

## HAMDAN V. RUMSFELD: IMPLICATIONS FOR THE GENEVA CONVENTIONS

Last term, in *Hamdan v. Rumsfeld*, the Supreme Court of the United States held that the military commissions convened by the Bush Administration to try non-citizen terror suspects could not proceed as constituted because they lacked congressional authorization and violated both the Uniform Code of Military Justice (“UCMJ”) and the Geneva Conventions.<sup>1</sup> This Recent Development focuses on the Court’s analysis and application of the Geneva Conventions, the most comprehensive codifications of international humanitarian law.<sup>2</sup> *Hamdan* has significant, and potentially dangerous, ramifications for international norms in foreign policy practice and American jurisprudence during—and beyond—this interminable “war on terror.” If the dissent’s view in *Hamdan* were to prevail,<sup>3</sup> the applicability of the Geneva Conventions would be notably limited, their domestic enforcement would be left solely to those responsible for violating them, and the customary international law they embrace could be altered.

Petitioner Salim Ahmed Hamdan, a Yemeni national accused of al Qaeda membership, was captured in Afghanistan in November 2001. He was transferred to Guantanamo Bay, Cuba, and held there for more than two years before being charged with conspiracy to commit “offenses triable by military commission.”<sup>4</sup> Subsequently, Hamdan filed a petition for a writ of habeas corpus to challenge the military commissions created to try non-citizen terror suspects.

The District Court for the District of Columbia granted the petition for habeas relief, staying the military commission’s proceedings.<sup>5</sup> The court found that the President’s authority to establish military commissions was bound by the laws of war, which included the Geneva Conventions, and Hamdan was entitled to the full protection of the Third Geneva Convention (on Prisoners of War) until it was determined, according to that treaty, that he was not a prisoner of war.<sup>6</sup> Furthermore, regardless of whether Hamdan was a prisoner of war, he could not be tried by the military commissions in question because their procedures violated the rights of the accused protected by the UCMJ and Common Article 3 of the Geneva Conventions.<sup>7</sup>

The Court of Appeals for the District of Columbia reversed, holding, most significantly, that the Geneva Conventions did not grant any judicially enforceable rights.<sup>8</sup> The court also found that the military commis-

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1. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2759 (2006).

2. Due to this focus, inapplicable opinions by Justices Breyer and Scalia are not discussed.

3. Such a result is plausible, specifically once Chief Justice Roberts joins deliberations on these issues. Roberts did not participate in the Supreme Court’s *Hamdan* decision because he had heard the case at the appellate level (and joined in that decision). *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

4. *Hamdan*, 126 S.Ct. at 2759.

5. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173–74 (D.D.C. 2004).

6. *Id.* at 162.

7. *Id.* at 172.

8. *Hamdan*, 415 F.3d at 40.

sions did not violate the separation of powers doctrine, the UCMJ, or the Geneva Conventions.<sup>9</sup> Neither the Third Geneva Convention nor Common Article 3 applied to the conflict with al Qaeda,<sup>10</sup> and even if Article 3 applied, any challenge to the procedures of the commissions should have been delayed until post-conviction appeals.<sup>11</sup>

The Supreme Court reversed and remanded.<sup>12</sup> The majority opinion, written by Justice Stevens and joined by Justices Breyer, Souter, Ginsburg, and Kennedy, held that the military commissions established by the Bush Administration exceeded executive authority.<sup>13</sup> Refraining from the debate about the judicial enforceability of rights protected in the Conventions, the Court declared that the Geneva Conventions were part of the laws of war, and, as such, constrained the construction of military commissions.<sup>14</sup> The Court also evaded the question of the general applicability of the Conventions to the conflict with al Qaeda. At the very least, Common Article 3 applied,<sup>15</sup> including its requirement that enemy combatants be subject to a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>16</sup> The Court decided the military commissions convened by the Bush Administration were not “regularly constituted” because they were not “regular military courts” and appeared to be “special tribunals” in light of their recent advent, which remains unjustified by necessity.<sup>17</sup> Finally, the Court affirmed that although Common Article 3 established vague and flexible requirements for prosecutions of those captured in armed conflict, “requirements they [were] nonetheless,” and requirements unsatisfied by the military commissions in question.<sup>18</sup> Justice Stevens, in a plurality opinion joined by three justices,<sup>19</sup> also declared that Hamdan was not accused of any valid crime against the laws of war.<sup>20</sup> Further, he found that the military commissions failed to provide “all the judicial guarantees” required by Common Article 3, particularly in light of the potential to exclude defendants from proceedings.<sup>21</sup>

9. *Id.* at 37–38.

