
30. The Uniform Code of Military Justice ("UCMJ") controls proceedings before the U.S. courts-martial.

all presidential authority to establish military commissions, provided that they are justified by the U.S. Constitution and the laws of war. In the absence of any explicit authorization, federal courts are empowered to assess whether the military commission that is to try Hamdan is indeed founded in compliance with the Constitution and the laws of war.[31]

Consequently, such judicial control could not be seen as a violation of the doctrine of separation of powers. An important implication of the Hamdan decision is that the authority of the President to undertake certain measures in time of war is and remains subject to judicial scrutiny. This reasoning can also be extrapolated to other jurisdictions when judicial control and supervision is circumvented in prosecuting unlawful combatants.

B. *Military Commission Proceedings and Their Incompatibility with the Third Geneva Convention*

1. Applicability of Common Article Three

As to Hamdan's second argument, the U.S. Supreme Court held that the military commissions in the Hamdan case were, in terms of both structure and procedure, in contravention of the UCMJ as well as Common Article Three of the Third Geneva Convention of 1949, to which the United States acceded in 1995,[32] observing that the procedures before the military commissions differ in a number of essential ways from U.S. court-martial proceedings.[33] For example, the rules of procedure and evidence promulgated for said military commission proceedings stipulate that:

> The commission's procedures, set forth in Commission Order No. 1, provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding the official who appointed the commission or the presiding officer decides to "close." Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." Ap-

31. *See Hamdan*, 126 S. Ct. at 2775.
32. *See infra* notes 45-53 and accompanying text.
33. *See Hamdan*, 126 S. Ct. at 2801-09.

> pointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of any evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other "protected information," so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial.[34]

The Bush Administration justified this divergent procedural rule on the basis of the following two arguments. First, the government argued that any jurisdictional or procedural challenges should be raised by Hamdan when he appears before the military commission itself.[35] The Supreme Court rejected the argument that such a challenge could not be evaluated in a judicial phase beforehand, stating that the real issue is not a potential violation of Hamdan's right to a fair trial, but the observation that "[h]e will be, and indeed already has been, excluded from his own trial."[36] It is for this reason that the justices vindicated a determination of the legality of military commissions proceedings by a federal judge in anticipation of the commissions proceedings. Second, the U.S. Government argued that the military commissions are different and distinct from a court-martial, and thus structurally and inherently are entrusted with different procedural rules.[37] Here, the justices observed that the procedures for both type of processes were historically seen as the same, precisely to discourage abuse of rules in times when the government was under the pressure of conducting a war.[38] It thus pursued a teleological interpretation of the military commission rules. In particular, the Supreme Court held that Article 36 of the UCMJ stipulates that the procedural rules developed by the President for military court-martial and military commissions, must be uniform "insofar as practicable."[39] The Supreme Court concluded

34. *See id.* at 2755.
35. *See id.* at 2787.
36. *Id.* at 2788.
37. *See id.* at 2791.
38. *See id.* at 2788.
39. *Id.* at 2790 (citing 10 U.S.C. § 836(b) (2006)).

that this last requirement was not met now that the U.S. Government failed to show that practical objections exist and, if so, what they are, especially in reference to the handing over of evidence to the suspect.[40] It certainly did not meet the requirement "to apply one of the most fundamental protections afforded not just by the Manual for Court-Martial but also by the UCMJ itself: the right to be present."[41] Said teleological interpretation is evidenced by the reasoning of Justice Stevens: "Whether or not that departure technically is 'contrary to or inconsistent with' the terms of the UCMJ . . . the jettisoning of so basic a right cannot lightly be excused as 'practicable.'"[42] The Court arrives at this conclusion in particular on the basis of the reasoning that: "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility."[43] It is thus no great surprise that, regarding practicability in the *Hamdan* case, the Supreme Court concluded that "[u]nder the circumstances, then, the rules applicable in court-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b)."[44]

2. Teleological Interpretation of Common Article Three

One of the most enlightening arguments underlying this conclusion, illustrative of the elusiveness of the Supreme Court ruling as a whole, lies in the determination that the rules of procedure and evidence applicable to military commissions are contrary to the fair trial principles envisioned by the Third Geneva Convention of 1949, in particular Common Article Three.[45] The *ratio decidendi* of the majority of the Supreme Court thereto rests on four elements.

As to the Government's first argument that the Supreme Court is not competent (authorized) to examine the procedures

40. *See Hamdan*, 126 S. Ct. at 2792.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 2796.
45. *See id.* at 2795-97.

of the commissions in terms of their compatibility with the Geneva Conventions, since only political and military authorities are responsible for enforcement of these Conventions, the justices considered that, irrespective of the nature of the norms in the Geneva Conventions, these are intrinsically part of the law of war. Pursuant to Article 21 of the UCMJ this compatibility issue is subjected to judicial scrutiny.[46]

Second, the U.S. Government argued that the Geneva Conventions would not apply, since Hamdan was arrested during the conflict with Al Qaeda—a party that has not ratified these Conventions.[47] In addition, it was argued that the conflict with Al Qaeda should be distinguished from the war with Afghanistan, who did accede to the Conventions.[48] The justices refuted such a distinction, holding that there is at least one Article of the Geneva Conventions, namely Common Article Three, that applies irrespective of whether the conflict is among States that ratified the Conventions.[49] Common Article Three appears in all four Conventions, and stipulates, *inter alia*, that in a non-international conflict on the territories of one of the signatory parties "each Party to the conflict shall be bound to apply, as a minimum" those provisions that offer protection to "persons . . . placed *hors de combat* by . . . detention," including the prohibition on "the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples."[50] The concept "regularly constituted court" is therefore interpreted restrictively by the Supreme Court in the *Hamdan* in the sense that, for terrorism trials as well, a link must be sought with the procedural rules that apply either for ordinary courts or military courts-martial.[51] Furthermore, the justices opined that the conflict with Al Qaeda is, contrary to the argument of the Bush Administration in the *Hamdan* case, not a conflict with an international character.[52] Rather it can be seen as an internal armed conflict within one and the same territory. Here, the Supreme Court relied

46. *See Hamdan*, 126 S. Ct. at 2793-94.
47. *See id.* at 2794-95.
48. *See id.* at 2795.
49. *See id.*
50. *Id.*
51. *See id.* at 2796
52. *Id.* at 2795.

upon the rationale of Common Article Three, saying that "Common Article 3, by contrast, 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."[53]

Next, confronted with the definitional question of what exactly should be understood by a "regularly constituted court," the justices again followed a teleleological approach, holding that, at a minimum, a military commission can be considered to be regularly constituted according to standards of the U.S. military justice system only if "some practical need explains deviation from court-martial practice."[54] As this burden of proof was not met, this argument was resolved against the U.S. Government position.[55]

In the same teleological vein, the *Hamdan* majority finally opined that, although Common Article 3 to a large extent allows flexibility in trying persons detained after an armed conflict, the basic rights in this provision are nevertheless "requirements."[56] In the view of the Court, the military commission that tried Hamdan did not meet those requirements.[57]

Summarizing the teleological approach in *Hamdan*, the following conclusions emerge:

First, the *ratio decidendi* of the Supreme Court ruling as to the applicability and interpretation of Common Article Three of the Geneva Conventions in terrorism and unlawful combatancy cases expresses the primacy of this provision as a norm to ensure a minimum standard of procedural fairness in this type of cases, as a norm that should be effectuated on the basis of its rationale and teleologically applied.

Second, although the justices do not specifically address the doctrine of direct effect of the Geneva Convention as a whole for individuals,[58] they do not exclude such effect.[59] At least for

53. *Hamdan*, 126 S. Ct. at 2796.

54. *Id.* at 2797.

55. *See id.* at 2798.

56. *See id.*

57. *See id.* ("[B]ut requirements they are nonetheless.")

58. *See id.* at 2795.

59. In the *Hamdan* case, the D.C. Circuit held that the Geneva Conventions were not legally enforceable for individuals involved in a criminal procedure. *See* Hamdan v.

Common Article Three, this direct effect is now accepted.[60]

Third, the acceptance of this form of direct effect signifies an ongoing precedent for the procedural approach on the basis of which terrorism trials in the United States (and elsewhere) ought to take place. It is to be expected that this decision will also affect courts of justice or commissions abroad that might be confronted with similar cases.

