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Responding Lawfully to al Qaeda

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RESPONDING LAWFULLY TO AL QAEDA

Jordan J. Paust

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I. INTRODUCTORY HYPOTHETICAL

Assume that three members of al Qaeda who form a small cell of al Qaeda in Canada are arrested in Canada at the border with the United States while allegedly participating in a plan to import explosives into the United States in order to terrorize subway commuters in New York City, possibly as suicide bombers. The members of the cell are all Canadian nationals who were born in Pakistan and had moved to Canada with their parents many years ago. None have ever visited Afghanistan or Iraq and none have participated directly or indirectly in any al Qaeda operation in such countries. Canada is considering a U.S. request for their extradition

+ Mike & Teresa Baker Law Center Professor, University of Houston Law Center. This Article is based primarily on a revised version of a lecture given at the U.S. Military Academy, West Point, Nov. 7, 2005.
to stand trial for conspiracy to commit war crimes and attempted war crimes in the United States.

II. "WAR" AGAINST AL QAEDA OR "TERRORISM" (AND THE LEGAL STATUS OF AL QAEDA AS SUCH)

Under international law, the United States cannot be at "war" with al Qaeda as such, much less with a tactic or strategy of "terrorism," and the laws of war are not applicable with respect to acts of violence between members of al Qaeda and armed forces of the United States outside the context of an actual war, such as the wars in Afghanistan or Iraq. Al Qaeda is not a state, nation, belligerent, or insurgent group. Indeed, al Qaeda is not known to have even purported to be or to have the characteristics of a state, nation, belligerent, or insurgent. Under customary international law, an insurgency is the lowest type of status for warfare or an armed conflict. For an insurgency to occur, the putative insurgent group would have to meet recognized criteria for insurgent status, which include the need for the group: (1) to represent an identifiable group of people or to have a "relatively stable . . . base of support within a broader population"; (2) "to have the semblance of a government"; (3) to have "an organized military force" and to be able to field its military units in hostilities; and (4) to control "significant portions of territory as its own."

The next highest level of status for warfare or an armed conflict is belligerent status. A belligerent must meet each of the four criteria noted with respect to an insurgency as well as a fifth criterion: it must have recognition either as a state or a belligerent by a state with which it is engaged in an armed conflict or by other states in the international community. The Confederate States of America during the U.S. Civil War is a well-known example of a belligerent engaged in an armed conflict to which all of the customary laws of war applied. It met the four criteria and had recognition as a "belligerent" by the United States and various European states.

In contrast, al Qaeda has never met the criteria for insurgent status and has certainly lacked any outside recognition as a belligerent, nation, or
state. In particular, al Qaeda lacks even the semblance of a government and has not controlled significant portions of territory as its own.

In view of the above, any conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war. Thus, outside the context of an actual war to which the laws of war apply, members of al Qaeda who were not otherwise attached to the armed forces of a belligerent or state cannot be “combatants,” much less “enemy” or so-called “unlawful” combatants, or prisoners of war as those terms and phrases are widely known in both international and U.S. constitutionally-based law.

Therefore, “‘war’ or ‘armed conflict’ and the laws of war could not have applied to the September 11th attacks by al Qaeda operatives, even though the attacks undoubtedly triggered other international laws” involving civil and criminal responsibility and universal jurisdiction, including human rights violations and crimes against humanity, terrorism, and human rights violations “in connection with the targeting of the World Trade Center.” Additionally, the laws of war would not apply to conduct and treatment of the three Canadians in the introductory hypothetical.


11. See id. at 327.

12. See, e.g., id. at 327; see also Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1013-15 (2d Cir. 1974) (holding that the United States could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts as a non-state, non-belligerent, non-insurgent actor).

13. Paust, supra note 1, at 327.


With respect to the September 11th attacks as such, any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of non-state actor violence and targetings that otherwise remain criminal could become legitimate and create an extended, but unwanted, form of combatant immunity. Two such targetings would have been the September 11th attack on the Pentagon, a legitimate military target during armed conflict or war (except for the means used, a hijacked civilian airliner with passengers and crew), and the previous attack on the U.S.S. Cole, another legitimate military target during armed conflict or war. Similarly, a radical extension of the status of war and the laws of war to terroristic attacks by groups like al Qaeda . . . would legitimize al Qaeda attacks on the U.S. President (as Commander-in-Chief) and various U.S. ‘military personnel and facilities’ in the United States and abroad . . . . Applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution.16

Politically, such an extension could also enhance the status of a terrorist group from that of an international criminal organization to that of an “enemy” of a powerful state able to engage in a protracted “war” and to achieve certain “victories.”17 Such a major shift in status might also significantly serve the group’s efforts at recruitment and attempted justification for its war and terrorist tactics as means of warfare and thus contribute to continued social violence. For these and other reasons, Osama bin Laden wants to be at “war” with the United States. War fits within his plan to avoid religious strictures against terroristic killings and to manipulate jihadists to blow up their bodies.

III. SELF-DEFENSE UNDER THE U.N. CHARTER

Although the United States cannot be at war with al Qaeda as such, this does not preclude the United States from using armed force in self-defense when responding to an ongoing process of armed attacks engaged in by bin Laden and his entourage.18 Armed attacks engaged in by non-state actors can trigger the right of selective and proportionate self-

16. Paust, supra note 1, at 327.
17. See Mark A. Drumbl, Guantánamo, Rasul, and the Twilight of Law, 53 Drake L. Rev. 897, 908 (2005) (recognizing the political irony of “absurdly glorifying terrorism as armed conflict and terrorists as ‘warriors’”).
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defense under the United Nations Charter against those directly involved in an armed attack, even if the responding force occurs partly in a foreign country.\footnote{Louis Henkin, War and Terrorism: Law or Metaphor, 45 SANTA CLARA L. REV. 817, 821 (2005).} Further, if a state engages in legitimate self-defense in a selective and proportionate manner merely against non-state actors that are perpetrating ongoing armed attacks, such a defensive use of force will not create a state of war or an armed conflict of any duration between the forces of the state engaged in self-defense and the forces of the state on whose territory the self-defense targetings take place.\footnote{See Jordan J. Paust, Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanmaro, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions, 79 NOTRE DAME L. REV. 1335, 1344 (2004) (noting remarks of Abraham D. Sofaer); Paust, supra note 18, at 535 n.3; see also Henkin, supra note 19, at 821; cf. Yoram Dinstein, War, Aggression and Self-Defence 245 (4th ed. 2005) (arguing that such creates an “armed conflict” with the state but not a “war”). However, if the non-state entity that initiated the attack has belligerent or insurgent status, an armed conflict between the responding state and the belligerent or insurgent can arise.}

Article 51 of the United Nations Charter allows a state to respond defensively “if an armed attack occurs against” it,\footnote{U.N. Charter art. 51.} and “nothing in the language of Article 51 requires that such an armed attack be carried out by another state, nation, or belligerent, as opposed to armed attacks by various other non-state actors.”\footnote{Paust, supra note 18, at 534 & n.3; see Dinstein, supra note 20, at 184-85, 204-08; Yoram Dinstein, Humanitarian Law on the Conflict in Afghanistan, 96 AM. SOC’Y INT’L L. PROC. 23, 24 (2002); see also Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion (July 9, 2004), 43 I.L.M. 1009, 1063 (2004) (Higgins, J., separate opinion); id. at 1072 (Kooijmans, J., separate opinion); id. at 1079 (declaration of Buergenthal, J.). But see id. at 1049-50 (opinion of the court); infra note 29.} Furthermore, nothing in the language of Article 51 requires the permission of the state on whose territory a self-defense action takes place, which generally would be required for law enforcement measures as such,\footnote{See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 432(2), 433(1)(a) (1987); JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 574-80 (2d ed. 2005).} nor does the language require direct involvement of the state in the non-state actor attack of such a nature as to justify “attribution” to the state.\footnote{See, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 64-65, 103-04, 118-19 (June 27) (concerning the general test for state attribution justifying military force in self-defense against the state, for example, from which a non-state actor attack emanates); see also Armed Activities on Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 306 (2005); Paust, supra note 18, at 540-41. Attribution is different than mere state responsibility. See infra note 29.} In fact, the famous Caroline incident in 1837, which involved a British-Canadian use of armed force in the
United States in self-defense against ongoing attacks by insurgents who were carrying out armed attacks in Canada and operating partly from within the United States, led to disagreement between the United States and Great Britain whether particular acts of self-defense were proper, especially since Britain could have waited until the vessel *Caroline* entered Canadian waters. There was no disagreement, however, regarding whether non-state insurgent armed attacks could trigger the right of self-defense under international law. Moreover, there was no U.S. control of the insurgents or direct involvement in their operations, the United States and Britain were not at war, and the British responsive use of force was against the *Caroline* as such and not against the United States.

More recently, in 2001, the United Nations Security Council and NATO recognized that the non-state "al Qaeda September 11th attacks implicated rights of individual and collective self-defense" under the U.N. Charter and the North Atlantic Treaty. United States use of force against al Qaeda on October 7, 2001 in Afghanistan was justified, and justifiable, as self-defense against ongoing processes of armed attack on the United States, its embassies, its military, and other U.S. nationals abroad. However, permissibility of the use of force against the Taliban at that time was highly problematic and, to be lawful, had to hinge on some form of direct involvement by the Taliban in the al Qaeda attacks and not merely on an alleged tolerating, harboring, endorsing, or financing of al Qaeda.

Measures of legitimate self-defense can include the targeting of [what would be] lawful military targets [during war], such as the head of a non-state entity—Mr. bin Laden—or the head of a state directly involved in ongoing processes of attack on the United States, U.S. military, or U.S. nationals abroad and such lawful targetings in self-defense would not be assassinations.

25. *See Paust, Van Dyke & Malone, supra* note 23, at 535 & n.6; *Paust, supra* note 20, at 1345-46; *see also* *Dinstein, supra* note 20, at 184-85.
27. *See, e.g.*, *Paust, supra* note 18, at 535 & nn.4-5.
28. *Id.* at 533-36.
29. *Id.* at 540-43. Also, permissibility of self-defense measures against the state on whose territory the non-state actor attacks originated does not exist when the state merely has "state responsibility" for tolerating, harboring, or financing the attacks, which can instead lead to political, diplomatic, economic, or juridic sanctions against the state. *See id.* at 540-41. State responsibility is therefore not the same as "attribution." With respect to the Iran hostage crisis, Iran did far more than endorse the student hostage-taking and other illegalities; they joined and controlled the continuing violations of international law. *See* Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 34-36 (May 24).
which, in times of armed conflict, would be [treacherous acts] and war crimes. 30

In fact, during war, the selective killing of persons who are taking a direct part in armed hostilities, including enemy combatants, unprivileged combatants, and their civilian leaders (thus excluding captured persons of any status), would not be impermissible assassination. 31 “The right of self-defense also justifies the capture of bin Laden or other members of al Qaeda during a permissible defensive military incursion into Afghanistan, [Pakistan,] or some other country, in order to capture and arrest those responsible for, or who directly participate in, the ongoing attacks.” 32 Clearly, self-defense captures would be less injurious than self-defense targetings that lead to the deaths of those targeted. The captured person would not have law of war protections if he or she was captured outside the theater of an actual war and was not directly participating in an actual war, but the captured person would have relevant customary and treaty-based human rights protections. 33

30. Paust, supra note 18, at 538; see also U.S. DEP’T OF ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE para. 31 (1956) [hereinafter FIELD MANUAL 27-10].