10. *Id.* at 41.

11. *Id.* at 42.

12. *Hamdan*, 126 S. Ct. at 2749.

13. *Id.* at 2759.

14. *Id.* at 2786.

15. *Id.* at 2795.

16. *Id.* at 2796.

17. *Hamdan*, 126 S. Ct. at 2798.

18. *Id.*

19. *Id.* at 2749 (Stevens, J., plurality opinion) (including all the Justices from the majority opinion except Justice Kennedy).

20. *Id.* at 2777–79.

21. *Id.* at 2797–98. In his opinion concurring in part, Justice Kennedy explained that he found it unnecessary to reach these additional issues because the commissions were unauthorized. *Id.* at 2808–09 (Kennedy, J., concurring in part).

Justice Thomas, joined by Justice Scalia in full and Justice Alito in part, dissented most vehemently.<sup>22</sup> Referring to a “well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs,” Justice Thomas would have deferred completely to the President’s authority.<sup>23</sup> Justice Thomas believed that the AUMF authorized the military commissions and that they were legal in all aspects. As to the Geneva Conventions, he agreed with the circuit court that the rights afforded by the Conventions were not judicially enforceable.<sup>24</sup> He also objected to the application of Common Article 3, in deference to the President’s definition of “conflict not of an international character”<sup>25</sup> and because Article 21 of the UCMJ referenced the law of war with respect to “offenders and offenses,” but not to trial procedures.<sup>26</sup> Even if Common Article 3 applied to Hamdan, it would have been too early to adjudicate because his trial was not yet complete,<sup>27</sup> and the procedures of the military commissions measured up to the requirements of Common Article 3.<sup>28</sup> Justice Thomas concluded that the Third Geneva Convention did not apply to Hamdan, once again deferring to the President who determined that the conflicts with Afghanistan and al Qaeda are distinct.<sup>29</sup>

Justice Alito, in his dissent, found it unnecessary to reach the issues of whether executive power were granted by the AUMF, whether membership in a group constituted a war crime, or if this conflict were international, thereby triggering application of Common Article 3.<sup>30</sup> However, joined by Justices Scalia and Thomas, Justice Alito asserted that the military commission created to try Hamdan qualified as a “regularly constituted court.”<sup>31</sup> Alito argued that *different* did not necessarily mean *irregular*, and that the military commissions were not “special tribunals” as long as they were applied the same to all defendants subject to their jurisdiction.<sup>32</sup> Further, even if some procedures of the military commissions were illegal, those procedures could have been challenged post hoc and, if necessary, amended.<sup>33</sup> Warning against dismantling an entire system for minor flaws, Alito concluded that the military commissions did not meet the fatal flaw of dispensing “summary justice.”<sup>34</sup>

22. *Hamdan*, 126 S. Ct. 2749 (Thomas, J., dissenting).

23. *Id.* at 2823.

24. *Id.* at 2844–45.

25. *Id.* at 2846.

26. *Id.* at 2845–46.

27. *Hamdan*, 126 S. Ct. at 2846–47 (Thomas, J., dissenting).

28. *Id.* at 2848.

29. *Id.* at 2849.

30. *Id.* (Alito, J., dissenting).

31. *Id.* at 2851–52.

32. *Hamdan*, 126 S. Ct. at 2852 (Alito, J., dissenting).

33. *Id.* at 2852–53.

34. *Id.* at 2854–55.