C. *"Conspiracy" as a* Contra-Legem *Form of Criminality Within International Criminal Law: A Jurisdictional Deficiency?*

1. The Justices' Approach

The *Hamdan* decision is important in yet another way. Four of the Supreme Court justices touched upon a substantive law matter which originated directly from international criminal law principles. As observed *supra*, the charges against Hamdan were based on the doctrine of conspiracy for acts committed between 1996 and November 2001.[61] Only two months of this period related to the time after September 11, 2001. It is notable that the elements underlying the conspiracy charge had not been defined by the Congress, but by the President himself.[62] In *Hamdan*, the U.S. Supreme Court does not accept conspiracy as a charge triable within the scope of the earlier mentioned third category of military commissions—namely military commissions intended to try violations of military law.[63]

Two arguments were put forward in support of this conclusion, arguments which have important precedential value and may affect cases beyond the scope of military commission proceedings. First, the justices held that, according to Article XXI of the UCMJ, the jurisdiction of military commissions of this category is limited to offenses committed "within the theatre of war," and those offenses must have been committed during the armed conflict, not before or after.[64] In the *Hamdan* case the

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Rumsfeld, 415 F.3d 33, 40 (2005), *cert. granted*, 126 S. Ct. 622 (2005), *rev'd* 126 S. Ct. 2749 (2006).

60. *See, e.g.*, Kadic v. Karadzic, 70 F.3d. 232, 242-44 (2d Cir. 1996) (discussing applicability of Geneva Convention Common Article III in regard to individuals in U.S. courts).

61. *See supra* notes 7-13 and accompanying text.

62. Military Commission Instruction No. 2, 32 C.F.R. § 11.6 (2006).

63. *See supra* notes 3-5 and accompanying text.

64. *Hamdan*, 126 S. Ct. at 2777.

Court concluded that "neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act is alleged to have occurred in a theatre of war or on any specified date after September 11, 2001."[65] The Supreme Court observed that "none of the overt acts that Hamdan is alleged to have committed violates the law of war."[66] Second, the Supreme Court concluded that the offense of conspiracy is not triable by a military commission of this category—*i.e.*, a commission intended to try violations of the law of war.[67] Although it was considered that in theory a military commission is allowed to try offenses that are not legally defined, such undefined offense must at least be "plain and unambiguous" in its manifestation.[68] Yet, this requirement was not met.[69] It is noteworthy that the offense of conspiracy has rarely been tried before a U.S. military commission of the third category, nor do the Geneva Conventions mention this offense.[70] In this regard, the justices were led by international jurisprudence. They explicitly stated that "international sources confirm that the crime charged here is not a recognized violation of the law of war," adding that "the only conspiracy crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a concrete plan to wage war."[71]

2. The Hamdan Defense Approach

The U.S. Supreme Court unambiguously relies on case law of the ICTY. As a result, the justices implicitly endorse the transposition of ICTY jurisprudence onto its own law-making powers.

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65. *Id.* at 2778.

66. *Id.*

67. *See id.* at 2785.

68. *Id.* at 2780.

69. *See id.*

70. *See generally* Geneva Convention, *supra* note 6; *see also* Capt. Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for* Hamdan v. Rumsfeld, 186 MIL. L. REV. 1 (2005) (discussing the *Hamdan* case and the rarity of conspiracy trials before military commissions).

71. *Hamdan*, 126 S. Ct. at 2784. Similarly, the Statutes of the Yugoslavia and Rwanda tribunals do not acknowledge the participation form of conspiracy to commit war crimes or crimes against the humanity. *See* Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Draguljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise (May 21, 2003).

The Hamdan defense team argued for precisely this approach before the U.S. Supreme Court, in order to support its argument that conspiracy is not a triable offense before the military commissions.[72] Here, the defense of Hamdan was assisted by the legal opinion drafted for these purposes ("Opinion Brief").[73] The Opinion Brief extensively elaborated on ICTY case law on conspiracy, analyzing several ICTY judgments, in particular the Decision on Draguljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise in the case of *Prosecutor v. Milutinovic* ("*Ojdanic*"),[74] which were put before the Supreme Court.

In *Ojdanic*, the Appeals Chamber categorically stated that "joint criminal enterprise" ("JCE") and "conspiracy" are two distinct forms of liability, saying that:

> [w]hilst conspiracy requires a showing that several individuals have agreed to commit a certain crime of sets of crimes, a [JCE] requires, in addition to such a showing, that the parties to the agreement took action in furtherance of that agreement. In other words, while the mere agreement is sufficient in the case of conspiracy, the liability of a member of a [JCE] will depend on the commission of criminal acts in furtherance of that enterprise.[75]

In the *Ojdanic* case, the Appeals Chamber also distinguished JCE from organizational liability, holding that "[c]riminal liability pursuant to a [JCE] is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a [JCE], a different matter."[76] In this regard, the Appeals Chamber emphasized that mere membership in a criminal organization or a JCE would not render the accused responsible for crimes committed by that organization/JCE. The prosecution must establish that the accused actually contributed to the

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72. *See* Legal Opinion on Joint Criminal Enterprise and Conspiracy, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) [hereinafter Feb. 23 Legal Opinion] (on file with author) (addressing *ultra vires* nature of conspiracy claims in this regard). This opinion was produced by the author under a comfidentiality agreement with the *Hamdan* defense team. The original is on file with the author and further questions may be directed to him.

73. *See* Feb. 23 Legal Opinion, *supra* note 72.

74. Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Draguljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise (May 21, 2003).

75. *Id.* ¶ 23.

76. *Id.* ¶ 26.

realization of the common plan/purpose or acted in furtherance of the common plan/purpose.[77]

Only when the charge concerns conspiracy to commit genocide can the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") entertain jurisdiction.[78] As yet, the ICTY has not entered convictions on this basis—the only genocide conviction upheld thus far was for aiding and abetting genocide, endorsed by the *Krstic* Appeals Chamber judgment.[79] In contrast, conspiracy has played a greater role at the ICTR. Firstly, because genocide has been much easier to prove in relation to the events in Rwanda, and secondly, because conspiracy is the only offense for which the ICTR Prosecutor is entitled to charge the accused in regard to acts occurring prior to 1994.[80]

D. *The Reliance of the Hamdan Defense on the Rationale for the Rejection of Conspiracy Triable as a War Crime*

In the *Hamdan* proceedings, the question arose as to the rationale of the non-acceptance of conspiracy as a triable offense *per se*.[81] This issue was addressed in the Opinion Brief provided to the Hamdan defense presented to the Supreme Court.[82] It posited two arguments for this rejection.

First, an argument was derived from the World War II ("WW-II") cases as well as the policy of the Allies relative to the restoration of the peace. Because Germany, after WW-II, had surrendered and was then occupied, it had relinquished its sovereignty; it was therefore not possible to prosecute the German State as such for breaching the WW-II peace treaties. Conspiracy to commit aggression/crimes against peace was therefore inserted into the Charter in lieu of State responsibility.[83]

Essentially, during WW-II, the Allies (*i.e.*, the United Kingdom and United States) pursued the policy that anyone who committed the listed acts (regarding breaching the peace treaty)

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77. *See id.* ¶¶ 23, 26.

78. *See* GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS: A COMPARATIVE STUDY 65 (2003).

79. *See* Prosecutor v. Krstic, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶ 138 (Apr. 19, 2004).

80. *See* KNOOPS, *supra* note 78, at 80.

81. *See* Feb. 23 Legal Opinion, *supra* note 72.

82. *See id.*

83. *See* KRIANGSAK KITTICHAISARREE, INTERNATIONAL CRIMINAL LAW 248-49 (2001).

would be guilty of conspiracy.[84] After the war, the United States was keen to use conspiracy in order to cover Hitler's regime and to prove that it was an illegal regime which had waged an illegal war. The French and Russians were not involved in the original discussions, but were allowed to participate later. The French were still recovering from their occupation, so they seem to have been at a disadvantaged position.[85]

Based on this historical reconstruction, one can assume that this was the reason why conspiracy was only accepted with respect to crimes of aggression/crimes against peace and not with respect to war crimes and crimes against humanity. These political motivations seemed to be the primary reason thereto, as well as the simple fact that Hitler had been put on notice of the intention of the Allies to prosecute this conspiracy crime. Notably, the French judge Henri Donnedieu de Vabres was opposed to conspiracy as a notion because it was not a familiar concept within civil law systems.[86] Judge Donnedieu de Vabres argued that it was unknown to international law. One may assume that his view as a judge was instrumental in avoiding the application of conspiracy in the WW-II convictions.[87]

In the second place, a more contemporary argument was developed by the Hamdan defense based upon an evaluation of the statute of the ICTY. Article VI of this statute provides that the international tribunal shall have jurisdiction over natural persons.[88] All persons are, therefore, subject to the personal jurisdiction of the tribunal, with the exclusion of legal persons, organizations and States.[89] The possibility of extending the personal jurisdiction of the ICTY to organizations for the purpose of establishing membership therein as an offense was discarded. The Nuremberg precedent, whereby a declaration of criminality of an organization by the Military Tribunal fixed the criminality of its members in subsequent proceedings before national courts of the signatory parties, could thus not have been followed in the

84. *See* Symposium, *Critical Perspectives on The Nuremberg Trials*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 495 (1995).

85. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 75-77 (1992).

86. *See* TAYLOR, *supra* note 85, at 581-82.

87. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 197 (2003).

88. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 6, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

89. *See* KNOOPS, *supra* note 78, at 4.

ICTY context. This was not only because a similar hierarchical structure between the international tribunal and national courts could not have been envisaged, but mainly because the notion of guilt by association, implicit in the crime of membership, does not comport with the underlying principle of the ICTY statute that criminal liability is personal.[90]

As a result, the ICTY Statute does not even retain the notion of conspiracy that was recognized by the Nuremburg Tribunal as a specific offense.[91] The Statute only recognizes conspiracy in relation to crimes against peace.[92] Instead, premised on the principle of individual criminal liability, the ICTY Statute retains the notion of complicity, which entails the individual criminal responsibility of the accused for acts done by him to the extent of his contribution to the execution of the crime.[93] Hence, the aforementioned Opinion Brief, which was instrumental to the Hamdan defense team in their oral arguments brought before the Supreme Court in March 2006, arrived at the conclusion that several legal political as well as doctrinal reasons are available to show why the doctrine of conspiracy is an unsuitable liability concept when it concerns war crimes.

E. *Conspiracy Under the International Criminal Court Statute: An Additional Defense Argument*

In *Hamdan*, the U.S. Government's submissions relied on Article 25(3)(d) of the International Criminal Court ("ICC") Statute to support its argument that a form of conspiracy has been included in the ICC Statute.[94] Notably, the concept of

90. For further elucidation of these arguments, see Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 E.J.I.L. 360, 369-70 (1994). For these reasons both New Zealand and Belgium in their submissions to the U.N. Secretary-General expressed opposition to including membership in criminal organization as an offense under the Statute.

91. *See* ICTY Statute, *supra* note 88, art. 4(3)(b).

92. *See id.*

93. *See id.* arts. 7(1), 7(2).

94. This provision reads:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: . . . (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime

joint criminal enterprise as such is not implemented within the ICC Statute.

The Opinion Brief, on which the Hamdan defense relied, refuted this argument, advocating the following arguments. As a preliminary point, the Brief observed that, unlike the ad hoc Tribunals, the ICC is a treaty-based institution; thus, the drafters of the ICC Statute only needed to gain the consent of the States Parties—it was not necessary for them to establish that the offenses codified in the ICC Statute were reflective of customary international law or conventional law, which was applicable to all the State Parties.[95]

Second, it argued that the fact that 104 States have now ratified the Statute offers evidence of wide-spread *opinio juris* regarding the Statute's provisions.[96] In order to respect the principle of legality, however, the ICC Statute explicitly states that it cannot be applied retroactively to offenses that occurred either before the ICC Statute came into effect in July 2002, or before the States Parties with jurisdiction over the offense ratified the ICC.[97] At the time Hamdan committed the alleged offenses, the ICC Statute had not been ratified by either the United States, Yemen, or Afghanistan.[98]

Third, while the inclusion of certain provisions in the ICC Statute (such as Article 25) is not evidence in and of itself that these provisions are customary international law, the fact that delegations of several States objected to the inclusion of certain offenses or forms of liability is evidence there was no consistent

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within the jurisdiction of the court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.

Rome Statute of the International Criminal Court art. 25(3)(d), A/CONF. 183/9, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (July 17, 1998) (entered into force July 1, 2002) [hereinafter Rome Statute].

95. *See* Feb. 23 Legal Opinion, *supra* note 72.

96. In *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment ¶ 223 (July 15, 1999), the Appeals Chamber opined noted that the:

> Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly . . . shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States.

97. *See* Rome Statute, *supra* note 94, arts. 22(1), 24(1).

98. Afghanistan deposited its instrument of accession to the Rome Statute on February 10, 2003. *See* International Criminal Court, Assembly of States Parties (Afghanistan), http://www.icc-cpi.int/asp/statesparties/country&id=41.html (last visited Jan. 22, 2007).

State practice and *opinio juris* as of 1998 in relation to these offenses or forms of liability.[99] In this regard, in light of the fact that conspiracy is not recognized by several civil law countries, it was not included in the ICC Statute.[100] Thus, in contrast to the statutes of the ad hoc tribunals, which incorporate the offense of conspiracy to commit genocide based on the wording of the Genocide Convention, the operative Article governing genocide in the ICC Statute[101] only lists completed acts of genocide as offenses under the Statute. This suggests that the consensus that existed in 1948 with respect to conspiracy to commit genocide as an inchoate offense no longer exists among the principal legal systems of the world.

Furthermore, the aforementioned Opinion Brief elucidated that the form of liability set out in Article 25(3)(d) differs from the form of conspiracy set out in Military Instruction No. 2 ("MCI No.2") in several key aspects.[102]

First, in contrast with MCI No. 2, which only requires that a member of the conspiracy/enterprise (not necessarily the accused) commit an overt act in furtherance of the common purpose, Article 25(3)(d) requires that the accused must contribute to the commission or attempted commission of the crime.[103] Hence, in contrast to MCI No. 2, the mere fact that an accused may have been a member of the conspiracy or enterprise and may have known of their criminal objectives is not sufficient to establish criminal responsibility under this Article. The use of the word "contribute" also suggests that the action of the accused should form part of the causal nexus of the commission of the crime (or attempted crime).[104] Indirect acts, such as ensuring the general safety of Osama Bin Laden, would not meet this criteria.

Second, the accused must intentionally contribute to the commission of a specific crime within the ICC Statute, and he must do so either with the aim of furthering the criminal activ-

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99. *See* Feb. 23 Legal Opinion, *supra* note 72.

100. *See* CASSESE, *supra* note 87, at 196; MARK JENNINGS, INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW, THE PROCEDURAL REGIME OF THE INTERNATIONAL CRIMINAL COURT 6 (2001), http://www.isrcl.org/Papers/Jennings.pdf (last visited Jan. 22, 2007).

101. *See* Rome Statute, *supra* note 94, art. 6.

102. *See* Feb. 23 Legal Opinion, *supra* note 72.

103. *See* Rome Statute, *supra* note 94, art. 25(3)(d).

104. *See* KITTICHAISARREE, *supra* note 83, at 250.

ity/purpose of the group (provided that the activity/purpose involves the commission of a crime within the jurisdiction of the court) or with the knowledge of the intention of the group to commit a crime within the jurisdiction of the court.[105] From this it can be extrapolated that the prosecution must establish at the very least that the accused possessed personal knowledge of the specific crime under the ICC Statute that the group of persons intended to commit.[106] In accordance with the ICC Statute formula, it would not be sufficient that the accused was only aware of the general criminal purpose of the group. Moreover, since the ICC Statute stipulates that the accused must "intend" to contribute, it is arguable that the accused would need to have known sufficient details of the criminal plan or activity to be aware that his actions would contribute to the commission or attempted commission of that specific crime.[107]

Third, it is notable that the extended form of JCE (third category), was not included in the ICC Statute. Article 25(3)(d) requires the prosecution to establish that the accused actually contributed to the commission/attempted commission of the crime charged, and that he either shared the intention of the perpetrators to commit that specific offense, or had actual knowledge of the group's intended commission or attempted commission of that specific crime.[108]

Finally, although there is no express requirement in the Article for the prosecution to establish that the accused possessed an agreement or understanding with the actual physical perpetrators of the offense, in the absence of any jurisprudence delineating the parameters of this Article, it is reasonable to conclude that the procedural limitations placed on JCE by the ICTY may be adopted by the ICC. In this regard, Article 21 of the ICC Statute provides that, after first consulting the Statute and rules and regulations of the court, the court may apply the applicable principles of international law.[109] In view of the fact that the

105. *See* Rome Statute, *supra* note 94, art. 25(3)(d).

106. *See* KITTICHAISAREE, *supra* note 83, at 241.