31. See, e.g., Paust, supra note 18, at 538.


33. See Paust, supra note 20, at 1350-52.
IV. STATUS OF MEMBERS OF AL QAEDA IN AFGHANISTAN AND IRAQ

A. Application of the Geneva Conventions during Wars in Afghanistan and Iraq

Despite the inapplicability of laws of war to armed violence engaged in by al Qaeda outside an actual theater of war and not otherwise directly connected with an actual war, it is beyond reasonable doubt that the laws of war apply to the wars in Afghanistan and Iraq, that these include the 1949 Geneva Conventions and the customary rights and duties reflected therein, and that members of al Qaeda found within such theaters of war or who are directly involved in such wars have certain rights and duties under relevant laws of war. In fact, the wars in Afghanistan and Iraq are international armed conflicts that trigger application of all customary laws of war in addition to relevant treaty-based laws of war and human rights law.

Moreover, Common Article 1 of the 1949 Geneva Conventions expressly requires that all of the signatories respect and ensure re-

34. See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795-96 (2006) ("[T]here is at least one provision of the Geneva Conventions that applies here . . . . Common Article 3 . . . ."); id. at 2797 (noting that the phrase "'regularly constituted court' . . . in Common Article 3 . . . . must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law"); id. at 2799 (Kennedy, J., concurring) ("[T]he requirement of the Geneva Conventions [is] a requirement that controls here . . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan . . . . That provision is Common Article 3 . . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law. By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses . . . ."); Paust, supra note 20, at 1347; Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 COLUM. J. TRANSNAT'L L. 811, 813-16 (2005).

Moreover, all of the customary laws of war, including those reflected in the 1949 Geneva Conventions, would apply in Afghanistan and Iraq during an armed conflict between a state and mere belligerents or during a civil war having the status of a belligerency. See, e.g., Field Manual 27-10, supra note 30, para. 11(a) ("The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents"). Thus, customary rights, duties, and competencies reflected in the Geneva Conventions would apply despite technical, non-policy-serving readings of the third paragraph in Common Article 2 of the treaties concerning a "[p]ower" that is not a signatory to the treaties (which can include a belligerent, but technically only if the belligerent "accepts and applies" the treaties). See Paust, supra, at 819 n.28 (concerning the reach of customary law reflected in the 1907 Hague Convention No. IV despite a limitation in the treaty concerning the reach of the treaty as such). Since the United States is still engaged in significant fighting in each country (apparently with remnants of the Taliban or Saddam Hussein's military) and some enemy fighters come from outside each country, one can recognize that the international nature of the conflicts continues. Cf. Jordan J. Paust, M. Cherif Bassiouini et al., International Criminal Law 819-20 (2d ed. 2000).

35. See supra note 34. Concerning the applicability of customary and treaty-based human rights law, see, for example, Paust, supra note 34, at 820-23.
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spect of the Conventions "in all circumstances."36 This assures that Geneva rights and duties are non-derogable, that alleged necessity provides no excuse 37 unless such an exception is contained in a particular article (which is rare), that reprisals are impermissible, and that rights and obligations do not rest upon reciprocity between warring parties but are peremptory obligatio erga omnes owed by and to all signatories and all of humankind.38

B. Combatant Status

Who is an enemy combatant during war? "The test for combatant or individual belligerent status under the laws of war is straightforward" and should not be changed.39

It is membership in the armed forces of a party to an armed conflict of an international character . . . With respect to an actual armed conflict (as opposed to the September 11th attacks as such), adding the word "enemy" to "combatant" has no legal consequence. Enemies in a war who are combatants are indeed enemy combatants.40

Under the well-recognized test, combatants or "privileged or lawful belligerents include members of the armed forces of a state, nation, or belligerent during an armed conflict."41 They do not include insurgents engaged merely in an armed conflict not of an international character to


37. See, e.g., 4 COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 15, 37 (Jean S. Pictet ed., 1958) [hereinafter 4 COMMENTARY] (providing that each party's "obligation is absolute [and] compulsory"); id. at 39 (stating that inhuman treatment and other proscriptions are "prohibited absolutely . . . [with] no exception or excuse"); id. at 204-05 (noting the "absolute . . . character" of the duty to provide humane treatment); id. at 219-20 (providing that the prohibition of coercion applies in "all cases, whether the pressure is direct or indirect," and coercion is "forbidden for any purpose or motive whatever"); id. at 228 (stating that no "military necessity" exception exists to the prohibition of reprisals); PAUST, BASSIOUNI ET AL., supra note 34, at 847; UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 23 (2004) [hereinafter 2004 U.K. MANUAL]; Paust, supra note 34, at 815. John Yoo still does not understand that "necessity" is not a defense under this binding treaty law of the United States or other treaties banning torture and cruel, inhuman, or degrading treatment. See JOHN YOO, WAR BY OTHER MEANS 172 (2006) (contending that United States interrogators should "do what is reasonably necessary"); id. at 175 (claiming that "good reasons" are available defenses); id. at 200 (stating in error that under current law, "necessity or self-defense" are allowable defenses).

38. See, e.g., Paust, supra note 34, at 814-16.

39. Paust, supra note 1, at 329.

40. Id. at 329-30.

41. Id.
which Common Article 3 of the Geneva Conventions applies.\textsuperscript{42} Since al Qaeda lacks even insurgent status, clearly they would not include persons who were merely members of al Qaeda and such persons would be unprivileged fighters if they engaged in armed violence during an actual war.\textsuperscript{43} Furthermore, they would lack combatant immunity and be subject to prosecution for violations of relevant domestic law with respect to their unprivileged belligerent acts of violence, unless they were directly attached to enemy armed forces during wars in Afghanistan or Iraq.\textsuperscript{44} By

\begin{thebibliography}{9}
\bibitem{43}Paust, \textit{supra} note 1, at 331-32. The phrase "unlawful combatant" is unhelpful because it confuses two separate issues concerning (1) the status of a person (e.g., as a combatant or noncombatant who is not privileged to engage in combat), and (2) a lack of immunity for personal acts committed in violation of the laws of war. If one is a combatant, one is not an unlawful combatant (although some of their acts may be unlawful), and a person having any status can violate the laws of war and lack immunity from prosecution.
\end{thebibliography}
improperly classifying nearly all of the members of al Qaeda’s terrorist network as enemy combatants, the Bush administration turns combatant status on its head, deflates the well-recognized meaning of combatant, and unwittingly perpetuates the unwanted consequences of a war paradigm favored by al Qaeda.

As noted in then-current U.S. military texts, “[a]nyone engaging in hostilities in an [international] armed conflict on behalf of a party to the conflict” (i.e., state, nation, or belligerent) is a combatant, and “[c]ombatants . . . include all members of the regularly organized armed forces of a party to the conflict.” Article 1 of the Annex to the 1907 Hague Convention expressly states that belligerent status during war will “apply . . . to armies” and it expressly sets forth additional criteria that are to be met merely by militia or volunteer corps. The customary 1863

the ultimate control of, the Supreme Court. See U.S. CONST. art. I, § 8, cl. 9; Paust, supra note 20, at 1362-63.


On July 7, 2004, nine days after the issuance of the Rasul decision, Deputy Secretary of Defense Paul Wolfowitz issued an Order creating a military tribunal called the Combatant Status Review Tribunal [CSRT] to review the status of each detainee at Guantanamo Bay as an ‘enemy combatant.’ . . . That definition is as follows:

[T]he term ‘enemy combatant’ shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 450 (emphasis added); see also Memorandum from Paul Wolfowitz, Deputy Sec'y, U.S. Dep't of Def., to Sec'y of the Navy (July 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707 Review.pdf. Even under this overly broad definition, if the three Canadians in the introductory hypothetical had been successful, they would not have committed a belligerent act and would not have directly supported hostilities, or be combatants, as those terms are widely known. A broad interpretation of “supporting” might be thought to reach them, but mere support of those who are in fact combatants engaged in hostilities does not make one a combatant.


Lieber Code also affirmed: "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."^49 Today, Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) has actually expanded the prisoner of war (POW) status that exists for members of armies or armed forces to include such status for members of certain militia forming part of the armed forces of a party to an international armed conflict.\(^50\)

Of course, members of the armed forces of the Taliban [in Afghanistan] were not simplistically mere "militia" or subject to the need to comply with additional criteria for combatant status beyond the determinative criterion of membership in an armed force or army of a state . . . or belligerent. Although some confuse the two, the tests for combatant status and prisoner of war status can be different for certain types of combatants. For example, both combatant status and prisoner of war status with respect to members of the armed forces of a state, nation, or belligerent are based on a single determinative criterion—membership in the armed forces.\(^51\)

Yet, "prisoner of war status for certain "militia" or members of "volunteer corps"" belonging to, but not forming a part of, "the armed forces of a party to an armed conflict hinges on applicability of various additional criteria.\(^52\)

C. Combatant Immunity

Importantly, enemy combatants during an armed conflict of an international character are privileged to engage in lawful acts of war such as the targeting of military personnel, [their leaders,] and other legitimate military targets. Such acts are privileged belligerent acts or acts that are entitled to combat immunity if

49. See Instructions for the Government of Armies of the United States in the Field art. 57, Apr. 24, 1863, available at http://www.icrc.org/ihl.nsf/FULL/110; see also id. art. 82 ("[Those] who commit hostilities . . . without commission, without being part and portion of the organized hostile army . . . 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.").


51. Paust, supra note 1, at 329; see also United States v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992); Goldman & Tittemore, supra note 42, at 9, 27; George H. Aldrich, The Taliban, Al Qaeda, and the Determination of Illegal Combatants, 96 Am. J. Int'l L. 891, 894-95 (2002); Paust, supra note 34, at 813; Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 Am. J. Int'l L. 905, 911 (2002); supra notes 46-49 and infra note 56.

52. Paust, supra note 1, at 329-30.
they are not otherwise violative of the laws of war or other international laws (e.g., those proscribing aircraft sabotage, aircraft hijacking, genocide, or other crimes against humanity).