With respect to the Geneva Conventions, the first question raised by *Hamdan* is whether the rights conferred in the Conventions are judicially enforceable. The majority found it unnecessary to reach this issue because Article 21 of the UCMJ grants authority to military commissions conditionally, based on compliance with the laws of war,<sup>35</sup> of which the Geneva Conventions indisputably form a part. Beyond this case, however, determining the judicial enforceability of individual rights conferred by international treaties is vital to the future application of such treaties. The circuit court and the dissent relied primarily on the precedent of the following footnote in *Johnson v. Eisentrager* to support the claim that the Geneva Conventions are not judicially enforceable: "It is . . . the obvious scheme of the [Conventions] that responsibility for observance and enforcement of these rights is upon political and military authorities."<sup>36</sup> Justice Thomas claimed that the Geneva Conventions cannot be applied piecemeal—the substantive protections are only available via those exclusive enforcement mechanisms assigned by the Conventions.<sup>37</sup>

*Hamdan*, however, was not seeking to enforce a private right of action, but effectively was invoking his Geneva rights defensively. Because treaties are part of the "supreme law of the land,"<sup>38</sup> *Hamdan's* claim that he was being detained and tried in violation of the Third Geneva Convention constituted a valid habeas corpus claim.<sup>39</sup> However, as this avenue now appears blocked by the Military Commissions Act of 2006 (at least for non-citizen unlawful enemy combatants),<sup>40</sup> the argument returns to whether the Conventions can be enforced through judicial remedies. According to the International Committee of the Red Cross (the most respected interpreter of the laws of war), the 1949 Geneva Conventions explicitly intended to include such a possibility, in contrast to the 1929 Conventions.<sup>41</sup>

A determination that the protections afforded by the Geneva Conventions are not judicially enforceable would be the functional equivalent of concluding adherence to the treaties is optional. The political and military actors to whom the dissent would leave enforcement of the Conventions are also those responsible for conducting armed conflict. In the American context, without the checks and balances of the judicial system, the Executive could freely choose whether to obey the Conventions, thereby defeating the purpose of making binding international law that also serves as "the su-

35. 10 U.S.C. § 821 (2006).

36. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

37. *Hamdan*, 126 S. Ct. at 2845 (Thomas, J., dissenting).

38. U.S. CONST. art. VI, cl. 2.

39. Brief for Law Professors Louis Henkin, et al. as Amici Curiae Supporting Petitioner (Geneva—Enforceability) at 19, *Hamdan*, 126 S.Ct. 2749 (No. 05-184). See 28 U.S.C. § 2241(c)(3) (2006).

40. 10 U.S.C. § 950j(b) (2006).

41. The latter were those interpreted by the *Eisentrager* Court. Protected persons may bring legal actions "in those countries at least in which individual rights may be maintained before the courts." INT'L COMM. OF THE RED CROSS, COMMENTARY TO THE CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 92 (Jean de Preux ed., 1960) [hereinafter ICRC COMMENTARY III].

preme law of the land” of the United States. The Conventions would be reduced to empty promises. They would also fail to live up to their purpose: “first and foremost to protect individuals, and not to serve state interests.”<sup>42</sup>

The next question is whether the Third Geneva Convention governing the status of prisoners of war (“POWs”) applies to combatants captured in the conflict with al Qaeda, which is clearly not a high contracting party to the Conventions. Even if the conflicts in Afghanistan and with al Qaeda were intertwined, or Hamdan was indeed an agent of the Taliban, the dissent claimed he still would not deserve POW protections because whatever group he belonged to did not meet the criteria of lawful combatants set out in the Convention, including wearing a signifying uniform, carrying arms openly, and conducting operations in compliance with the laws of war.<sup>43</sup> Allegedly the Executive had authority to make this determination.<sup>44</sup> But Article 5 of the Third Geneva Convention requires a presumption that detainees are POWs, and thus deserving of all inherent protections, if there is *any* doubt about their status.<sup>45</sup> This presumption persists until and unless their status is determined by a “competent tribunal.” The government believed that the Combatant Status Review Tribunal (“CSRT”) process dispelled doubt by determining that Hamdan was an enemy combatant. However, the CSRT process has been criticized as contrived by the Executive and falling far short of a “competent tribunal.”<sup>46</sup> As none of the opinions addressed the validity of the CSRT process, the issue could recur.

