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The Special Tribunals of Guantanamo

A legal approach

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INTRODUCTION

September 2001 saw the beginning of a national dynamic in the United States that would very soon expand and affect profoundly the relations in world's politics. President W. Bush's 'War on Terror' went far beyond a military offensive strategy. It implemented or used already existing mechanisms to combat a blurry enemy –terrorism- both home and abroad. These mechanisms included the occupation of foreign countries, and the capture and detention of individuals suspected to be involved with terrorist organizations. Several detention centers are known to be in place over the world, in territories namely out of formal US jurisdiction. The most widely known are located at Guantanamo Bay, Iraq (Abu Ghraib the most tragically famous), and Afghanistan.

A firm response to the September 11 attacks was expected from the U.S. citizens, forcing every governmental organization to do its most to combat the terrorist threat. The Congress declared war on its enemies, and authorized the President the use of the Armed Force. The chief of the Executive deemed it necessary to install special tribunals to judge detainees captured during hostilities and held in detention centers as suspects for participating or aiding terrorist activities. These special tribunals were constituted under the model of military commissions to try enemies for violations to the law of war. Rules and procedures for such trials were set up, detainees were charged and appointed to a special commission. For being the first ones to start their hearings, these military commissions became known as 'The Special Tribunals of Guantanamo'.

Very soon after the first captures and detentions started in 2001, an international concern began over the conditions of individuals held in the centers. Several international organizations objected the detention under Human Rights and Humanitarian Law arguments. One main issue of concern was that detainees were not being accused and charged in a reasonable time, and that basic judicial procedures were not being respected. Still, fear of national security vulnerability justified the new measures. But when the rules of the appointed military commissions started to be disclosed by different non-

governmental organizations, both the national and international community started to question its procedures and methods. The most basic judicial guarantees did not seem to be satisfied by the tribunals. Specialists started to ask themselves if the United States could simply decide no to comply with international law. Still, a more fundamental question was being asked: was the President taking too many attributions under the excuse of war?

Along with these questions came the first claims against the military commissions appointed by the government, raising the debate. Many arguments of all kinds –legal, political, humanitarian- have been presented on both sides: those who believe that any measure to combat terrorism should be applied, and those who believe that, even in the given circumstances, the principle of balance of powers should be preserved, and that individual guarantees contemplated in international and national laws must be respected. Fortunately, on June 29, 2006 the debate over the legality of these military commissions and the Constitutional questions it raised obtained a sound answer through the decision of the Supreme Court of the United States in the case *Hamdan v. Rumsfeld* 548 US (2006).

Even though the subject of analysis of the present work is the Special Tribunals of Guantanamo, it is not its objective to enter into the political arguments of this debate. Indeed, the concern arises from a growing preoccupation for the rights of detainees and their protection from any possible institutional or governmental abuse in the name of the 'War on Terror'. Still, for this analysis to have a solid basis and be as objective as possible, it is indeed more convenient to start from the already sanctioned legal perspective.

Such a task cannot be undertaken without a clearly defined position towards the issue. The main thesis of this work is that the military commissions appointed by President Bush to try detainees at Guantanamo Bay violate the federal laws of the United States, as well as fundamental international treaties, such as The Geneva Conventions, that have been integrated to the US federal law system.

Under this statement, the objective is to analyze the lawfulness of the so called Special Tribunals of Guantanamo departing from the recent Supreme Court decision in *Hamdan v. Rumsfeld*. The reason to do so is that the Court's opinion gives a solid ground to further analyze the whole system that sustains the Special Tribunals on the most contested issues, along with the governmental activities under the War on Terror. The main focus is on the examination of the court's findings of any possible violations to international human rights and humanitarian law, but also on the constitutional issues examined.

The final document should clearly explain, to a non-familiarized reader, and from a legal perspective, the values at stake and the political context in which this case has been developing, along with the legal background and instruments on which the Supreme Court of the United States analyzed the fundamental issues of the case to be able to determine whether the military commissions are lawful. This approach can provide a better understanding of this case that has been in the middle of the debate about the methods and mechanisms implemented by the U. S. government under the War on Terror. In this way, any further discussion will lay on solid arguments about the legal foundations of the detention and trial system.

Even though it is important to put Hamdan's case under the perspective of its political context, to approach this subject from a legal perspective it is necessary to put more relevance on the instruments that provide it with a legal background. And, therefore, to document the U. S. federal laws and mandatory precedents that apply in the case, as well as the international instruments that regulate the type of circumstances under which Hamdan's capture and detention took place. Yet, given that this work is based on the reasoning of the Supreme Court in this particular case, the main document analyzed is the court's opinion in *Hamdan v. Rumsfeld*.

Finally, it is important to clarify why a juridical analysis of *Hamdan v. Rumsfeld* is most relevant and pertinent. In the political arena, this case has been taken as a flag for those who oppose government's measures justified under the War on Terror. To governmental and non-governmental international organizations the arguments presented by the petitioner illustrate all the deficiencies and violations to law of the whole detention system that has been implemented since September 11, and that became even more shocking when translated into judicial procedures for so-called 'fair trials'. For the judicial system, this case will definitely set an important about thelegality of the military commissions appointed to try those detainees held in centers off the US territory. Lawfulness of the Special Tribunals of Guantanamo will be a determinant factor for the immediate future of more than 400 individuals waiting either to be tried, or to be charged. Moreover, it will also regulate possible future detentions and have an impact on unrestrained orders to capture and interrogate individuals in hostile areas under the argument that detainees can provide useful information on terrorist organizations.

Hamdan v. Rumsfeld is capable of questioning the very foundations of the dynamics imposed by the Bush Administration under the argument of the danger posed by the terrorist menace. Presently, objections to the actions taken by the White House reside on two main arguments dealing with the US legal system. First, that the President might be taking upon himself attributions that exceed those corresponding to the chief of the Executive (even under war circumstances), given the traditional system of separation of powers; second, that the procedures to capture, detain, interrogate and try individuals under the argument that they might be involved in terrorist activities or that they can help capture terrorist, departs from the U.S. Constitutional guarantees, from the federal laws of the United States, and from international instruments that have been integrated to the U.S. The decision of the Supreme Court in *Hamdan v. Rumsfeld* addresses the most contested issues as part of its analysis, and provides some perspective on the allegations of each party. Its reasoning will give some light over the attributions of each branch of government in times of war, over the capacity or incapacity of the Executive to deviate from federal and international standards in trying individuals captured during hostilities

on international grounds, and over the applicability of the provisions of The Geneva Conventions as federal laws in the war against international terrorism.

A clear set of rules is, indeed, a requisite to construct a legitimate, integrated, collaborative international system against a global threat like terrorism. *Hamdan v. Rumsfeld* is just the first step, but a most relevant one, to clarify the application of federal and international legal standards to this fight.

I. U.S. LEGAL BACKGROUND

Constitutional Background. The Principle of Separation of Powers

The separation of powers and balance of their attributions has been a fundamental principle of the United States form of government and foundation of its democracy. Since its enactment in 1787, the US Constitution established the separation of powers and a system of checks and balances that was designed to prevent the concentration of attributions in a single branch of government. These principles are preserved under Article I, II, and III of the Constitution.

Article I prescribes the federal legislature and its limited powers; Article II grants also limited powers to the executive branch, headed by a President; and Article III describes the limited powers of the federal judiciary system, mandated by a Supreme Court and the inferior courts established by the Congress.[1] The foundation and preservation of this system has a clear purpose:

> It is through these many ways-federalism, separation of powers, Bill of Rights, representative democracy, and jury trials—that the Founding Fathers, true to their fears of both the masses and of centralized power, attempted to circumscribe governmental authority and to protect private property and the rights of individuals from mass tyranny and abusive government intrusion.[2]

This system gives each branch of the U.S. government different and specific attributions in case of war. While the President is the Commander in Chief of the Armed Forces pursuant to Article II, Article I gives the Congress such powers as to declare war, to make the rules that concern captures both on land and water, to raise and support the armies, to define the offenses against the Law of Nations and punish them, to make the rules for the Government, and the regulation of armed forces.

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[1] SUBRIN, WOO. Litigating in America. Aspen Publishers. New York, 2006. Pg 11-14
[2] Ibidem, Pg 14.

In *Ex parte Milligan*, a most relevant precedent on the subject, the Supreme Court describes the interaction of these powers:

> The power to make necessary laws is in Congress: the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of the Congress, nor the Congress upon the proper authority of the President...[3]

Article IV of the Constitution contains another important regulating concept. The Supremacy Clause provides that when the U.S. Constitution, a United States treaty, or a federal statute covers a given situation, then all the courts, both state and federal, must apply the federal law. This means that the applicable federal law is the supreme law of the land. This constitutional rule is critical for the judiciary system to know which law to apply when the United States, an agency or office is part in a lawsuit.[4] This kind of situation is indeed frequent when cases from an armed conflict, in which the United States has participated, arise.

The Origins and Justification of Military Commissions

> *"The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity"*[5]

Military commissions arose during the Mexican American War, when General Winfield Scott, as commander to an occupied territory, ordered the establishment of 'military commissions' and 'a council of war'. The first ones were intended to try ordinary crimes committed in the occupied territory, and the latter to try offenses against the law of war. With the Civil War, and the need to actually use such commissions, the dual system

[3] Ex parte Milligan, 4 Wall. 2, 121 (1886). Pg 139.
[4] SUBRIN, WOO. Litigating in America. Aspen Publishers. New York, 2006. Pg 90-98. The authors analyze the role of the 'supremacy clause' both in the issues of federal question jusridiction and choice of law.
[5] USSC decision on *Hamdan v Rumsfeld*. Pg 25

proposed by Scott transformed into a single tribunal system that took jurisdiction over ordinary crimes, war crimes, and breaches of military orders.[6]

These tribunals have, historically, been used in three kinds of situations:

a.as a substitute for civilian courts at times and places where martial law has been declared;

b.to try civilians 'as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot or does not function;

c.convened as an 'incident to the conduct of war', where there's a need to seize and subject to disciplinary measures those enemies who...have violated the law of war. Its jurisdiction is limited to offenses cognizable during time of war, and its role is mainly fact finding, to determine if there was a violation of the law of war.[7]

Although their main objective is to provide a sort of 'battlefield justice', military commissions are also subjected to the principles and mechanisms of the balance of powers. When created, they had to find a way to be functional under this system. Even though military commissions and penal tribunals are not contemplated in Article I and Article III of the Constitution, according to General W.Winthrop, "[i]n general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies' and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction."[8] Necessity, though, requires a document that provides such an authorization to use this kind of tribunals.