Moreover, “[v]iolations of the laws of war are war crimes; violators are not entitled to immunity, and are thus prosecutable” and subject to civil sanctions. If the Bush administration needlessly continues to classify all detainees at Guantanamo as enemy combatants, the consequences might involve not merely a deflation of the well-recognized meaning of combatant, but also a deflation of combatant immunity and a threat to United States and other military if so-called enemy combatants at Guantanamo are prosecuted for engaging in acts that would be lawful acts of warfare, including carrying weapons and permitted targeting of lawful military targets. The law of war should not be changed, but there is an evident need for the administration’s misuse of law of war categories to end.

D. Prisoner of War Status

It must also be asked, who should be accorded prisoner of war status?

With respect to prisoner of war status, the Geneva Convention Relative to the Treatment of Prisoners of War sets forth separate categories of persons who are entitled to prisoner of war status.


55. Paust, supra note 1, at 330.
during an armed conflict of an international character. The 1949 Convention's list of six separate categories involved a clear change of certain prior interpretations of coverage under the 1929 Convention. Under express terms of the [1949] treaty, only one category out of six contains criteria limiting prisoner of war status to those belonging to a group that carries arms openly, wears a fixed distinctive sign recognizable at a distance, and conducts operations generally in accordance with the law of war. Under GPW Article 4(A)(2), these limiting criteria expressly apply only to certain "militias or volunteer corps," or "organized resistance movements" [belonging to a Party to the conflict]. They expressly do not apply to "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces" covered under 4(A)(1) or to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" covered under 4(A)(3). 56

With respect to the armed forces of a party to the armed conflict in Afghanistan (such as those of the Taliban and the United States), "the determinative criterion for prisoner of war status is membership. Thus, members of the armed forces of each party qualify as prisoners of war under GPW Article 4(A)(1), if not 4(A)(3) . . ." 57 It is highly doubtful that members of al Qaeda as such could be members of a militia or organized resistance movement of "a Party to the conflict" or members of an armed force as those terms and phrases have been used during prior wars, especially when they are not nationals of Afghanistan or Iraq. Whether or not they could be members of a "volunteer corps . . . be-

56. Id. at 332-33. "Insurgents during an armed conflict not of an international character to which merely common Article 3 applies (and perhaps Protocol II to the Geneva Conventions and certain customary laws of war) presently have no right to POW status or combat immunity." Id. at 333 n.31; see also Berman, supra note 44, at 20; supra note 42.

57. Paust, supra note 1, at 333 n.32; see also Goldman & Tittemore, supra note 42, at 9-10, 27.
long[ing] to a Party to the conflict,” they may not meet the criteria required in GPW Article 4(A)(2). Thus, it is quite likely that members of al Qaeda captured in Afghanistan or Iraq would not be prisoners of war. Nonetheless, in case of doubt, GPW Article 5 requires that they “enjoy the protection of [GPW] until such time as their status has been determined by a competent tribunal.”

In any event, POW status does not inhibit the ability to detain enemy POWs for the duration of an armed conflict, whether or not particular POWs can also be prosecuted for war crimes or other violations of international law. Moreover, POWs subject to prosecution do not thereby lose their status as a POW. There is no need to change the laws of war in that regard, and changing the Article 4(A)(1) test of membership in the armed forces can be dangerous for United States and other military. For example, requiring U.S. soldiers to wear fixed distinctive insignia recognizable at a distance for either combatant or POW status would seriously endanger U.S. soldiers who wear camouflage to blend in with desert, jungle, or arctic flora or surroundings to avoid being killed or wounded.


When Congress adopted the Military Commissions Act of 2006, it adopted a scheme concerning the status of an enemy combatant that made matters worse. The scheme differentiates between a lawful enemy combatant and an unlawful enemy combatant, using the terms “enemy” and “combatant” to describe an unlawful enemy combatant who may in fact be an unprivileged fighter (within or outside of the context of an armed conflict) or a noncombatant who is not privileged to engage in warfare, neither one of which is a combatant under international law. Moreover, some persons who impermissibly engage in armed terrorist

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59. GPW, supra note 50, art. 4(A)(2).
60. Id. art. 5; see also In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 479-80 (D.D.C. 2005) (“If there is any doubt as to whether individuals satisfy the Article 4 pre-requisites, Article 5 entitles them to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal.'” (quoting GPW, supra note 50, art. 5)), vacated sub nom. Boumediene v. Bush, Nos. 05-5062 to 05-5064, 05-5095 to 05-5116, 2007 WL 506581 (D.C. Cir. Feb. 20, 2007).
62. See, e.g., Goldman & Tittemore, supra note 42, at 10, 15-16; Paust, supra note 1, at 331-32.
63. See Parks, supra note 44, at 540.
65. 10 U.S.C.A. § 948a(1)-(2) (West Supp. 2007).
66. Id.; cf. GPW, supra note 50, art. 4(A)(1)-(6).
violence outside the context of an actual armed conflict in Afghanistan or Iraq do not seem to be covered under the statute's definition of unlawful enemy combatant, since the words “enemy” and “combatant” imply a limitation to circumstances of actual armed conflict or war. Additionally, the first type of unlawful enemy combatant set forth in the legislation is limited to “a person who has engaged in hostilities or who has purposely and materially supported hostilities . . . who is not a lawful enemy combatant.” The word “hostilities” has a similar limiting effect, especially when used to describe the conduct of persons labeled unlawful enemy combatants.

The first type of unlawful enemy combatant may also be over-inclusive. Depending on how the relevant statutory provision is interpreted, it may contain an improper sweeping denial of lawful combatant status to “a person who is part of the Taliban,” since members of the regular armed forces are not defined as unlawful enemy combatants. This may affect the interpretation of the War Powers Resolution, which was intended to limit the President's ability to use military force without authorization from Congress. The resolution was designed to ensure that the President would consult with Congress before committing U.S. forces to a military conflict, and to prevent the President from committing U.S. forces to a conflict without proper authorization. The War Powers Resolution is an important tool in ensuring that the President remains accountable to Congress and the American people, and that the United States does not engage in unauthorized military actions.

67. See, e.g., Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40-41 (1800) (opinion of Washington, J.) (stating that the word “enemy” applies to “a state of war between . . . two nations” or hostilities and combating between them); id. at 45 (opinion of Chase, J.) (stating that “France was an enemy” because war existed); id. at 45-46 (opinion of Peterson, J.) (stating that United States and France were in a “qualified state of hostility” or war and thus, “the term ‘enemy,’ apply[es]”); War Powers, Libya, and State-Sponsored Terrorism: Hearing Before the H. Subcomm. on Arms Control, International Security and Science of the H. Comm. on Foreign Affairs, 99th Cong. 7 (1986) [hereinafter War Powers Hearing] (statement of Hon. Abraham D. Sofaer, Legal Adviser, U.S. Dep’t of State) (“Where no confrontation is expected between our units and forces of another state [during efforts to capture non-state terrorists] . . . such units can reasonably be distinguished from . . . forces equipped for combat. And their actions against terrorists differ greatly from the ‘hostilities’ expressly contemplated by the [War Powers] Resolution.”); see also Drumbl, supra note 17, at 908 (implying that one cannot be at war with a non-state, non-belligerent, non-insurgent actor).

Additionally, one uses international law as a background for interpretation of federal statutes. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 70, 99, 120, 124 n.2 (2d ed. 2003); infra note 188. Thus, limitation of the reach of terms such as enemy, combatant, and hostilities under international law to circumstances of actual armed conflict is significant with respect to the proper meaning of 10 U.S.C. § 948a.

68. 10 U.S.C.A. § 948a(1)(i) (identifying the first type of unlawful enemy combatant as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces”). The phrase “associated forces” is ambiguous. Does it include Pakistani military units who reportedly fought alongside the Taliban as U.S. forces went into Afghanistan? See Paust, supra note 18, at 543 n.36.


70. 10 U.S.C.A. § 948a(1)(i).

71. Id. (defining an unlawful enemy combatant as a person “who is not a lawful enemy combatant (including a person who is part of the Taliban”)). One might read the subsection to include a member of the Taliban as an unlawful enemy combatant, but this is not clear.
forces of the Taliban involved in the international armed conflict in Afghanistan are entitled to prisoner of war status and combatant status under treaty-based and customary laws of war. Moreover, as at least one federal court has rightly recognized, the GPW does not permit the determination of prisoner of war status in such a conclusive fashion.

Article 4 defines who is considered a "prisoner of war". If there is any doubt as to whether individuals satisfy the Article 4 prerequisites, Article 5 entitles them to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Nothing in the Convention itself authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the [GPW] falls outside of the Article 4 definitions of "prisoners of war." Similarly, nothing in the Convention, or international law more generally, would allow the sweeping denial by legislative fiat of POW status and the right to have one's status determined by a competent tribunal should any doubt arise. In fact, such a denial would violate the Convention, and violations of the Convention are war crimes. Since Congress intended to comply with the Geneva Conventions and did not clearly and unequivocally express an intent to override any of their provisions, the statutory provision should be interpreted so as to avoid any such sweeping denial.

Such an avoidance is possible, since the relevant subsection identifies a person who is an unlawful enemy combatant and excludes from that category a person "who is not a lawful enemy combatant." While doing

72. See supra notes 56-58 and accompanying text. It would seem to be rare, but a member of al Qaeda could also be entitled to prisoner of war status if, for example, such person was also a member of the regular armed forces of the Taliban, a militia, or volunteer force attached to a unit of the Taliban. See GPW, supra note 50, art. 4(A)(1); supra notes 58-60.


74. See GPW, supra note 50, arts. 2, 5; FIELD MANUAL 27-10, supra note 30, para. 499.

75. See, e.g., 152 CONG. REC. S10,399, 10,401-402 (daily ed. Sept. 28, 2006) (statement of Sen. McCain) (urging final passage of the Military Commissions Act of 2006); R. Jeffrey Smith & Charles Babington, White House, Senators Near Pact on Interrogation Rules, WASH. POST, Sept. 22, 2006, at A1 (reporting on remarks of Senator John McCain); see also PAUST, supra note 67, at 70 (noting that courts attempt to interpret federal statutes as if they are consistent with international law); infra note 89 (observing that Supreme Court case law requires that Congress express a clear, unequivocal intent to override a treaty or the treaty retains its primacy as law of the United States).

76. 10 U.S.C.A. § 948a(1)(i).
so, the subsection uses the phrase "including a person who is part of the Taliban" after the phrase "lawful enemy combatant" in the following language: "who is not a lawful enemy combatant (including a person who is part of the Taliban)." In view of the placement of the inclusive listing of members of the Taliban, the subsection might be read to identify as persons excluded from the category of unlawful enemy combatant and included as a lawful enemy combatant certain persons, "including a person who is part of the Taliban." This interpretation makes sense, since members of the armed forces of the Taliban should have the status of lawful enemy combatant under international law.