Even if the Third Geneva Convention’s general protections for POWs do not apply to those captured in the conflict with al Qaeda, debate continues as to whether Common Article 3 applies. So-called because it appears in all four of the Geneva Conventions, the Article establishes some minimum protective provisions “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>47</sup> Interpretations of “conflict not of an international character” vary; the dissent understood this to be limited to conflicts internal to one state, whereas the majority read the phrase to mean any conflicts not between two or more states. The clear intent of the drafters of the 1949 Conventions supports the former understanding, in that the drafters wished to extend the protection of basic humanitarian principles to combatants of civil war.<sup>48</sup> However, evidence suggests that with that intent in mind, the drafters chose to write Common Article 3 to provide minimum protections in *all*

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42. *Id.* at 22.

43. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

44. *Hamdan*, 126 S. Ct. at 2849 (Thomas, J., dissenting).

45. Third Geneva Convention, *supra* note 43, art. 5.

46. *See, e.g., Hamdan*, 344 F. Supp. 2d at 162.

47. Third Geneva Convention, *supra* note 43, art. 3.

48. ICRC COMMENTARY III, *supra* note 41, at 28, 36.

conflicts not covered by Common Article 2, which is limited to “conflict which may arise between two or more of the High Contracting Parties.”<sup>49</sup> The majority opinion embraced the literal definition of “international” as “between nations,” as opposed to “on the territory of more than one nation,” in order to give effect to these minimum standards.<sup>50</sup> Amici argued further that Common Article 3 provides a minimum standard for *all* conflicts, international or not, a position advocated by international courts.<sup>51</sup>

The majority’s view affirms the ideals of international humanitarian law. If the dissent prevailed, the result would be no minimum standard for protections of international humanitarian law, which would clearly violate the spirit of the Geneva Conventions. Even if it were true that the drafters of the Conventions were unable to “anticipate every eventuality,”<sup>52</sup> the Executive is not adrift without any guidance on how to meet the novel challenges of the war on terror. The Executive can construe Common Article 3 broadly, as most commentators and courts already have, and act accordingly.<sup>53</sup> The fancy footwork used to carve out an exception to the Geneva Conventions “repudiates the very concept of a ‘law’ of war,” substituting “a new form of international armed conflict that is subject to no identifiable norms of international humanitarian law.”<sup>54</sup> By exempting from both Articles 2 and 3 conflicts between a state and a non-state actor that take place in two or more countries (including civil wars that spill over international borders, as is common),<sup>55</sup> the dissent suggested that an entirely new international agreement must be reached to cover such conflicts. However, such an extreme and unlikely step is unnecessary when the current Conventions can be, and commonly are, read to incorporate those conflicts. Meanwhile, standards of treatment of detainees are left to ad hoc decisions by those

49. Third Geneva Convention, *supra* note 43, art. 5.

50. At the appellate level, one concurring judge had concluded the same. *Hamdan*, 415 F.3d at 44 (Williams, C.J., concurring).

51. Brief of Professors Ryan Goodman et al. as Amici Curiae Supporting Reversal (Geneva—Applicability) at 24–25, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Brief of Retired Generals and Admirals and Milt Bearden as Amici Curiae Supporting Petitioner (Geneva Conventions—Judicial Deference) at 22–23, *Hamdan*, 126 S. Ct. 2749 (No. 05-184); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27) (“There is no doubt that, in the event of international armed conflict . . . [the rules articulated in Common Article 3] . . . constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts . . .”); Prosecutor v. Tadic, Case No. ICTY IT-94-1, Decision on Defense Motion on Jurisdiction, ¶¶ 65–74 (Aug. 10, 1995). “The minimum requirement of humanitarian guarantees in the case of a non-international conflict is a fortiori applicable in international conflicts.” ICRC Commentary III, *supra* note 41, at 14.

52. Brief of American Center for Law and Justice & European Centre for Law and Justice as Amici Curiae Supporting Respondents at 8, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).

53. A state, however, should not need to be legally bound in order to treat detainees according to the humanitarian spirit of the Conventions.

54. Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT’L & COMP. L. REV. 303, 317–18 (2002).

55. Brief of Professors Ryan Goodman et al., *supra* note 51, at 22–23.

prosecuting the conflict (the executive branch), a dangerous situation for American forces fighting the war on terror<sup>56</sup> and all of humanity.