Accordingly to Winthrop's opinion, the Supreme Court's reasoning in *Ex parte Milligan* reflects that:

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[6] From "W.WINTHROP, Military Law and Precedents, 2ed 1920, in *Hamdan v Rumsfeld*. Pg 26.
[7] Idem
[8] Idem

> [the] Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of the Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.[9]

This means, with previous approval of the Congress, the President or a "commander under him" would be able to institute this kind of tribunals, with the prerequisite of a sound justification.

It was logical, from the beginning, that these special tribunals should be separated from civilian ones, meaning that they would only be used to hear war offenses. W.Winthrop, analyzing the historical background of military commissions, states that "the occasion for a special military commission is the fact that jurisdiction of a court martial proper, in US law, is restricted by statute almost exclusively to members of the military force and to certain very specific offenses defined in a written code."[10]

It is important to note that, historically, the procedures governing trials by military commissions have been the same as those used for governing courts martial. This finds its reason in the fact that, originally, the only difference between military commissions and courts martial was jurisdiction. But, most of all, it was done with the intention of ensuring protection against abuse and also fairness under a war situation.[11]

The Uniform Code of Military Justice

The base document for the present provisions dealing with military justice are the Articles of War adopted in 1916, later re-enacted as the Uniform Code for Military Justice (hereafter UCMJ) in 1950. This code provides the rules of courts-martial trial for

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[9] Ex parte Millingan. 4 Wall. 2, 121 (1886). Pg 139.
[10] "W.WINTHROP, Military Law and Precedents, 2ed 1920, in *Hamdan v Rumsfeld.* Pg26
[11] In *Hamdan* (Pg 53) the Supreme Court acknowledged the original intention of preserving the same procedures for both the military commissions and the courts martial to ensure fairness in trials.

military members, and for offenders of the laws of war. Most relevant is Article 15 of the 1916 Articles of War, brought directly from the original document by decision of the Congress, under the reasoning that it was a construction of the Supreme Court.[12] It sanctions the use of military commissions in the conditions previously described, and has been preserved in Article 21 of the UCMJ as follows:

> Jurisdiction of courts-martial not exclusive.
>
> The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

Article 36 of the UCMJ also sets specific restrictions on the President's power to promulgate rules of procedure, by stating that:

- No procedure rule may be contrary to or inconsistent with UCMJ;
- Rules adopted must be 'uniform (with the UCMJ) insofar as practicable'.

Relevant Precedents on the Use of Military Commissions

The Supreme Court has dealt with the determination of jurisdiction of military commissions and their applicability several times in a history that has been frequently stained by war. This resulted in a vast number of mandatory precedents about military commissions. Still, few of them are relevant to the analysis of the Special Tribunals of Guantanamo. These precedents are relevant, of course, given that they were considered and evaluated by the Supreme Court. But their pertinence derives from the fact that their holdings deal with three main interrelated issues: jurisdiction of military commissions,

[12] *Hamdan* Pg. 29

the authorization to install them, and the crucial question of balance of power when it comes to the implementation of such tribunals.

a. *Schlesinger v. Councilman*, 420 US 738 (1975). This case questions whether it is convenient or not that the Supreme Court intervenes in pending courts-martial proceedings involving members of the Armed Forces. In *Schlesinger v. Councilman* an army officer on active duty was charged with violation of the Uniform Code of Military Justice and therefore referred to a court-martial. He neither questioned the lawfulness of the courts-martial, nor its procedures, or the personal jurisdiction of the tribunal over him as member of the armed forces. But he contested the subject matter of the case, for the charges did not fall within the scope of the courts-martial. The Supreme Court never got to analyze the merits of his petition, for they decided there was no reason to address the argument when he could present it before the highest military court. The holding of the case sustained that "as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial proceedings against members of the Armed Forces, and further that there was nothing in the particular circumstances of the officer's case to displace that general rule."[13] Those 'comity' reasons were mainly that: a) military discipline and the efficient operation of the Armed Forces are 'best served' if the military justice system acts without regular interference from civilian courts; and b) respect from federal courts to the balance between "military preparedness and fairness to individual service members" when the Congress created the Court of Military Appeals under an integrated system of military courts and procedures of review. This case created a sort of "judge-made rule that civilian courts should await the final outcome of on-going military proceedings before entertaining and attack on those proceedings." Therefore, the Supreme Court abstained from intervening in the process. Still, it considered that the so called 'Councilman abstention' is inappropriate where there is "substantial question whether a military tribunal has jurisdiction over the defendant."[14]

[13] *Schlesinger v. Councilman*, 420 US 738 (1975).
[14] Ibidem. Pg20-22.

b. *Ex parte Milligan* 4 Wall. 2, 121 (1866) is most relevant because it contains the Supreme Court's explanation of the existent interplay of the Executive and Legislative powers when it comes to periods of war and the institution of tribunals under those circumstances:

> Certainly no part of the judicial power of the country was conferred on [military commissions]... The power to make the necessary laws is in the Congress: the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon proper authority of Congress, nor Congress upon the proper authority of the President...Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of the Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."[15]

It derives from this explanation that, in the checks and balance system between the powers of government in the U.S., even under specific circumstances of war, only one power, the Congress, may sanction the actions taken by the Executive.

c. *Ex parte Quirin*.317, U.S. 1 (1942) This is, without question, the most relevant precedent for the Special Tribunals of Guantanamo, for it contains the Supreme Court's reasoning on the authorization that the Congress sanctioned to the President with Article 21 of the UCMJ (former Article 15 of the Articles of War). It provides a "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions" [16].

In *Ex parte Quirin* the Supreme Court granted certiorati to the habeas corpus petition of seven German saboteurs that contested the President's decision to try them by a military

[15] *Ex parte Milligan* 4 Wall., at 139-140 in Hamdan v Rumsfeld 548 U.S. (2006). Pg 26-28.
[16] Opinión of the Court of Appeals about Hamdan v. Rumsfeld, 415 F. 3d, at 36. in *Hamdan v. Rumsfeld* 548 U.S. (2006) Pg 24-29.

commission "in view of the public importance of the question raised and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."[17]

Here, the Court held that by Article 15 of the Articles of War, 21 of present UCMJ, the Congress sanctioned the use of military commissions to try offenders or offenses against the law of war. Still, the Court pointed out "that the Congress had simply preserved an already existing power in hands of the President, granted by the Constitution and the law of war, and that previewed a very clear condition: that the President (and those under his or her command) complies with the law of war. Under the reasoning of the Court, the Congress never granted the President authority to convene military commissions as a sort of mandate whenever he considers them necessary.[18]

Ex parte Quirin, along with *Ex Parte Milligan*, deals with the principle of balance of powers when it states that "[The] Congress and the President, like the courts, posses no power not derived from the Constitution ...[T]hat authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war."[19]

This set of precedent cases affirm that all government branches must limit to the exercise of those powers granted by the Constitution, which preserves the system of checks and balances even during times of war. This system of counter-balances is also preserved through the 'Councilman abstention' that recommends the federal courts to stay away from pending procedures from military commissions. Still, the fact that the Supreme Court has stated that this abstention should not be applied when there is question on the jurisdiction of a military tribunal over a defendant is a clear sign that the balance between the different branches is also preserved when each power looks over the others' actions.

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[17] *Ex parte Quirin*. 317, U.S.
[18] *Hamdan*. Pg 29.
[19] Ibidiem. Pg 27.

II. INTERNATIONAL TREATIES
THE GENEVA CONVENTIONS ON INTERNATIONAL HUMANITARIAN LAW

War between and within nations has given birth to diverse international institutions and treaties between States with the intention to regulate violent conflicts. Some of these institutions have been transformed and grown stronger over time, while others have failed. The whole system of the United Nations is just one example of the means that States have found to unite efforts to solve conflicts of international scale.

With the evolution of war it was necessary to create a legal system that enabled protection for victims of a conflict. With time, it became clearer that those voluntarily or involuntarily involved in an armed conflict needed to be granted basic rights and guarantees. This pursuit permitted the evolution of the principal institutions and instruments of International Humanitarian Law (frequently referred as IHL).

The main purpose of International Humanitarian Law, throughout its history, has been to submit a present situation of violence to the rule of law. It has a main 'organizing function', for it looks forward to regulate the relations between states in situations of armed conflict. Of course, there is also a preventive function, regarding the limitations imposed on the actions of states. And, indeed, the protective function is the base.[20]

Christophe Swinarski, analyzing the origins of International Humanitarian Law states that "from the origin of international law there was the conviction of the need, from the point of view of the very interests of States, to submit *ad bellium* relations to a law regime with the objective of making it compatible with the fundamental principles of international

[20] SWINARSKI, Christophe. Principales Nociones e Institutos de Derecho Internacional Humanitario como Sistema de Protección de la Persona Humana. Instituto Interamericano de Derechos Humanos. 2ed, San José de Costa Rica, 1991. Pg. 21-22.

interaction, and to keep it within reasonable limits, avoiding war to appear totally barbaric."[21]

Humanitarian Law, as part of International Law, has its main source in international treaties, the principles of law, and doctrine. It is indeed in the latter where we find more potential to interpret and develop this specific branch of international law through the doctrine of international tribunals, but also that of national tribunals of adopting States when they deal with international normative that has been incorporated into their legislation.[22]

It is also important to highlight the historical relevance of international tribunals. There has been a clear evolution from non permanent (ad hoc) tribunals for very specific offenses to the law of war, to those that have institutionalized the application of international law, such as the International Court of Justice. These tribunals have indeed contributed to develop IHL doctrine.

There has also been an evolution into a very specific doctrine of IHL, widely known as 'doctrine of the International Committee of the Red Cross', that sustains this branch of law and its implementation. It also gives place to the body of instruments approved as part of the International Conferences of the Red Cross, that have been widely adopted around the world to regulate armed conflicts.

Instruments of International Humanitarian Law

The instruments used by International Humanitarian Law have the purpose of limiting the sovereignty of States in regards to their conduction of hostilities and toward the individuals involved in them. To do so, this set of rules is granted through the instruments

[21] SWINARSKI. 1991. The author makes a compendium of the principal sources of international law that have transformed into the main instituions of International Humanitarian Law, and that allow their implementarion and application around the world today.
[22] Ibidem. Pg 17

known as The Geneva Conventions[23] and The Hague Conventions. Each one of them serves a different objective. While the Hague Conventions have the purpose of limiting certain conducts during hostilities, the Geneva Convention is focused on the protection of victims. It is indeed more relevant to the purpose of this work to focus on the evolution of The Geneva Conventions or 'Geneva Law' and their impact in international law.