107. Article 30(2)of the Rome Statute provides that "a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

See Rome Statute, *supra* note 94, art. 30(2).

108. *See id.* art. 25(3)(d).

109. *See id.* art. 21(1).

respective chambers of the ICTY have argued that the limitations they have placed on the theory of JCE derive from customary international law, the ICC might also adopt their conclusions. As a result, the *Hamdan* case, led by the Opinion Brief, arrived at the conclusion that it would therefore be premature to cite Article 25(3)(d) in support of a broad definition of conspiracy/complicity under international law. The U.S. Supreme Court implicitly acknowledged this reasoning.

F. *The Hamdan Defense: Distinguishing Conspiracy From Joint Criminal Enterprise Under ICTY Jurisprudence*

The Opinion Brief provided to the Hamdan defense for the purpose of the Supreme Court proceedings also delved deeper into the fundamental distinction between the concept of conspiracy and the concept of joint criminal enterprise, which was developed by the judges of the ICTY. Noticeably, the latter concept was not specifically promulgated by the Statute of the ICTY in 1993, but developed from case law of the ICTY.

The two most important judgments at the ICTY on the topic of JCE are the *Tadic Appeals Chamber Judgment* of July 15, 1999 ("*Tadic Judgment*"),[110] and the *Brdjanin Trial Judgment* of September 1, 2004 ("*Brdjanin Judgment*").[111] The *Tadic Judgment* was the first occasion on which the ICTY elaborated on the subject of JCE (or *common purpose* as it was designated then). As an appeals judgment, it is binding on the respective trial chambers. Although the Judgment is not *per se* binding on domestic or other international courts and tribunals, to the extent that it seeks to ground its conclusions in customary international law, it is an influential statement of the status of that law as of 1991-1995.[112] The *Brdjanin Judgment* is particularly relevant to the Military Commission indictments, because it seeks to limit the scope of JCE, particularly in the scenario of large scale enterprises entailing broad temporal and geographic spans.[113] The other judgments referred to below clarify certain aspects of JCE and individual criminal responsibility for war crimes.

The *Tadic Judgment* is considered to be the primary author-

110. Prosecutor v. Tadic, Case No. IT-94-1-A (July 15, 1999).

111. Prosecutor v. Brdjanin, Case No. IT-99-34-T, Trial Judgement (Sept. 1, 2004).

112. *See* CASSESE, *supra* note 87, at 349-53.

113. *See Brdjanin*, Case No. IT-99-34-T, ¶ 355.

ity for the concept of *common purpose* at the ICTY. The facts concerned the ethnic cleansing of the village of Jaskici, in which Tadic participated.[114] Five men were taken to a river bank and shot that day, but the prosecution was unable to establish who pulled the trigger.[115] During trial, Tadic was acquitted of these murders, but on appeal the Appeals Chamber found that there was a joint criminal enterprise to cleanse the village.[116] Tadic shared this intention and participated in this cleansing. In addition, the Chamber held that the killing of the five men was a foreseeable consequence of the JCE, and that Tadic had voluntarily participated in the JCE, knowing that such killings were a foreseeable consequence of the ethnic cleansing.[117] The Appeals Chamber therefore convicted Tadic of the five murders.

In terms of the legal theory, from the outset, the *Tadic Judgment* emphasized that criminal liability should be based on individual participation/responsibility: "nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[118] The Appeals Chamber cites several national constitutions that set out this principle. It references Article 7(1) of the ICTY Statute regarding the principle of individual responsibility and the Report of the Secretary General accompanying the text of the ICTY Statute (analogous to the *travaux preparatoires* of the ICTY Statute), in which the Secretary-General states that the law applied by the ICTY should be founded on customary international law, and that its *competence ratione personae* (personal jurisdiction) should extend only to individuals and not to groups.[119]

It can be extrapolated from these clear caveats that the Appeals Chamber did not intend for this form of liability to extend to impose responsibility for membership in a criminal group—a form of collective as opposed to individual responsibility. Although the Appeals Chamber does reference the notion of col-

114. *See* Prosecuter v. Tadic, Case No. IT-94-1-I, Indictment (Amended), ¶ 12 (Dec. 14, 1995).

115. *See* Prosecuter v. Tadic, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 373 (May 7, 1997).

116. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 231 (July 15, 1999).

117. *See id.* ¶¶ 231-232.

118. *Id.* ¶ 186.

119. *See id.*

lective criminality at paragraph 191,[120] it further elaborates that, by the use of this term, the Appeals Chamber is referring to a scenario in which "[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offense in question."[121]

Since the ICTY Statute does not set out the requirements for the elements of the *actus reus* and *mens rea*, the Appeals Chamber relied on customary international law as set out in international legislation and case law (WW-II jurisprudence and domestic jurisprudence).[122] The Appeals Chamber concluded that these cases illustrated three different categories of JCE, defined as described below.

The first category concerns co-defendants who possess the same criminal intention—*i.e.*, to achieve the goal of the joint criminal enterprise—but not all of whom have the same role in carrying out the criminal goal. All participants in the JCE may nonetheless be convicted of the crime that was the goal of the JCE if the following is established: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.[123]

With respect to the nature of the accused's participation—citing the *Ponzano* case,[124] the Appeals Chamber concluded that the accused's contribution to the common plan/purpose must have been a link in the chain of causation vis-à-vis the ultimate

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120. *Id.* ¶ 191.

> Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.

121. *Id.*

122. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 194 (July 15, 1999).

123. *See id.* ¶ 196.

124. *See id.* ¶ 199 (discussing Trial of Feurstein and Others, Proceedings of a War Crimes Trial Held at Hamburg, Germany (Aug. 4-24, 1948), Judgment of August 24, 1948).

offense—although not that it was the *sine qua non*, *i.e.*, that but for the accused's contribution, the common plan would not have been achieved.[125] The Chamber referred to the *Trial of Otto Sandrock and Three Others*,[126] the *Trial of Gustav Alfred Jepsen and Others*,[127] the *Trial of Franz Schonfeld and Others*,[128] the *Trial of Feurstein and Others*,[129] and *United States v. Otto Ohlenforf*,[130] as examples of this first category.

The second category of JCE, a variant of the first, is applicable where offenses charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; *i.e.*, by groups of persons acting pursuant to a concerted plan.[131] In fleshing out the details of this category, the Trial Chamber relied on the *Dachau Concentration Camp* case[132] and the *Belsen* case.[133]

The elements of this category were as follows:

(a) *Actus reus*: satisfied by active participation in the enforcement of a system of repression.[134] This participation could be inferred from the position of authority and specific functions of the accused.[135] This implies that an accused who did not exercise a position of authority (e.g., driver or cook) or whose functions were not actively/directly linked to the system of repression would not fall within the scope of this category.

(b) *Mens rea*: satisfied if the accused possessed (i) knowledge of the nature of the system; and (ii) the intent to further the common concerted design of ill-treatment (in camps or sys-

125. *See id.*

126. *See id.* ¶ 197 (discussing Proceedings of British Military Court for the Trial of War Criminals, Held at the Court House, Almelo, Holland (Nov. 24-26, 1945)).

127. *See id.* ¶ 198 (discussing Proceedings of a War Crimes Trial Held at Luneberg, Germany (Aug. 13-23, 1946), Judgment of August 24, 1946).

128. *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment (discussing Proceedings of British Military Court, Essen (June 11-26, 1946)).

129. *See id.* ¶ 199 (discussing Proceedings of a War Crimes Trial Held at Hamburg, Germany (Aug. 4-24, 1948), Judgment of August 24, 1948).

130. *See id.* ¶ 200 (discussing trials of war criminals before the Nuremberg Military Tribunals).

131. *See id.* ¶ 202.

132. *See id.* (discussing Trial of Martin Gottfried Weiss and Thirty-nine Others, General Military Government Court of the United States Zone, Dachau, Germany (Nov. 15-Dec. 13, 1945).

133. *See id.* (discussing Trial of Josef Kramer and Forty-four Others, British Military Court, Luneberg (Sept. 17-Nov. 17, 1945)).

134. *See id.*

135. *See id.* ¶ 203.

tem).[136]

With respect to the issue of intent, the Appeals Chamber held that, in many of the concentration camp cases, the accused's intent could be inferred from the position of authority of the accused if the accused exercised a high level of authority such that it would evidence the accused's knowledge of the system of ill-treatment and intention to further it.[137] It is, however, arguable that it would not be possible to infer intent if the accused was, for example, a cook or a cleaner, who would not necessarily know the details of the system of ill-treatment or would not necessarily have the ability to actively influence the system of ill-treatment. Accordingly, the fact that they continue to perform their functions within the system is not necessarily indicative of their intention to further the criminal purpose of the system.