Once it is determined that Common Article 3 applies to persons like Hamdan, the question becomes whether the military commissions qualified as “regularly constituted court[s]” and whether their procedures provided “all guaranteed protections.” With respect to the first requirement, “special tribunals” do not qualify as “regularly constituted,”<sup>57</sup> but the question then arises whether or not these military commissions were “special tribunals.” The majority opinion held that they were, reading “regularly constituted” to imply previous and standing existence. Although the Court seemed willing to entertain the validity of military commissions created after the detainees subject to them were captured *if* such creation were required by military necessity, the justices found no such legitimate necessity here. Because a regular court martial would have sufficed to try Hamdan, the commissions were simply *ad hoc*, unnecessary “special tribunals.”

Along with Justice Thomas’ dissent generally deferring to the Executive’s power to create military commissions that were then inherently “regularly constituted,” Justice Alito presented the most detailed defense of the commissions. Alito argued that “special” is not synonymous with “different,” so that a new kind of tribunal can be created in novel circumstances. For Alito, the paramount issue is application; as long as the commissions were the same for all detainees subject to them, they were acceptable. But Alito’s argument falls victim to the slippery slope—if it were up to the executive branch to determine who was subject to which commissions, both by definition (“enemy combatants”) and individually (through the CSRT process), it could create different kinds of tribunals for different groups of accused. The Executive, therefore, would have the sole power to vary the justice that detainees receive, restrained only by some minimum number of detainees who must be subject to the same process to stave off accusations that the tribunals were too “special.”

The latter half of the Common Article 3 requirement mandates “judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>58</sup> Hamdan attacked various procedures of the commissions that allegedly failed to meet this standard, including absence of “the right to be present, trial by an impartial body, and trial without risk of testimony obtained by torture.”<sup>59</sup> Although the majority opinion refrained from specifics, Stevens’ plurality opinion found the procedures lacking in protection of fundamental rights, focusing primarily on exclusion of the accused from the presentation

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56. Brief of Retired Generals and Admirals and Milt Bearden as Amici Curiae Supporting Petitioner (Geneva Conventions—Judicial Deference) at 3–9, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).

57. INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE CONVENTION (IV) RELATIVE TO THE PROTECTIONS OF CIVILIAN PERSONS IN TIME OF WAR 340 (1958), available at <http://www.icrc.org/ihl.nsf/COM/380-600073?OpenDocument>.

58. Third Geneva Convention, *supra* note 43, art. 3.

59. Brief for Petitioner Salim Ahmed Hamdan at 50, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).

of evidence deemed classified.<sup>60</sup> The result was that defendants could be convicted on the basis of evidence they could not see or know. The only argument to rebut this seems to be the generic claim of deference to the executive war power and military necessity to protect classified information; because military commissions are not subject to court martial rules,<sup>61</sup> the Executive can create new rules as he determines appropriate. The implied reasoning is that enemy combatants pose such a grave threat and are worth so little that they must and should be denied fair trial protection. Such a view clearly violates the “innocent until proven guilty” bedrock of American criminal justice, and, given the number of men already released from Guantanamo without charge,<sup>62</sup> presents frightening potential for miscarriages of justice.

However, Justice Alito, in his defense of the military commissions, made a compelling argument that flaws in the commissions’ procedures should not invalidate the commissions as a whole.<sup>63</sup> Rather, after proceedings finish, specific procedures that rendered the trial unfair could and should be challenged on appeal. Justice Thomas, too, thought any claim Hamdan might have had with respect to Common Article 3’s procedural requirements was premature.<sup>64</sup> Justice Thomas’ conclusion arose from the fact that Common Article 3 is limited to prohibiting “the *passing of sentences* and the *carrying out of executions* without previous judgment pronounced by a regularly constituted court . . . ”<sup>65</sup>—neither of which had yet occurred in Hamdan’s case.

