REVISITING *HAMDAN V. RUMSFELD*'S ANALYSIS OF THE LAWS OF ARMED CONFLICT

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In Hamdan v. Rumsfeld, the Supreme Court carried forward the international legal debate over the nature and regulation of armed conflicts between state and non-state actors that go beyond the territory of the state. According to the prevailing interpretation of the Hamdan decision held by both scholars and the current Administration, the Court identified such conflicts as armed conflicts not of an international character, which are governed by Common Article 3 of the Geneva Conventions. One of the implications of this interpretation is that al Qaeda detainees are entitled only to the minimal protections enshrined in Common Article 3. This Article challenges this interpretation by arguing that the Court deliberately avoided determining both the nature of the conflict in which the petitioner was captured and the nature of the applicable legal regime. While the Court indeed applied Common Article 3 to this conflict, it regarded Common Article 3 as a minimum rather than necessarily as an exhaustive legal regime. The boundaries that the Court marked for future debate are therefore much wider than understood by many thus far. The Article ends with a call to the Administration to revisit its interpretation of the decision and consider whether al Qaeda detainees are legally entitled to further protections beyond those afforded in Common Article 3.

INTRODUCTION

One of the most troubling post-September 11th questions for states and international law scholars has been the classification and regulation of ongoing hostilities between state and non-state actors that amount to armed conflict and extend beyond the territory of the state.[1] States and scholars argue that

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[1] The conflict between the United States and al Qaeda is one example of such hostilities. The recent conflict between Israel and the Hezbollah, which took place in both Israeli and Lebanese territory in the summer of 2006, is another. Scholars have suggested the term "extra-state hostilities" to describe armed

traditional concepts of the laws of armed conflict, distinguishing between inter-state and intra-state armed conflicts[2] and subjecting them to distinct legal regimes,[3] no longer capture the entire spectrum of armed conflicts witnessed today. Traditional concepts are inadequate in meeting the challenges posed by new global realities.[4]

In the recent decision of *Hamdan v. Rumsfeld*,[5] which considered the legality of the military commissions established by the Administration to try

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conflicts of such nature. *See* Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need For a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 1–5 (2004).

2 Throughout this Article, I prefer the use of the term "inter-state armed conflict" over "international armed conflict" and "intra-state armed conflict" over the more traditional terms "armed conflict not of an international character" or "non-international armed conflict." The former terms help to sharpen the distinction between the factual nature of an armed conflict and the legal regime applicable to it, a distinction that the latter tend to blur. *See* Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EUR. J. INT'L L. 721, 747–48 (2004) (pointing at another advantage of the terminology used here, as "it becomes clear that inter-state and intra-state armed conflicts do not cover the field of all possible armed conflicts."); Schöndorf, *supra* note 1, at 1 n.2. This sensibility is particularly important for purposes of the discussion here, since the Court in *Hamdan v. Rumsfeld* broadens the traditional scope of the term "armed conflict not of an international character" to include armed conflicts other than intra-state ones. *See infra* Section II.

3 The legal regime governing inter-state armed conflicts is codified primarily in the four Geneva Conventions of 1949 [hereinafter the Geneva Conventions]. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31[hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Most relevant to the discussion here is Geneva Convention III. Article 2, common to all four Geneva Conventions [hereinafter Common Article 2], provides that they apply to "all cases of . . . armed conflict which may arise between two or more of the High Contracting Parties" (as well as to "all cases of partial or total occupation of the territory of a High Contracting Party"). The Geneva Conventions were supplemented by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The United States is not a party to Additional Protocol I.

The legal regime governing intra-state armed conflicts is codified primarily in Article 3 common to all four Geneva Conventions [hereinafter Common Article 3]. Common Article 3 provides for minimal obligations that apply to the parties to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Common Article 3 was supplemented by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. The United States is not a party to Additional Protocol II.

4 *See*, *e.g.*, Christopher Greenwood, *International Law and the 'War Against Terrorism'*, 78 INT'L AFF. 301, 301 (2002); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 2 (2002); Stein Tønnesson & Jozef Goldblat, *A 'Global Civil War'?*, 33 SECURITY DIALOGUE 389, 389 (2002); Schöndorf, *supra* note 1, at 1–4.

5 Hamden v. Rumsfeld, 126 S. Ct. 2749 (2006).

non-U.S. citizens captured in the context of United States' "War Against Terrorism,"[6] the Supreme Court made a significant contribution to this debate. Although the thrust of the decision rests on U.S. law, the Court also engaged in a profound analysis of the laws of armed conflict and made several important observations relevant to the nature and regulation of armed conflicts between state and non-state actors that go beyond the territory of the state.[7] On the basis of this analysis, a majority of the Court concluded that the military commissions lack power to proceed, as their structure and procedures violate both U.S. law and the Geneva Conventions.[8]

The prevailing reading of both scholars and, more significantly, the Administration of *Hamdan*'s analysis of the laws of armed conflict has been three-fold: first, the Court concluded that there is an armed conflict between the United States and al Qaeda; second, the armed conflict is not of an international character; and, third, this conflict is governed by Common Article 3 of the Geneva Conventions.[9] For example, in a memorandum issued shortly after the *Hamdan* decision and addressed to the senior echelon of the Department of Defense and the U.S. Armed Forces, Deputy Secretary of Defense Gordon England noted that "[t]he Supreme Court has determined that Common Article 3 . . . applies as a matter of law to the conflict with Al

[6] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[7] *See Hamdan*, 126 S. Ct. at 2794-96 (2006).

[8] *See id*. at 2798.