The third category of JCE, the extended form of JCE, is essentially based on the classic bank robbery scenario, *i.e.*, three people agree to rob a bank (which is the common purpose), one of them is armed, the bank is guarded, the other two are aware of these factors, but nonetheless participate. During the course of the robbery, there is a struggle; and someone is shot and killed. In the extended form of JCE, all participants in the robbery are liable for the death because it was a natural and foreseeable consequence of their decision to rob the bank.[138]

The Appeals Chamber applied this form of liability in the context of a conflict and gave the example of:

> a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.[139]

In this scenario, all participants in the ethnic cleansing will

136. *See id.*

137. *See id.*

138. *See* CASSESE, *supra* note 87, at 187-88.

139. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 204 (July 15, 1999).

be liable for the resulting deaths "where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."[140] Although the use of the word "predictable" has been criticized in subsequent judgments[141] and by commentators[142] as being unduly ambiguous, it is arguable that its use implies that there must be some kind of relationship between the accused and the physical perpetrator of the criminal act, and that the proximity of this relationship was such that the accused was in a position to predict the specific actions of the actual physical perpetrator. This would only have been the case if there was an actual agreement (whether express, implied, or extemporaneous) between the accused and the physical perpetrator regarding their respective roles in the alleged JCE.

The Appeals Chamber subsequently notes that cases falling under this category during the WW-II prosecutions concerned mob violence, such as the *Borkum Island* case (*Kurt Goebell et al.*)[143] and the *Essen Lynching* case.[144] It is, however, important to distinguish between mob violence cases in which the scenario is that the mob all shared the same intention (*i.e.*, to lynch someone), but it is difficult to ascertain which member of the mob struck the killing blow, which would properly fall under the first category of JCE, and the scenario in which the mob shares the intention to loot/plunder, etc. while armed, and it is foreseeable that violence to life might ensue in the course of this armed looting and plundering, which would fall under the third category. The Appeals Chamber's reliance on "mob violence" cases to demonstrate the third category is therefore misleading.

The analysis of the Appeals Chamber of war crimes cases brought before Italian courts (the Court of Cassation) after WW-II is particularly relevant to the framing of the offenses in the Hamdan indictment.[145] The Appeals Chamber examined the Italian Court of Cassation's findings with respect to the causal

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140. *Id.*

141. *See* Prosecutor v. Ojdaniæ, et al., Case No. IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdaniæ to Jurisdiction (May 21, 2003).

142. *See* Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

143. *See Tadic*, Case No. IT-94-1-A, ¶¶ 210-12.

144. *See id.* ¶¶ 207-09.

145. *See Tadic*, Case No. IT-94-1-A, ¶¶ 214-19.

nexus between the JCE and the offense in the Mannelli judgment of July 20, 1949. The court explained the required causal nexus as follows:

> The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (*rapporto di occasionalita*). Indeed, the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, *it is necessary that the latter crime should constitute the logical and predictable development of the former (il logico e prevedibile sviluppo del primo).* Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita*), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of the intended offense, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (*mandante*) by a merely incidental relationship.[146]

A further factor taken into consideration by the Italian Court of Cassation was whether—in an extended JCE scenario—the crime, which was the by-product of the initial JCE, was more serious than the intended objective of the JCE.[147] For example, if, in the course of committing a "mopping up" operation, someone commits the far more serious offense of homicide, in order to find the other participants in the mopping up incident culpable, "it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (*fosse stata spiegata un'attività volontaria in relazione anche all'omicidio*)."[148] The reference to "voluntary activity also concerning homicide" implies that, for individual A to be convicted of a more serious offense that has been perpetrated by

146. *Id.* ¶ 218 (citing *Giustizia Penale*, 1950, Part II, cols. 696-697).

147. *See id.* ¶ 216 (citing handwritten text of unpublished judgment *in re Beraschi*, on file with ICTY library).

148. *Id.*

another participant (individual B) in the JCE, it is necessary to demonstrate that individual A was able to predict in advance that the commission of acts of such gravity was a possible and foreseeable consequence of undertaking the JCE, and nonetheless, voluntarily and intentionally continued to participate in the JCE. Indeed, in summing up the elements for the third category of JCE, the Appeals Chamber further clarified that: "more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk."[149] In conclusion, now that the concept of JCE fundamentally differs from "conspiracy" under principles of international criminal law, the Hamdan defense was able to challenge the U.S. government's arguments before the U.S. Supreme Court on this issue.

G. *Projection from the Hamdan Case*

In the context of *Hamdan*, the Supreme Court accepted that the jurisdiction of the military commission does not encompass conspiracy, and that the commission therefore lacked the authority to try Hamdan.[150] As a consequence, the Supreme Court in fact transformed a deficiency *rationae materiae* exposed by the indictment into a jurisdictional deficiency.

By doing so, the justices actually introduce a criterion that seems applicable to all types of proceedings similar to military commissions: that of military necessity. They considered that the charge against Hamdan did not only contain procedural defects. Rather, they held that such defects were also indicative of a broader failure on the part of the U.S. government to meet the most fundamental requirements for establishing such commissions: that of military necessity. Quite revealing are the considerations of the five Supreme Court justices who voted in favor of Hamdan—that this "tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities."[151]

149. *Id.* ¶ 220.

150. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2785 (2006).

151. *Id.*

III. *THE DIRECT EFFECT AND INDIVIDUAL ENFORCEABILITY OF THE (THIRD) GENEVA CONVENTION(S) WITHIN (INTERNATIONAL) CRIMINAL PROCEEDINGS*

A. *The (International) Legal Standing of Common Article Three*

One of the pivotal questions central to *Hamdan v. Rumsfeld* was whether the Geneva Conventions create, for those accused of and charged with violations of the law of war, a direct effect, so that these persons can utilize the conventions in their defense. In *Hamdan,* this question was initially answered in the affirmative by the U.S. District Court for the District of Columbia.[152] However, on appeal, the Court of Appeal for the D.C. Circuit held the opposite.[153]

The U.S. Supreme Court abstained from answering this question, saying that "[w]e need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories."[154] In doing so, they left open the question whether an accused like Hamdan can directly rely on the provisions of the Geneva Conventions within the legal process. On February 7, 2002, the U.S. President indicated that the Geneva Conventions were applicable to the conflict with the Taliban regime, which at that time ruled Afghanistan.[155] No such acknowledgement was made for members of Al Qaeda. The Supreme Court justices, however, set forth the notion that unlawful combatants can directly rely on the fair trials provision of the Geneva Conventions. Preceding this ruling, Common Article Three was perceived to have this effect on the basis of (customary) international law on the following bases:

First, the Third Geneva Convention is deemed self-executing, *i.e.*, it can be called upon directly in domestic trial proceedings, and it requires no legislation for its implementation, as the stipulated norms are sufficiently clear and precise to be directly applicable within a State's criminal process.[156] It is noteworthy

152. *See id.* at 2761-62.

153. *See id.* at 2762; *see also* Neil Richardson & Spencer Crona, *Detention of Terrorists as Unlawful Combatants and Their Trial by American Military Commissions, in* LAW IN THE WAR ON INTERNATIONAL TERRORISM 123, 123-43 (Ved P. Nanda ed., 2005).

154. *Hamdan,* 126 S. Ct. at 2795.

155. *Id.* at 2795 n.60.

156. *See* T.D. Gill & E. van Sliedregt, *Guantánamo Bay: A Reflection on the Legal Status and Rights of "Unlawful Enemy Combatants,"* 1 UTRECHT L. REV. 28 (2005).

that during the ratification by the United States of the Third Geneva Convention in 1955, the U.S. Congress argued that some provisions required implementation, but this was only with respect to those articles that concerned the severity of punishment.[157] Furthermore, the United States listed no reservations at the time of ratifying the Third Geneva Convention.

Second, ICTY case law qualifies Common Article Three as part and parcel of customary international law.[158]

Third, according to an ICTY Trial Chamber decision of May 29, 1998, as well as the ICTY Appeals Chamber judgment in the *Delalic* case, the norms embodied in Common Article Three apply "in all situations of armed conflict."[159] These rulings are in line with the opinion of the ICJ in the *Nicaragua* case, in which the ICJ decided that Common Article Three contains minimum rules, applicable to every armed conflict, irrespective of whether the conflict had an internal (domestic) or international character.[160] Thus, any dispute regarding whether an internal conflict features in a certain case is superfluous when it concerns the direct applicability of this provision on the basis of international law.

