

THE LAW OF WAR AFTER THE DTA, HAMDAN AND THE MCA

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I am grateful to be here and part of this panel and to discuss these important issues.

Part of my goal as a member of this panel is to portray DoD's assessment of some of the recent issues that have made up many of the topics for this Conference. When military experts are asked to provide advice or an opinion on a larger issue, we focus on the military interests. The same has been true of these issues, including the Detainee Treatment Act,¹ the Supreme Court's decision in *Hamdan v. Rumsfeld*,² and the Military Commissions Act.³

In all of these cases, the military's interests have revolved around issues germane to the law of war and military application of those laws. For example, I know that a great discussion has begun around the habeus corpus stripping provisions of the MCA. That is an aspect of the MCA that has very little impact on the military. I don't have much to say about that issue. However, I think there are three particular issues that have a significant impact on the military and about which I would like to talk about. They are: first, *Hamdan's* discounting of a "no law" zone by holding that Common Article 3 (CA3) of the Geneva Conventions applies to all conflicts that are not between states; second, the amendment to the War Crimes Act (WCA) which details "serious crimes" under CA3; and third, the establishment of the minimum standards for treatment of detainees on the battlefield by the DTA and *Hamdan*.

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1. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.
2. *Hamdan v. Rumsfeld*, 126 S. Ct. (2006).
3. Military Commissions Act of 2006, Pub. L. No. 109—366, § 3, 120 Stat. 2600 (codified in scattered sections of 10, 28, and 42 U.S.C.) [hereinafter MCA].

As I am sure you all know, the Geneva Conventions⁴ establish a three tier paradigm for conflict classification. Common Article 2 describes armed conflicts between states and applies the full body of the law of war to those conflicts. Because there are a number of conflicts that are not between states, either civil wars or other conflicts, the Geneva Conventions also contain Common Article 3 which says that in armed conflicts “not of an international character” “persons taking no active part in hostilities” get some protections that do not equal those given to prisoners of war, but still represent a baseline of humane treatment. Then, the Conventions, and particularly the Commentary,⁵ contemplate conflicts that do not rise to the level of armed conflict but are typified as banditry or marauders. These are matters for domestic law, which is governed by domestic legal standards and applicable Human Rights Law. Because Human Rights Laws, like the ICCPR,⁶ are designed to apply to the relationship between a state and the people of the state, U.S. policy does not generally apply Human Rights Law extraterritorially; instead, in military operations, the military applies the *lex specialis* of the Law of Armed Conflict.

This seemingly trifurcated, or really bifurcated for the purposes of the military, paradigm left some issues unresolved. In the years subsequent to the Geneva Conventions, there has been debate concerning the coverage of CA2 and CA3. As early as 1951, Richard Baxter argued that unprivileged belligerents received no protections under the Conventions but were “virtually at the power of the enemy.”⁷ After the terrorist attacks of Sept 11, 2001, the Bush Administration took a similar approach and consistently asserted that neither CA2 nor CA3 applied to detainees in the Global War on Terror (GWOT).⁸

4. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 3 *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GSW]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCC].

5. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, *available at* <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=375&t=com> (last visited, Mar. 17, 2007).

6. International Covenant on Civil and Political Rights art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force for the United States Sept. 8, 1992).

7. Major Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 343 (1951).

8. See generally David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61 (2005).

With the decision in *Hamdan*, it is now clear that CA3's coverage is broad enough to cover unlawful combatants in the GWOT. The Supreme Court held:

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to *Hamdan* because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." 415 F.3d at 41. That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. So much is demonstrated by the "fundamental logic [of] the Convention's provisions on its application." *Id.*, at 44 (Williams, J., concurring). Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U.S.T., at 3318 (Art. 2, ¶ 1). High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies" those terms. *Ibid.* (Art. 2, ¶ 3). 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. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. See, e.g., J. Bentham, *Introduction to the Principles of Morals and Legislation* 6, 296 (J. Burns & H. Hart eds. 1970) (using the term "international law" as a "new though not inexpressive appellation" meaning "betwixt nation and nation"; defining "international" to include "mutual transactions between sovereigns as such"); *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949*, p. 1351 (1987) ("[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other").⁹

As a result of this holding, every armed conflict that US armed forces are involved in invokes the protections of CA3. The standard appears to be the existence of hostilities and the use of the regular armed forces. There is not a "no law" zone where people can be excluded from receiving humane treatment because the type of armed conflict doesn't seem to fit neatly into one of the two

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

traditional categories. Rather the reach of international law covers all persons on the battlefield during an armed conflict. Even in this strange but deadly war against terrorism, that isn't against another state but crosses multiple international boundaries, there is international law that guarantees all persons will be treated humanely.

Though, as I will argue below, this didn't change the practical application of treatment of military detainees, it provides a clear statement of why the military's practice has been what it has been for the past several decades. It is a pronouncement that the law of war has application to everyone in an armed conflict, not just to those who fit the traditional paradigm.