[9] *See*, *e.g.*, Julian G. Ku & John C. Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 189 (2006) ("[T]he Court held that Common Article 3 of the Geneva Conventions applied to the U.S. conflict with al Qaeda . . . . The Court concluded that the war with al Qaeda in Afghanistan . . . qualifies as a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties.'"); Jack M. Beard, *The Geneva Boomerang: The Military Commission Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56, 57 (2007) ("While the full protections of the Third Geneva Convention were not implicated, the Court found common Article 3 to be applicable to the conflict with Al Qaeda because it was a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties.'" (footnotes omitted)); Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEO. WASH. INT'L L. REV. 645, 655 (2006) (reading *Hamdan* as "concluding that the conflict between the United States and al-Qaeda was a non-international armed conflict to which Common Article 3 of the Geneva Conventions applied"); Geoffrey S. Corn, Hamdan*, Fundamental Fairness, and the Significance of Additional Protocol II*, 2006 ARMY LAW. 1, 2 ("[T]he Court then addressed the subsequent predicate issue: whether the armed conflict [between the United States and al Qaeda] fell under the regulatory umbrella of Common Article 3. The Court's answer to this question was, contrary to the assertion of the government, 'yes'."). *But see* John P. Cerone, *Status of Detainees in Non-International Armed Conflict, and Their Protection in the Course of Criminal Proceedings: The Case of* Hamdan v. Rumsfeld, ASIL INSIGHT, July 14, 2006, http://www.asil.org/insights/2006/insights060714.html ("Ultimately, the Court chose not to take a position on whether there were two separate conflicts, and refrained from characterizing the nature of the conflict(s).").

Qaeda."[10] Subsequently, in a message to the Congress upon transmittal of the draft Military Commissions Act of 2006, the President explained that "[t]he Act also addresses the Supreme Court's holding that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda."[11] This understanding of the Court's ruling may obviously have far-reaching practical implications, as demonstrated in a recent comment by John Bellinger, the Legal Adviser to the Secretary of State:

> The U.S. Supreme Court has decided that the U.S. conflict with al Qaida is governed by Common Article 3. Because the Court had found that the conflict with al Qaida is not one between nations, but instead a Common Article 3 conflict, al Qaida detainees are not entitled to POW [prisoner-of-war] protections under the Third [Geneva] Convention.[12]

This Article questions this common reading of *Hamdan*. By carefully and critically reading the fewer than four pages of the Majority Opinion in which the Court discussed the applicability of the Geneva Conventions, I seek to ascertain what has been decided by the Court and, perhaps even more importantly, what has been left open for future debate. I argue that, while the Court applied Common Article 3 to the conflict(s) in Afghanistan, it did not determine the nature of the conflict(s), nor did it exhaustively determine the applicable legal regime. Therefore, the boundaries that the Court marked for future debate are much wider than commonly understood thus far. As a result, the Administration's embracing of Common Article 3 as the exhaustive legal regime governing the conflict with al Qaeda and the detention of individuals captured in the course of this conflict may prove to be premature.

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[10] Memorandum from Gordon England, Deputy Sec'y of Def., to Sec'ys of the Military Dep'ts et al. 1 (July 7, 2006), http://www.defenselink.mil/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf [hereinafter England Memorandum].

[11] Press Release, George W. Bush, President, President's Message to the Congress of the United States (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-4.html.

[12] Unlawful Enemy Combatants, Posting of John Bellinger to Opinio Juris, http://www.opiniojuris.org/posts/1169000173.shtml (Jan. 17, 2006, 06:01 EST). On another occasion, in response to a question about the U.S. interpretation of the *Hamdan* decision, Bellinger said: "[T]he Supreme Court has held that the armed conflict with al Qaida is not a conflict between states, and that the conflict is governed by Common Article 3 . . . the Administration reads the *Hamdan* decision to accept that the U.S. is in an armed conflict and therefore that the laws of war are appropriate to apply but that the armed conflict is not of an international character." Armed Conflict with Al Qaida: A Response, Posting by John Bellinger to Opinio Juris, http://www.opiniojuris.org/posts/1169001063.shtml (Jan. 17, 2006, 20:43 EST). Editor's note: The organization is sometimes translated "al Qaida" and sometimes "al Qaeda." The Article uses "al Qaeda" except when direct quotations use the other form.

I. BACKGROUND

In 2001, militia forces in Afghanistan captured Salim Ahmed Hamdan, the petitioner, during the hostilities that erupted with the U.S. invasion.[13] The militia forces turned him over to the U.S. military, which transported him in 2002 to the detention facility in Guantanamo Bay.[14] In 2003, the President determined that "there is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States."[15] Accordingly, he was designated for trial before a military commission (the "military commission").[16] Hamdan filed habeas corpus and mandamus petitions, challenging the authority of the military commission to try him on two grounds: first, the military commission, whose substantive authority was limited to violations of the law of war, lacked authority to try the offence of conspiracy with which Hamdan was charged; second, the procedures followed by the military commission violated basic principles of military and international law, including the defendant's right to see and hear the evidence against him.[17]

The District Court for the District of Columbia granted in part Hamdan's petition for habeas corpus and stayed the commission's proceedings.[18] It concluded that, according to Geneva Convention III, Hamdan was entitled to prisoner-of-war status unless, as required by Article 5 of the Convention, a competent tribunal decided otherwise.[19] In addition, the District Court found that the military commission violated the Uniform Code of Military Justice[20] (UCMJ) as military commission procedures permitted the exclusion of the accused from commission sessions and the withholding of evidence from him.[21] The Court of Appeals for the District of Columbia reversed, concluding that Geneva Convention III was not "judicially enforceable"[22] and that, in any event, it did not apply to Hamdan.[23] The Court of Appeals further decided that

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[13] *Hamdan*, 126 S. Ct. at 2759.

[14] *Id.*

[15] Press Release, Dep't of Def., President Determines Combatants Subject to His Military Order (July 3, 2003), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=5511.

[16] *Hamdan*, 126 S. Ct. at 2760.