The so called 'Geneva Law' refers to the successive conventions on the subject of protection of victims and individuals in armed conflicts. The first Geneva Convention saw the light in 1864 and was later modified in 1906 to serve the protection of the military wounded in battlefield. In 1929 a new version was approved that included protection to the military wounded and sick, and protection was granted to a whole new category of victims: prisoners of war. This fact gave the 1929 convention the name under which it is known: the 'Prisoners of War Code'. With the last codification in 1949, this set of rules became the four Geneva conventions that regulate *international conflicts*.[24]

Still, it is important to recognize that geopolitical dynamics generate conflicts that cannot be classified as international because they are carried out by states. More and more, we see conflicts within a State or where new subjects of international law, that is, other than states, appear.[25] Non international conflicts were thus contemplated under Article 3, or 'Common Article 3', present at the four conventions. This article provides as follows:

> In a conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following

[23] The so called Geneva Conventions of Internacional Humanitarian Law refer to the series of instruments signed through the mid-XIX century to mid-XX century with the intention to protec victims of armed conflicts. Together, the 1864, 1906, 1929, and 1949 conventions constitute the 'Geneva Law' that sets the rules of application of humanitarian law under international and non-international conflicts.

[24] SWINARSKI, Christophe. Introducción al Derecho Internacional Humanitario. CICR e Instituto Interamericano de Derechos Humanos. Costa Rica, 1984.

[25] LÓPEZ BASSOLS, Hermilio. Derecho Internacional Público. Porrúa. México, 1997. The author analyses the theories on the subjects of international law that accept, each time in a more formal way, that international law cannot only be applied to status, but must consider other ones that acquire relevance, such as international organizations both governmental and non governmental-, private enterprises, and even individuals 'when they have acquired a certain notoriety'.

> provisions to protect the persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed out of combat...by detention.

This provision also specifically prohibits passing sentence and carrying out executions without previous judgment of a regularly constituted court that provides all the affordable judicial guarantees.

In 1974 important complementary agreements were signed under the name of Additional Protocols I and II. The first protocol clarifies provisions on situations of international armed conflict, and the second one precises those provisions of Common Article 3 on non international armed conflicts.

Adoption and Applicability of IHL

Even though International Law has historically being contested on its applicability, International Humanitarian Law, along with International Human Rights, is probably the branch that has been more universally recognized as necessary to be applied and respected: "[t]he doctrine of international law has made so appear that a part of the basic norms of IHL represent exactly the *jus cogens* of the international community, that is, its [imperative] law."[26] The reason can be found in the very values it protects, because they are unavoidable for the survival of the international community and, ultimately, of humanity.

Mohamed El-Kouhêne gives a clarifying statement on this subject:

> [B]y clearly defining the impossibility to diminish [the fundamental rights of the human person granted by International Human Rights and International Humanitarian Law] it has been demonstrated that such norms are of an essential relevance to the international community and to humanity. The sphere of the

[26] A.A. Cancado Trindade in SWINARSKI. 1984. Pg 27.

> fundamental rights of the human person is, without any doubts, that in which the concepts of *jus cogens* and imperative law find their reason to exist.[27]

The universality of these dispositions is expressed by the wide ratification of the instruments that contain them. To this day, more than 166 states have integrated the rules of International Humanitarian Law to their national legal system.

The applicability of IHL can be revised under three perspectives: the situational one (*rationae situationis*), the temporal one (*rationae temporis*), and the personal one (*rationae personae*). Under the situational point of view, it is crucial to distinguish between three different situations where the rules of IHL can be directly applied and invoked:

- International armed conflict. Defined under Common Article 2 of the 1949 Geneva Conventions as "declared war or any other armed conflict that rises between two High Contracting Parties, even through state of war has not been recognized by any of them."
- Interstate war. Term applied to those conflicts that, "without extending to the territory of more than one State, the nature of their character is that of an international conflict."[28]
- Non International armed conflict. It is defined by the Protocol II of 1977 as a "conflict that has place in the territory of a High Contracting Party, between its dissenting Armed Forces or armed organized groups that, under the direction of a responsible command, exercise on a fraction of that territory, such a control that allows them to develop sustained and concerted military operations and apply the present Protocol II."

Given that the Protocols can only be applied when the Conventions are applicable too, that these definitions are contemplated in Protocol II has an important consequence: the

[27] M. El Kouhêne in Swinarski. 1984. Translation from the French (original) by the ICRC.
[28] Ibidem. Pg 36.

rules of Common Article 3 can only be applied to a non international conflict only when the Geneva Convention is already applicable in a State.[29]

Regarding the span of time, it is important to note that The Geneva Conventions belong to those set of rules of IHL whose applicability starts with the beginning of hostilities in a conflict, and they cease to be applicable when hostilities come to an end. To apply these rules, it is not a requisite that the parties acknowledge formally that they are in conflict.

Finally, from a formal point of view, the main subjects of the rules of The Geneva Conventions are the High Contracting Parties to the treaties; that is, the signatory States. Individuals protected by those rights are beneficiaries under very specific circumstances. Under this reasoning, it can be said that The Geneva Conventions are a set of rules in favor of the human person, but individuals cannot activate by themselves the mechanisms for their protection.

Moreover, each of the four Geneva Conventions has been designed to protect a specific category of victims of armed conflicts:

- First Convention on protection of wounded and sick in war on land.
- Second Convention on protection of wounded, sick and wrecked in naval war;
- Third Convention on the treatment of prisoners of war;
- Fourth Convention on protection of civil population in power of the enemy. [30]

They all contemplate the right to a 'maximum' (reinforced) or 'minimal' protection, according to the status and situation of individuals protected under each one. The minimal protection means that even though an individual might not be granted every

[29] Ibidem, pg 35-41. The autor enumerate the different areas of application of IHL under the following categories: situational, temporal, and personal.
[30] SWINARSKI, 1984.

right under the corresponding convention, he or she is still entitled to certain basic guarantees.

Applicability of International Treaties in the US National Legislation

Derived from interaction and agreement with other nations, international treaties and their integration into national legislations has been a necessary part of the legislative history of every country. For the U.S. courts to determine how to integrate these agreements into their legislation, they have adopted a practical approach: to look into each treaty's text to find the instruments to do so.

The Supreme Court of the United States has determined that an international treaty can be interpreted both as a contract between the United States with another independent nation, but also as an instrument that sets certain rules intended to be incorporated to the right of the citizens of the contracting parties.[31] And so, as such it must be applied.

In *Foster v Neilson*[32] the Supreme Court further classified international treaties accordingly to their applicability, introducing the concepts of 'auto applicability' and 'hetero applicability'. The difference resides in the presence of the instrument that the treaty provides –or not- to be integrated and operate in the national legal system. Auto applicable treaties can be automatically incorporated without need of implementing any additional legislation, while hetero applicable ones require a complementary legislative act to be applied into to the national legal system. Still, it is important to remark that the final decision on how to assimilate a treaty's dispositions into US legislation is on the Congress, for it was this body the one that either conceived or reviewed the treaty.

The integration of international treaties into the adopting States' legislation is thus a way in which that country's citizens can harmonize their national dispositions with those of

[31] SUBRIN, WOO. Op. cit.
[32] Ibidem.

other contracting states. It is through this harmonization that the basis for a universal system of individual rights can be constructed.

III. THE WAR ON TERROR

Political Context

The terrorist attacks of September 11, 2001 on civilian and military targets in the United States were the beginning of what was called by the Bush administration the 'War on Terror'. The hijacking of commercial planes to attack the World Trade Center and the headquarters of the Department of Defense, along with the thousand of civilian casualties, generated an atmosphere of fear and a sensation of vulnerability that needed to be quickly contested by a sound and firm response from United States. The Executive power of the United States soon revealed the presumed enemy, Al-Qaeda, whose leader, Osama Ben Laden, had been a long time target for the intelligence services of the United States. Reportedly, the Taliban government of Afghanistan had supported the organization and allowed terrorist activities in its territory. Under the 'Authorization for Use of Military Force' (AUMF) and the argument of capturing the leaders of Al-Qaeda and their fostering government members, Afghanistan was invaded.

The menace of terrorism on the United States had been always present, but the idea of attacks on its territory was remote to most of the population. Although some sectors were aware about discontent in the international arena with the international policies pursued by the US government, the sensation of invulnerability was shattered by September 11. Attacks in the US territory brought closer the enemy, but that enemy had a blurry face, if in fact had one. The concept of 'War on Terror' and the invasion of Afghanistan was

intended to show to the public that there was a strong response from the United States on the attacks, but also had the convenient effect of giving the population a more conceivable portrait of the enemy: the terrorists, whatever that meant.

Even though the attack was not previously authorized by the Security Council, as the United Nations' procedures state must be done to answer any hostile attacks, very few governments around the world would have dared to contest it. The War on Terror could not be refused as illegitimate or controversial, because the threat of terrorism seemed potentially present in practically every country. Even though some shy voices protested, it appeared reasonable to answer the attacks over the nation that was suspect of fostering the responsible terrorist organization.

After the invasion and quick victory over Afghanistan, the offensive was set over Iraq. Although the justifying argument was that the government of the new target was producing massive destruction weapons, the fear of new terrorist attacks was clearly underlying. It was very clear that the United States needed to overcome the sensation of invulnerability by vigorously answering any kind of threat. The country was not only showing that it preserved its strength and power, but the Government also felt an urgent need to demonstrate to its citizens that it was able to protect them efficiently.

Towards a Global War on Terror

The sensation of vulnerability was soon expanded around the globe. Although permanently present in the political life of many regions, strikes on the nations that were at that moment allied to the United States had a profound effect in the international arena. The responsibility for the attacks to the Atocha Train Station in central Madrid on March the 11th, 2004 claimed by an Islamist terrorist organization while Spain was still supporting the US forces in Iraq raised even more fears about an expanding wave of terrorism related with Islamic terrorist cells around the globe. This concern was enough to determine the immediate Spanish presidential elections in favor of the candidate of the socialist party, José Luis Rodríguez Zapatero, who pronounced himself against the participation of Spanish forces in the occupation.

Great Britain, the strongest and closest ally to the US' War on Terror, suffered in its own territory the effects of terrorism when London's public transportation system was attacked on July the 7th, 2005. Again, the responsibility was said to be claimed by an Islamist group.

Global terrorism was present in the numerous attacks on civilian targets in other countries, most of them in Arab and Islamic nations. Although those that captured most of the attention were Osama Bin Laden's videos transmitted mainly by the Arab chain Al-Jazeera, many others were constantly released by any kind of media, and were permanently accessible by internet. The boom of mass media, and particularly electronic

media, was taking its part in the world wide diffusion of the terrorist message. The general sensation among the North American audiences was that of a permanent hazard. At least in the media, it seemed that it all had to do with turmoil in the Middle East.

