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**ARE YOU THERE, GENEVA?
IT'S ME, GUANTÁNAMO**

*Keith A. Petty**

*This essay examines the application of the Geneva Conventions at the Guantánamo Bay Military Commissions. International and domestic commentators have long criticized the military commissions for failing to adhere to the laws of armed conflict enshrined in Geneva, referring to Guantánamo as a “legal black hole.” This criticism, however, is misplaced. Since the attacks of September 11, 2001, the legal framework for prosecuting suspected terrorism detainees has evolved. The underlying reason for this is a considerable gap in the Geneva protective regime for combatants who do not satisfy the legal requirements of prisoners of war (GCIII) or civilians (GCIV). Nonetheless, the Military Commissions Act of 2006 codifies the U.S. application of the laws of war to Guantánamo accused. As the pre-trial litigation in the case *United States v. Hamdan* demonstrates, the Geneva Conventions have been faithfully applied by the military commissions contributing to a trial process that is full and fair.*

I. INTRODUCTION

On May 21, 2009, President Obama declared that military commissions play an important role in prosecuting law of war offenses. This speech effectively revived the controversial Guantánamo Bay justice system. He stated, “[m]ilitary commissions have a history in the U.S. dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war.”¹ Nonetheless, commentators maintain that the military commissions fail to comply with constitutional, international, and military legal obligations. In practice,

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¹ President Barack Obama, Remarks on National Security at the National Archives and Records Administration, Daily Comp. Pres. Doc. 00388, at 5 (May 21, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900388.pdf>.

however, the commissions have been at the cutting edge of these disciplines, particularly the law of armed conflict.

This essay examines the application of the law of armed conflict in military commission jurisprudence. In order to fully understand current practice it is necessary to discuss U.S. policy regarding the applicability of the Geneva Conventions to terrorist detainees at various times: immediately following September 11, 2001, the 2006 Supreme Court decision in *Hamdan v. Rumsfeld* as it relates to Common Article 3 of the Conventions, and the law of war aspects of the Military Commissions Act of 2006. Once the preliminary legal framework is established, this essay examines two pre-trial rulings in the commission case *United States v. Hamdan*, each dealing with the applicability of law of war provisions to Guantánamo accused. This essay concludes by questioning whether the laws governing armed conflicts of the past must be updated to provide greater protection to parties to modern conflicts. Only then will there be sufficient legal parameters set for all parties engaged in the struggle against terrorism.

II. A DEVELOPING LEGAL FRAMEWORK

A. *The Pre-Hamdan Approach to Geneva*

After the terrorist attacks of September 11, 2001, the U.S. was faced with the daunting task of determining the legal framework that applied to the perpetrators of these terrible crimes. When the U.S. led coalition invaded Afghanistan in October 2001, there was no longer any question that the laws of armed conflict applied to the “global war on terror.”² The U.S. government, however, determined that al-Qaeda terrorists and members of the Taliban captured during the course of this conflict did not meet the requirements of prisoners of war and, as such, were not entitled to the protections of the Third Geneva Convention Relative to the Treatment of Prisoners of War (GCIII).³ Moreover, former President Bush stated in a memorandum,

I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of [the Geneva Conventions] does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the

² In fact, the armed conflict likely began at least in 1996 when Osama bin Laden issued his public fatwa calling on the forcible removal of U.S. personnel from Saudi Arabia and celebrating other attacks against the U.S. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 48 (2004), available at <http://www.gpoaccess.gov/911/index.html>.

³ White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

relevant conflicts are international in scope and common Article 3 applies only to “armed conflict not of an international character.”⁴

The Bush administration’s policy was not without merit. The plain language of Common Article 3 provides protections to persons who are *hors de combat*—out of the fight—only “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”⁵ Additionally, Jean Pictet’s commentary to the Third Geneva Convention explains that “it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities’—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.”⁶

Applying these standards it was reasonable to believe that the “war on terror” was international in scope. On its face, the conflict with al-Qaeda was not limited to a single country since attacks had taken place in East Africa in the 1998 embassy bombings, off the Yemen coast in the bombing of the U.S.S. Cole in 2000, and of course the attacks in the U.S. in 2001.⁷ This analysis, however, was upended when a Yemeni detainee, Salim Hamdan, took his case to the Supreme Court and won.