The first type of unlawful enemy combatant might also include other persons who are entitled to prisoner of war status under the 1949 Geneva Conventions. The definition in 10 U.S.C. § 948a(1) includes a person who has engaged in hostilities "who is not a lawful enemy combatant." Section 948a(2) lists categories of persons who are lawful enemy combatants, but the list may be inclusive and not exclusive. The categories of persons listed in § 948a(2) do not mirror the categories of persons entitled to prisoner of war status under GPW Article 4(A)(1)-(6). For example, § 948a(2) does not include any person who would be entitled to POW status under GPW Article 4(A)(4)-(6). Section 948a(2)(A) includes "a member of the regular forces of a State party engaged in hostilities against the United States" as POWs, but GPW Article 4(A)(1) does not contain the limiting word "regular" and also covers as prisoners of war "members of militias or volunteer corps forming part of such armed forces." Section 948a(2)(C) includes "a member of a regular armed force who professes allegiance to a government engaged in such hostilities but not recognized by the United States," but GPW Article 4(A)(3) uses the broader phrase "who profess allegiance to a government or an authority."

Thus, several types of persons who are entitled to prisoner of war status are not covered in the list of categories of lawful enemy combatant in § 948a(2). Under one interpretation, those not listed could be unlawful

77. Id.
78. Id. § 948a.
79. Id. § 948a(1)(i).
80. See id. § 948a(2).
81. Compare id., with GPW, supra note 50, art. 4(A)(1)-(6).
82. See 10 U.S.C.A. § 948a(2).
83. Id. § 948a(2)(A).
84. See GPW, supra note 50, art. 4(A)(1). Would the word "regular" preclude coverage of a person in the reserves who is called to active duty? GPW Article 4(A)(1) covers all members of the armed forces. See id.
85. Id.
86. 10 U.S.C.A. § 948a(2)(c).
87. GPW, supra note 50, art. 4(A)(3).
enemy combatants if (1) the list of categories in § 948a(2) is thought to be exclusive, and (2) if Article 4 of the GPW did not have primacy as treaty law of the United States. However, federal statutes must be interpreted to be consistent with treaty law. This is possible in this instance if the list in § 948a(2) is considered to be inclusive and not exclusive. Further, there was no expression of a congressional intent to override the 1949 Geneva Conventions (or any other treaties of the United States). Under venerable Supreme Court precedent there must be a clear and unequivocal expression of congressional intent to override a treaty, or the treaty will retain its primacy as law of the United States. Even if there had been such a clear and unequivocal congressional expression, Supreme Court cases recognize the primacy of "rights under" a treaty as well as the laws of war more generally even when portions of subsequent legislation that are consistent with rights under treaties and the laws of war might otherwise prevail. Moreover, Senator McCain expressed the views of his colleagues when enacting the Military Commissions Act that there was no intent to deviate from Geneva law. For these reasons, § 948a(1) and § 948a(2) should be interpreted to recognize lawful enemy combatant status for those persons entitled to such a status under international law.

The statute's use of the phrase "materially supported hostilities" is also problematic with respect to the first category of an unlawful enemy combatant. One who merely materially supports hostilities is not a fighter or combatant. Thus, it seems illogical to label as a combatant one who merely supports combat. Would a Middle East arms dealer from a neutral country who supplies members of al Qaeda with weapons be a combatant? Would a Saudi banker who finances the sale of arms by the arms dealer be a combatant? Would a British book vendor who supplies members of the Taliban with training and weapons manuals be a combatant? They would not be combatants under the laws of war or even un-

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88. See, e.g., PAUST, supra note 67, at 99, 120, 124 n.2.
89. See, e.g., Weinberger v. Rossi, 456 U.S. 25, 35 (1982) ("[C]ongressional expression [to override is] necessary"); Cook v. United States, 288 U.S. 102, 120 (1933) (finding that the purpose to override or modify must be "clearly expressed"); Cheung Sum Shee v. Nagle, 268 U.S. 336, 345-46 (1925) (ruling that the Immigration Act "must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude"); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) (recognizing that the "purpose . . . must appear clearly and distinctly from the words used" by Congress); PAUST, supra note 67, at 99, 107, 120, 124-25 nn.2-3 (citing additional cases); see also Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 142 (2005) (Ginsburg, J., concurring).
90. See PAUST, supra note 67, at 104-05 (explaining the rights under treaties exception); id. at 106-07, 109 (discussing the law of war exception).
91. See Smith & Babington, supra note 75.
privileged belligerents. Further, they would not be enemies, lawful military targets during an actual war, or violators of the laws of war. The phrase “materially supports” also seems to be improperly vague and overbroad. Perhaps Congress had in mind an enemy fighter during an actual war who is not a prisoner of war or a combatant entitled to combatant immunity when it enacted this subsection, but the language used is potentially overbroad. The purpose of this type of classification is evident in § 948c, since military commissions under the statute have jurisdiction only over “[a]ny alien unlawful enemy combatant.”93 Under Geneva law, a prisoner of war must be tried “by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power.”94 The United States is therefore bound by treaty law to prosecute prisoners of war either in federal district courts or in general courts-martial, where U.S. service members might be prosecuted for war crimes. Importantly, human rights treaties and numerous bilateral friendship, commerce, and navigation treaties also require that foreign nationals have equality of treatment and equal protection.95 Since one tries to interpret a federal statute consistently with international law, it would be logical and policy-serving to read any of the language of § 948a in a manner that best preserves the rights of any prisoner of war to not be labeled as an unlawful enemy combatant, and thus, to not be subjected to a military commission that has no jurisdiction over U.S. military personnel who might be reasonably accused of war crimes. Additionally, since there was no clear and unequivocal expression of congressional intent to override the GPW, Supreme Court case law requires that the GPW have primacy.96 The primacy of the GPW also mandates that § 948a be interpreted consistently with the GPW.

Under the Military Commissions Act, the second category of unlawful enemy combatant is potentially more sweeping. Section 948a(1)(ii) does not facially exclude the persons listed in § 948a(2) or any person entitled to prisoner of war status.97 However, proper construction of § 948a would not permit inclusion of lawful enemy combatants listed under subsection (2) within the meaning of subsection (1)(ii), which covers unlawful enemy combatants.98 Otherwise, there are no limiting criteria contained in sub-

93. Id. § 948c. But see id. § 948b(a) (providing procedures for use in “military commissions to try alien unlawful enemy combatants engaged in hostilities” (emphasis added)).
94. See GPW, supra note 50, art. 102.
96. See supra note 89. Even if there had been such a clear, unequivocal expression of congressional intent and the statute is later in time, exceptions to the last in time rule based on Supreme Court decisions would assure the primacy of rights under the GPW either under the traditional rights under treaties exception or the law of war exception to the last in time rule. See supra note 90.
98. See id.
section (1)(ii) other than that the person "has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal [CSRT] or another competent tribunal established under the authority of the President or the Secretary of Defense." With such an approach to determination of status, any person could find themselves labeled an unlawful enemy combatant by a CSRT or competent tribunal under the control of the executive. This alone requires vigilant judicial review of status determinations by the executive branch. International law requires judicial review of the propriety of detention of an individual whether or not status is determined initially by the executive or by the legislature, and the judiciary should be vigilant in fulfilling such treaty-based and customary international legal requirements. There is another problem connected with § 948a(1)(ii), since it contains no standards whatsoever. If the subsection involves a delegation of legislative power to the executive without any standards, there is a violation of the non-delegation doctrine. If there is no delegation of legislative power, then the subsection would be ultra vires because Congress would be legislating where it has no power.

Trusting the executive branch, without any standards, to properly determine enemy combatant status has already proven to be highly problematic. In fact, in In re Guantanamo Detainee Cases, Judge Green found that the CSRT procedures utilized "to confirm that the petitioners are 'enemy combatants' subject to indefinite detention violate the petitioners' rights to due process of law" and that some of the petitioners "have stated valid claims under" GPW. Judge Green stated that Rasul v. Bush requires "recognition that the detainees at Guantanamo Bay

99. Id. § 948a(1)(ii).
100. Cf. Dan Eggen, Justice Department's Brief On Detention Policy Draws Ire, WASH. POST, Nov. 15, 2006, at A3 (describing a motion before the Fourth Circuit, in which the executive claimed a power to detain any foreign national arrested in the United States who is declared to be an enemy combatant).
102. See id. at 507-10, 514.
103. See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 324 (1936) (explaining that even in the area of foreign affairs, there must be at least some minimal standard set forth in legislation for compliance with the delegation doctrine).
105. Id. at 445.
possess enforceable constitutional rights" and that *Hamdi v. Rumsfeld* requires that "an individual detained by the government on the ground that he is an 'enemy combatant' must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."

The CSRT procedures failed such tests in two ways. First, the procedures failed
to provide the detainees with access to material evidence upon which the tribunal affirmed their "enemy combatant" status and [failed] to permit the assistance of counsel to compensate for the government's refusal to disclose classified information directly to the detainees. The second category of defects . . . [included] the vague and potentially overbroad definition of 'enemy combatant' in the CSRT regulations.

Judge Green addressed the overbroad definition used in the CSRT process and noted that the government claimed a right to detain without trial "individuals who never committed a belligerent act or who never directly supported hostilities." Demonstrating how overbroad and nonsensical the government claims have been, Judge Green noted:

This Court explored the government's position on the matter by posing a series of hypothetical questions to counsel at the December 1, 2004 hearing on the motion to dismiss. In response to the hypotheticals, counsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.

**F. Security Detainees**

During an actual war, certain persons who are not POWs and are under definite suspicion of activity hostile to the security of a state can be de-

107. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 454. Concerning this point, see, for example, Paust, *Courting Illegality*, supra note 32, at 18-20, 25. Furthermore, various treaties require equality of treatment and equal protection. *Id.* at 25-26.


109. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 467 (quoting *Hamdi*, 542 U.S. at 533 (plurality opinion)).

110. *Id.* at 468.

111. *Id.* at 475.