The next issue that I think has had some significant impact on the military is the amendment of the War Crimes Act. In passing the MCA, Congress amended the WCA. In 1996, the WCA did not criminalize any violation of Common Article 3. It was amended in 1997 to include all violations of CA3 as a war crime.¹⁰ This blanket coverage was, at least in part, in response to a request by DoD.¹¹ This coverage was too broad for fair and meaningful application because not all violations of CA3 are criminal in nature. Some of the more serious crimes, such as murder, mutilation, and torture are clearly criminal and should be treated as war crimes. Other violations, such as some

10. Prior to the enactment of the MCA, 18 U.S.C. 2441 (2006) read:

(a) Offense.—Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.—The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.—As used in this section the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

11. Letter from Judith Miller to Honorable Bill McCollum, Committee on the Judiciary, House of Representatives, H.R. 698, 104th Cong. (2d Sess. 1996).

forms of cruel treatment or humiliating and degrading treatment, may not deserve to be considered a war crime but should be prohibited and sanctioned in other ways.¹²

This rationale is similar to that established to deal with grave breaches of the Geneva Conventions. Articles 129¹³ of the GPW and 146¹⁴ of the GCC establish a bifurcated system for responding to violations of the law of war. In the case of grave breaches, signatories accepted the obligation to pass laws that criminalized violations, search for alleged offenders, and prosecute alleged offenders or turn them over to another country that will prosecute them.¹⁵ For

12. See John B. Bellinger III, State Dept. Legal Advisor, State Dept. Briefing (Oct. 19, 2006), available at <http://fpc.state.gov/fpc/74786.htm> (last visited Mar. 17, 2007).

13. GPW, *supra* note 4 at art. 129 states:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

14. GCC, *supra* note 4 at art. 146 states:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

15. GWS, *supra* note 4 at art. 50; GPW, *supra* note 4 at art. 130; GCC, *supra* note 4 at art. 147.

non-grave breaches, the obligation is to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention.”¹⁶

The MCA establishes a similar system which criminalizes as war crimes the serious crimes from CA3, and allows other violations of CA3 to be remedied through suppression, appropriate lesser criminal or administrative sanctions, and retraining. I think this is an appropriate result. Serious crimes need to be criminalized, but the military has a number of methods including lesser criminal sanctions, nonjudicial punishment, administrative punishment or separation, that are more appropriate methods for some less serious violations.

Finally, as briefly mentioned above, the recent passage of the DTA and decision in *Hamdan* have also focused the international law lens on CA3 and the standards of treatment for detainees. The DTA prohibits cruel, inhuman, or degrading treatment or punishment as defined by the 5th, 8th, and 14th Amendments’ jurisprudence on cruel, unusual, and inhumane treatment or punishment.¹⁷ This prohibition is sweeping in that it covers anyone “under the physical control of the United States Government.”¹⁸ In *Hamdan*, the Supreme Court provided additional affirmation of the humane treatment standard by applying CA3 to all non-international armed conflicts, including the GWOT.

In conjunction with the DTA’s and *Hamdan*’s establishment of a minimum standard of treatment for battlefield detainees, Deputy Secretary of Defense Gordon England instructed all military units to verify that “all DoD personnel adhere to [Common Article 3].”¹⁹ The DEPSECDEF memo was an important affirmation of the minimum standards for conduct, under the Law of War. However, this was unnecessary as the military has been applying an even higher standard, that of giving every detainee prisoner of war treatment until otherwise instructed, as a matter of policy²⁰ for at least two decades. It has been and continues to be the policy of the United States military to treat all detainees humanely and as Prisoners of War, until otherwise directed by competent

16. GCC, *supra* note 4, at art. 146.

17. Detainee Treatment Act of 2005, Pub. L. No. 109-148 at 2742-44.

18. *Id.*

19. Memorandum from Gordon England, U.S. Deputy Secretary of Defense, on the Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (Jul. 7, 2006), available at <http://jurist.law.pitt.edu/pdf/genevaconsmemo.pdf> (last visited Mar. 17, 2007).

20. See U.S. DEP’T OF DEFENSE, DEP’T OF DEFENSE DIRECTIVE 5100.77, DO D LAW OF WAR PROGRAM (Dec. 9, 1998), available at http://biotech.law.lsu.edu/blaw/dodd/corres/pdf/d510077_120998/d510077p.pdf (last visited Mar. 17, 2007) which states:

5.3. The Heads of the DoD Components shall:

5.3.1. Ensure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.

authority. This treatment does not establish status, but does provide a standard of treatment that exceeds that required by either the DTA or *Hamdan*.

This GPW-based standard of treatment has recently been confirmed in the promulgation of DoD Directive 2310.1E, "DoD Detainee Program,"²¹ and FM 2-22.3, "Human Intelligence Collector Operations."²² The Directive and FM require all detainees, including unlawful combatants, be treated consistent with the requirements of CA3 as a minimum standard. They also reiterate the GPW standards for prisoners of war. The Directive further enumerates specifically prohibited acts such as murder, torture, corporal punishment, mutilation, the taking of hostages, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment, in accordance with and as defined in U.S. law; threats or acts of violence, including rape, forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals; being subjected to medical or scientific experiments; and protects against being subjected to sensory deprivation.

I believe that the events of the past five years have highlighted and illustrated the wisdom and practical efficiency in DoD's approach to treatment of detainees, and I think that has been borne out by the subsequent actions of the President, Congress and courts.

In conclusion, I think these three recent events:

- 1) *Hamdan*'s discounting of a "no law" zone by holding that CA3 of the Geneva Conventions applies to all conflicts that are not between states;
- 2) The amendment to the WCA to detail "serious crimes" under CA3; and
- 3) The establishment of humane treatment as the minimum standards for treatment of detainees on the battlefield by the DTA and *Hamdan*

demonstrate the continuing vitality of the law of war and its effects on international law.

21. See U.S. DEP'T OF DEFENSE, DEP'T OF DEFENSE DIRECTIVE 2310.01E, DEP'T OF DEFENSE DETAINEE PROGRAM (Sep. 5, 2006), available at http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf (last visited Mar. 17, 2007).

22. See U.S. DEP'T OF THE ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sep. 2006), available at <http://www.fas.org/irp/doddir/army/fm2-22-3.pdf> (last visited Mar. 17, 2007).