International institutions and international law soon saw the consequences of the new debate between peace, freedom, and security. The response to terrorist attacks was a series of global initiatives to strengthen the security systems and attack terrorism. Although many protested against the new measures, it was quite clear that the vulnerability sensation imposed itself, and most governments preferred to adopt the new security measures.

Under this context, the Government of the United States managed to implement all kinds of measures and mechanisms aimed at reinforcing homeland security, while avoiding the debate on the violation of individual freedoms. Many governmental actions, both by the Executive and the Congress, were taken to combat terrorism from abroad and to ensure security in US territory.

Governmental Actions

The Congress of the United States answered to the attacks granting the President the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided terrorist attacks...in order to prevent any future acts of international terrorism, against the United States by such

nations, organizations or persons", under the name of *Authorization for Use of Military Force (AUMF)* 115, Stat. 224 (2001).

It was under this Joint Resolution and the extended powers it gave to the chief of the Executive Branch that the President, having determined that the responsible organization for the attacks was being supported by the Taliban regime, ordered the Armed Forces to invade Afghanistan and detain those suspected of helping terrorism. Those suspects were to be held in detention centers in Afghanistan and Guantanamo Bay.

As a result of this action, on November the 13th, 2001, the President issued a comprehensive military order. Known as the 'November 13th Order' or 'President Military Order', its objective was to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism". Individuals subject to this Order are those non-US citizens for whom the President determines "there is a reason to believe" that he or she "is or was" a member of Al-Qaeda or has engaged or participated in terrorist activities aimed at or harmful to the United States. Those individuals shall "be tried by a military commission for any and all offenses triable by a military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death." In the document, the power to appoint the military commissions is vested on the Secretary of Defense, at the time Donald H. Rumsfeld. In practice, an 'Appointing Authority for Military Commissions' has been designated, and this power delegated to a retired major

general and military lawyer, John D. Altenberg Jr.[33] The policies, procedures, and responsibilities for the trials of those non-US citizens appointed to a military commission under the November 13th Order were defined under what is known as Military Order No. 1 (MCO No.1), issued March 21st, 2002.[34] Other instructions were released and some others revised under later instruments: the Military Commission Instructions set (MCIs) from April 30, 2003; Military Commission Order No. 3 (MCO No.3) from February 5, 2004; and Military Commission Instruction No.10 from March 24, 2006.[35]

In order to try non-US citizens that had been determined to be implicated in acts of terrorism against the United States, the Bush administration decided to use the territory of the U.S. military base at Guantanamo Bay, in an attempt to keep detainees outside the theater of war. This land, leased from the Cuban government in 1903, is under an agreement that gives the U.S. territorial jurisdiction but recognized the Cuban government ultimate sovereignty. The Guantanamo Bay military base was highly desirable to the Executive's objectives for two reasons: first, it is highly protected; second, because its legal status and the agreement with the Cuban government renders it, at least to the eyes of the Bush administration, outside the jurisdiction of any court. These purposes were indeed well served: since the arrival of the first prisoners in January 2002, the number of detainees held at Guantanamo Bay is almost 800[36], and its location and

[33] Several reports from international organizations, along with the Supreme Court's opinion in *Hamdan v. Rumsfeld* have examined the November 13th Order.
[34] Department of Defense. Military Ordern No. 1. March the 21st, 2002. http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf
[35] Human Rights Watch. Briefing Paper on U.S. Military Commissions. June 23, 2006. http://www.hrw.org
[36] GUDE, Ken. After Guantánamo. Center for American Progress. April 2006.

legal status have made it almost impossible for humanitarian organizations to have access to this detention center.[37]

Although the most famous, the Guantanamo Bay detention center is not the only one of its kind. An uncertain number of these centers are known to be in place outside the territory of the United States with a similar objective: to be out of reach of any court's jurisdiction. This very fact was enough to raise concerns that became stronger when the conditions of confinement and procedures for trial came to be known. Most of the detainees were charged a long time after being captured, and any information of the accusations to which they were subjected remained a secret, both to the detainees and their families. Even to this date, from about 460 detainees that are now being held only in Guantanamo, only ten have been charged with an offense considered triable by military commission. On May 2006 the Bush Administration was expecting to charge about 70 or 80 more and to release 134. The rest are to be held indefinitely.

From the beginning, the Bush administration has denied detainees the designation of 'prisoners of war', demanded by The Geneva Conventions, at least until their status is defined by a competent tribunal. According to this document, whenever the status of a detainee is in doubt he or she will be entitled to the full protection of the Conventions until an authorized court defines his or her status. Still, detainees were also refused access

[37] Several organizations concerned about the conditions of detention and right of the detainees have demanded access to the Guantanamo Bay detention center. Only few, among them the International Committee of the Red Cross have had very limited and surveyed access to the Guantanamo facilities, but no contact with prisoners. These organizations, among them the ICRC, Aministy International, Human Rights Watch and UN organisms, have denounced the lack of transparecy over what is happening in these centers.

to any mechanism to contest their status. On this basis, in 2004 the Supreme Court ruled that detainees should have a venue to contest their designation as unlawful combatants.

It was under this context that the November 13th Order started to be complied with. Hearings to the first military commission finally began on Tuesday, August the 24th, 2004, at Guantanamo Bay. Even before the first hearing started, polemics on the trials' legitimacy were already raising in the national and international arena.

The Detainee Treatment Act of 2005

Both as a reaction to critics about detention and to the rules of trials, another relevant document was issued by the Congress: the *Detainee Treatment Act of 2005* or *DTA*, enacted on February the 13th, 2005, signed into law on December 30 of the same year. The DTA places restrictions on the treatment and interrogation of the detainees held under US custody. For the US personnel accused of engaging in improper interrogation it established procedural protections and set 'Procedures for Status Review of Detainees Outside the United States'. The DTA also contains the so-called 'Graham-Levin Amendment'[38] provision, that precludes detainees from bringing any legal challenge to their ongoing detention or confinement conditions.

[38] The text reads: "No court, justice or judge will have jurisdiction to hear or consider an application for writ of habeas corpus filed by or on behalf of an allien outside the United States...who is detained by the Department of Defense at Guantanamo Bay, Cuba." PDF document in http://jurist.law.pitt.edu/gazette/2005/11/graham-levin-amendment-on-detainee.php

The DTA also contemplated a particular tribunal to determine the detainees' status: the Combatant Status Review Tribunal (CSRT), under subsections (a) through (d), called "Procedures for Status Review of Detainees Outside the United States". These sections of the DTA direct the Secretary of Defense to report to the Congress the procedures that the CSRT used to determine the detainee's status and classification. These procedures apply to individuals under US custody in detention centers of Guantanamo Bay, Iraq and Afghanistan.

Subsection (e) of DTA, "Judicial Review of Detention of Enemy Combatants" amended the United States Code in its subsection 2241 title 28 on judiciary and judicial procedures, by adding three paragraphs with the following rules:

Paragraph 1:

- No court, justice, or judge will have jurisdiction to hear or consider the following (except as provided in section 1005):
  - The application for writ of habeas corpus of an alien detained by the Department of Defense at Guantanamo Bay;
  - Any action against the United States or its agents related to any aspect of the detention at Guantanamo Bay by the Department of Defense of an alien who: a) is currently in military custody; or b) has been determined by the United States Court of Appeals for the District of Columbia Circuit to have been properly detained as an 'enemy combatant'.

Paragraph 2

- The Court of Appeals for the District of Columbia Circuit has the 'exclusive jurisdiction to determine the validity of any final decision of a Court of Status of Review Tribunal designating an alien an 'enemy combatant'. The scope of that review is limited to accordance to the tribunal's procedures.

Paragraph 3

- The Court of Appeals for the District of Columbia Circuit also has exclusive jurisdiction to determine the validity of any final decision of a military commission (that is, decisions pursuant to Military Commission Order No.1). Review is a right only for those sentenced to death or more than ten year imprisonment, and the rest of the cases are review only at the Court of Appeals discretion. The scope of review is also limited to:
    - Whether the final decision was consistent with the standards and procedures specified by the military commission;
    - To the extent the Constitution and laws of the United States are applicable.

The provision of the effective date of enactment clearly states, for the CSRT and for the decisions of military commissions, that: "Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one such paragraphs and that is pending on or after the date of the enactment of this Act."

The Supreme Court[39] has stressed the fact that it was clear on the date of application of paragraphs 2 and 3, but "is silent about whether paragraph (1) of subsection (e) "shall apply" to claims pending on the date of enactment."[40]

The Detainees Treatment Act of 2005 was an answer to the concerns of the public opinion. It provided procedures for treatment and interrogation, and established a so-called 'competent tribunal' to determine the detainees' combatant status. Still, as a whole, the DTA was rather an answer to the concerns of the Bush administration regarding detentions. Even though it established a CSRT to comply with international law, its procedures were widely contested. Moreover, it precluded detainees from contesting the conditions in which they were being held, and limited the US federal courts jurisdiction to hear from these cases.

Eyes Over Guantanamo

Soon after the first actions taken by the Executive and Legislative powers, but particularly with the detention of individuals in centers off the United States' territory, many organizations concerned about International Human Rights and International Humanitarian Law started their protests. The very capture, detention, charging, status determination of detainees, establishment and procedures of military commissions were controversial.

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[39] *Hamdan v Rumsfeld.* Opinión of Stevens, J. pg 9-10

[40] This remark is essential to the understanding of further denial of the Supreme Court to the government's demand to dismiss Hamdan's writ of certiorati.

The White House made an effort to show the U.S. citizens that it was effectively responding to the menace of international terrorism by creating even more specialized agencies on terrorism and bringing suspects to trial. It developed an elaborate discourse on the need to hold suspects, now namely 'enemy combatants[41]', under US custody to prevent them from doing any harm and to provide most useful information on terrorist cells. Detainees, the White House insisted, were treated according to the menace they represented, but also according to US and international law.[42]

Secrecy was kept over the conditions in detention centers and the protests of the international community under the argument of 'national security'.[43] But it was, indeed, the interest of media in presenting the most shocking images (the scandal on Iraqui prisoners at Abu Ghraib[44] detention center at has not yet being forgotten) what made the protests louder. Controversies over detentions were based on the following points:

- Non compliance with due protection of detainees under the required status of 'prisoners of war' according to The Geneva Conventions.