If the dissent view prevailed, customary international law with respect to fair trial procedures could change.<sup>66</sup> Congress’ recent explicit authorization will only bolster the belief that complete deference should be granted to the Executive in its creation of procedures for military commissions.<sup>67</sup> Even if the commissions’ procedures are not accepted wholesale, but withstand post-trial challenges, the conclusion will be that national security interests necessitate some limits on fair trial guarantees. Customary international law depends on both widespread state practice and *opinio juris* (behavior out of a sense of legal obligation).<sup>68</sup> In this age of the “war on terror,” with the United States still the sole superpower in the world, it is conceivable that

60. *Hamdan*, 126 S. Ct. at 2798 (Stevens, J., plurality).

61. *Id.* at 2843 (Thomas, J., dissenting).

62. See *U.S. Transfers 5 Cuba Detainees*, Associated Press, Aug. 27, 2006, available at [http://www.boston.com/news/world/articles/2006/08/27/us\\_transfers\\_5\\_cuba\\_detainees](http://www.boston.com/news/world/articles/2006/08/27/us_transfers_5_cuba_detainees).

63. The argument is compelling dependent upon the conclusion that the commissions were “regularly constituted.”

64. *Hamdan*, 126 S. Ct. at 2847 (Thomas, J., dissenting).

65. Third Geneva Convention, *supra* note 43, art. 3, *quoted in Hamdan*, 126 S. Ct. at 2846–47 (Thomas, J., dissenting).

66. Some might even consider this change to be a reversal.

67. After the Military Commissions Act of 2006, the Executive will be acting with the consent and approval of Congress, so his power will be at its highest ebb according to Justice Jackson’s model in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

68. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

other nations would follow this example.<sup>69</sup> As states progressively openly prioritized national security over individual defendants' rights, those rights and their foundations would be eroded.<sup>70</sup> The result could be the dissolution of modern minimum fair trial standards.

In a swift and resounding response to *Hamdan*, Congress passed the Military Commissions Act of 2006 ("MCA").<sup>71</sup> Therein, Congress deprived non-citizen "unlawful enemy combatants" of habeas corpus review<sup>72</sup> and the ability to assert rights under the Geneva Conventions.<sup>73</sup> The MCA also explicitly declared the military commissions it establishes to be in compliance with Common Article 3 of the Geneva Conventions.<sup>74</sup> While the MCA does not allow exclusion of the accused from proceedings,<sup>75</sup> it makes special provisions for the protection of classified information,<sup>76</sup> so the accused could still be convicted based on evidence he cannot examine.<sup>77</sup>

Despite the Court's holding in *Hamdan* that the previous commissions did not meet the Geneva procedural requirements, the decision did not specify precisely what is required of military commissions. As a result, it is highly likely that the procedures of the new commissions will be challenged and the Court may face the task of delineating minimal procedural requirements. Moreover, the provision in the MCA declaring rights granted by the Geneva Conventions to be judicially unenforceable might be challenged. Therefore, neither *Hamdan* nor the MCA is likely to be the last or definitive word on these issues, and future deliberations should more carefully consider the reputation and historic reality of America's commitment to the rule of law, at home and abroad.

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69. Although, according to the International Court of Justice, inconsistent acts should be perceived as breaches of the rule as opposed to establishment of a new rule, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27), with enough repetition and adoption, a new rule would inevitably emerge.

70. To meet the subjective (and controversial) *opinio juris* requirement, states would have to be prioritizing national security interests out of a perceived legal obligation. The legal obligation could be the "responsibility to protect" citizens, embraced by the UN and international law. See INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

71. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). For a longer discussion of the Military Commissions Act, see Arsalan Suleman, Recent Development, *Military Commissions Act of 2006*, 20 HARV. HUM. RTS. J. 325 (2007).

72. 10 U.S.C. § 950j(b).

73. *Id.* § 948b(g).

74. *Id.* § 948b(f).

75. *Id.* §§ 949d(a)(2), 949d(b). Exceptions exist for deliberations and votes, *id.* § 949d(c), and when the accused's behavior proves dangerous or disruptive. *Id.* § 949d(e).

76. *Id.* § 949d(f).

77. *Id.* § 949d(f)(2)(A). Other contentious provisions allow for the introduction of evidence obtained by coercion, which might border on torture. *Id.* §§ 948r(c)–(d).

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