It is without dispute that Common Article Three, as now acknowledged by the Supreme Court in the *Hamdan* case, has a self-executing effect on terrorism and unlawful combatancy procedures. The principle also applies to situations wherein the conflict only involves armed factions that are not affiliated with a particular State. *Hamdan* endorses the view that a particular alleged terrorist organization, which does not qualify as a State in accordance with international law and thus is not party to the Geneva Conventions, can have recourse to the procedural requirements of Common Article Three. This view is vindicated by the rationale that, "whether detained or prosecuted, unlawful

157. *See* Richardson & Crona, *supra* note 153.

158. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment, ¶ 609 (May 7, 1997); *see also* Prosecutor v. Delalic et al., Case No. IT-96-21-T, Trial Chamber, Judgment, ¶¶ 164-174 (Nov. 16, 1998).

159. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1, Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), (May 29, 1998); Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeals Chamber, Judgment, ¶¶ 140-150 (Feb. 20, 2001).

160. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27).

combatants must not be deemed beyond the ambit of law."[161] Indeed, when one accepts that the text of Common Article Three "reflects an irreducible minimum that no State is allowed to ratchet down even a notch in any armed conflict (whether international or non-international),"[162] this view is justified.

In conclusion, it is established that the protective nature of the Geneva Conventions lies in their self-executing effect contingent upon the location of the conflict, and not so much on the nature and characterization of the factions to which an alleged terrorist or warrior is connected.[163] In a situation where several fighting parties or factions are involved, it is conceivable that these parties are associated with each other or with a certain State, the result being that the Geneva Conventions apply. This can, for example, occur when a particular State exerts such a control over certain militia that their actions can be imputed to that particular State.[164]

B. *The Distinctive Entitlements to Common Article Three and to Prisoners of War Status*

The above conclusion is not to say that Taliban troops are endowed with a prisoner of war status. The ability to invoke Common Article Three should not be confused with entitlement to prisoner of war status under the laws of war, as the applicability of Common Article Three to unlawful combatants does not automatically denote prisoner of war status under the Third Geneva Convention. Since all armed forces, under the law of international armed conflict, are obliged to wear uniforms or display some other fixed distinctive emblem, it is questionable whether unlawful combatants can claim a prisoner of war status under said laws.[165] The same counts for Al Qaeda fighters, although less doubt seems to exist here as to the non-attribution of a prisoner of war status to them.[166] Notwithstanding the notion that

161. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 32 (2005).

162. *Id.*

163. *See* Richardson & Crona, supra note 153.

164. *See, e.g., Military and Paramilitary Activities*, 1986 I.C.J. at 114.

165. *See* DINSTEIN, *supra* note 161, at 48. Dinstein describes seven requirements for the acceptance of this status, the second of which pertains to having a fixed distinct emblem recognizable at a distance. *See id.* at 36-41.

166. *See id.* at 49.

unlawful combatants are not *eo ipso* entitled to a prisoner of war status,[167] the applicability of Common Article Three ensures at the least humane treatment and legal protection of fundamental principles of fair trial to all parties to the conflict, irrespective of any belligerent State's standing as to the scope of the *jus ad bellum*. It can be said, however, that the incongruence between fair trial protection for prisoners of war and for unlawful combatants has been diminished by *Hamdan*.

IV. *INTERNATIONAL LEGAL-POLITICAL IMPLICATIONS OF THE* HAMDAN *DECISION*

Hamdan will implicitly have legal political implications as to the ambit of Common Article Three. Firstly, from the perspective of the United States' internal legal politics, this decision creates clarity for the 450 Guantanamo Bay detainees regarding the fair trial principles originating from Common Article Three. Secondly, it endorses the customary international law status of these principles, raising them to the level of a *jus cogens* norm. Had the decision been different, it is conceivable that foreign regimes or States would have been led by such a negative precedent of the Supreme Court to promulgate similar military commission trials without adherence to the principles of Common Article Three. This would have led to a further deterioration of the fair trial protection pertinent to terrorism and unlawful combatancy trials. This effect is now prevented in view of precedential value of *Hamdan*, as it effectively declared military commission proceedings in their current form illegal.

Aside from these internal legal political implications, the *Hamdan* case implicates international legal political consequences. This decision in fact implies that, even in times of armed conflict when governments are under pressure to take action, they remain not only bound and limited by their own domestic constitution; but also by the dictates of international law. The executive power within a State thus can neither deviate from fundamental procedural guarantees, even while combating terrorism and prosecuting unlawful combatants, nor can it avoid judicial control. In this sense, the *Hamdan* decision consolidates and reaffirms the doctrine of separation of powers in that the executive power cannot independently set up legal proceedings

167. *See id.* at 50.

during armed conflict that are not subject to judiciary control. This was evidenced by the rejection of the Bush Administration argument that the power to subject enemy combatants to a State's own specific terrorism legislation would inherently flow from the power of the President himself.[168] Because such reasoning would result in a circumvention of basic fair trial rights, it was rejected.

V. HAMDAN v. RUMSFELD: *EXPONENT OF THE ANATAGONISTIC VALUES OF THE RULE OF LAW AND COMBATTING TERRORISM*

The *Hamdan* decision also exemplifies the constant struggle to find a proper balance between the interests of the executive power of a State combating terrorism on the one hand, and the responsibility of the judiciary to protect fundamental rights and freedoms that are at stake as a result of combating terrorism on the other hand. The discord between the justices of the Supreme Court in *Hamdan* is illustrative of this antagonistic situation.[169] A feature of these antagonistic positions within U.S. society is reflected in a remark made by former Associate White House Counsel Bradford A. Berenson after *Hamdan*: "What is truly radical is the Supreme Court's willingness to bend to world opinion and undermine some of the most important foundations of American national security law in the middle of a war."[170] Berenson's view reflects a tendency in the United States to shift the balance in the fight against terrorism in favor of the executive power, so that judicial control over the executive power with respect to terrorism legislation should be limited to only an extremely marginal form of judicial review. It is a view that assumes that the effort to obtain intelligence by means of detention centers like Guantanamo Bay and anti-terrorism procedures utilizing military commissions to prevent terrorist attacks and punish terrorists ought not to be waylaid by judicial review. The *Hamdan* decision supersedes and vitiates this view, as the Supreme Court imposes various necessary restrictions

168. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774-75 (2006).

169. Three U.S. Supreme Court Justices gave a dissenting opinion in which they distanced themselves, in scathing terms, from the majority decision of their colleagues. *See id.* at 2810-55.

170. *See* David E. Sanger & Scott Shane, *Court's Ruling Is Likely to Force Negotiations over Presidential Power*, N.Y. TIMES, June 29, 2006, at A21.

thereto. Yet, it must be observed that the *Hamdan* ruling does not say anything about the legitimacy of detention centers like Guantanamo Bay *per se*, or the authority of the President and/or the executive power to set up stringent measures to combat terrorism. It only holds that such regulations should remain within the ambit of the U.S. Constitution and international law parameters, in particular, the Geneva Conventions. In this sense, the Supreme Court consolidates some discretion for the executive to prioritize national security law, albeit under strict circumstances and conditions.

VI. *INTERNATIONAL (CRIMINAL) LAW IMPLICATIONS OF THE* HAMDAN v. RUMSFELD *CASE ON THE PROLIFERATION OF ANTI-TERRORISM CASES*

Hamdan was deemed a considerable setback for the Bush administration in the area of combating terrorism and the prosecution of unlawful combatants.[171] It was not the first one for this administration. In 2004, the Supreme Court rejected the U.S. government's argument that the Guantanamo Bay detainees were not entitled to petition for *habeas corpus* review of the lawfulness of their detention before the federal courts.[172] Immediately after *Hamdan* was decided, President Bush stated that his administration would respect the Supreme Court's decision, expressing his desire to consult with the U.S. Congress in order to ascertain an adjusted or new form of trial proceedings for the Guantanamo Bay accused.[173] The U.S. President also announced he would ask Congress to enact legislation explicitly authorizing military commissions to try the individuals charged with terrorist crimes who are detained at the U.S. Marine base in Guantanamo Bay.[174]

There can be no doubt that prospective (international) terrorism and unlawful combatancy trials will have to be in line with

171. *See* Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1.