[17] *Id*. at 2759.

[18] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173–74 (D.D.C. 2004).

[19] *Id*. at 160–62, 165.

[20] 10 U.S.C. § 801 *et seq.* (2000 & Supp. III 2003).

[21] *Hamdan*, 344 F. Supp. 2d at 166–72.

[22] Hamdan v. Rumsfeld, 415 F.3d 33, 39–40 (D.C. Cir. 2005).

[23] *Id*. at 40–42.

the military commission violated neither the UCMJ nor the U.S. Armed Forces regulations intended to implement the Geneva Conventions.[24]

II. *HAMDAN*'S ANALYSIS OF THE LAWS OF ARMED CONFLICT

After rejecting several jurisdictional arguments raised by the government, the Supreme Court moved to examine the legality of the military commission.[25] The Court left unresolved whether the President maintains inherent constitutional powers to convene military commissions absent congressional authorization. A determination of this question could be avoided as the Court had already decided in *Ex parte Quirin*[26] that such congressional authorization could be read in Article 15 (Article 21 today) of the UCMJ under circumstances of "controlling necessity."[27] In any event, when the President convenes military commissions, he must comply with the limitations set by Congress in the UCMJ, notwithstanding the Authorization for Use of Military Force of 2001[28] and the Detainee Treatment Act of 2005.[29,30]

The Court found such limitations in Article 21 of the UCMJ, which provides that the UCMJ is not intended to deprive the jurisdiction of military commissions "with respect to offenders or offenses that by *statute* or by the *law of war* may be tried by military commissions."[31] As no statute directly regulates the operation of military commissions, the Court relied on the reference to the "law of war" to examine the legality of the rules specified for Hamdan's trial against the laws of armed conflict.[32] In its discussion of the "law of war," the Court made several interesting conclusions regarding how to classify the conflict with al Qaeda and which international legal regime should govern it.[33]

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[24] *Id*. at 42–43.

[25] *Hamdan*, 126 S. Ct. at 2775.

[26] *Ex parte* Quirin, 317 U.S. 1 (1942).

[27] *Hamdan*, 126 S. Ct. at 2774.

[28] Authorization for Use of Military Force 50 U.S.C. § 1541 (2006).

[29] Detainee Treatment Act of 2005, 10 U.S.C. § 801 (2006).

[30] *See Hamdan*, 126 S. Ct. at 2774 & n.23, 2775, 2786.

[31] 10 U.S.C. § 821 (2006) (emphases added).

[32] *See Hamdan*, 126 S. Ct. at 2794 (stating that "compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the UCMJ] is granted").

[33] Another limit on the President's powers to establish military commissions is the "uniformity principle" in Section 36(b) of the UCMJ; Section 36(b) requires that the rules of procedure promulgated by the President for military commissions be the same as those applied to courts-martial unless such uniformity proves impracticable. *See* 10 U.S.C. § 836(b) (2006). The Court concluded that some of the procedures specified for Hamdan's military commission—particularly those permitting exclusion of the accused from the proceedings,

The Court first addressed the question of whether the Geneva Conventions apply to the conflict during which Hamdan was captured. The Court of Appeals accepted the Administration's position that the conflict in Afghanistan was composed of two distinct armed conflicts: one between the United States and the Taliban (fighting on behalf of Afghanistan), and one between the United States and al Qaeda.[34] The Geneva Conventions applied to the former by virtue of Common Article 2, as Afghanistan was a state party to the Geneva Conventions.[35] However, they did not apply to the latter, as al Qaeda was a non-state actor (thus excluded from Common Article 2, dealing with "cases of . . . armed conflict which may arise between two or more of the High Contracting Parties") and the conflict with it was "international in scope" (thus excluded from Common Article 3, which has been interpreted to concern intra-state armed conflicts only, given its reference to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties").[36] Since Hamdan's capture was in the context of the conflict with al Qaeda, the Court of Appeals decided that he was not entitled to the protections afforded to detainees by the Geneva Conventions.[37]

The Supreme Court also appeared to acknowledge that the applicable international legal regime for a given armed conflict depends on its classification into one of the traditional categories of inter-state or intra-state armed conflict.[38] However, contrary to previous readings of *Hamdan* by several commentators and by the Administration,[39] the Court reserved its position on the nature and classification of the conflict in which Hamdan was

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denial of his access to evidence in certain circumstances, and admission of any evidence that "would have probative value to a reasonable person" (including testimonial hearsay and evidence obtained through coercion)—are illegal, for they deviate in many significant respects from the rules applied by courts-martial without showing any impracticability that prevents applying the latter. *Hamdan*, 126 S. Ct. at 2786–87, 2790–93.

[34] *See Hamdan*, 415 F.3d at 41–42.

[35] *See id.*

[36] *See id.*

[37] *Id.* Judge Williams, in a concurring opinion, also accepted that the United States' conflicts with the Taliban and al Qaeda were distinct. *See id.* at 44 (Williams, J., concurring). However, he rejected the conclusion regarding the inapplicability of Common Article 3 to the conflict with al Qaeda. Interpreting the language "international character" as referring to the nature of the parties to the conflict (rather than to its location), Judge Williams concluded that a conflict "not of an international character" was a conflict between a state and a non-state actor. Judge Williams read Common Article 3 as a "gap-filler," providing "some minimal protection" for those not eligible under Common Article 2 for the protections of Geneva Convention III, such as "al Qaeda personnel captured in the conflict in Afghanistan." *Id.*

[38] The Court agreed with the Court of Appeals, without any explicit deliberations, that the conflict during which Hamdan was captured amounted to an armed conflict. *See Hamdan*, 126 S. Ct. at 2794.