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[41] The creation of this new term by the Combatant Status Review Tribunal was a quite convenient denomination of detainees's status to avoid the internationally recognized one of 'prisoners of war' which entitles them to very specific protection. The status of 'enemy combatant' is inexistent under The Geneva Conventions, but was trying to emulate the one of 'unprivileged belligerent', that renders individuals unprotected under those conventions.

[42] A great number of official discourses and communications were issued to international media and posted in the official sites of the White House, Armed Forces and Specialized Agencies since the very beginning of the detentions. (See Electronic Sources in Bibliography).

[43] Not only several governments protested against detention centres in Afganistán, Iraq and Guantánamo Bay, but official reports from different organisms of the United Nations, along with those from reputed non governmental international organizations like Human Rights Watch urged the US government to thoroughly revise its policies in detention centers and respect international law.

[44] On April, 2004 shocking images of physicial abuse inflicted on prisoners of the Abu Ghraib detention center held at Iraq were disclosed to the international media. The scandal unleashed by these images raised concern about conditions of detention, but also on the reliability of the information obtained from the prisioners, given the interrogation methods that were apparently put in place.

- Unlawful detention without charges under the law of war and international law. Most detainees were not even charged.
- Conditions of detention, mainly because of allegations of degradation.
- The procedures of interrogation.[45]

To these allegations the Congress answered with the Detainees Treatment Act, particularly after the claims of abusive interrogation methods at Guantanamo Bay, but mainly after the Abu Ghraib scandal.

When the special tribunals to judge the detainees at Guantanamo Bay were installed and trials started, very few external observers were allowed. Under the allegation of national security, public access to most procedures was denied. Still, access to the audiences was granted to certain organizations, looking after legitimating the process by showing that detainees were having a fair trial. Protests did nothing but become louder over the composition of the appointed military commission, incompetence of its members, and procedures that violated The Geneva Conventions and both US and international laws.

It was not long before the first claims against lawfulness and lack of jurisdiction of military commissions were filed to the federal courts. Cases were received by the District Court of Columbia Circuit as a first instance. These actions raised complaints from the White House, for the DTA, according to the Government's reading, stated that federal courts could not hear those cases of detainees captured under hostilities with Al-Qaeda. *Hamdan v. Rumsfeld* was the first case to escalate its way to the Supreme Court.

[45] Controversies and violations to international standards of international human rights and international humanitarian law have already been widely documented. These are, of course, not the only arguments but only the main ones. The principal organizations contributing to the most credible reports, for they have been granted access to both detention centers and detainees, are the International Committee of the Red Cross (ICRC), Human Rights Watch (HRW) and Amnesty International (AI).

IV. CASE ANALYSIS: *HAMDAN V RUMSFELD*

Background

Yemeni Salim Ahmed Hamdan was captured in 2001 during the hostilities between the US and Taliban forces, in the midst of the invasion over Afghanistan. He has been held in the Guantanamo Bay detention center since June 2002, when he was transported there from Afghanistan after being turned to the US military. Hamdan received a formal hearing before a specially created tribunal to determine his status as a prisoner: the Combatant Status Review Tribunal (CSRT). This instance decided to classify Hamdan under the term 'enemy combatant'. Being neither a prisoner of war of an international conflict, nor of a non-international one, Hamdan was allegedly not entitled to the protections of any of The Geneva Conventions.

Only a year after his detention, Hamdan, along with other detainees, was deemed eligible by the President for trial by the military commissions the Chief of the Executive had established under Order No.1.[46] Yet, another year had to pass before Hamdan was finally charged with 'conspiracy to commit offenses triable by military commission'.[47] Under this circumstance, Hamdan started filing petitions for writ of habeas corpus and mandamus that challenged the prosecution of charges against him.

Although Hamdan had conceded that he could be tried for offenses against the law of war by a court-martial under the Uniform Code of Military Code, he objected that the military commission appointed by the President lacked authority to do so. He presented two main arguments:

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[46] Military Order No. 1 of March 21st, 2001 on policied and proceedures for tribunals established under the 'Novermber 13th Order' or 'President Military Order' that established the Special Tribunals of Guantanamo.
[47] The details of Hamdan's process have been revised by several human rights organizations, and verified by the Supreme Court of the United States.

a. There is no law or congressional act that supports trial for the charge of conspiracy, for it is no violation to the law of war. Therefore, this charge cannot be tried by a military commission.

b. The procedures that the Executive had decreed for military commissions violate US military and international laws at their most basic principles.

On the Way to the Supreme Court

Hamdan's trial before the military commission appointed for him should have started on November the 8th, 2004. Instead, on that same month, the District Court of Columbia Circuit, as a first federal instance, granted Hamdan's petition of habeas corpus, and heard his arguments on the lack of authority of the assigned commission to try him. The District Court found that Hamdan could not be judged by the appointed military commission, and stayed the commissions' proceedings.[48]

That decision was reversed by the second instance, the Court of Appeals for the District of Columbia Circuit. This new decision was based on the opinion of the judges that President Bush had not violated the principle of separation of powers with the establishment of special tribunals, because he had the authorization of the Congress to do so under the AUMF of 2001. It also rejected Hamdan's claim that the Geneva Convention was judicially enforceable in a federal court.[49]

On November 7, 2005 the Supreme Court of Justice of the United States granted Hamdan certiorati, under the *Quirin* precedent, "recognizing, as we did over a half-century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure."[50]

[48] Hamdan v. Rumsfeld. 344 F. Supp. 2d 152 (DC 2004).
[49] Hamdan v. Rumsfeld. 415 F. 3d 33 (2005).
[50] Hamdan v. Rumsfeld 548 US (2006)

After evaluating the main arguments of the case, the Supreme Court held that:

> [T]he military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and The Geneva Conventions, [and that] the offense with which Hamdan has been charged is not an offense that by the law of war may be tried by military commissions.[51]

The Supreme Court's decision on *Hamdan v. Rumsfeld* was widely interpreted as a triumph of justice by those concerned about the process of detention and trial of under the Special Tribunals of Guantanamo. Others saw a strong answer to the actions of the White House on the issue of counter balance of powers. Still, this decision deserves a more profund analysis on its juridical basis.

What Did the Supreme Court Analyze?

> *"Congress and the President, like the courts, posses no power not derived from the Constitution...That authority, if it exists, can derive only from the powers granted jointly to the President and the Congress in time of war."*[52]

The Supreme Court had two issues to answer in Hamdan v. Rumsfeld. First, if it had the authority to decide upon such a case. If the answer to the first issue was affirmative, it had to determine in the tribunals established under the 'War on Terror' were lawful.

Therefore, before even considering Hamdan's arguments on unlawfulness of the military commissions, the Supreme Court had to determine whether it had the authority to review these cases. Only if such authority existed, the Supreme Court could address the main issues of the *Hamdan* controversy. For this second analysis, the court was basically asked to answer three general questions regarding lawfulness of the military commissions, each with specific points to examine:[53]

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[51] Hamdan, pg 10.

[52] Citations taken from the Supreme Court's opinion on *Hamdan v Rumsfeld*, from *Ex parte Quirin* and *Yamashita*, 327 US 1, 11 (1946).

[53] This scheme was based on an analysis of the Hamdan case by the organization 'Human Rights Watch', whose specialized international lawyers followed the proceedings closely from the beginning of the

1. Is the establishment of military commissions by the President lawful?

a. Does the President have the authority to establish them?

b. Does the President need the authorization of the Congress to establish the commissions?

c. Did the Congress give the President the authorization to do so?

2. Does the Military Commission appointed to Hamdan have jurisdiction over him?

a. Can the petitioner be judged on the charge of conspiracy?

3. Are Military Commissions lawful and do they have the authority to judge the detainees?

a. Are the procedures of the military commissions lawful and in accordance with the US laws, particularly UCMJ and DTA, and The Geneva Conventions?

b. Can the petitioner obtain judicial enforcement of Common Article III of the Geneva Conventions, and thus are his rights protected in a habeas corpus action?

In summary, the first question examines the military commissions' lawfulness under the US laws, and particularly under the Congress Authorization to Use Military Force (AUMF), the Uniform Code of Military Justice, and the allegedly inherent powers of the President. The second question addresses whether the military commissions are in accordance with the instruments of International Humanitarian Law that the United States has integrated to its national law with no need of additional regulation. Finally, the third question examines in depth the procedures of the military commissions and compares them to the rule of both national and international law.

The Arguments

In order to make the arguments that sustain the decision of the Supreme Court of Justice more structured, it is more convenient to address them in the order of the principal

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establishment of the commissions and were present at the few open hearings. (See reports from Human Rights Watch).

questions raised by this case. Therefore, it is necessary to briefly explain first the Court's reasoning to determine it had authority to review the case.

Authority of the Supreme Court to Review Cases under a Military Commission

As stated above, before even considering the merits of the Hamdan's petitions, it was necessary that the Supreme Court determined if it had the authority to and decide upon cases for which the government decided to appoint a Military Commission. This, because while Hamdan was asking for a certiorati, the Government stated the Court could not grant a hearing and should dismiss the detainee's petition.

Government petition to dismiss certiorati: Denied[54].

The Government filed a motion to dismiss the writ of certiorati, arguing that the Supreme Court had no jurisdiction to review the decision of the Court of Appeals of the District of Columbia Circuit. This, on the ground that the Detainee Treatment Act, section 1005 subsection (e) paragraph (1) and section1005 (h) had the immediate effect of repealing federal jurisdiction over detainees habeas actions were yet to be filed and those pending in federal courts. The Government also argued that not applying (e)(1)[55] to pending cases would produce an undesired result of dual jurisdiction over detainees.

Hamdan objections included the following arguments:
- That the Government's argumentation raised "grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases."

[54] Hamdan, Pg 7-20.
[55] Section 1005 (h) (e) (1) reads says its paragraph 1 that no court, justice, or judge will have jurisdiction to hear or consider the application for writ of habeas corpus of an alien detained by the Department of Defense at Guantanamo Bay; or any action against the United States or its agents related to any aspect of the detention at Guantanamo Bay by the Department of Defense of an alien who: a) is currently in military custody; or b) has been determined by the United States Court of Appeals for the District of Columbia Circuit to have been properly detained as an 'enemy combatant'.

- That if the Government's reading was correct, then the Congress unconstitutionally suspended the writ of habeas corpus.

Hamdan supported these arguments with precedents: *Ex parte Yerger*, where the Supreme Court of the United States held that the Congress would not be presumed to have made a denial to consider an original writ of habeas, unless there was an 'unmistakably clear statement to the contrary'; and *Duroussoeau v. United States*: "[t]he appellate powers of this court are not created by statute, but are given by the constitution."[56] This means that the Supreme Court needed no specific statute to consider Hamdan's petition, given that it had the Constitutional power to do so and that there was no explicit statement against it.