112. *Id.* (alterations in original) (citations omitted).
tained when it is reasonably necessary to do so for reasons of security.113 When tests are met under Articles 5, 42-43, and 78 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, non-prisoners of war (who we might call security detainees) can be detained in the territory of a party to the conflict or in occupied territory, subject to required review of the propriety of their detention.114 There is no need to change this law of war. Human rights law prohibits arbitrary detention and also requires judicial review of the propriety of detention.115 Other customary and treaty-based international law prohibits refusals to disclose either the names or the whereabouts of detainees, either of which can involve criminal and civil liability for the forced disappearance of persons.116 Another important limitation with respect to non-prisoner of war detainees is the customary prohibition, mirrored in Article 49 of the Geneva Civilian Convention, of the transfer, removal, or relocation of any such person from occupied territory, regardless of purpose or putative excuse.117 Any such transfer is a war crime as well as a

113. Geneva Civilian Convention, supra note 36, art. 5.
114. See, e.g., Paust, supra note 101, at 512-13, cited in Hamdi, 542 U.S. at 520 (plurality opinion). The President is bound by our Constitution to faithfully execute treaty-based law of the United States. See U.S. CONST. art. II, § 3. Therefore, Article 5 of the Geneva Civilian Convention, which recognizes the detention authority of parties such as the United States, might enhance presidential power to detain certain persons without trial. See, e.g., Paust, supra note 20, at 1359 n.100.
115. See Paust, supra note 101, at 505-10; see also Rasul v. Bush, 542 U.S. 466, 484 (2005) (requiring habeas corpus review for detention of persons at Guantanamo); G.A. Res. 59/191, supra note 14; S.C. Res. 1566, supra note 14 (affirming that human rights law must be complied with while countering terrorism); Paust, supra note 53, at 690-94.
117. See, e.g., Geneva Civilian Convention, supra note 36, art. 49 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . are prohibited, regardless of their motive.”); id. art. 147 (providing that an “unlawful . . . transfer” is a “grave breach[]”); 4 COMMENTARY, supra note 37, at 279-80 (“The prohibi-

V. TREATMENT OF DETAINEES

All persons detained during an international armed conflict have certain rights under customary and treaty-based laws of war and human rights law. There are no gaps in the reach of law and at least some forms of right and protection exist for any detained person who is not a POW. With respect to treaty-based rights and duties during war, it is worth emphasizing that the nationals of a state that has ratified the 1949 Geneva Conventions have numerous express and implied rights as well.

118. See supra notes 36-37 and 117.
119. See, e.g., Paust, supra note 34, at 813-23.
as duties under such treaties whether or not such nationals are also members of an entity that is not a state, nation, belligerent, or insurgent—such as a private security corporation operating in Iraq, a lawyers’ bar association, or al Qaeda.  

Common Article 3 of the 1949 Geneva Conventions is an example of the customary and treaty-based laws of war that provides various rights and duties with respect to any person who is not taking an active part in hostilities, thus including any person detained whether or not such a person had previously engaged in hostilities and regardless of status (e.g., whether the detainee is an enemy combatant, a prisoner of war, an unprivileged belligerent, a noncombatant, a security detainee or a terrorist). Today, Common Article 3 reflects a minimum set of customary rights and obligations that are applicable during an international armed conflict. The Article expressly declares that detainees have certain

supra note 101, at 515-17 & n.43. They also reflect customary international law that is directly incorporable. See infra note 124.

122. See Paust, supra note 34, at 829 & n.62; infra note 164 and accompanying text. Specifically, it is irrelevant that al Qaeda did not and could not ratify the treaties, since members of al Qaeda are undoubtedly nationals of a signatory state. Id. Professor John Yoo still does not understand this fundamental point concerning the reach of rights as well as duties to nationals of a party to a treaty. See, e.g., Yoo, supra note 37, at 23, 237.

123. See Geneva Civilian Convention, supra note 36, art. 3; id. art. 5 (stating that security detainees “shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial”).

124. See, e.g., Hamdan, 126 S. Ct. at 2796 n.63; Hamdan, 344 F. Supp. 2d at 162-63; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 113-14 (June 27) (“There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which . . . reflect . . . ‘elementary considerations of humanity.’ ”); id. at 129 (“[G]eneral principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not.”); Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.97, doc. 6 rev. ¶ 158 (1997); Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶¶ 143, 150 (Feb. 20, 2001); Prosecutor v. Tadic, IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995) (“The International Court of Justice has confirmed that these rules reflect ‘elementary considerations of humanity’ applicable under customary international law to any armed conflict, whether it is of an internal or international character. Therefore, at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.”); Prosecutor v. Tadic, IT-94-1-T, Decision on the Defence Motion on Jurisdiction, ¶¶ 65, 67, 74 (Aug. 10, 1995); 4 COMMENTARY, supra note 37, at 14 (“This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts.”); HENCKAERTS & DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, supra note 116, at 299, 306-19 (observing that the prohibitions reflected in Common Article 3 are “fundamental guarantees” that apply as “customary international law applicable in both international and non-international armed conflicts”); PAUST, BASSIOUNI ET AL., supra note 34, at 693, 695, 813-14, 816; INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 9 (2003); MARY ELLEN
minimum rights “in all circumstances” and “at any time and in any place whatsoever.” Among such absolute and legally unavoidable rights are “the right to be ‘treated humanely’; freedom from ‘violence to life and person’; freedom from ‘cruel treatment and torture’; freedom from ‘outrages upon personal dignity, in particular, humiliating and degrading treatment’; and minimum human rights to due process in case of trial.” Similarly, customary and treaty-based human rights that are universally applicable, nonderogable, and part of peremptory rights and prohibitions jus cogens in time of peace or during any form of armed conflict require that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

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O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE 390 (2005); OPERATIONAL LAW HANDBOOK, supra note 46, at 67, 69; Jinks, supra note 120, at 1508-11; Paust, supra note 34, at 816-17 & n.19; Paust, supra note 101, at 511 n.27; see also 2004 U.K. MANUAL, supra note 37, at 5 & n.13 (recognizing that among “important judgments,” the I.C.J. “referred to the rules in Common Art. 3 as constituting ‘a minimum yardstick’ in international armed conflicts”); Letter from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to William H. Taft, IV, Legal Adviser, U.S. Dep’t of State 3-4 (Mar. 22, 2002) (on file with Catholic University Law Review) (noting that in a March 22, 2002 memorandum prepared by Legal Adviser Taft, it is stated “that all combatants are entitled, ‘as a minimum, [to] the guarantees of article 3’ and that the March 22 memo also states “that [i]t is widely recognized internationally . . . that common Article 3 reflects minimum customary international law standards for both internal and international armed conflicts” (alterations and omission in original) (citation omitted)); Letter from William H. Taft, IV, Adviser, U.S. Dep’t of State, to John C. Yoo, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice 2 (Jan. 23, 2002) (on file with Catholic University Law Review) (“Even those terrorists captured in Afghanistan, however, are entitled to the fundamental humane treatment standards of common Article 3 of the Geneva Conventions—the text, negotiating record, subsequent practice and legal opinion confirm that common Article 3 provides the minimal standards applicable in any armed conflict.”). Customary international law is directly incorporable in the U.S. and binds the executive. See, e.g., PAUST, supra note 67, at 7-12, 169-73, 175, 488-90, 493-94; Paust, supra note 34, at 856, 858-61; Paust, Before the Supreme Court, supra note 32, at 839-40 n.53.

125. Geneva Civilian Convention, supra note 36, art. 3(1); see also supra notes 36-37 and accompanying text.

126. Paust, supra note 34, at 818 & n.25; see Geneva Civilian Convention, supra note 36, art. 3(1)(d); Hamdan, 126 S. Ct. at 2796-97; Paust, supra note 53, at 678 n.9; see also Rome Statute, supra note 117, art. 8(2)(a)-(b).

127. See, e.g., HENCKAERTS & DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, supra note 116, at 299-306; Paust, supra note 34, at 820-23; Paust, supra note 101, at 505 n.5.

128. See, e.g., International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Paust, supra note 34, at 821 n.40. Human rights are guaranteed universally and in all contexts to all persons under the United Nations Charter and in case of an unavoidable clash between Charter-based human rights and law of war treaties, human rights will prevail. See U.N. Charter arts. 55(c), 56, 103. Human rights that are also customary jus cogens will prevail over any inconsistent more ordinary international law. Id. Thus, human rights jus cogens will prevail over ordinary laws of war. However, there will rarely be an unavoidable clash between human rights law and the laws of war. For example, concerning the human right to
Whether or not they constitute torture or violence to life and person, it is quite clear that what we saw in photos from Abu Ghraib, for example, the stripping of persons naked for interrogation purposes, the use of dogs for interrogation and even terroristic purposes, and hooding for interrogation purposes, as well as combinations of these tactics, are among patently illegal interrogation tactics covered by prohibitions of cruel, inhuman, degrading, and humiliating treatment.\footnote{130}

Secretary of Defense Donald Rumsfeld authorized the use of each of these interrogation tactics, among several others, in an action memo on December 2, 2002 and in another memo on April 16, 2003, adding that if additional interrogation techniques for a particular detainee were required, he might approve them upon written request.\footnote{130} Others within the military and the administration approved or directly participated in the approval of these and other tactics that are either patently illegal or can be illegal in a given circumstance,\footnote{131} although the Judge Advocates Gen-


\footnote{130} See, e.g., Paust, supra note 34, at 840-41, 843-44. Customary human rights are directly incorporable in the United States. See, e.g., Paust, supra note 67, at 7-12, 224-28, 370-71. Treaty-based human rights in the ICCPR can be self-executing at least for some purposes. See, e.g., id. at 361-62, 381 n.12; Paust, Before the Supreme Court, supra note 32, at 852-54.

\footnote{131} See, e.g., Diane Marie Amann, Abu Ghraib, 153 U. PA. L. REV. 2085, 2086 (noting the “self-conscious creation of the Executive” and “deliberate executive construction” more generally of a process of interrogation violative of law); id. at 2094 (recounting Attorney General Gonzales’ advice to President Bush that “‘Geneva’s strict limitations’” should not be observed); Paust, supra note 34, at 834-36, 838-50; David Johnston, At a Secret Interrogation, Dispute Flared Over Tactics, N.Y. TIMES, Sept. 10, 2006, at 1; Chitra Ragavan, Cheney’s Guy, U.S. NEWS & WORLD RPT., May 29, 2006, at 32, 35; Golden & Schmitt, supra note 116; Eric Lichtblau, Gonzales Says Humane-Policy Order Doesn’t Bind C.I.A., N.Y. TIMES, Jan. 19, 2005, at A17 (noting that Gonzales still claimed in 2005 that CIA and nonmilitary personnel are outside the reach of any remaining limitations on treatment contained in President Bush’s Feb. 7, 2002 directive and that a congressional ban on cruel and inhumane treatment does not apply to “‘aliens overseas’”); Editorial, Impunity, WASH. POST, Apr. 26, 2005, at A14 (reporting that a meeting chaired by Gonzales approved simulated drowning); Josh White, Military Lawyers Say Tactics Broke Rules, WASH. POST, Mar. 16, 2006, at A13; Evan Thomas & Michael Hirsh, The Debate Over Torture, NEWSWEEK, Nov. 21, 2005, at 26, 28; Jane Mayer, The Hidden Power: The Legal Mind Behind the White House’s War on Terror, NEW YORKER, July 3, 2006, at 44; Jane Mayer, The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted, NEW YORKER, Feb. 27, 2006, at 32, 33; Morning Edition (National Public Radio broadcast Nov. 3, 2005) (discussing Vice President Cheney’s role in the Iraq war); see also James Gordon Meek, Torture’s No Good, Army Cadets Told, DAILY NEWS (New York), Nov. 13, 2005, at 24 (reporting former Secretary of State aide Col. Larry Wilkerson’s remarks regarding the Administration’s so-called prohibition of torture: “That is not what I saw in the paperwork coming out of the vice president’s office and the office of the secre-
eral of the Army, Navy, Marines, and Air Force, and other military lawyers opposed use of the illegal tactics. More recently, Brigadier General Janis Karpinski has stated in an interview that she saw a Rumsfeld authorization on a pole outside at Abu Ghraib. "It was a memorandum signed by Secretary of Defense Rumsfeld, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food," and so forth. Karpinski added: "And then a handwritten message over to the side that appeared to be the same handwriting as the signature . . . said 'Make sure this happens,' with two exclamation points." In an interview on Frontline, she also stated that Major General Miller came from Guantanamo to Iraq on a mission to "GITMOize" interrogation tactics.