[39] *See supra* notes 9–12 and accompanying text.

captured. Whether the conflict in Afghanistan constituted a single armed conflict or a combination of two simultaneous armed conflicts is left open, as is the classification of such conflict(s) under international law.[40]

While circumventing a conclusive resolution of the nature and classification of the armed conflict in which Hamdan was captured, the Court made two interpretative moves that allowed it to invalidate the military commission for its non-compliance with even the minimal standards of Common Article 3. First, the Court adopted a residual view of Common Article 3 by interpreting it to apply to *any* armed conflict that is not an inter-state armed conflict (and hence does not fall within the ambit of Common Article 2) rather than to intra-state armed conflicts only.[41] Through this interpretation, the Court arguably intended to cover the possibility that the conflict in which Hamdan was captured would be classified as neither an inter-state nor an intra-state armed conflict. The protections enshrined in Common Article 3 would still apply. Second, the Court regarded the protections of Common Article 3 as "minimal protection," falling short of the "full protection" afforded to individuals involved in inter-state armed conflicts.[42] By doing so, the Court intended to cover the possibility that Hamdan would be deemed to have been captured in the context of an inter-state armed conflict. If the military commission is in violation of Common Article 3, it is unavoidably also in violation of the rules applicable to inter-state armed conflicts. These two interpretative moves are discussed in greater detail in the following paragraphs.

A. First Interpretative Move—Residual View of Common Article 3

The first interpretative move—the adoption of a residual view of Common Article 3—is based primarily on textual interpretation of this article. The Court interpreted "armed conflict not of an international character" as bearing

[40] Note the elusive language that the Court uses in order to evade any classification of the conflict(s) in Afghanistan. For example, the Court alludes to "the armed conflict during which Hamdan was captured." *Hamdan*, 126 S. Ct. at 2794. Also, the Court states that "there is at least one provision of the Geneva Conventions that applies *here* . . . even if the *relevant conflict* is not one between signatories." *Id*. at 2795 (emphases added). In result, "Common Article 3, then, is applicable *here*." *Id*. at 2796 (emphasis added). Any definite expressions, such as "the conflict with al Qaeda," are carefully avoided. Justice Kennedy, though, was less cautious in his opinion, referring to "our Nation's armed conflict *with al Qaeda* in Afghanistan" and to "our Nation's armed conflict *with the Taliban* and *al Qaeda*—a conflict that continues as we speak." *Id*. at 2802, 2804 (Kennedy, J., concurring in part) (emphases added).

[41] *Id*. at 2795–96.

[42] *Id*. at 2796.

"its literal meaning" and capturing *any* armed conflict that is not between two or more states, which would be beyond the scope of Common Article 2.[43] By interpreting the scope of Common Article 3 so broadly, the Court moved away from a traditional interpretation of the Article 3, which was to regulate intra-state armed conflicts.[44] Indeed, the Court acknowledged that "an important purpose" of Common Article 3 is to furnish minimal protection to rebels in civil wars, but concluded that the scope of this Article is wider.[45] Given that this broad interpretation of Common Article 3 responds directly to the Administration's argument that the conflict between the United States and al Qaeda is excluded from Common Article 3 as "international in scope,"[46] the Court's interpretation should be read as specifically encompassing armed conflicts between state and non-state actors that go beyond the territory of the state as well.[47] As mentioned, the Court's interpretative move ensured that, even if the conflict of Hamdan's capture was classified neither as an inter-state armed conflict (covered by Common Article 2) nor as an intra-state armed

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43 *See id.*

44 *See id.*

45 *Id.* To support this conclusion the Court quoted from the International Committee of the Red Cross Commentary on Geneva Convention III that "the scope of [Common Article 3] must be as wide as possible." *Id.* quoting INT'L COMM. OF THE RED CROSS [ICRC], COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36–37 (Jean S. Pictet gen. ed., A.P. de Heney trans., 1960) [hereinafter GC III COMMENTARY]. However, this quotation is somewhat misleading, as the commentary's call for wide interpretation of Common Article 3 is limited to the context of intra-state armed conflicts, and responded to the suggestion to limit this article's scope to specific situations of intra-state armed conflict. GC III COMMENTARY, *id.* at 36–37.

46 *Hamdan*, 126 S. Ct. at 2795–96.

47 The Court ignored the interpretative difficulty that is created by its broad interpretation of Common Article 3, rendering deficient some of the language of this article. The language of Common Article 3 qualifies its application to situations of armed conflict not of an international character "occurring in the territory of one of the High Contracting Parties." Geneva Convention III, *supra* note 3. Originally, this qualification intended to limit the application of Common Article 3 to intra-state armed conflicts that take place in the territory of states that are parties to the Geneva Conventions only. GC III COMMENTARY, *supra* note 45, at 28–30. This made sense, as the article imposes obligations upon the countries in whose territory the armed conflict occurs. *Id.* at 37–38. However, under the novel interpretation that the Court introduces in *Hamdan*, it is unclear why the prerequisite of being a party to the Geneva Conventions should apply to the host state—that is not necessarily a party to an armed conflict between a third state and a non-state actor that takes place in its territory (e.g., the conflict between Israel and Hezbollah that took place in Lebanon in Summer 2006)—rather than to the state that is actually a party to the armed conflict and hence is in a position to effectively ensure respect of Common Article 3 obligations. Admittedly, with the broad adoption of the Geneva Conventions (194 state parties as of March 8, 2007), this interpretative difficulty is more theoretical than practical today. ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties* 1–11 (Oct. 22, 2007), http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf. Nonetheless, engaging in an interpretative move, particularly a textual one, the Court could have been expected to address this difficulty.

conflict (covered by Common Article 3), it would still be subject to Common Article 3.