B. *Hamdan v. Rumsfeld*

The U.S. Supreme Court’s seminal 2006 decision in *Hamdan v. Rumsfeld*⁸ changed U.S. policy regarding the law of armed conflict in the war on terror. In spite of the Executive’s arguments against the applicability of Geneva, the Court held that Article 21 of the Uniform Code of Military Justice required military commissions to comply with the law of war.⁹ Through this article, the Geneva Conventions were officially brought into the legal framework of military commissions.¹⁰ Specifically, the majority

⁴ *Id.*

⁵ Geneva Convention (III) 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 GCIII] (setting international law standards for humanitarian treatment of victims of war).

⁶ INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37, available at <http://www.icrc.org/IHL.nsf/COM/375-590006?OpenDocument> [hereinafter ICRC COMMENTARY III].

⁷ See, e.g., Posting of John Bellinger to *OpinioJuris* (January 25, 2007 21:26), <http://opiniojuris.org/2007/01/25/wrap-up-discussion-ii/> (last visited Oct. 21, 2009).

⁸ 548 U.S. 557 (2006).

⁹ *Id.* at 628 (stating that “compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”).

¹⁰ See *id.* See also *id.* at 602 (stating that “Congress, through Article 21 of the UCMJ, has ‘incorporated by reference’ the common law of war . . .”).

found that Common Article 3 is applicable to the conflict between the U.S. and al-Qaeda as a non-international armed conflict.¹¹ The Court reasoned that the conflict was not international in scope because it did not involve two warring States, even though the conflict was primarily between the U.S. and a foreign-based non-state armed group.¹²

C. *The Military Commissions Act of 2006*

The Military Commissions Act of 2006 (MCA) was enacted as a direct response to the Supreme Court's decision in *Hamdan*. Besides containing the most comprehensive legal guide to the prosecution of unlawful combatants, the MCA directly references the law of armed conflict. Specifically, the MCA's personal jurisdiction provisions reaffirm the critical distinction between lawful and unlawful combatants and the protections they are afforded.¹³ Other provisions, including that the Geneva Conventions may not be used as a source of rights, have drawn considerable criticism. The following sections discuss each of these important issues.

1. Personal jurisdiction and combatant status

Congress specified that military commissions may only exercise jurisdiction over alien unlawful enemy combatants.¹⁴ The MCA explains further that lawful combatants may not be tried before a military commission.¹⁵ As discussed in more detail below, the distinction between lawful and unlawful combatants can be found in the Third Geneva Convention (GCIII).¹⁶ While the Conventions do not define persons as "lawful" or "unlawful" combatants, it follows naturally that a person who qualifies for the Conventions' prisoner of war protections is considered a "lawful" combatant.

For the purposes of trial for law of war violations, lawful combatants enjoy combatant immunity and may not be prosecuted merely for taking part in hostilities. According to the MCA, "[l]awful enemy combatants who violate the law of war are subject to [the Uniform Code of Military

¹¹ *Id.* at 628–29. This application includes the prohibition against the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* at 630 (quoting GCIII, *supra* note 5, art. 3(1)(d)).

¹² *See Hamdan v. Rumsfeld*, 548 U.S. 557, 628–30 (2006). *See also* Curtis A. Bradley, *Agora (Continued): The Military Commissions Act of 2006: The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 337 (2007).

¹³ Military Commissions Act of 2006, 10 U.S.C. § 948d (2006).

¹⁴ *See id.* § 948d(a).

¹⁵ *Id.* § 948d(b).

¹⁶ *See* GCIII, *supra* note 5, art. 4.

Justice],”¹⁷ the same law used to try U.S. soldiers at courts-martial.¹⁸ In contrast, unlawful combatants—those failing the elements of GCIII Article 4—do not enjoy the belligerents’ privilege and may be prosecuted for their criminal acts before a military commission.

A lawful enemy combatant—someone not subject to trial by military commission—is defined under the MCA as:

(A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.¹⁹

The language above is taken directly from Article 4 of GCIII,²⁰ with some notable exceptions. For example, in order to qualify as a prisoner of war in the Geneva framework, an individual must meet seven criteria. Five of these are explicitly listed above: operating under the authority of a government (“State party”), operating under responsible command, wearing fixed insignia, carrying arms openly, and following the laws of war. The following two criteria of Article 4 are not expressly mentioned in the MCA: the existence of an international armed conflict as required by Common Article 2 to the four Geneva Conventions of 1949,²¹ and the prohibition against acting unilaterally without belonging to an organization.²² When these criteria are met, combatants enjoy certain privileges upon capture, including combatant immunity.