The Supreme Court did not considered Hamdan's arguments, but refused government's petition, for this particular case was pending at the time the DTA was enacted. Refusal was made on the reasoning that, if the Congress was 'reasonably concerned' to ensure that the dispositions of its section 1005(e)(2) and (3) were applied to pending cases, it should have been equally concerned with those of subsection (e)(1), *unless* this was not its original intention. The reasoning of the Court was that reinforcing the application to pending cases of the provision that gives the D.C. Circuit exclusive jurisdiction to review final decisions of combatant status tribunals and military commissions, was precisely to exclude application to those same pending cases of the disposition by which civil courts will have no jurisdiction to hear petitions of habeas corpus by an alien detained at Guantanamo Bay. Government's argument on dual jurisdiction was also dismissed, given that Hamdan's action is not contesting any 'final decision', and so the DTA does not deal with it.

[56] *Ex parte Yerger* and *Duroussoeau v. United States* in *Hamdan v. Rumsfeld.*

Government petition for the court to wait the outcome of the military proceedings: Denied.

The Government relied on the *Schlesinger v. Councilman*[57] precedent[58] and suggested that the Court should apply the "judge-made rule that civilian courts should wait the final outcome of on-going military proceedings before entertaining an attack on those proceedings. Several charactersitics of the Hamdan petition differed from those of the *Schlesinger v. Councilman* precedent: the fact that the petitioner is not a member of the armed forces, that the contested military commission is not part of an integrated system of military courts, and that he had no possibility to access a higher military court to hear his case. Given these differences, the Government's petition was rejected.

Moreover, the Supreme Court found that *Ex parte Quirin*[59] is a more relevant precedent to the case, because of the power it provides to civilian courts to entertain challenges that are looking forward to interrupt processes before military commissions, and recognizes the public importance of addressing these cases. Particularly for *Hamdan v. Rumsfeld*, the Court considered it was in the best interest of the parties to know in advance if, in effect, the detainee could be tried by military commission.

Presuming that the Congress intention was not to apply DTA's dispositions of section 1005 (e) (1) to cases pending at the time, that there was no reason to claim double jurisdiction issues, that there is reasonable doubt that the military commissions has jurisdiction over the defendant, and that in this particular case the Court considered it was in the interest of the parties to know if the military commission could try the defendant, ***the Supreme Court determined it had the authority to review the merits of Hamdan's case.***

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[57] *Schlesinger v. Councilman.* 420 US 738 (1975).

[58] *Schlesinger v. Councilman* sets a precedent that compels civil courts to wait for the final out come of military proceedures; the exception are those cases in which there is reasonable doubt on the jurisdiction of the court over the accused, particularly when there is special interest of the military tribunals to know in advance if it actually has that jurisdiction.

[59] *Ex parte Quirin.* 317, US. (1942).

Lawfulness of Military Commissions

After determining it had the authority to review Hamdan's case, the Supreme Court started the examination of the arguments of both parties on the lawfulness of the establishment, jurisdiction, and procedures of military commissions.

Lawful establishment of Military Commissions by the Executive Power[60]

The Supreme Court, on the ground of precedents on the establishment and use of military commissions, points out that "exigency alone...will not justify the establishment and use of penal tribunals not contemplated by Article I, section.8 and Article III, section 1 of the Constitution unless some other part of that document authorizes a response to the felt need".[61] Therefore, the use of these special tribunals must find a solid justification argument.

The Constitution, accordingly to the exigency of war, grants each power certain attributions to deal with this situation. The President can institute tribunals for trial of offenses against the laws of war, only with the sanction of the Congress. The Supreme Court, in *Quirin*, held that through Article 15 of the Articles of War, Article 21 of UCMJ, the Congress may sanction the use of military commissions in circumstances of 'controlling necessity'. Still, the Authorization to Use Military Force (AUMF) is no expansion of those powers the President already had under Article 21 of UCMJ. Moreover, that authorization cannot be interpreted as a mandate to install military commissions. Together with the Detainees Treatment Act, the AUMF and the UCMJ provide a 'general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war".[62] Given that there was no specific congressional authorization for the military

[60] Hamdan, pg 26.
[61] Idem.
[62] Ibidem, pg. 30.

commission trying Hamdan, the Supreme Court had to examine if it was justified according to the 'Constitution and laws'.

Regarding the question of whether the establishment of military commissions by the president is lawful, the Supreme Court has held that, in effect, the President does have the authority to establish them under certain specific circumstances. Yet, the authorization issued by the Congress is a general one, and therefore goes no further than the presidential powers already granted under Article 21 of the UCMJ. Given there was no specific congressional act to install those commissions, *it is necessary to examine if they are justified and in accordance to the Constitution and the law.* In this case, the Congress, through AUMF, and DTA made this kind of general authorization on already existing presidential powers. This means that the military commissions at issue are not expressly authorized by any congressional act. Therefore, the Supreme Court analysis must go further to determine if these commissions are justified and lawful.

Jurisdiction of the Appointed Military Commission over the Detainee

The model of military commission appointed to try Hamdan is found in *Ex parte Quirin*[63], its most invoked precedent, given that Guantanamo Bay (Hamdan's place of detention) falls in neither of the first two situations in which this kind of special tribunals has been traditionally used: it is not an enemy occupied territory or under martial law. Thus, the supposition left is that of 'an incident to the conduct of war where there is the need to seize and subject to disciplinary measures those enemies who...have violated the law of war".[64]

To bring a detainee before a military commission, and for this to prove jurisdiction over him, it is indeed necessary, according to the Uniform Code of Military Justice, that the charge sets forth the details of the offense *and* the circumstances that confer jurisdiction

[63] *Ex Parte Quirin*, 317 U.S.
[64] Hamdan, pg 32.

to that tribunal. Still, it is also a must to justify military necessity to use special tribunals, and that the preconditions to ensure this need are accomplished in this case. Hamdan contests that these preconditions are not being fulfilled.[65]

Recalling Winthrop's description of the preconditions for exercise of jurisdiction by a military commission[66], the Supreme Court evaluated the tribunal convened for Hamdan:

> a. A military commission can legally assume jurisdiction only of *offenses committed within the field of command or the theater of war*[67] of the convening commander.
>
> b. The offense charged must have been committed *within the period of the war*. It is important to note that Winthrop points out that there is no jurisdiction for offenses occurred before or after the war.
>
> c. Those military commissions that have not been established pursuant martial law or occupation can only *try individuals of the enemy's army guilty of illegitimate warfare or offenses that violate the laws of war.*
>
> d. Law-of-war commissions only have jurisdiction over two kinds of offense: violations of laws and usages of war that can be brought before military tribunals; and breaches of military orders or regulations for which offenders are not legally triable by courts-martial.

One of Hamdan's main arguments is that the charge that he is being accussed of and the reason why he is being brought before a military commission, conspiracy, is no violation to the law of war. The charging document that the government filed to the court reads in its first two paragraphs the alleged basis for the jurisdiction of the military commission – November 13 Order and the presidential declaration of Hamdan's eligibility to trial by

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[65] The Supreme Court analyses jurisdiction of the appointed military commission over the detainee in *Hamdan*, Pg 31-49.

[66] W. Winthrop, who has been called by the Supreme Court "the Blackstone of Military Law", and who examined the conditions for instauration of a Military Commission, and its use during times of war, describes four such preconditions. *Hamdan*, pg 33.

[67] Winthrop calls the theater of war the 'field of command' to imply the stage where the hostilities are taking place.

commission-and then provides the 'General Allegations', which describe Al-Qaeda's activities from 1989 to 2001. Hamdan is only mentioned in the last two paragraphs of the document, under "Charge: Conspiracy", that states: "from on or about February 1996 to on or about November 24, 2001 [Hamdan] willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspires and agreed with [named members of Al-Qaeda] to commit the following offenses triable by military commission: attacking civilian objects; murder by an unprivileged belligerent; and terrorism."[68] According to the Supreme Court, there is no allegation in the charging document that Hamdan had any command responsibilities, leadership role, or that he ever participated in the planning of the mentioned terrorist activities.

From this document it derives that:

- None of the acts and activities mentioned in the document are alleged to have occurred in the theater of war.
- Hamdan was charged with alleged conspiracy that extended from 1996 to November 2001. The alleged events should have taken place before the S-11 attacks (with the exception of two months), and thus to the enactment of the AUMF by the Congress. The acts mentioned in the document are not alleged to have occurred on any specific date after the attacks of September 11, 2001.
- None of the alleged acts committed actually violate the law of war.

From these statements, the last one is indeed the most relevant. Even though the Congress has not identified 'conspiracy' as a violation to the law of war, it is possible-under Article 21 of UCMJ-to try by military commission those offenses that are not defined by statute, and whose elements and range of permissible punishments are not defined either. But for this to happen, the existence of a 'plain and unambiguous precedent' is fundamental. The reason for this is that, otherwise, there would be a risk of "concentrating in military hands a degree of adjudicative and punitive power in excess of

[68] *Hamdan*, pg 4-5.

that contemplated either by statute or by the Constitution"[69]. This 'plain and unambiguous precedent' is inexistent.

As a minimum to accept this charge, it is required that the charging instance demonstrates that the acts for which it is trying to put the offender under a military commission is already acknowledged as an offense against the law of war. But 'conspiracy' has not been charged in the United States by any military commission that deals with offenses against the law of war. Even in the legal background of the United States, W. Withrop states that the intention to violate the law of war is insufficient, for the offense must consist in "overt acts in unlawful commissions or actual attempts to commit, and not in intentions merely."[70] The precedent relied on by the government, *Quirin*, to charge Hamdan with conspiracy, also plays in favor of the latter, for in that case, the Court saw the need to 'identify an overt, complete act' to charge the offenders with conspiracy.

The government was not able to prove that 'conspiracy' is contemplated by international law as a war crime. It is definitely not contemplated by the principal instruments of the law of war: The Geneva Conventions and the Hague Conventions. War tribunals only recognize this charge as 'conspiracy to commit genocide' or as a 'common plan to wage aggressive war'. The last one is considered only as a crime against peace and requires actual participation in a concrete plan to wage war.[71] Even the Nuremberg Tribunal refused to consider 'conspiracy to commit war crimes' as a violation of the law of war[72].