Given the consequences of the Court's broad interpretation of the scope of Common Article 3, the Court's minimal support of its view beyond the literal interpretation of the phrase "not of an international character" is surprising. Moreover, even the little support that the Court provided is unsatisfactory. Without taking any position on the merits of such broad interpretation, there are several flaws in the Court's reasoning. For example, the Court's treatment of the drafting history of Common Article 3 seems somewhat deficient. The Court suggested that the omission of references to specific situations of intra-state armed conflicts from the final text of Common Article 3 supports a broad reading of the article's scope, such that it is not limited to intra-state armed conflicts.[48] However, from the outset of the negotiations, Common Article 3 was intended to apply to intra-state armed conflicts only.[49] The debates among draftspersons over its scope did not result from the position of some that it should extend also to situations that go beyond the territory of a single country.[50] Rather, the draftspersons were driven by the concern of some states that the article would be read as encompassing *internal* exigencies that do not amount to armed conflicts (such as "plain brigandage") and hence do not justify interference with the internal affairs of the respective state.[51] Therefore, Common Article 3's omission of references to particular types of intra-state armed conflicts during the drafting negotiations should not be regarded as support to broaden the article's scope to include armed conflicts not confined to the territory of the state that is party to the conflict.

The Court's reliance on the official commentaries of the International Committee of the Red Cross is also questionable. In a footnote, the Court quoted from the commentary on Common Article 3 that "[i]ts observance does not depend upon preliminary discussions on the nature of the conflict," which seems to suggest that the scope of this article is not limited to intra-state armed

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

49 GC III COMMENTARY, *supra* note 45, at 29–34.

50 *Id*. at 30–34.

51 *See id.* at 30–33, 36–37; David A. Elder, *The Historical Background of Common Article 3 of The Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. 37, 41–54 (1979) (reviewing the drafting history of Common Article 3). The official commentary of the International Committee of the Red Cross concludes: "[T]he conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, *but take place within the confines of a single country*." GC III COMMENTARY, *supra* note 45, at 37 (third emphasis added).

conflicts.[52] However, read in its original context, this assertion relates only to intra-state armed conflicts and is apparently intended to clarify that Common Article 3 applies to all cases of intra-state armed conflict, regardless of their specific nature.[53] The Court further cited a passage from the Commentary on Geneva Convention IV[54] stating that "nobody in enemy hands can be outside the law," thus suggesting that persons captured in the course of an armed conflict are covered by the Geneva Conventions regardless of the nature of the armed conflict.[55] This assertion may be true, but the quotation brought to buttress it originally refers to *inter*-state armed conflicts only.[56] In the context of interpreting Article 4 of Geneva Convention IV, which defines the category of persons protected by the Convention, the Commentary clearly indicates that a person captured during an inter-state armed conflict is either a prisoner of war covered by Geneva Convention III, a civilian covered by Geneva Convention IV, or a member of the medical personnel of the armed forces covered by Geneva Convention I.[57] No reference is made to persons captured by the enemy in the context of conflicts other than inter-state armed conflicts.[58] Moreover, this quotation could run contrary to the Court's traditional jurisprudence, which acknowledges the status of "unlawful combatants," who, as commonly understood, are entitled neither to prisoner-of-war status nor to the status of a "protected person."[59]

Finally, the Court's reference to previous international judicial practice to support its interpretation of Common Article 3 is somewhat disconcerting. The Court read the decision of the International Court of Justice (ICJ) in *Nicaragua*[60] and the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadic*[61] as applying Common Article 3 to armed

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52 *Hamdan*, 126 S. Ct. at 2796 n.63.

53 GC III COMMENTARY, *supra* note 45, at 34–35.

54 Geneva Convention IV, *supra* note 3.

55 *Hamdan*, 126 S. Ct. at 2796 n.63.

56 INT'L COMM. OF THE RED CROSS [ICRC], COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet gen. ed., Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter GC IV COMMENTARY].

57 *See id.*

58 *See id.* at 45–51.

59 *Id.* at 50. For a recent affirmation of this jurisprudence *see* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (stating that "the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942))).

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

61 Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

conflicts other than intra-state armed conflicts.[62] The Court thus implied that this article applies to any armed conflict, regardless of its nature.[63] Nonetheless, several substantial distinctions between the interpretation of Common Article 3 in *Hamdan* and its readings in *Nicaragua* and *Tadic* should be highlighted. While the Court in *Hamdan* read Common Article 3 as applying directly, *as a matter of treaty law*, to situations other than intra-state armed conflicts (such as armed conflicts between state and non-state actors that go beyond the territory of the state), the decisions in *Nicaragua* and *Tadic* apply only the *rules* of Common Article 3 as embodied in "fundamental general principles of humanitarian law" or "customary international law," respectively, to *inter*-state armed conflicts.[64] Thus, *Hamdan* goes much further than previous international judicial practice.

B. Second Interpretative Move—Common Article 3 as Setting a Floor of Minimal Protections

The Court's second interpretation covers the possibility that Hamdan could be classified as captured during an inter-state armed conflict.[65] Such a possibility could materialize if, for example, the conflict with al Qaeda were regarded as incidental to the armed conflict with Afghanistan.[66] The Court

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[62] *Hamdan*, 126 S. Ct. at 2796 n.63.

[63] *See id.*

[64] *Military and Paramilitary Activities*, 1986 I.C.J. at 113 (stating that "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law . . . . [I]n the event of *international* armed conflicts, these [Article 3] rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts . . . . The Court may therefore find them applicable to the present dispute." (emphasis added)); *Tadic*, Case No. IT-94-1 at ¶ 102 (stating that "[s]tates specified certain minimum mandatory rules applicable to *internal* armed conflicts in common Article 3 . . . . 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." (emphases added)).

[65] The District Court espoused this position. *Hamdan*, 344 F. Supp. 2d at 160–61 (stating that the "language [of Article 2 of Geneva Convention III] covers the hostilities in Afghanistan . . . . Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan . . . , the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with.").