Combatant immunity and the protections afforded prisoners of war are part of the customary laws of war. These norms developed in order to provide humane treatment for persons no longer taking part in hostilities.²³

¹⁷ Military Commissions Act of 2006, 10 U.S.C. § 948d(b) (2006).

¹⁸ See generally Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2006).

¹⁹ Military Commissions Act of 2006, 10 U.S.C. § 948a(1)(B)(2) (2006).

²⁰ See GCIII, *supra* note 5, art. 4.

²¹ Article 2 common to the four Geneva Conventions of 1949 provides: “[T]he present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” An international armed conflict, then, is characterized as one between two or more States. See, e.g., GCIII, *supra* note 5, art. 2.

²² *Id.* art. 4.

²³ Persons no longer taking part in hostilities are considered *hors de combat*. According to Article 41(2) of Additional Protocol I to the Geneva Conventions “[a] person is hors de combat if: (a) He is in the power of an adverse Party; (b) He clearly expresses an intention to surrender; or (c) He has been rendered unconscious or is otherwise incapacitated by wounds

Over time the rules protecting persons *hors de combat* have been codified in various international treaties and regulations to include the Lieber Code,²⁴ the Hague Convention II of 1899,²⁵ the Hague Convention IV of 1907,²⁶ the Geneva Convention of 1929,²⁷ the Third Geneva Convention of 1949,²⁸ and Additional Protocols I & II of 1979.²⁹

U.S. federal courts have upheld the principle of combatant immunity, also known as the belligerents' privilege. According to the court in *United States v. Valentine*, "[m]ere membership in the armed forces could not under any circumstances create criminal liability."³⁰ Similarly, in *Johnson v. Eisentrager*, Justice Black stated in his dissent that "it is no 'crime' to be a soldier."³¹ More recently, in *United States v. Lindh*, the district court reaffirmed that the protections in GCIII "make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war."³²

In contrast to the many protections afforded lawful combatants, unlawful combatants do not enjoy the belligerents' privilege. As this distinction relates to the Guantánamo Bay military commissions, it is important to clarify two points. First, enemy combatants may be detained irrespective of

or sickness, and therefore is incapable of defending himself." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 41(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

²⁴ U.S. Dep't. of War, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (April 24, 1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp [hereinafter Lieber Code].

²⁵ 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land with Annex of Regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247. Article 3 of the annexed regulations provides that "[i]n case of capture by the enemy [combatants and non-combatants] have a right to be treated as prisoners of war." See *id.* annex art. 3.

²⁶ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (adopting the same criteria as Hague II for lawful combatants and prisoner of war status).

²⁷ Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 (setting international law standards for humanitarian treatment of victims of war).

²⁸ GCIII, *supra* note 5.

²⁹ Additional Protocol I, *supra* note 23; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 609.

³⁰ 288 F. Supp. 957, 987 (D.P.R. 1968) (citing *Ford v. Surget*, 97 U.S. 594, 605–06, 24 L. Ed. 1018 (1878)).

³¹ 339 U.S. 763, 793 (1950) (Black, J., dissenting).

³² 212 F. Supp. 2d 541, 553 (E.D. Va. 2002).

the lawfulness of their status.³³ Distinguishing between law of war detention standards and the personal jurisdiction requirements for military commissions has been ideologically problematic for some. Second, in order to prosecute a detainee in a forum other than the detaining power's own military courts, it must be determined that the detainee is an unlawful enemy combatant.³⁴

That unlawful combatants are not entitled to combatant immunity and may be tried by military commission has historical roots. Attorney General James Speed noted in 1865 in reference to the Lincoln co-conspirators that “[a] bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war.”³⁵ The Lieber Code similarly distinguishes between lawful combatants and:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.³⁶

The concept of “unprivileged belligerency” dates back to *jus militair* (chivalry) and the Just War tradition, both of which included the requirement for war to be authorized by “the right authority.”³⁷ In this sense “public war” was contrary to assassins and acts of perfidy. The principle of discrimination paralleled the “right authority” concept. Combatants were to

³³ GCIII, *supra* note 5, arts. 118–19. See also Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 437 (2004) (stating that “all enemy combatants, even if POWs, may be detained without criminal charge for the duration of the hostilities.” (emphasis in original)). See also *United States v. Khadr*, CMCR 07-001 (Ct. Mil. Comm'n Rev. 2007), available at <http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%2009-24-07.pdf>.