172. Rasul v. Bush, 542 U.S. 466 (2004).

173. *See Bush Refuses to Abandon Tribunals*, BBC, Jun. 30, 2006, http://news.bbc.co.uk/2/hi/americas/5131812.stm (last visited Jan. 22, 2007); *Bush Says He'll Work with Congress on Tribunal Plan*, CNN, Jun 29, 2006, [hereinafter *Bush Work with Congress*] http://www.cnn.com/2006/POLITICS/06/29/hamdan.reax/index.html (last visited Jan. 22, 2007).

174. *See Bush Work with Congress*, *supra* note 173.

the principles set out in *Hamdan*. In this respect, the precedential value of the *Hamdan* ruling will likely reach beyond U.S. jurisdiction, and impact upon similar proceedings in other jurisdictions. In light of *Hamdan*, such proceedings will have to meet the following principles:

> (i) Even with regard to (criminal) proceedings to try terrorism suspects and unlawful combatants, the judiciary in a State retains the possibility to review the legitimacy not only of the basis of such systems but also of the procedural rules that apply. Such judicial review can even go as far as to vitiate or supersede potential constitutional powers of a head of State to take particular measures with respect to combating terrorism. This form of review also follows from Article Six of the European Convention on Human Rights and Article Fourteen of the International Covenant on Civil and Political Rights ("ICCPR").[175]
>
> (ii) For special procedures such as military commissions to be instituted, the criterion of military necessity must be met, and the burden of proof lies with the government.
>
> (iii) Procedural rules that can be certified as applicable in such proceedings should in principle not deviate from criminal procedures prevalent in the State concerned, unless the government shows that there is a clear need for such deviation, including practical necessity therefor.
>
> (iv) These procedural rules must at minimum meet the criteria and basic principles that originate from Common Article Three of the Geneva Conventions, further expanded by Article Fourteen of the ICCPR.
>
> (v) Even if the parties or one of the parties to an armed conflict have not ratified the Geneva Conventions, Common Article Three is to be respected when trying individuals within or by that State for alleged violations of the law of war.
>
> (vi) The self-executing nature of Common Article Three is now beyond dispute; individuals facing proceedings akin to the Hamdan case can directly rely on its principles.

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175. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); International Covenant on Civil and Political Rights art. 14, Oct. 5, 1977, 999 U.N.T.S. 171. The latter also was incorporated in the *Hamdan* case by the District Court of the District of Columbia judgment of November 8, 2004, by Judge James Robertson. *See* 344 F. Supp. 2d 152, 158-62 (D.D.C. 2004).

> (vii) The charges to be applied in this type of (terrorism) proceedings ought to find support in the basic principles of international criminal law, in particular the principles as set forth in the ICTY and ICTR Statutes, and the jurisprudence of those tribunals.
>
> (viii) At this point, the case law of contemporary international criminal tribunals has a self-executing effect on domestic criminal proceedings, including proceedings similar to the Hamdan case.[176] According to the Supreme Court, the definition of the type of offenses vindicated to prosecute violations of the law of war must at least be "plain and unambiguous."[177]

It is fair to conclude that after *Hamdan*, trials akin to the U.S. military commission proceedings will never be the same. This conclusion is warranted in view of the explicit decision by the Supreme Court on the issue of enforceability of Common Article Three, irrespective of the status of the combatant and nature of the conflict. The core of this historical decision is the decision that, even assuming the charges against Hamdan are correct, and even assuming that he is a dangerous person whose ideas could endanger innocent civilians, the rule of law must be maintained when trying this type of individual. The justices expressly distinguish between the authority of the government to detain Hamdan for the "duration of active hostilities in order to prevent such harm" on the one hand, and subjecting him to a criminal trial on the other.[178] When it comes to such a trial, "the executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[179] The key question becomes whether the Bush administration is seriously complying with the principles set forth by the Supreme Court.

VII. *THE CREATION OF A NEW U.S. CODE OF MILITARY COMMISSIONS TO PROSECUTE ENEMY COMBATANTS: COMPLIANCE WITH INTERNATIONAL LAW STANDARDS*

In particular, the question needs to be addressed whether

176. In *Hamdan*, such effect is indirectly relied upon.

177. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780 (2006).

178. *See Hamdan*, 126 S. Ct. at 2798.

179. *Id.*

the New Code of Military Commissions ("CMC")[180] for prosecuting enemy combatants launched by the Bush administration on September 6, 2006,[181] compensates for the defects revealed by the Supreme Court in the *Hamdan* case. Some relevant provisions of the legislation ("the Bill") are described below.

First, the CMC adapts relevant provisions of the Uniform Code Of Military Justice ("UCMJ") to the military commission context. The Administration purports to have carefully reviewed the procedures of the UCMJ and to have adopted or adapted certain UCMJ articles that would be appropriate for these military commissions.[182] The Bill would provide for trial by military commission of unlawful enemy combatants, including members of al Qaeda, the Taliban, and other international terrorists.[183]

The Bill claims to rely on existing court-martial procedures where they make sense for terrorists, but separates the military commission process from the court-martial process used to try U.S. service members. The proposed procedures for military commissions would be separate from the UCMJ provisions for military courts-martial, with separate implementing rules.[184] Author should re-draft section to reflect fact that bill has been passed?

Furthermore, the CMC would track the UCMJ structure in various respects. The Bill establishes a system of military commissions, presided over by a military judge, with commission members drawn from the armed forces, and prosecutors and defense counsel from the Judge Advocate General Corps.[185] The accused may also retain civilian defense counsel if he or she so chooses.[186] Trial procedures, sentencing, and intermediate appellate review generally parallel the processes currently provided under the UCMJ.[187] The bill would also provide for appellate review by the United States Court of Appeals for the District of

180. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§948a-950w).

181. *See* Press Release, White House, Fact Sheet: The Administration's Legislation to Create Military Commissions (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/print/20060906-6.html.

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*; *see also* 10 U.S.C. § 948j(b).

186. *See* Press Release, *supra* note 181.

187. *See id.*

Columbia Circuit, as provided for under the Detainee Treatment Act of 2005 ("DTA").[188]

The Bill establishes that the military judge, as in the court-martial process, has the traditional authority of a judge to rule on questions of law and evidence.[189] The military judge is not a voting member of the commission.[190]

The Bill increases the minimum number of commission members from three to five and requires twelve commission members for any case in which the death penalty is sought.[191] A conviction would require a vote of two-thirds of the commission members in non-death penalty cases.[192] As with the UCMJ, the death penalty would require the unanimous vote of all twelve commission members.[193]

The Bill proposes a formal military appellate process that parallels the appellate process under the UCMJ. Congress would establish a Court of Military Commission Review within the Department of Defense to hear appeals on questions of law.[194] All convicted detainees would also be entitled to an appeal to the U.S. Court of Appeals for the D.C. Circuit, regardless of the length of their sentence.[195] The Supreme Court could review decisions of the D.C. Circuit.[196]

Finally, the CMC provides the accused with substantial due process rights, such as the right to a full and fair trial and the right to cross examine witnesses against him.[197] Furthermore, it is said that the prosecution must disclose any exculpatory evidence to the defense.[198]

At first sight, the CMC seems to anticipate the fundamental criticism envisaged by the Hamdan ruling. However, when one delves deeper into its provisions, specifically on the procedural

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188. *See* 28 U.S.C. § 2241(a) ("Writs of *habeas corpus* may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.").

189. *See* 10 U.S.C. § 949a(a).

190. *See id.* § 948j(d).

191. *See id.* §§ 948m, 949c, 949m.

192. *See id.* § 949m.

193. *See id.*

194. *See id.* § 950f.

195. *See id.* § 950g.

196. *See id.* §§ 950g, 950d.

197. *See* Press Release, *supra* note 181.

198. *See* 10 U.S.C. § 949j(d); *see also* Press Release, *supra* note 181.

mechanisms applicable before the military commissions, the following fundamental deficiencies seen from an international law perspective can be detected.