[66] Several major human rights organizations, such as Human Rights Watch and Amnesty International, have taken this position. *See* Schöndorf, *supra* note 1, at 17 n.55. In the specific context of the *Hamdan* proceedings, the potential of finding Hamdan to have been captured in the context of an inter-state armed conflict due to his affiliation with the Taliban was raised in a brief submitted by professors of law and public policy as amicus curiae supporting reversal. *See* Brief of Professors Ryan Goodman, Derek Jinks, and Anne-Marie Slaughter as Amicus Curiae Supporting Reversal (Geneva-Applicability) at 5, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53970.

seemed to regard the difference between Common Article 2 (and the rest of the terms of the Geneva Conventions) and Common Article 3 not as a difference in kind, but rather in degree; the latter represents a floor of "minimal protection," while the former represents "full protection" to individuals involved in armed conflicts.[67] The Court stated that:

> Common Article 3, by contrast [to Common Article 2], 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.[68]

Viewing the Common Article 3 protections as included in the protections afforded to individuals involved in inter-state armed conflicts allowed the Court to conclude that:

> We need not decide the merits of this argument [namely, the Administration's argument that '[s]ince Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda . . . is not a . . . signatory of the Conventions, the protections of those Conventions are not . . . applicable to Hamdan'] because there is *at least* one provision of the Geneva Conventions that applies here *even if* the relevant conflict is not one between signatories [namely, Common Article 3].[69]

And although the Court did not explicitly say so, the underlying premise suggests that military commissions that are incompatible with the requirements of Common Article 3 will necessarily violate other provisions of the Geneva Conventions regulating inter-state armed conflicts as well.

However, the Court's perception of the relationship between Common Article 2 and Common Article 3 remains unclear, particularly whether it regards them as mutually exclusive or as simultaneously applicable to inter-state armed conflicts. On the one hand, the application of Common Article 3, as a matter of treaty law, to inter-state armed conflicts is difficult to plausibly argue given its clear language ("armed conflicts not of an international

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67 *Hamdan*, 126 S. Ct. at 2796. A similar perspective is taken by the International Committee of the Red Cross. *See* GC III COMMENTARY, *supra* note 45, at 38 ("The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For 'the greater obligation includes the lesser', as one might say.").

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

69 *Id*. at 2795 (emphases added).

character") and traditional interpretation.[70] On the other hand, although the Court quoted from *Nicaragua* and *Tadic*, it did not reiterate their observation that the rules of Common Article 3 represent customary international law applicable to both intra-state and inter-state armed conflicts and could therefore be used as a yardstick to assess the legality of measures (such as the military commission) whether in the context of inter-state or intra-state armed conflicts.[71] The Court further refrained from demonstrating how the specific rules of Common Article 3 at stake here (i.e., the requirement for a "regularly constituted court affording all judicial guarantees" contained in Article 3(1)(d)) are actually embodied in the comparable rules applicable to inter-state armed conflicts.[72] Instead, the Court focused only on an analysis of Common Article 3, and the Court's language suggested that this article directly applies, as a matter of treaty law, regardless of the actual nature of the conflict in which Hamdan was captured.[73]

Concluding that at least Common Article 3 applies to Hamdan, the Court then considered whether the military commission complies with the requirements of this Article and found that it does not.[74] The Court read Common Article 3's requirement for a "regularly constituted court, affording all judicial guarantees" to mean "the courts-martial established by congressional statutes" in the context of the U.S. legal system.[75] And since the structure of the military commission, as well as its rules of procedure, deviate

[70] *See*, *e.g.*, GC III COMMENTARY, *supra* note 45, at 34 ("Article 3 . . . applies to non-international conflicts only").

[71] *See supra* note 64 and accompanying text.

[72] In other words, if Common Article 3 sets minimal protections that apply to any armed conflict, including to inter-state armed conflicts, then we should expect to find a requirement comparable to that of Article 3(1)(d) in the laws regulating detention of persons in the context of inter-state armed conflicts. With respect to prisoners of war, such a comparable requirement can perhaps be found in Geneva Convention III, *supra* note 3, at art. 102 (stating that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."). However, as mentioned, the Court refrained from referencing this or any other article.

[73] *Hamdan*, 126 S. Ct. at 2795–96 (stating that "there is at least one provision of the Geneva Conventions [i.e., Common Article 3] that *applies here* even if the relevant conflict is not one between signatories . . . . Common Article 3, then, is *applicable here*." (emphases added)).

[74] *See generally id.* at 2796–98.

[75] *Id.* at 2797. Article 3(1)(d) prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" with respect to "[p]ersons taking no active part in the hostilities, including members of armed forces . . . placed '*hors de* combat' by . . . detention." Geneva Convention III, *supra* note 3, at art. 3(1)(d).

from those of courts-martial for no practical reasons,[76] the Court concluded that the military commission violates Common Article 3.[77]

III. *HAMDAN*'S IMPLICATIONS FOR FUTURE DEBATE

As shown above, the *Hamdan* Court did not conclusively define the nature of the conflict with al Qaeda, nor did it fully determine the legal regime that governs it. What are the implications of this cautious judicial approach for future debate? The Court left several possibilities open. One possibility is that the conflict with al Qaeda is part of a single *inter*-state armed conflict between the Unites States and Afghanistan. In that case, the status of individuals captured in the course of the conflict, such as Hamdan himself, should be determined on the basis of the criteria for prisoner-of-war status found in Article 4 of Geneva Convention III.[78] Indeed, the Court reserved Hamdan's argument that "his potential status as a prisoner of war independently renders illegal his trial by military commission," given the holding that he may not be tried by this commission in any event.[79]

Another possibility left open by the Court is that Hamdan was captured during an armed conflict between the United States and al Qaeda that is neither an inter-state nor an intra-state armed conflict. Arguably, the Court left room for future acknowledgement of a new type of armed conflict, between states and non-state actors that takes place, at least in part, outside the territory of the respective state. At least two indications in the *Hamdan* decision may support this argument. First, as mentioned above, the Court broadly interpreted Common Article 3's scope to include situations of armed conflict that do not fall into the traditional category of intra-state armed conflicts.[80] If the Court merely wanted to leave open the question of whether Hamdan was captured in an inter-state or intra-state armed conflict, it could have followed in the

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[76] *See supra* note 33.