³⁴ See *Khadr*, CMCR 07-001 at 5 (citing customary international law, as well as provisions of the GPW to support this analysis).

³⁵ 11 Op. Att'y. Gen. 297, 314 (1865). See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 104 (2000) (citing GEORG FRIEDRICH VON MARTENS, *XII A COMPENDIUM OF THE LAW OF NATIONS*, ch. III § 2 (William Cobbett trans., 1802)).

³⁶ Lieber Code, *supra* note 24, art. 82. The Lieber Code also provides that combatants not satisfying the POW status requirements could be captured and summarily executed. *Id.* art. 85.

³⁷ See G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 BRIT. Y.B. INT'L L. 173, 176, n.2 (1971).

distinguish themselves from civilians, and civilians, in turn, were not to take up arms lest they be targeted as combatants themselves. Civilians who engaged in hostilities against military forces were denied lawful status and the entitlement to POW protections.

Although the term “unlawful combatant” has generated some criticism,³⁸ primarily due to its absence from the authoritative law of war treaties and conventions, the legal effect of such a designation is no less significant. Enemy combatants who are not entitled to take part in the conflict lose the combatant’s immunity.³⁹ In fact, the drafters of the Geneva Conventions—in spite of claims by some that the Geneva regime protects all persons with no “gaps”—did not intend to provide protection to unlawful combatants.⁴⁰ Case law and recent scholarship indicate that this concept holds true today.

In *Lindh*, the District Court for the Eastern District of Virginia noted that unlawful combatants are civilians and may be detained and prosecuted under the domestic laws of the detaining power for any unlawful combat activity.⁴¹ This follows the WWII Nazi saboteur decision, *Ex parte Quirin*, which states that “[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”⁴² More recently, at least one commentator has noted that unlawful combatants may be prosecuted and punished merely for participating in hostilities.⁴³

Losing combatant immunity does not mean that a detainee is completely removed from the protections of Geneva. Unlawful combatants still receive the base line protections of Common Article 3 to the Geneva Con-

³⁸ See, e.g., Jack M. Beard, *Agora: Military Commissions Act of 2006: The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT'L L. 56, 59–60 (2007). See also GREEN, *supra* note 35, at 104 n.13. (“It is not strictly correct to describe them as ‘unlawful combatants’, since they are non-combatants unlawfully taking part in combat.”).

³⁹ GREEN, *supra* note 35, at 105 (stating “it matters little whether we use the term soldiers or combatants, so long as we mean thereby those who are embodied in a state’s armed forces and are entitled to take part in conflict.”). See also Jinks, *supra* note 33, at 422 (stating that “unlawful combatants are not entitled to participate in the hostilities and consequently may be prosecuted and punished for doing so.”).

⁴⁰ See II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 622 (1949).

⁴¹ *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002) (citing *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942)).

⁴² *Ex parte Quirin*, 317 U.S. at 31. See also *United States v. Khadr*, CMCR 07-001 at 6 (Ct. Mil. Comm’n Rev. 2007), available at <http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf>.

⁴³ See Jinks, *supra* note 33, at 422.

ventions, which includes humane treatment. Moreover, Common Article 3 requires that detainees be tried by regularly constituted courts of the detaining power.⁴⁴ The military commissions are such regularly constituted courts, particularly due to the extensive procedural rights afforded the accused.⁴⁵ Nonetheless, as the next section discusses, the MCA has come under fire for other provisions related to the Geneva Conventions.