Under the reasoning of the Supreme Court, the legality of the charge of conspiracy and of the appointment of a military commission to try Hamdan is in doubt given the deficiencies to charge offenses that occurred in the time of war and in the battlefield. But

[69] Ibidem, pg 38.
[70] W.Winthrop in Hamdan, pg 40.
[71] Geneva Convention of 1948 defines genocide as "a specific act (killing, serious bodily or mental harm, etc.) "committed with intent to destroy, in whole or in part, a national, ethnical, religious or racial group, as such". http://www.icrc.org
[72] Hamdan, pg. 47. The International Military Tribunals at Nuremberg were set up to judge individuals for war crimes after World War II.

the most relevant issue is that the offense the government charges on Hamdan is no violation triable by such a tribunal. To sustain this, the court recalls its decision on Yamashita: "Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charged proffered against him is a violation of the law of war." [73]

Given that conspiracy is no offense to the law of war and that the basic precondition of military necessity to convene a special tribunal is unsatisfied, the Supreme Court held that ***the military commission convened to try Hamdan lacks jurisdiction to do so***.

Authority and lawfulness of the military commissions

Even though under the supposition that the military commission appointed to Hamdan had jurisdiction over him, the Supreme Court had to consider the arguments regarding the authority of this instances under the U.S. and international laws, and if they have the power to proceed. [74]

The military commissions' procedures are contained in Commission Order No.1, last amended in August 15, 2001, when the Hamdan trial had already begun. The commissions' composition, conditions and procedures were being largely contested by different organizations, both national and international, as violations to the most basic rights ought to be granted to an individual. [75] These rules and their alleged violation are summarized below[76]:

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[73] Yamashita, 327 U.S. in Hamdan v. Rumsfeld.

[74] The Supreme Court analyses the power of appointed military commissions in part VI of the Hamdan v. Rumsfeld decision.

[75] See reports on Human Rights Watch and NGOs' reports on detention centres off U.S. territory, and on Guantánamo Special Tribunals.

[76] This is a brief recall of those proceedings that most called the attention of the Supreme Court as analyzed in the Hamdan v. Rumsfeld decision along with the statements of the reports of the main organizations addressing the case. Still, many other deficiencies in the commissions' proceedures have been claimed by humanitarian groups and experts, who have documented legal and practical failures of military commissions. Among them, bodies of the United Nations dealing with Human Rights, Human Rights Watch, and innumerable legal associations throughout the United States. No doubt that the exclusion from evidence has

- Composition: every commission is composed of a presiding officer and (at least) other three members who must be commissioned officers. The presiding officer rules on questions of law, evidentiary and interlocutory issues. The other members make findings and, if it is the case, they sentence decisions.

Non governmental organizations have questioned the capacity of some members of the commissions given their lack of legal experience in trials, and pointed out that the actions of appointed members were vicious from the very beginning given that the appointing authority was the same that had charged the defendant and the one supervising the trial[77].

- Counseling: the accused is entitled with an appointed (that is, not freely chosen) military counsel. He or she can hire a civilian counsel at his or her own expense with the condition of that person being a citizen of the U.S. and being in possession of a security clearance with the level 'SECRET' or higher.

Concerned organizations and experts have also pointed out that the information provided by the defendant to the counsel(s) can be disclosed to the members of the commission, violating a basic principle of confidentiality.

- Rights of the accused: the defendant is entitled to a copy of the charges –in English and in his own language-, a presumption of innocence, and other rights afforded by criminal defendants both in civilian and military courts.

Yet, from the beginning detainees and their families have been denied the right to know the charge for which they are being held. The lack of proper translators from and to the

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been the most attacked, but many other have also found echo. One is the convenient designation of detainees as 'enemy combatants' (denomination inexistent under International Humanitarian Law). Also, the prohibition of military counsels to share information about evidence and about the process with his client but also with anyone else on 'national security interests' has been interpreted as a way to assure that violations to basic trial guarantees are never made public. Other 'minor' issues are also rising concern, like government's incapability to provide professional and capable translators from English to Arab and vice versa, for this is the language of most detainees. Issues like this provide that the detainees are not capable of making themselves clear, and do not clearly understand the process against them. As a whole, these conditions work against a fair trial. (See reports from national and international media and international organizations in Electronic Sources).

[77] Various reports on Special Tribunals of Guantanamo from Human Rights Watch (HRW), Amnesty International (AI) and the International Committee of the Red Cross (ICRC). HRW was one of the very few organizations granted access to the first hearing of the special tribunals, and the ICRC the only one who has had some limited access to detainees at Guantanamo Bay, while AI has issued extensive reports on detention conditions and deficiencie of the legal process.

native language of detainees has also been denounced as a major fault that limits the detainee's understanding of the process and their statements about the accussations.

- Closure of information of national security interests: the accused and his civilian counsel may be excluded from ever learning what evidence was presented during any part of the proceeding that has been 'closed' by the Appointing Authority or by the presiding officer, as long as he considers this would not "result in the denial of a full and fair trial". This closure can be done under the arguments of: protection of classified or classifiable information, information protected by law or rule from unauthorized disclosure; physical safety of participants (including prospective witnesses); intelligence and law enforcement sourced, methods, or activities; other national security interests. The appointed military counsel can be present in closed sessions, but may also be forbidden to reveal what happened there to his client, if the presiding officer considers so.
- Admission of evidence: these military commissions admit any evidence that –in the opinion of the presiding officer- has "probative value to a reasonable person". Evidence may also be excluded if the presiding officer considers that it would have no probative value to a reasonable person.

A major concern about these tribunals' procedures is the fact that, under the first rules, information can be obtained through coercion on the detainees and latter be used and validated by the commission. A later instruction (Military Commission Instruction No. 10[78]) prevents the prosecutor to present statements obtained as result of torture, and keeps the commission from accepting such statements. Yet, these provisions fail to place appropriate safeguards to avoid this situation, and there is no obligation from the prosecutor to disclose that evidence was obtained through coercion methods.[79]

- Verdict: after all evidence has been presented the commission members, other than the presiding officer, the commission votes. For a verdict and sentence a 2/3 vote is enough.
- Appeal: is made by a three member review panel of military officers, of which only one must have experience as a judge, designated by the Secretary of Defense. The

[78] Military Commission Instruction No. 10 was issued on March 24, 2006.
[79] Human Rights Watch. Briefing Paper on U.S. Military Commissions. June 23, 2006. Pg. 9-10 http://www.hrw.org

focus of this review is if the commission followed its own procedures and how that could have materially affected the outcome of the trial. The commission then sends a recommendation to the Secretary of Defense, who can demand for further proceedings or send it to the President with his own recommendation. It is the President who has the final decision to change the commission's findings or sentence in favor of the accused.[80] Again, the existing conflict of the chain of command is a concern regarding supervision of due process that has been continuously pointed out.

Hamdan contested the power of the military commission appointed to him on the general argument that the procedures decreed under Commission Order No.1 deviate from those governing courts martial, rendering the appointed military commissions illegal.

The Government objected to the Supreme Court's review of Hamdan's arguments under the following considerations:

- The already dismissed 'Councilman abstention',[81]
- That Hamdan would have opportunity to challenge the verdict of his trial under the Detainee Treatment Act; and
- That "there is no basis to presume, before trial has even commenced, that the trial will not be conducted in good faith and according to law".

The Supreme Court refused to accept any of these arguments. In the first place, *Councilman*'s abstention rule had already been dismissed as inapplicable to his case for there was reasonable doubt on the military commission's jurisdiction over the defendant. Next, because any challenge to a 'final decision' of a military commission under the DTA requires that the accused is sentenced to death or more than 10 years of imprisonment. Hamdan's accusations, as many of those of detainees already charged, do not merit such sentences. Thus, he would have no automatic right to review. And third,

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[80] This rule has also been very contested in legal and military circles, for it is clear that the appealing organism will be probably influenced by the very same instance that ordered the capture in the first place and that charged the prisoner under the belief that he had committed a crime against the law of war.
[81] From *Schlesinger v. Councilman*.

because the Supreme Court considered that there was, indeed, a basis to presume that the military commission's procedures would violate the law. On this basis, the Supreme Court granted review of the procedures of the military commission appointed to try Hamdan.

For a complete analysis on the lawfulness of military commissions on this issue, the Supreme Court had look both at the applicable federal and international laws. Most pertinent to this issue is the Uniform Code of Military Justice, regarding US laws, and The Geneva Conventions on International Humanitarian Law.

Lawfulness of the Military Commissions accordingly to the UCMJ. As pointed out before, there is a special justice interest in preserving the same procedures for both courts martial and military commissions in the legal history of these special tribunals. This interest was best served when, after World War II, the UCMJ, in its Article 2, expanded the category of persons that are subject to it:

(9) Prisoners of war in custody of armed forces.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leases by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.[82] Guantanamo Bay, and its detention center, corresponds to such an area outside territory of the United States but reserved for its use.

This uniformity principle for the military commission's procedures, accordingly to Article 36 of the same code, places two conditions on the President's power to set rules of procedure:

- They shall not be contrary or inconsistent to those of the UCMJ.
- Those rules must be 'uniform' and 'practicable'.

[82] Uniform Code of Military Justice, Article 2. 10 U.S.C. section 802 (a).

The Government argues that deviation from the proceedings set in the UCMJ respond to the fact that military commissions would be of no use if restrained by that code, and that the President's determination that 'danger to the safety of the United States and the nature of international terrorism' makes it impracticable to apply the UCMJ principles.[83] The Supreme Court found this argument insufficient to justify the variances of the procedures of the appointed military commissions from those governing courts martial and ruled by the UCMJ. Any deviation should have been justified by proving it was *impracticable* to do otherwise. Not only was this not proved by the Government, but the only justification it presented was the 'danger posed by international terrorism', without any supporting reasons. Therefore, the court found that ***the rules governing courts martial should be applicable to the military commissions***.

W. Winthrop, as examined before, explains that the origin of military commissions, and the uniformity of its procedures to those of courts martial, served from the very beginning an interest of fairness as well as the need for justice in situations of war. As interpreted by the Supreme Court:

> The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts martial lacked jurisdiction over either the accused or the subject matter...Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections.[84]

Given that the rules of procedure of the military commission do not comply with those of the courts martial, and that deviation finds no sound justification, the Supreme Court found that they ***violate Article 36 of the UCMJ. Thus, the rules for the Hamdan trial are illegal***.

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[83] *Hamdan*, pg 58.
[84] W. Winthrop by Supreme Court in *Hamdan*, pg 60.

Violations of The Geneva Conventions. As part of his allegations, Hamdan stated that the procedures of the military commission also violated the dispositions of International Law contained in The Geneva Conventions.