As documented elsewhere, various memoranda, authorizations, and actions demonstrate that there were plans soon after 9/11 to deny protections under the Geneva Conventions to persons detained during the armed conflicts in Afghanistan and Iraq. More recently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized and another document that contains a DOJ legal analysis specifying interrogation methods that the CIA was authorized to use against top al-Qaeda members.

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132. See, e.g., Paust, supra note 34, at 843 & n.119; White, supra note 131.
134. Id.
135. Id.
137. See YOO, supra note 37, at ix (noting that coercive interrogation and denial of application of Geneva law "policies were part of a common, unifying approach to the war on terrorism"); id. at 35 (observing that instead of “following the Geneva Conventions,” the inner circle decided whether such “would yield any benefits or act as a hindrance”); id. at 39-40 (stating that the inner circle believed that following Geneva law would “interfere with our ability to . . . interrogate” since “Geneva bars ‘any form of coercion’”; as a result, “[t]his became [a] central issue,” and following “‘Geneva’s strict limitations on . . . questioning’ . . . made no sense”); id. at 43 ("[T]reating the detainees as unlawful combatants would increase flexibility in detention and interrogation . . . ."); Paust, supra note 34, at 824-26.
138. See, e.g., Dan Eggen, CIA Acknowledges 2 Interrogation Memos, WASH. POST, Nov. 14, 2006, at A29; David Johnston, C.I.A. Tells of Bush’s Directive on the Handling of Detainees, N.Y. TIMES, Nov. 15, 2006, at A14; see also Johnston, supra note 131 (stating that President Bush authorized the CIA to secretly detain and interrogate persons in a
There is no indication that the presidential directive has been withdrawn. In fact, during a speech in early September 2006, President Bush admitted that a CIA program has been implemented “to move [high-value] individuals to [locations] where they can be held [in] secret[],” or in forced disappearance, and interrogated using “tough” forms of treatment, and he stated that the CIA program will continue.139

The plans to deny protections that are owed to other human beings under the Geneva Conventions were necessarily plans to violate the Conventions, and violations of the Conventions are war crimes. As such, they were plans to permit war crimes. Various memoranda, authorizations, orders, and actions also abetted the use of illegal interrogation tactics and transfers of detainees. The role that several lawyers played directly in a dreadful process of denial of protections under the laws of war is far more serious than the loss of honor and integrity to power. . . . It can form the basis for a lawyer’s civil and criminal responsibility [whether or not the lawyer is a civilian or military attorney] . . . .140

Of course, under our constitutional form of government, and as a matter of law, all persons within the military, and the executive branch more generally, are bound faithfully to execute the laws of war.141 Judicial power clearly exists to identify and apply customary and treaty-based laws of war and to review the legality of executive decisions and actions taken in time of war.142

September 17, 2001 directive known as a memorandum of notification and that harsh interrogation tactics were devised in late 2001 and early 2002); cf. Paust, supra note 34, at 836 (describing a secret presidential directive to transfer detainees for secret detention and interrogation).

139. Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570-71, 1573 (Sept. 6, 2006); see, e.g., Barnes, supra note 116; Donnelly & Klein, supra note 116; Herman, supra note 116 (adding that the CIA secret detention program “had held about 100 detainees”); Silva, supra note 116; see also Eggen, supra note 138; Johnston, supra note 138.

140. Paust, supra note 34, at 861-62; see also 4 COMMENTARY, supra note 37, at 349, 583, 594, 602; FIELD MANUAL 27-10, supra note 30, para. 499 (“The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.”).

141. See, e.g., U.S. CONST. art. II, § 3; PAUST, supra note 67, at 7-12, 67-70, 169-73, 175, 488-90, 493-94; Paust, supra note 34, at 856, 858-61; Paust, Before the Supreme Court, supra note 32, at 839 n.53. The primacy of the laws of war has also been recognized since the Founding. See, e.g., PAUST, supra note 67, at 106-07.

142. See, e.g., Paust, supra note 101, at 514, 517-24; supra note 141.
VI. PROSECUTING IN A MILITARY COMMISSION

A. A Regularly Constituted Court with Fair Procedures: The Supreme Court’s Decision in Hamdan

1. Problems Concerning Establishment of Military Commissions

In June of 2006, the Supreme Court issued its landmark opinion in *Hamdan v. Rumsfeld*. The Court ruled that “the military commission convened [under the President’s order and DOD Rules of Procedure] to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.” While addressing issues concerning the establishment and structure of the military commissions, the Court stated:

Exigency alone . . . will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need. . . . [T]hat [constitutional] authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.

The Court noted that historically there have been three types of military commissions: (1) those created during martial law; (2) those created 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; and (3) those convened “as an ‘incident to the conduct of war’ when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.’” With respect to the third type, the type of military commission at issue in the case:

Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one—to determine, typically on the battlefield itself, whether the defendant has violated the law of war.

. . . Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.

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143. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). This section is borrowed from a forthcoming book, PAUST, supra note 64.
144. *Hamdan*, 126 S. Ct. at 2759.
145. *Id.* at 2773.
146. *Id.* at 2775-76 (quoting *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)).
147. *Id.* at 2776-77.
The Court then recognized "four preconditions for exercise of jurisdiction" by a so-called law-of-war military commission:

First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." The "field of command" in these circumstances means the "theatre of war." Second, the offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses "committed either before or after the war." Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war."

The Court also noted that all parties agreed that such "jurisdictional limitations... were incorporated in [the 1916] Article of War [art.] 15 and, later, Article 21 of the UCMJ." It follows that the military commission was not lawfully constituted because it operates outside any theatre of war and was created to prosecute offenses that were not committed within the field of command of the convening authority. As the Court stressed, there exists a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity. Hamdan's 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.

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148. Id. at 2777 (alterations in original) (citation omitted) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 836-39 (2d ed. 1920)). Concerning such recognitions, see also Paust, Courting Illegality, supra note 32, at 5-9, 26-27, 29.

149. Hamdan, 126 S. Ct. at 2777; see also In re Yamashita, 327 U.S. 1, 19 & n.7 (1946) (stating that when Congress enacted the 1916 Articles of War, it sanctioned the uses of a military commission contemplated by the common law of war, which is a "war court").

150. Hamdan, 126 S. Ct. at 2785 (noting Justice Kennedy's observation in Rasul that "'Guantanamo Bay is... far removed from any hostilities'" (omission in original) (quoting Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring))).
Additionally, in this instance, "[n]one of the overt acts alleged to have been committed [by Hamdan] ... is itself a war crime, or even necessarily occurred during time of, or in a theater of, war."\textsuperscript{151} Thus, the military commission had several structural defects that were violative of the UCMJ and the requirement under Geneva law that persons be tried in a "regularly constituted court."\textsuperscript{152}

2. Procedural Violations Under the 2001 Order and 2002 DOD Rules

The Supreme Court also recognized that the Bush military commission lacks power to proceed because of significant procedural improprieties and that these are interrelated with the question whether a regularly constituted court has been created.\textsuperscript{153}

The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the ‘rules and precepts of the law of nations,’ ... including, \textit{inter alia}, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan’s trial by commission violate these laws.\textsuperscript{154}

More particularly, the rights of the accused are subject ... to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to “close.” Grounds for such closure “include the protection of information classified or classifiable ... ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.” Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer’s discretion, be forbidden to reveal to his or her client what took place therein.\textsuperscript{155}

Additional procedural improprieties were identified by the Supreme Court in language echoing several of the concerns noted earlier by text writers:

\textsuperscript{151} \textit{Id.}
\textsuperscript{152} Geneva Civilian Convention, \textit{supra} note 36, art. 3(1)(d).
\textsuperscript{153} \textit{Hamdan}, 126 S. Ct. at 2759; see also Geneva Civilian Convention, \textit{supra} note 36, art. 3(1)(d).
\textsuperscript{154} \textit{Hamdan}, 126 S. Ct. at 2786 (quoting \textit{Ex parte} Quirin, 317 U.S. 1, 28 (1942)).
\textsuperscript{155} \textit{Id.} (omission in original) (citation and footnote omitted).
Another striking feature of the rules governing Hamdan’s commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses’ written statements need be sworn. Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," so long as the presiding officer concludes that the evidence is "probative" under § 6(D)(1) and that its admission without the accused’s knowledge would not "result in the denial of a full and fair trial." Finally, a presiding officer’s determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members.

... Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. The President then, unless he has delegated the task to the Secretary, makes the "final decision." He may change the commission’s findings or sentence only in a manner favorable to the accused.156

156. Id. at 2786-87 (citations omitted). As Justice Kennedy emphasized:

These structural differences between the military commissions and courts-martial—the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress—remove safeguards that are important to the fairness of the proceedings and the independence of the court.

Id. at 2807 (Kennedy, J., concurring). He added:

The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission regulations specifically contemplate admission of unsworn written statements; and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture."

Id. at 2808 (citations omitted); see also Paust, Courting Illegality, supra note 32, at 10-18; Paust, supra note 53, at 678-79, 685-90.
Of additional concern was the general need for uniformity of courts-martial and military commission procedures and the evident inconsistency between procedures for courts-martial and those adopted by the President and DOD for military commissions.\(^{157}\) As the Court explained:

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. Accounts of commentators from Winthrop through General Crowder—who drafted [the 1916] Article of War [art.] 15 and whose views have been deemed "authoritative" by this Court—confirm as much. As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. That understanding is reflected in Article 36 of the UCMJ . . . .