2. Geneva as a source of rights & the War Crimes Act

The MCA specifically references the Geneva Conventions in two controversial provisions. First, under § 948b(g) the MCA provides that “[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”⁴⁶ Although this provision has drawn sharp criticism,⁴⁷ it does not appear to have been intended to limit the arguments of the accused at military commissions.⁴⁸ Even though the scope of this provision has never been resolved, it is worth noting that commissions have considered Geneva-related issues, including whether the accused is entitled to have his status as a prisoner of war determined by a GCIII, Article 5 tribunal, and whether the accused qualifies for protections under the Fourth Geneva Convention (GCIV).⁴⁹

The MCA also amends the War Crimes Act in significant ways. Previously, the War Crimes Act punished any violation of Common Article 3.⁵⁰ The MCA provides that only “grave breaches” of Common Article 3 are criminalized, as defined in part by Article 129 of GCIII.⁵¹ While critics maintain that this amendment impermissibly limits prosecutable offenses

⁴⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006); *Khadr*, CMCR 07-001 at 6–7.

⁴⁵ See JENNIFER K. ELSEA, *THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE* (Congressional Research Service 2007), available at <https://www.policyarchive.org/handle/10207/19896>.

⁴⁶ Military Commissions Act of 2006, 10 U.S.C. § 948(b)(g) (2006).

⁴⁷ But see David A. Martin, *Judicial Review and the Military Commissions Act: On Striking the Right Balance*, 101 AM. J. INT’L L. 344, 353 (2007) (“Though ostensibly quite restrictive, the wording could be found to leave room for a court to enforce Geneva-sourced rights *sua sponte*.”).

⁴⁸ Bradley, *supra* note 12, at 327–28 (citing 152 CONG. REC. S10,401-02 (daily ed. Sept. 28, 2006) (Senators McCain, Warner and Graham stating that “it is not the intent of Congress to dictate what can or cannot be said by litigants in any case.”)).

⁴⁹ See *infra* Part III.

⁵⁰ 18 U.S.C. § 2441(c) (2000).

⁵¹ 18 U.S.C. § 2441(c)–(d) (2006); GCIII, *supra* note 5, arts. 129–30. See also Bradley, *supra* note 12, at 329 (observing that the MCA definition of “grave breaches” notably omits the denial of fair and regular trials and humiliating and degrading treatment).

under Common Article 3,⁵² it is unclear that the “grave breaches” provisions of Article 129 apply to Common Article 3 at all, since Article 3 applies only to conduct taking place in non-international armed conflicts.⁵³

Whether the MCA complies fully with U.S. treaty obligations has not been resolved in the courts. However, there is ample authority that if the MCA conflicts with a treaty then the MCA prevails as later in time. According to Curtis Bradley “it is well settled that Congress has the authority to override treaties for the purposes of U.S. law.”⁵⁴ While the later-in-time rule does not relieve the U.S. of its international legal obligations, it will be instrumental to determining the applicable legal standard in domestic litigation.

Besides treaty obligations, many will argue that the MCA is subordinate to the customary laws of war. Commentators rely on the *Paquete Habana* case for the position that “international law is our law.” While this is true, the Supreme Court explained further that international law is relevant to U.S. courts “where there is no treaty and no controlling executive or legislative act or judicial decision”⁵⁵ There can be no argument that the MCA is the legislative act that controls the field in terms of the standards applied at military commission trials.

At least one commentator presents another argument against the MCA’s approach to Geneva. David A. Martin states “an individual detainee should still be permitted to refer to the Geneva Conventions as the basis for a *Charming Betsy* argument affecting how a court should construe a particular statutory provision.”⁵⁶ In the *Charming Betsy* case, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, not to conflict with international law.⁵⁷ However, as applied by the Second Circuit, “[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity.”⁵⁸ In this case, Congress

⁵² See Martin, *supra* note 47, 353 n.39 (citing Michael J. Matheson, *The Amendment of the War Crimes Act*, 101 AM. J. INT’L L. 48, 52 (2007)).

⁵³ See Bradley, *supra* note 12, at 329 n.47 (citing Matheson, *supra* note 52).

⁵⁴ Bradley, *supra* note 12, at 339 (citing *Breard v. Greene*, 523 U.S. 371, 376 (1998); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 597–99 (1884)).

⁵⁵ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁵⁶ Martin, *supra* note 47, at 353.