[77] *Hamdan*, 126 S. Ct. at 2796–97. A plurality of the Court further concluded that the rules of procedure applied by the military commission, which permitted exclusion of the accused from commission sessions and the withholding of evidence from him, failed to satisfy Common Article 3's requirement to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id*. at 2797–98 (Stevens, J., Souter, Ginsburg, & Breyer, JJ., concurring). Justice Kennedy found it unnecessary to decide "whether Common Article 3's standard . . . necessarily requires that the accused have the right to be present at all stages of a criminal trial," given the earlier conclusion that the military commission was unauthorized under the UCMJ. *Id*. at 2809 (Kennedy, J., concurring in part).

[78] *See* Geneva Convention III, *supra* note 3, art. 4.

[79] *Hamdan*, 126 S. Ct. at 2795 n.61.

[80] *See supra* text accompanying notes 43–47.

footsteps of the ICJ in *Nicaragua* and the ICTY in *Tadic* and decided the case using the rules of Common Article 3 as a minimum yardstick.[81] From the Court's broad interpretation of Common Article 3, it may appear that the Court wanted to leave open the door to recognition of other types of armed conflicts.[82]

A second indication is the Court's holding that "there is *at least* one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories [i.e., not an inter-state armed conflict]."[83] The potential application of further provisions of the Geneva Conventions to the armed conflict *in addition* to Common Article 3, which is the only Geneva Convention provision applicable to intra-state armed conflicts, suggests that the conflict in which Hamdan was captured was neither an inter-state nor an intra-state armed conflict.

As for the legal rules that regulate this potential new type of armed conflicts, the Court was even less clear. The decision clearly demonstrates that Common Article 2 (and as a result the entire body of the Geneva Conventions) does not apply, at least not as a matter of treaty law, since not all parties to the conflict are states.[84] However, the protections of Common Article 3 apply as a minimum.[85] The question of which protections apply beyond those of Common Article 3, if any, remains open.

CONCLUSION

For the first time since it began hearing the detention cases, the *Hamdan* Court engaged in a meaningful, albeit incomplete, discussion of the laws of armed conflict and their application to the conflict with al Qaeda.[86]

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[81] *See supra* note 64 and accompanying text.

[82] The Court's reluctance to follow *Nicaragua* and *Tadic* may also be explained by the controversial status of customary international law under the Constitution. *See*, *e.g.*, T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 91–99 (2004). According to this explanation, the Court may have preferred an activist and unprecedented treaty interpretation of Common Article 3 over reliance on common interpretation that is based on customary international law.

[83] *Hamdan*, 126 S. Ct. at 2795 (emphasis added).

[84] *See id*. at 2796.

[85] *Id*. at 2795.

[86] *See* Peter J. Spiro, *International Decisions*, Hamdan v. Rumsfeld, *126 S.Ct. 2749*, 100 AM. J. INT'L L. 888, 894–95 (2006) (suggesting that the Court's use of international law sources could be explained by the Court's confidence that "the decision would advance, rather than interfere with, U.S. foreign relations by predictably assuaging international opposition to U.S. detention practices").

Admittedly, the reference to international law is not so daring; the Court did not acknowledge the direct application of the laws of armed conflict—whether codified in international treaties or embodied in customary international law—to the conflict with al Qaeda. Rather, the Court applied the laws of armed conflict only to the extent that they are incorporated in U.S. domestic law, namely, in the UCMJ.[87] The obvious implication of the Court's reliance on congressional authorization to invoke the laws of armed conflict is that such authorization may always be withdrawn. Indeed, Justice Breyer (joined by Justices Kennedy, Souter and Ginsburg) specifically stipulated that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary."[88] And that is exactly what the President did. The Military Commissions Act of 2006 (MCA), passed by Congress shortly after the decision in *Hamdan*, authorizes the establishment of military commissions with similar structure and procedures to those that had been invalidated by the Court.[89]

The discussion of the laws of armed conflict in *Hamdan* is somewhat disappointing for another reason. The key question—whether the detention of alleged al Qaeda combatants is legal under international law—still remains unresolved.[90] Again, the Court did not say more than the specific case directly

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[87] *Id.* at 893. "*Hamdan* is, by its terms, an exercise in statutory construction . . . . Although both customary international law and the Geneva Conventions were material to the result, they came into play only to the extent that the Court deemed Congress to have authorized their adoption." *See id.* "Hamdan is a construction of the UCMJ, not a direct application of the Geneva Conventions of 1949." Samuel Estreicher & Diarmuid O'Scannlain, *The Limits of* Hamdan v. Rumsfeld, 9 GREEN BAG 353, 358 (2006).