Article 36 places two restrictions on the President’s power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be “contrary to or inconsistent with” the UCMJ—however practical it may seem. Second, the rules adopted must be “uniform insofar as practicable.” That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.\(^{158}\)

Hamdan argued that the President’s Order violated both of these restrictions.\(^{159}\) Having considered his claims and those of the executive, the Court decided that the variances in procedure were unjustified:

Without reaching the question whether any provision of Commission Order No. 1 is strictly “contrary to or inconsistent with” other provisions of the UCMJ, we conclude that the “practicability” determination the President has made is insufficient to justify variances from the procedures governing courts-martial. . . .

\(^{157}\) See Hamdan, 126 S. Ct. at 2788-90.

\(^{158}\) Id. at 2788 (footnote omitted) (citing Madsen v. Kinsella, 343 U.S. 341, 353 (1952); 1 WAR OF THE REBELLION 248 (2d ed. 1894); Paust, Courting Illegality, supra note 32, at 3-5).

\(^{159}\) Id. at 2790.
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.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. 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."

Under 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).'  

Importantly, the Supreme Court also ruled that "[t]he procedures adopted to try Hamdan . . . violate the Geneva Conventions," that "regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war"; "[a]nd [that] compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." Instead of addressing all possible violations of the Geneva Conventions with respect to detainees who are either prisoners of war or persons protected under provisions of the Geneva Civilian Convention during particular types of armed conflicts, the Court found it sufficient to focus on violations of Common Article 3 of the Geneva Conventions, which requires that there be a "regularly con-

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160. Id. at 2791-92 (citations omitted). Justice Kennedy added that the requirement in Common Article 3 of the Geneva Conventions that there be a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples' supports, at the least, a uniformity principle similar to that codified in § 836(b)" of the UCMJ. Id. at 2803 (Kennedy, J., concurring).

161. Id. at 2793 (majority opinion).

162. Id. at 2794 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 520-21 (2004) (plurality opinion); United States v. Rauscher, 119 U.S. 407 (1886)).

163. Id.

164. Id. at 2795 (adding that "there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories," Common Article 3, and it "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"); see also id. at 2796 n.63 (quoting 3 COMMENTARY, supra note 58, at 35; 4 COMMENTARY, supra note 37, at 51; U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., LAW OF WAR
stituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” In his concurring opinion, Justice Kennedy emphasized:

The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation’s armed conflict with al Qaeda in Afghanistan and, as a result, to the use of a military commission to try Hamdan. That provision is Common Article 3 of the four Geneva Conventions of 1949. . . . The provision [in Article 3(1)(d)] is part of a treaty the United States has ratified and thus accepted as binding law. By Act of Congress, moreover, violations of Common Article 3 are considered “war crimes,” punishable as federal offenses, when committed by or against United States nationals and military personnel.

As the Court’s opinion stressed:

Common Article 3 . . . requires that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” While the term “regularly constituted court” is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines “‘regularly constituted’ tribunals to include “ordinary military courts” and “definitely exclud[e] all special tribunals.” And one of the Red Cross’ own treatises defines “regularly constituted court” as used in Common Article 3 to mean “established and organized in accordance with the laws and procedures already in force in a country.”

In view of the definitional factors recognized by the Court, it would not seem possible to conclude that a special military commission created ad hoc (and post hoc) by the President or Congress to try particular aliens in a manner that does not comply with the principle of uniformity can constitute a regularly constituted court. The Supreme Court noted that the executive offered “only a cursory defense of Hamdan’s military commission in light of Common Article 3. As Justice Kennedy explains, that defense fails because ‘[t]he regular military courts in our system are the

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HANDBOOK 144 (2004); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (Oct. 2, 1995)).

165. Geneva Civilian Convention, supra note 36, art. 3(1)(d).

166. *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring).

167. *Id.* at 2796-97 (majority opinion) (alteration in original) (quoting 4 COMMENTARY, supra note 37, at 340; HENCKAERTS & DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, supra note 116, at 355).
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courts-martial established by congressional statutes.”168 Another reason why the military commission is irregular, the Court noted, “is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive.”169

“Inextricably intertwined with the question of regular constitution,” Justice Stevens stressed, “is the evaluation of the procedures governing the tribunal and whether they afford ‘all the judicial guarantees which are recognized as indispensable by civilized peoples.’”170 “[J]udicial guarantees,” Justice Stevens recognized, “must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law [and m]any of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I).”171 “Among the rights set forth in Article 75,” Justice Stevens added, “is the ‘right to be tried in [one’s] presence.’”172 In this instance:

[V]arious provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be

168. Id. at 2797 (alteration in original) (citation omitted). Justice Kennedy added that the “regularly constituted” requirement reflects “the importance of standards deliberated upon and chosen in advance of crisis.” Id. at 2799-2800 (Kennedy, J., concurring). This point is relevant also to the standards rushed through Congress during creation of the Military Commissions Act.

169. Id. at 2797 n.65 (majority opinion) (“Commission Order No. 1, § 11 . . . provid[es] that the Secretary of Defense may change the governing rules ‘from time to time . . . .’” (citation omitted)).

170. Id. at 2797 (plurality opinion).

171. Id. Justice Stevens also stated: “Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government ‘regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.’” Id. (alteration in original) (quoting William H. Taft, IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 YALE J. INT’L L. 319, 322 (2003)).

172. Id. (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4)(e), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]). Justice Stevens aptly recognized in footnote 66 that “[o]ther international instruments to which the United States is a signatory include the same basic protections set forth in Article 75. Id. at 2797 n.66 (citing ICCPR, supra note 128, art. 14). Justice Stevens further noted:

Following World War II, several defendants were tried and convicted by military commission for violations of the law of war in their failure to afford captives fair trials before imposition and execution of sentence. In two such trials, the prosecutors argued that the defendants’ failure to apprise accused individuals of all evidence against them constituted violations of the law of war.

Id. (citing 5 U.N. WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 25, 66 (trials of Sergeant-Major Shigeru Ohashi and General Tanaka Hisakasu).
privy to the evidence against him. That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.\footnote{173}

Of course, there are other due process requirements under customary international law that are incorporated by reference in Common Article 3.\footnote{174} It is of great significance that Justice Stevens rightly affirmed in \textit{Hamdan} that such minimum and customary rights to due process under Common Article 3 include those reflected in Article 75 of Geneva Protocol I and Article 14 of the International Covenant on Civil and Political Rights. Importantly also, customary human rights to due process are applicable whether or not Common Article 3 applies.

\textbf{B. The 2006 Military Commissions Act}

Most of the procedural improprieties identified in earlier writings and by the Supreme Court in \textit{Hamdan} were set forth in the Military Commissions Act of 2006.\footnote{175} First, there is continued per se discrimination on the basis of national origin, denial of equality of treatment, and denial of justice to aliens. Under 10 U.S.C. § 948c, only an “alien unlawful enemy combatant is subject to trial by military commission.”\footnote{176} Second, as noted above in Part IV.E, the definitions of unlawful and lawful enemy combatant in the Act are problematic. Under some interpretations (which are not preferable), aliens entitled to prisoner of war status under Geneva law might be mislabeled as unlawful enemy combatants and subject to trial in a military commission in violation of Article 102 of GPW, which requires trial in the same tribunals using the same procedures as trials of U.S. service members (i.e., trials in courts-martial or federal district court).\footnote{177} Third, under the Act, there are no area, time of war, or other contextual limits with respect to creation of a military commission. The Supreme Court’s decision in \textit{Hamdan} demonstrates that military commissions prosecuting violations of the laws of war can be lawfully created only during time of actual armed conflict and then only within a theater of war or war-related occupied territory.\footnote{178} Under some interpretations of the Act, there were attempts to deny persons who are subject to trial by military commission their rights under the Geneva Conven-

\footnotesize{\begin{itemize}
\item \footnote{173}{\textit{Id.} at 2798 (citations and footnote omitted).}
\item \footnote{174}{See, e.g., Paust, \textit{Courting Illegality}, supra note 32, at 10-18; Paust, \textit{supra} note 53, at 678-79, 682, 685-90.}
\item \footnote{175}{See 10 U.S.C.A. §§ 948a(1)(i)-(ii), 948b(a), 948c (West Supp. 2007).}
\item \footnote{176}{\textit{Id.} § 948c.}
\item \footnote{177}{See GPW, \textit{supra} note 50, arts. 4(A)-(B), 102.}
\item \footnote{178}{\textit{Hamdan}, 126 S. Ct. at 2778-86.}
\end{itemize}}
tions as well as their more specific right to habeas corpus relief under the Geneva Conventions and other international law. However, such interpretations must not be allowed to prevail because there was no clear and unequivocal expression of congressional intent to override rights and prohibitions reflected in the Geneva Conventions.

With respect to the right to review by a competent, independent, and impartial court, the Act sets up a system of initial review by a convening authority, automatic Court of Military Commission Review (CMCR) of a final decision of guilt approved by the convening authority, limited review by the United States Court of Appeals for the District of Columbia Circuit, and possible review by writ of certiorari to the Supreme Court. Review by the D.C. Circuit is limited to: "(1) whether the final decision was consistent with the standards and procedures specified in [the Act]; and (2) to the extent applicable, the Constitution and the laws of the United States." Because some of the standards and procedures set forth in the Act are either violative of international law or highly problematic, limitation of review to whether a final decision was consistent with some of the standards and procedures expressed in the Act would hardly be sufficient to comply with international legal standards concerning the creation of a regularly constituted tribunal, the status and equality of treatment of persons subject to trial, procedural fairness, effective representation by counsel of one's choice, and meaningful review by a court of law. In view of the fact that review is also possible in accordance with applicable laws of the United States, it is important to note that treaties of the United States and customary international law are relevant to each of these issues and are part of "the laws of the United States." They are also a necessary background for interpretation of federal statutes. For these reasons, the phrase "laws of the United

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181. See supra notes 89, 96.
182. See Paust, Courting Illegality, supra note 32, at 10-11, 15; Paust, supra note 53, at 685-86.
184. See id. § 950g(a)-(c).
185. See id. § 950g(d).
186. Id. § 950g(e).
"States" should be interpreted as it has normally been interpreted to include international legal standards. Further, it will only be possible to provide meaningful appellate review in the D.C. Circuit if all relevant international legal standards are followed.