⁵⁷ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

⁵⁸ *Olivia v. U.S. Dep’t of Justice*, 433 F.3d 229, 235 (2d Cir. 2005).

could not have been more clear regarding the MCA's interpretation and application of the Geneva Conventions.⁵⁹

In spite of this authority, critics of the military commissions will continue to argue that the MCA deviates from the requirements of the Geneva Conventions. These arguments do not take into account that Common Article 3, which is the benchmark for military commission procedures according to *Hamdan v. Rumsfeld*, was intended only to prevent "summary justice."⁶⁰ Whatever can be said about the procedures of military commissions, they are certainly not summary.⁶¹ In fact, the following section examines pre-trial litigation at the commissions, illustrating the extent to which the Geneva Conventions are applied in practice.

III. THE APPLICATION OF GENEVA AT MILITARY COMMISSIONS

The Geneva Conventions have been the subject of vigorous litigation at the Guantánamo Bay military commissions. This section discusses two rulings in *United States v. Hamdan* that demonstrate this practice. First, Hamdan's commission ruled that the al-Qaeda suspect was due an Article 5 status determination hearing under GCIII.⁶² Second, the military judge later ruled that the accused was not entitled to the protections of the civilian convention under GCIV.⁶³ The *Hamdan* case illustrates that the accused at military commissions have every opportunity to challenge the applicability of various provisions of the Geneva Conventions.

A. *United States v. Hamdan and Article 5 Status Determinations*

Salim Hamdan argued prior to the commencement of his trial that he was entitled to an Article 5 hearing.⁶⁴ Article 5 status hearings are held in order to determine whether a captured enemy combatant qualifies for the protections of the prisoner of war convention.⁶⁵ These hearings are to be

⁵⁹ For further discussion, see Bradley, *supra* note 12, at 342.

⁶⁰ ICRC COMMENTARY III, *supra* note 6, at 39–40 ("We must be very clear about one point; it is only 'summary' justice which it is intended to prohibit.").

⁶¹ See ELSEA, *supra* note 45, at 1–2.

⁶² See Ruling on Defense Motion for Article 5 Status Determination, *United States v. Hamdan* (December 17, 2007), <http://www.defenselink.mil/news/Dec2007/HAMDAN%20ARTICLE%205%20RULING%2017%20Dec%202007.pdf> [hereinafter Article 5 Status].

⁶³ See *United States v. Hamdan*, Ruling on Motion for Order Implementing Fourth Geneva Convention (Allred, J.) (Mar.24, 2008), available at http://www.pegc.us/archive/Hamdan_v_Rumsfeld/MC_ruling_20080324.pdf [hereinafter Hamdan GCIV Ruling].

⁶⁴ See Article 5 Status, *supra* note 62.

⁶⁵ GCIII, *supra* note 5, art. 5.

The Present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent

provided if there is any doubt as to the detainee's status, a standard reflected in Army Regulation 190-8, which implements the Geneva standard for battlefield practice.⁶⁶ In this case, Hamdan was charged with conspiracy and material support for terrorism.⁶⁷ Specifically, the government would show that Hamdan knowingly transported and guarded bin Laden before, during, and after the 9/11 terror attacks, he transported weapons and ammunition for al-Qaeda including two surface-to-air missiles, and he received weapons training.⁶⁸

In response to the defense motion for an Article 5 hearing, the government argued that the accused was not entitled to an Article 5 hearing in part because he had already been determined to be an "enemy combatant" by a Combatant Status Review Tribunal (CSRT).⁶⁹ The military judge disagreed. He rejected the CSRT's finding because it failed to adequately determine whether the accused was entitled to POW status, there was no reference to the Geneva Conventions or Article 5, and there was no analysis as to the lawfulness of his combatant status.⁷⁰ Limited by the Department of Defense regulations,⁷¹ Hamdan's CSRT only focused on whether he would remain an "enemy combatant" for the purpose of continued detention.⁷²

Judge Keith Allred correctly noted that the status determination should be decided before trial "if at all possible, because on it depends the whole array of procedural protections accorded to Prisoners of War, by the Third Convention, and the issue may go to the jurisdiction of the tribunal."⁷³

act and having fallen into the hands of the enemy, belongs to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id.

⁶⁶ Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, § 1-1(b) (1997), available at http://www.usapa.army.mil/pdffiles/r190_8.pdf.

⁶⁷ Referred Charge Sheet, United States v. Hamdan (May 1, 2007), http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf.

⁶⁸ *Id.*

⁶⁹ See Article 5 Status, *supra* note 62.

⁷⁰ *Id.* at 3-4.