First, the Bill contains strict requirements limiting the introduction of classified evidence outside the presence of the accused. The Bush Administration still maintains the commissions must provide for the possibility of using classified evidence outside the presence of the accused, albeit in extraordinary circumstances. The U.S. Government endorses the view that sharing sensitive intelligence with captured terrorists could pose a serious risk to national security, particularly if the terrorists might be released before hostilities are over. According to the CMC, where the judge finds it is warranted and fair, military commissions can consider such evidence in extraordinary circumstances and subject to the following conditions:

> - Before any classified evidence may be introduced outside the accused's presence, the head of the executive department that has classified the evidence must certify that sharing the evidence would harm national security, and that the evidence has been declassified to the maximum extent possible.[199]
> - The military judge would be required to make specific findings that excluding the accused is warranted to protect classified information, that the admission of an unclassified summary or redacted version would not be an adequate substitute, that the exclusion is no broader than necessary, and that it would not violate the accused's right to a full and fair trial.[200]
> - The accused would have to be provided with a redacted transcript of any portion of the proceedings from which he is excluded and an unclassified summary of any evidence introduced, to the extent possible.[201]

Second, statements allegedly obtained through use of coercion are not admissible if the judge finds that the circumstances under which they were obtained render them unreliable or lacking in probative value.[202] Hence, this proposed provision still leaves open the possibility that coerced testimony or statements obtained through coercion are admissible, predicated upon a re-

199. *See* 10 U.S.C. §§ 949d(f)(1)-(3).
200. *See id.*; *see also* Press Release, *supra* note 181.
201. *See* 10 U.S.C. §§ 949d(f)(1)-(3).
202. *See id.* §§ 949r(c).

liability test. This provision, in combination with the first element above, renders the legitimacy of the Bill contestable.

Third, the commission proceedings must be open, except in special circumstances where the judge makes specific findings.[203] Therefore, the principle of public hearings can be circumvented.

Finally, the Bill allegedly recognizes the accused's privilege against self-incrimination during an actual commission proceeding.[204] However, the Administration does not accept that Miranda warnings should be required before interrogating terrorist combatants, a position that is is justified from the perspective of the interest of collecting intelligence.[205] Thus theoretically an accused, under this system, could be convicted on the basis of coerced testimony while he or she is prevented from hearing any incriminating classified evidence. As will be seen *infra*, this scenario under the CMC infringes principles of international law. Moreover, with respect to the admission, in exceptional circumstances, of classified evidence outside the accused's presence, The Bill goes beyond the accepted limits of international law, as evidenced by the case law of the European Court of Human Rights ("ECHR.")

It is possible that an analogy with the case law of the ECHR regarding the disclosure of information in the context of terrorist crimes may serve to develop further guidelines with respect to the legitimacy of the proposed CMC.[206] In this regard, the ECHR has developed the following case law as to the admissibility of intelligence information as evidence for the prosecution of alleged terrorists:

In the case of *O'Hara v. United Kingdom*, the ECHR held that:

> terrorist crime poses particular problems, as the police may be called upon, in the interest of public safety, to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in

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203. *See id.* § 949d(e).

204. *See id.* § 948r(a).

205. *See* Press Release, *supra* note 181.

206. This sentence and the following paragraphs, through and including note 214, are excerpted from a textbook written by the author. *See* GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 238-241 (2005).

> court without jeopardizing the informant. However, though Contracting States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the safeguard secured by Article 5(1)(C) is impaired. Even in those circumstances, the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offense.[207]

This reasoning may be applicable to the submission of intelligence information into evidence before military commissions.

Second, for the ECHR, disclosure of evidence is not absolute in nature; in exceptional cases disclosure of evidence may be suppressed by the court or withheld by the prosecution when the defense interest is outweighed by the public interest. The ECHR put this clearly in the case of *Fitt v. United Kingdom* where it said that:

> the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defen[s]e so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defen[c]e which are strictly necessary are permissible under Article 6 para. 1.

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207. O'Hara v. United Kingdom, 34 Eur. Ct. H.R. 32, ¶ 35, (2001). The applicant, a prominent member of Sinn Fein, complained about violation of Article 5 of the European Convention on Human Rights, and argued that in his case no reasonable suspicion existed and that he had not obtained exact information regarding the origins of the accusations. The Court emphasized that the "reasonableness" of the suspicion on which an arrest is based forms an essential part of the safeguards against an arbitrary arrest and detention pursuant to Article 5(1)(c) of the European Convention on Human Rights. The reasonableness of the suspicion must be based on facts and circumstances. What may be deemed as reasonable depends on the circumstances of the case. The Court considered that when it involves terrorist crimes, not all information may be revealed in order to protect informants or for public safety. However, even in case terrorist crimes are suspected the safeguards of Article 5(1)(c) of the European Convention on Human Rights apply.

> Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defen[c]e by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[208]

This means that national security interest or the need to protect witnesses may prevent disclosure of evidence, provided that the defense is compensated for this handicap. Yet, it is hard to see how this could be done in the event the evidence is decisively dependent on this (intelligence) information.[209]

Third, defining exactly what these "counterbalancing measures" are or could be, the ECHR opines that supervision by the trial judge of the non-disclosed materials with a view to upholding defense rights is an essential condition. Again, in *Fitt*, the ECHR holds that:

> The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of withholding the evidence. It has not been suggested that the judge was not independent and impartial within the meaning of Article 6(1). He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial.[210]

Fourth, withholding of evidence by the prosecution while circumventing the trial judge and defense—such that they are

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208. Fitt v. United Kingdom, 30 Eur. Ct. H.R. 480, ¶ 45 (2000); *see also* Jasper v. United Kingdom., 30 Eur. Ct. H.R. 441, ¶ 52 (2000); Rowe & Davis v. United Kingdom, 30 Eur. Ct. H.R. 1, ¶ 61 (2000).

209. *See infra* notes 213-214 and accompanying text.

210. *Fitt*, 30 Eur. Ct. H.R. at ¶ 49 (2000); *see also Jasper*, 30 Eur. Ct. H.R. at ¶ 56. In *Jasper* the court emphasized explicitly the importance of continuous supervision by the trial judge:

> [M]oreover it can be assumed—not least because the Court of Appeal confirmed that the transcript of the ex parte hearing showed that he had been 'very careful to ensure and to explore whether the material was relevant, or likely to be relevant to the defence which had been indicated to him'—that the judge applied the principles which had recently been clarified by the [C]ourt of Appeal, for example that in weighing the public interest in concealment against the interest of the accused in disclosure, great weight should be attached to the interests of justice, and that the judge should continue to assess the need for disclosure throughout the progress of the trial . . . . The jurisprudence of the English Court of Appeal shows that the assessment which the trial judge must make fulfils the conditions which . . . are essential for ensuring a fair trial in instances of non-disclosure of prosecution material.

not made aware about this non-disclosure—may lead to a dismissal of the case. This can be deduced from the ECHR case of *Rowe and Davis v. United Kingdom* where the court held that:

> [d]uring the applicants' trial at first instance the prosecution decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defen[s]e and weigh this against the public interest in keeping the information secret, cannot comply with the above mentioned requirements of Article 6(1).[211]

Notably the fact that the authorities revealed the information in appeal did not result in a different outcome; the ECHR remarked in this respect that:

> the Court does not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, assessing the importance of the undisclosed evidence at a stage when new issues were emerging, when it might have been possible through cross-examination seriously to undermine the credibility of key witnesses and when the defen[s]e case was still open to take a number of different directions or emphases. In contrast, the Court of Appeal was obliged to carry out its appraisal ex post facto and may even, to a certain extent, have unconsciously been influenced by the jury's verdict of guilty into underestimating the significance of the undisclosed evidence.[212]

The ECHR concludes that "the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a

211. *Rowe & Davis*, 30 Eur. Ct. H.R. at ¶ 62.

212. *Id.* ¶ 65.

fair trial."[213]

Finally, "counter balancing measures" are being positioned by the ECHR within the endorsement of the principle of "equality of arms;" the latter principle is the decisive criterion upon which the trial judge should assess whether non-disclosed intelligence information is acceptable in court. This view is echoed by the ECHR in *Fitt*:

> The Court is satisfied that the defence were kept informed and were permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds. . . . It notes, in particular, that the material which was not disclosed in the present case formed no part of the prosecution case whatever, and was never put to the jury.[214]

In conclusion, when reviewing the ECHR case law vis-à-vis the admissibility of "secret" (intelligence) information into the evidence in a criminal case, it is fair to say that, despite the possibilities for the prosecution to do so, several fundamental procedural and substantive safeguards are yet to be met in order to comply with the fair trial standards. In this regard, the procedural safeguards set forth by the ECHR seem to be quite stringent, emphasizing the fair trial rights of the accused. This means that it is highly questionable whether the proposed CMC meets these notions as set forth by the ECHR. Hence, the Hamdan defense arguments as analyzed in this article will continue to play an important role in prospective proceedings in this field.

213. *Id.*

214. *Fitt*, 30 Eur. Ct. H.R. at ¶ 48; *see also Jasper*, 30 Eur. Ct. H.R. at ¶ 55.