With respect to the need for fair procedure and fair rules of evidence, essentially the same problems explored in earlier writings and by the Supreme Court in *Hamdan* persist under the Military Commissions Act. Hearsay, 189 unsworn statements, and other evidence that would be inadmissible in U.S. federal courts and courts-martial might be used, and there could also be a denial of the right of an accused person to confrontation or examination of all witnesses against him. 190 In general, "[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person." 191 Classified information can be admitted without an opportunity to confront persons who prepared such information and the information can be admitted by "substitution of a portion or summary of the information" or through "substitution of a statement admitting relevant facts that the classified information would tend to prove." 192

Language in the Act allowing the use of some coerced statements is especially problematic. Although under the Act a "statement obtained by use of torture shall not be admissible," 193 statements obtained by use of cruel, inhuman, or degrading treatment or any other form of coercion prior to creation of the Detainee Treatment Act (DTA) of 2005 194 can be admitted if the military judge finds that they are "reliable and possess[] sufficient probative value" and that the "interests of justice would best be

Robertson, 124 U.S. 190, 194 (1888); The Pizarro, 15 U.S. (2 Wheat.) 227, 245-46 (1817); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 9 Op. Att'y Gen. 356, 362-63 (1859) ("A law . . . must be made and executed according to the law of nations."); 1 Op. Att'y Gen. 26, 27 (1792); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); PAUST, supra note 67, at 12-13, 43 n.53, 58 n.73, 70, 99, 101, 107, 120, 124 n.2, 134 n.18, 137 n.41, 143 n.73; PAUST, VAN DYKE & MALONE, supra note 23, at 155-56; see also Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion) ("[O]ur understanding [of the AUMF] is based on longstanding law-of-war principles."); id. at 551 (Souter, J., dissenting in part and concurring in judgment) ("[T]here is reason to question whether the United States is acting in accordance with the laws of war . . . . I conclude accordingly that the Government has failed to support the position that the [AUMF] authorizes the described detention . . . .").

189. See 10 U.S.C.A. § 949a(b)(2)(E)(i) ("[H]earsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission . . . .").

190. Paust, supra note 53, at 688-89.


192. Id. § 949(c)(B)-(C); see also id. § 949d(f)(2)(A)(ii)-(iii).

193. Id. § 948r(b).

served by admission of the statement into evidence." Statements obtained by coercion after enactment of the DTA that do not amount to "cruel, inhuman, or degrading treatment" prohibited by the DTA can also be admitted. Thus, if the prohibition of other forms of coercion, intimidation, and improper treatment under the Geneva Conventions\textsuperscript{97} did not have primacy over the Military Commissions Act, violations of the laws of war and human rights law would occur with respect to use of such coerced information—especially, as Nuremberg precedent warns, if a judge knowingly allows use of coerced statements obtained in violation of the laws of war.\textsuperscript{198} The primacy of rights and prohibitions under the

\textsuperscript{195} See 10 U.S.C.A. § 948r(c); see also id. § 949a(b)(2)(C) ("A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r . . . .").

\textsuperscript{196} Id. § 948r(d)(1)-(3).

\textsuperscript{197} See, e.g., Geneva Civilian Convention, supra note 36, art. 3(1) (providing that detainees must be "treated humanely," and prohibiting mutilation, "outrages upon personal dignity," and "humiliating" treatment); id. art. 27 (requiring that persons be "humanely treated"); id. art. 31 ("No physical or moral coercion shall be exercised . . . in particular to obtain information . . . ."); id. art. 32 (prohibiting "physical suffering"); id. art. 33 ("[A]ll measures of intimidation or of terrorism are prohibited."); id. art. 147 (stating that "inhuman treatment" and willfully causing "great suffering or serious injury" are "grave" breaches); GPW, supra note 50, arts. 3(1), 13-14, 130; see also infra note 198.

\textsuperscript{198} See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be involved as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."); ICCPR, supra note 128, art. 14(3)(g) ("[E]veryone shall be entitled . . . [n]ot to be compelled . . . to confess guilt"); see also Garcia Perez v. Peru, Case 11.006, Inter-Am. C.H.R., Report No. 1/95, OEA/Ser.L/V/II.88, doc. 9 rev. (1995) (applying exclusionary rule to material seized during a search in violation of due process and other rights); United Nations, Human Rights Comm., General Comment 20: Article 7, para. 12 (1992), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1\Rev.1 at 32 (July 29, 1994) ("It is important . . . that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment [under Article 7 of the ICCPR]"); 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1093-94 (1951) [hereinafter TRIALS OF WAR CRIMINALS] (addressing, in United States v. Altstoetter (The Justice Case), the war crime responsibility of defendant Klemm, and noting: "[I]t can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo . . . was placed beyond the jurisdiction of law. He must have been aware that a prolific source of clear cases based on confessions and, therefore, legally incontestable, came to him from the obscurity of the torture chamber. . . . More specifically, Klemm knew of abuses in concentration camps. He knew of the practice of severe interro-
Geneva Conventions and other treaties and customary international law is assured, however, because there was no clear and unequivocal expression of a congressional intent to override the Geneva Conventions and, in any event, because the "rights under treaties" and law of war exceptions to the last in time rule would also assure the primacy of Geneva law. Of additional relevance is the recognition in In re Guantanamo Detainee Cases that "[t]he Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment." Thus, under international law and constitutionally-based due process standards, such statements must be excluded. Although appeal before the CMCR and the D.C. Circuit is limited in each instance to "matters of law," the legal problems concerning creation of a regularly constituted tribunal, the status and equality of treatment of accused, fair procedures and fair rules of evidence, and coerced statements noted above are matters of law and should be fully addressed.

The right to counsel of one's choice and to adequate representation is also jeopardized under the Military Commissions Act. Under the Act, civilian defense counsel are limited to U.S. citizens with access to classified information at the level of secret or higher. Civilian defense counsel cannot divulge any classified information to their client or to any other person not entitled to receive such information.

An additional problem is that the military commissions are not limited to prosecutions of violations of the laws of war. For example, "spying" and "conspiracy" are chargeable under the Act, but neither spying...
nor conspiracy as such 207 is a violation of the laws of war. Given the Supreme Court’s recognition in \textit{Hamdan} that a relevant military commission can be used only to prosecute violations of the laws of war, 208 neither spying nor conspiracy as such should be chargeable. Thus the three Canadian nationals in the introductory hypothetical should not be extradited to the United States if the request for extradition is based merely on a charge of conspiracy to commit war crimes, and since the laws of war do not apply to conduct of the three Canadians, extradition should not be

\textit{is not a crime, and the offense which is against the laws of war consists of being found during the war in the capacity of a spy.}); \textit{PAUST, BASSIOUNI ET AL., supra note 34, at 1025; FIELD MANUAL 27-10, supra note 30, para. 77 ("Spying is no offense against international law. Spies are punished, not as violators of the laws of war . . . ."); see also Totten v. United States, 92 U.S. 105, 106 (1876) (finding that the use of spies in enemy territory is appropriate during war); Smith v. Shaw, 12 Johns. Cas. 257, 265-66 (N.Y. Sup. Ct. 1815) (holding that a civilian who allegedly was an enemy spy exciting mutiny and insurrection during a war could not be detained by the U.S. military for trial in a military tribunal); YOO, supra note 37, at 113. Spying is a crime against the state or “pure political offense” for which extradition is not allowed. See, e.g., \textit{PAUST, BASSIOUNI ET AL., supra note 34, at 332-33, 367-69.}

207. \textit{See, e.g., Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006) (ruling that neither the old UCMJ nor the “law of war supports trial by this commission for the crime of conspiracy”); id. at 2778-79 (“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 theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war. These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and \textit{during}, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission.”); id. at 2780-81 (“The crime of ‘conspiracy’ has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.” (footnote omitted)); id. at 2782 (“If anything, \textit{Quirin} supports Hamdan’s argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the \textit{completion} of an offense; it took seriously the saboteurs’ argument that there can be no violation of a law of war—at least not one triable by military commission—without the actual commission of or attempt to commit a ‘hostile and warlike act.’”); id. at 2783 (“Winthrop confirms this understanding . . . when he emphasizes that ‘overt acts’ constituting war crimes are the only proper subject at least of those military tribunals not convened to stand in for local courts.” (citation omitted)); id. at 2784-85 (“Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. . . . [N]one of the major treaties governing the law of war identifies conspiracy as a violation thereof. . . . As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that ‘[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.’” (alteration in original) (quoting \textit{Telford Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir} 36 (1992))).

208. \textit{See supra text accompanying notes 147-48, 151.}
based on a charge of attempted war crimes. Although certain forms of terrorism violate the laws of war, the definition of terrorism in the Military Commissions Act is ridiculously overbroad. For example, instead of using a common sense and objective definitional factor involving the need for a "terror" outcome, terrorism is defined in the Act to merely require conduct calculated to "influence or affect . . . by intimidation or coercion" of any sort and with any type of outcome. One portion of the definition merely requires that the purpose of the listed conduct be "to retaliate against government conduct," thereby requiring no outcome of intimidation or coercion, much less terror. In contrast, an objective and common sense definition of terrorism must contain the element of terror outcome.

What resonates from the efforts over the last five years to tailor special military tribunals and their procedures for prosecution of certain aliens is the overall goal of supporting convictions. None of the specially constituted tribunals envisioned by the executive or Congress, or the changes in their rules of evidence and procedure from those of courts-martial, were designed to enhance fairness. It is possible to avoid some of the violations of international law that would occur and possible criminal and civil liability if language in the Military Commissions Act was followed (1) by interpreting the Act consistently with international law wherever possible, and (2) by recognizing the primacy of relevant treaty law in any event because there was no clear and unequivocal expression of congressional intent to override treaties. Nevertheless, serious constitutional problems would remain with respect to the creation of military commissions outside an actual theater of war or war-related occupied territory and outside the time of an actual war.

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209. See, e.g., Geneva Civilian Convention, supra note 36, art. 33; Protocol I, supra note 172, art. 51; TRIALS OF WAR CRIMINALS, supra note 198, at 21, 1031 (recognizing Hitler's use of secret trials with the "purpose of terrorizing the victims' relatives and associates"); id. at 1058-59 ("The IMT held that the Hitler . . . decree was 'a systematic rule of violence, brutality, and terror,' and was therefore a violation of the laws of war as a terroristic measure. . . . This secrecy of the proceedings was a particularly obnoxious form of terroristic measure . . . .").
211. Id.
212. See, e.g., G.A. Res. 49/60, supra note 14, ¶ 3 (declaring as unjustifiable all "criminal acts intended or calculated to provoke a state of terror . . . for political purposes"); PAUST, BASSIOUNI ET AL., supra note 34, at 997, 1004-05; Paust, supra note 14, at 701, 703-05; see also 17 OXFORD ENGLISH DICTIONARY 820 (2d ed. 1989) (defining terror as "[t]he state of being terrified or greatly frightened; intense fear, fright, or dread").
213. See supra note 89.
VII. CONCLUSION

Finally, I agree with a statement by General Lennox that this country must not engage in inhumane treatment.\textsuperscript{214} More generally, war crimes policies and authorizations are not merely a threat to constitutional government and our democracy. They degrade our military,\textsuperscript{215} place our soldiers in harms way, thwart our mission, and deflate our authority abroad. They can embolden an enemy, serve as a terrorist recruitment tool, and fulfill other terrorist ambitions.

\textsuperscript{214} General Lennox made the remarks during the West Point Conference.