⁷¹ See Memorandum from Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal to the Secretary of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. The CSRT system was later embraced by Congress in the Detainee Treatment Act of 2005 (DTA). See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, § 1005e(2)(A)(2005).

⁷² Article 5 Status, *supra* note 62, at 3-4.

⁷³ *Id.* at 2 (quoting COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 556 (Yves Sandoz et. al., eds., 1988)).

This analysis follows the Court of Military Commission Review decision in *United States v. Khadr*, which provides:

[Article 45(2) of Protocol I to the Geneva Conventions] suggests that a detained individual who is not being held as a POW has the right to assert an entitlement to POW status before a judicial tribunal, and that judicial adjudication of combatant status shall occur before trial for any alleged substantive offense. Following the M.C.A. procedures, as we interpret them here, would allow an accused to assert a claim of POW (i.e., lawful combatant) status at a pretrial motion session before the military judge. This pretrial determination of status would be fully in accord with Article 45(2) of Protocol I.⁷⁴

On its face, it would appear that Article 5 does not apply to an accused al-Qaeda terrorist, with whom the U.S. is engaged in a non-international armed conflict.⁷⁵ The accused's association with al-Qaeda, however, was not established at the time Judge Allred made his ruling.⁷⁶ Even when Hamdan's status was established in a ruling two days later, the commission made no indication as to the nature of the underlying conflict. This naturally left open the possible application of the full panoply of Geneva's protections, not just those reserved for non-international armed conflicts.

Ultimately, Hamdan's commission determined that he was an alien unlawful enemy combatant. The broader protections of GCIII did not apply, and he was subject to the jurisdiction of the military commission. Hamdan's status would play an important role in another motion calling for the application of the protections of the civilian convention.

B. Hamdan and Civilian Status

After Hamdan's military commission determined that he was not entitled to Prisoner of War status, he moved to be determined a civilian subject to the protections of the Fourth Geneva Convention.⁷⁷ The defense reasoned that no one participating in armed conflict can be without status.⁷⁸ In

⁷⁴ *United States v. Khadr*, CMCR 07-001 at 25, n.38 (Ct. Mil. Comm'n Rev. 2007), available at <http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf>. See also Additional Protocol I, *supra* note 23, art. 45; Jinks, *supra* note 33, at 386.

⁷⁵ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 n.61 (2006).

⁷⁶ The commission determined that Hamdan was an alien unlawful enemy combatant subject to the jurisdiction of the military commission two days later. See *United States v. Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, at 8 (Allred, J.) (Dec. 19, 2007), available at <http://www.defenselink.mil/news/Dec2007/HamdanJurisdiction%20After%20Reconsideration%20Ruling.pdf>.

⁷⁷ See *Hamdan GCIV Ruling*, *supra* note 63.

⁷⁸ *Id.* at 2.

other words, having failed to satisfy the requirements for prisoner of war status, the accused must be considered a civilian under GCIV. Citing Jean Pictet, who is widely considered authoritative in international humanitarian law, the defense argued that, “[t]here is no intermediate status; nobody in enemy hands can be outside the law.”⁷⁹ The military judge agreed that this is the general rule, but certain exceptions apply.⁸⁰

The plain language of the Convention excludes from its protection, “[n]ationals of a neutral state [Yemen] who find themselves in the territory of a belligerent state [Afghanistan] . . . while the State of which they are nationals [Yemen] has diplomatic representation in the State in whose *hands* [American] they are.”⁸¹ The Commission rightfully concluded that Article 4 of GCIV did not apply because Yemen, Hamdan’s state of nationality, continued to have diplomatic relations with the U.S.⁸²

The commission cites leading scholars to support the conclusion that Article 4 of GCIV excludes certain persons. Helen Duffy writes that “[c]ertain limited categories of persons may, however, be excluded [from protected person status] by GCIV, which is principally directed towards the protection of civilians associated with the adversary against whom the state is engaged in conflict. The Convention appears on its face to exclude nationals of co-belligerent states and neutral states.”⁸³

Even Jean Pictet addressed possible derogations from the protections of GCIV. He stated that:

Some people considered that [GCIV] should apply without exception to all persons to whom it referred, while to others it seemed obvious that persons guilty of violating the laws of war were not entitled to claim its benefits Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare.⁸⁴

The compromise to this debate is found in Article 5 of GCIV. It provides that persons who would otherwise be protected under the Convention but who are “suspected of or engaged in activities hostile to the security

⁷⁹ *Id.* (citing COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean Pictet ed., 1958) [hereinafter COMMENTARY]).