[88] *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

[89] Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[90] Some regard this question to have already been resolved in Hamdi v. Rumsfeld, 542 U.S. 507 (2004). *See, e.g.*, *Hamdan*, 344 F. Supp. 2d at 172–73 ("[T]he Supreme Court made it clear, in *Hamdi*, that, whether or not Hamdan has been charged with a crime, he may be detained for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant."); Armed Conflict with Al Qaida?, Posting by John Bellinger to Opinio Juris, http://www.opiniojuris.org/posts/1168811565.shtml (Jan. 15, 2007, 12:01 EST) ("One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities . . . . The Supreme Court explicitly has affirmed in *Hamdi* that the United States had the right to detain enemy combatants in the armed conflict that ensued after our decision to act in self-defense."). However, not only was the *Hamdi* decision based on U.S. constitutional law (rather than international law), it also dealt with a *citizen* (rather than with an alien) detained as an "enemy combatant" for allegedly taking up arms with the *Taliban* (rather than with al Qaeda). See *Hamdi*, 542 U.S. at 516 (stating that "[t]he threshold question before us is whether the Executive has the authority to detain *citizens* who qualify as 'enemy combatants' . . . . We therefore answer only the narrow question before us: whether the detention of *citizens* falling within that definition [of 'enemy combatant'] is authorized." (emphases added).).

entailed.[91] The Court provided only a partial discussion of the laws of armed conflict.

Nonetheless, in substantively discussing the laws of armed conflict, *Hamdan* contributes both to the debate over the status of al Qaeda detainees and to the more general debate over the classification and regulation of armed conflicts between state and non-state actors that go beyond the territory of the state. In this sense, the implications of *Hamdan* transcend the immediate question of the legality of the military commission, as the Court's interpretation of Common Article 3 is valid notwithstanding the Military Commissions Act. Therefore, interpreting the Court's analysis of the laws of armed conflict and assessing its future implications, as this Article tried to do, is a worthwhile endeavor.

Careful study of the portion of the *Hamdan* decision discussing the laws of armed conflict raises some difficult problems, despite its obvious merits. In particular, the Court's reasoning in support of its broad interpretation of Common Article 3's scope is unsatisfactory. Arguably, the Court's analysis may be explained by its reluctance to define the nature of the conflict in which Hamdan was captured and to determine the legal regime governing it. Despite previous readings of *Hamdan*, by scholars as well as by the Administration, these issues are not conclusively determined by the Court but are left for future debate. The Court left unresolved whether the conflict with al Qaeda is part of an inter-state armed conflict, an intra-state armed conflict, or perhaps a third novel category of armed conflicts. The legal regime applicable to the conflict with al Qaeda also remains partially open. The Court concluded only that Common Article 3 applies, *as a minimum*, to this conflict.

Given the reading of *Hamdan* that was suggested here, it may be time for the Administration to revisit its reading of the decision as well. As mentioned, the Administration adopted a very convenient understanding of *Hamdan*. What the Court saw as a minimum applicable to Hamdan, the Administration interpreted as an exhaustive regime.[92] This position is not surprising. The protections afforded by Common Article 3 set a very low bar and essentially do not impose any new obligations on the Administration or require any

[91] *Hamdan*, 126 S. Ct. at 2798 (noting that "Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm" (i.e., great harm and even death to innocent civilians) that would be expected if Hamdan were given the opportunity to act upon his beliefs).

[92] *See supra* notes 9–12 and accompanying text.

changes in its pre-*Hamdan* policy (with the exception of the military commission).[93] However, in the wake of *Hamdan*, the onus rests on the Administration to consider whether Hamdan and others in similar situations are entitled to further protections, by virtue of having been captured in the context of an inter-state armed conflict or a new type of an armed conflict. As shown above, both these options have been left open by the *Hamdan* decision. The approval of the Military Commissions Act, which stripped federal courts of their jurisdiction to hear habeas and other petitions filed by alien enemy combatants,[94] and the recent decision of the Court of Appeals for the District of Columbia, which upheld the constitutionality of this act,[95] have lessened the chances for the Supreme Court to review the Administration's interpretation of *Hamdan*. Nevertheless, these developments do not relieve the Administration of this onus.

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[93] Indeed, in the memorandum of Deputy Secretary of Defense England that was mentioned above, he observes: "It is my understanding that, aside from the military commission procedures, existing DoD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3." England Memorandum, s*upra* note 10, at 1.

[94] Military Commissions Act of 2006 (MCA) § 7(a), Pub. L. No. 109-366, 120 Stat. 2600 (2006). Section 7(a) of the Military Commissions Act removes the jurisdiction of any "court, justice, or judge" to hear habeas corpus petitions or other detention-related actions brought by any alien detained by the United States who has been determined to have been properly detained as an enemy combatant or is awaiting such determination (with the exception of the District of Columbia Circuit's exclusive jurisdiction to hear challenges to final determinations of status review by the Combatant Status Review Tribunal and to decisions of the military commissions). *Id*. Following the decision in *Hamdan*, Section 7(b) makes sure to clarify that this removal of jurisdiction applies retroactively to all cases of detention since September 11, 2001, including pending ones. *See id*. § 7(b).

[95] *See* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007). A two-judge majority concluded that the Military Commissions Act did not violate the Suspension Clause of the Constitution in depriving the courts of jurisdiction over the detainees' habeas petitions. *Id*. at 988–94. Unless overturned by the Supreme Court, this decision seems to bring to an end the litigation in the detention cases. The Supreme Court consolidated *Boumediene* with another case (127 S.Ct. 3078). Oral arguments were heard on Dec. 5, 2007. Mark Sherman, *Justices Ponder Detainee Rights*, WASHINGTON POST.COM, Dec. 5, 2007, http://washingtonpost.com/wp-dyn/content/article/2007/12/05/AR2007120501443_pf.html. Hamdan's case, which was remanded to the District Court for the District of Columbia, was already dismissed earlier for want of subject matter jurisdiction on the basis of the Military Commissions Act. *See* Hamdan v. Rumsfeld, 464 F.Supp.2d 9 (D.D.C. 2006). A notice of appeal and a motion to hold the case in abeyance pending the decision in *Boumediene* were filed on February 6, 2007. The decision in *Boumediene* seems to halt this litigation as well.