⁸⁰ Hamdan GCIV Ruling, *supra* note 63, at 2.

⁸¹ *Id.* at 3 (emphasis in original) (citing COMMENTARY, *supra* note 79, at 48–49).

⁸² Hamdan GCIV Ruling, *supra* note 63, at 3.

⁸³ *Id.* (citing HELEN DUFFY, THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW 402 (2005)).

⁸⁴ Hamdan GCIV Ruling, *supra* note 63, at 4 (quoting COMMENTARY, *supra* note 79, at 52–53).

of the State, such individual person[s] shall not be entitled to claim such rights and privileges under the present Convention.”⁸⁵

Professor Yoram Dinstein notes that an unlawful combatant “is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges pertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 [of GCIV] . . . specifically permits derogation from the rights of such a person”⁸⁶

In addition to legal scholars, the International Criminal Tribunal for the Former Yugoslavia has weighed in on the issue of derogation from the protections of GCIV. In the *Delalić* case, the Trial Chamber wrote:

There is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war or of the First or Second Convention, he or she necessarily falls within the ambit of [the Fourth Convention], *provided that its Article 4 requirements are satisfied*.⁸⁷

Therefore, unlawful combatants failing the requirements of Article 4 to GCIV will not be afforded its protections. Judge Allred’s reliance on these authorities in the *Hamdan* ruling demonstrates one thing—the military commissions have not shied away from the application of the laws of war. Rather, they adhered to the Geneva Conventions quite faithfully. Moreover, there was no effort to remove accused entirely from the protections of Geneva. As Judge Allred stated, “[Hamdan] is among that unusual class of persons not protected by either GC III or GC IV, but entitled to the minimal protections of Common Article 3.”⁸⁸ How then do we “bridge the gap” of those left relatively unprotected?

IV. CONCLUSION

The military commissions have faithfully applied the laws of war. Nonetheless, critics still maintain that the U.S. requires its enemies to abide by the laws of war while denying them the protections of Geneva. In reality, everyone engaged in armed conflict is required to follow the laws of war.⁸⁹ To complete the quote by Pictet above, “[t]hose who take part in the strug-

⁸⁵ Hamdan GCIV Ruling, *supra* note 63, at 4 (quoting Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287).

⁸⁶ Hamdan GCIV Ruling, *supra* note 63, at 5 (quoting YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 29–30 (2004)).

⁸⁷ Hamdan GCIV Ruling, *supra* note 63, at 5 (quoting Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 271 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II Nov. 16, 1998)) (emphasis added).

⁸⁸ Hamdan GCIV Ruling, *supra* note 63, at 5.

⁸⁹ See Bellinger, *supra* note 7.

gle while not belonging to the armed forces are acting deliberately outside the laws of warfare. *Surely they know the dangers to which they are exposing themselves.*⁹⁰ The danger is exposure to a massive gap in the Geneva protective framework.

At the heart of the matter is how these laws apply to persons on the battlefield, not just the courtroom. Curtis Bradley notes that, “[t]he Geneva Conventions concern the ways a nation’s military interacts with classes of people during armed conflict.”⁹¹ Today, when our military applies these laws at least one class of people is not included in this paradigm—the unprivileged belligerent. If the purpose of the law of armed conflict is to extend the full spectrum of Geneva’s protections to all persons on the contemporary front lines, then the laws of war must be amended. For now, unlawful combatants will only find solace in the base line protections of Common Article 3. Perhaps this is as it should be. It must be considered whether the law should change to oblige derogations of unlawful actors, or whether combatants themselves must conform their actions to the existing laws governing armed conflict.

Ultimately, the question is not whether Geneva was present at Guantánamo Bay. The truth is that the military commissions applied the law of armed conflict rigorously and with greater intellectual honesty than critics will dare admit.

⁹⁰ Hamdan GCIV Ruling, *supra* note 63, at 4 (quoting COMMENTARY, *supra* note 79, at 52–53) (emphasis added).

⁹¹ Bradley, *supra* note 12, at 338.