The Government's argument, accepted by the Court of Appeals who previously analyzed the case, was that the provisions of The Geneva Conventions were not judicially enforceable in the armed conflict in which Hamdan was captured. And that, even if they were enforceable, Hamdan was not entitled to their protection.

The Supreme Court rejected the Government's argument that the provisions of The Geneva Conventions are not judicially enforceable on a very simple basis: The Geneva Conventions, as an international auto applicable treaty to which the United States is a party, is part of the law of war. The real question was whether they applied to the armed conflict in which Hamdan allegedly participated.

The Government alleged impossibility to apply those provisions in this case given that the conflict in which Hamdan was captured took place between the U.S. and Al-Qaeda organization (definitely not a High Contracting Party to The Geneva Conventions) and not that between the United States and the Taliban government of Afghanistan. Still, the Supreme Court decided not to consider this argument, for there is a provision in the Geneva Convention that clearly applies to Hamdan's case: Common Article 3.

The third article of all four Geneva Conventions contemplates non-international conflicts, and provides that when such a hostile situation occurs in the territory of one of the High Contracting Parties, the signatories must apply certain provisions to protect those who are not taking part in the hostilities, including the members of armed forces who have laid down their arms, and the ones that are out of combat because of detention. This provision is clearly applicable to the armed conflict in which Hamdan was captured, for it was a non international conflict between the United States and the organization Al-Qaeda, taking place in Afghan territory, a High Contracting Party to the Conventions. Given that

the main difference of a non-international conflict with an international one is the legal status of the opposing entities, it is true that Article 3 provides only a minimal protection to those individuals involved in hostilities that are not associated to a signatory or a non signatory power in the conflict. Yet, Hamdan should be entitled to that protection.

Under this reasoning, the Supreme Court determined that ***the provisions of The Geneva Conventions are judicially enforceable in Hamdan's case, and that the dispositions of Common Article III are applicable.***

Article III also contains the prohibition of passing sentences or executions without the previous judgment of a regularly constituted court that provides "all the judicial guarantees which are recognized as indispensable by the civilized people." Given that the term 'regularly constituted court is not specified by this article, the Supreme Court looked into the commentaries of the International Committee of the Red Cross to find a more precise description.[85] Furthermore, under the U.S. legal system, "the regular military courts...are the courts martial established by congressional statutes". In consequence, ***the military commissions should be constituted according to those standards and evaluation of their procedures must also be done accordingly to determine if these tribunals afford 'all judicial guarantees'.***

The evaluation of such judicial guarantees 'recognized as indispensable by civilized people' can be done based on Article 75 of Protocol I to the Geneva Convention, for it contains "the barest of those trials protections that have been recognized by customary law."[86]

Article 75 provides that "an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him." Thus, keeping the

[85] Commentaries of the International Committee of the Red Cross on any of The Geneva Conventions, although cannot be considered supreme law and do not have the hierarchy of the Conventions, are acceptable regarding interpretation of these documents.
[86] *Hamdan*, pg 70.

accused from being present in the proceedings against him and avoiding disclosure of information to him, to his counsels, and forbidding his military counsel to share that information with him, violate this requirement. Even though the appointed military counsel has access to it, there is no way in which the accused can contest evidence against him, and the civilian counsel works with very limited information to defend his client. Moreover, the reasons under which this exclusion can be made, although enumerated, are not clearly defined.

Although not a requirement under Article 75, the Supreme Court did pointed out its concern regarding the admission of *any* evidence. This opens the door to admission of testimonial hearsay and not sworn testimony or written statements that could potentially be determinant for the trial's outcome. Most important, makes evidence obtained through coercion fully admissible[87].

The Supreme Court contrasted the rules of the controversial military commissions with the requirements of the Uniform Code of Military Justice and The Geneva Conventions. Through this analysis, the Court found that the procedures set for the military commission appointed to try Hamdan present inconsistencies with requirements of both the UCMJ and the Geneva Law. It was pointed out that, for example, while US federal law requires all proceedings, other than voting and deliberations, shall be made part of the record and shall take place in the presence of the defendant, international humanitarian law grants the right of the accused to be present in his own trial and to have access to all evidence presented against him. Concurrent deficiencies like exclusion from one's owns trial proceedings and denial of access to evidence were considered most relevant. In consequence, ***the Supreme Court determined the military commission appointed to try Hamdan violates the applicable federal laws along with international dispositions.***

[87] This consideration of the Supreme Court is relevant given the recent scandals over torture and coercion methods to obtain confessions from detainees in detention centers off the U.S., particularly in Iraq.

CONCLUSIONS

The Supreme Court, through its decision in *Hamdan v. Rumsfeld*, has proven that the military commissions appointed to the detainees under government's actions against terrorism, are unlawful.

Yet, it is very important to be cautious and distinguish between the factors that constitute unlawfulness of these commissions. The debate raised by *Hamdan* presents confronting arguments that, though they might reflect the political conflict, do not offer solid ground to contest any possible violations to the law. In this midst, terms like 'legitimate', 'patriotic', 'defensive', 'unlawful' and 'lawful' have acquired very diverse meanings. This is the reason why it is so important to construct a legal analysis of the legitimacy of the commissions, here provided by the reasoning of the Supreme Court in *Hamdan v. Rumsfeld.*

For this purpose, it is useful to recall the questions this case posed regarding these special tribunals. First of all, the Court had to answer whether the establishment of these military commissions by the President was lawful or not. Here, the Court found that the argument of the 'danger posed by the terrorist threat' to establish penal tribunals. To do so, the chief of the Executive would require specific authorization from the Congress. Such authorization did not exist at the moment, as so lawfulness of establishment of these Special Tribunals could not be justified.

Regarding jurisdiction over the enemy, it was clear that Hamdan's detention fell under the description of an 'incident of war' where it was necessary to apply disciplinary measures to those enemies that had violated the law of war. To confer a military commission jurisdiction over the defendant the Government had to detail the offense and the circumstance under which it occurred, and justify military necessity to try the offender under a special tribunal. The Government's charging document was not able to prove that Hamdan's actions occurred in the theater of war and during the corresponding

time. But, what is more relevant, it never mentioned any offense that can be triable as a violation to the law of war. The accusation pending upon Hamdan, conspiracy, is not considered triable by such tribunals, and so there is no jurisdiction over the defendant.

Finally, given that there was no legal justification for the establishment of special tribunals, lawfulness of military commissions had to be determined in accordance to the Constitution and to international law. It was clear for the Supreme Court that the procedures followed by these tribunals departed from those of the courts martial: the defendant was not entitled to the same guarantees and protection, he had no resource to challenge the final verdict, and many of the rules left doubts over the 'good faith' with which the trials were conducted. Given that the Government could not prove any real need for the these commissions to have different procedures, the Supreme Court considered the appointed military commissions were not in accordance with the US federal laws. The other half of the issue of lawfulness dealt with the controversy over application of The Geneva Conventions (and thus its protection system) to Hamdan's case. The Court not only stated that The Geneva Conventions are applicable in US legislation and indeed an important part of the law of war that must be complied with, but also found that the Geneva Law description of non-international conflict applied to the situation under which Hamdan was captured. Thus, the detainees under this conflict afford the protections contained in this instrument. The Geneva Conventions point out that cases under non-international conflicts must be appointed to 'regularly constituted courts'; in the United States such tribunals are courts-martial and it is their proceeding that must be applied. As said before, the Government presented no sound justification for the non-application of these rules to these cases. Unjustified noncompliance with both US federal laws and international law rendered these special tribunals unlawful.

This last statement was, definitely, considered the most important by activists concerned about lack of 'good faith' and guarantees of a faire process. Yet, the declaration of unlawfulness of these special tribunals was made based on the failure to justify inconsistencies with the proceedures of courts.martial, not on the rules themselves. This

means that many of those rules that have been claimed to be unacceptable and a clear violation to humanitarian law were not considered for the verdict and, in consequence, there is no pronunciation from the Supreme Court that condemns them. There is no specific statement, for example, against the lack of proscriptions against presenting as evidence any information obtained through coercion, the lack of obligation to inform if it was obtained through these means, or invalidation of such evidence. Lack of confidentiality between the defendant and its counsel(s) was another non-addressed issue. Other claims considered 'minor' in this case, like failure to provide efficient translation, would be considered unthinkable in regular trials. Though nonconformity with the applicable Geneva Conventions was a factor to find this special tribunals unlawful, we find in this document no further discussion on the designation of detainees with the nonexistent term of 'enemy combatant' by the Combatant Status Review Tribunal, instead of the appropriate one of 'prisoner of war'. Moreover, there are other rights relevant to the case contained in universally ratified international instruments that were not discussed here. For example, the right of detainees to be informed about the pending accusations in reasonable time, to be granted minimum detention conditions, or even the right not to be tortured to obtain information. This shows that the debate over the Special Tribunals of Guantanamo is far from being closed.

This is a consequence of the fact that the reasoning of the Supreme Court in *Hamdan v. Rumsfeld* were centered on the accordance of these military commissions with the U.S. legal background of federal laws, precedents, and congressional acts that applied at the time. Whatever its limitations, important legal principles were highlighted in the Court's final decision. Balance of powers and preservation of the system of checks and balances is indeed a most relevant one. Any disposition against this principle must be soundly justified. Threat of terrorism was found insufficient to deviate from the dispositions set by the law and thus the Executive's self-attributed powers under the argument of the war go against the system of checks and balances between the branches of government. In consequence, the Supreme Court felt compelled to remind the Executive that the authorization to use the force, as granted by the Congress in times of war, is no

authorization to take further attributions than those granted by the Constitution, and certainly is no authorization to violate the law of war. The Court also stressed the importance of granting the accused access to a truly independent and impartial court of appeals that is not influenced by the criteria of the very same authorities that accused him in the first place. This compliance must be in accordance with both national legislation and international treaties signed by the United States. The debated application of The Geneva Conventions was finally deprived from its initial doubts, demonstrating that the definition of 'non-international conflict' is perfectly applicable to many of today's armed conflicts. This reminded the Executive branch that the application of international law provisions is not discretionary. Under this perspective, the relevance of each country's compromise with international treaties is reaffirmed. In the national arena, this decision re-stated which are the attributions of each branch of government in times of war, and stressed that each one must comply with the applicable laws, both national and international. Departure from these essential principles was determinant to consider unlawful the establishment and procedures of these special tribunals.

Further than the mere legal perspective, application of ratified international instruments is a requisite for the construction of a universal protection system, and for the actual pacific resolution of international conflicts between States and other actors such as non governmental organizations and individuals. Stress on the obligation to comply with international law is essential under the circumstances in which nations interact today, particularly when dealing with a conflict that has become global. General commitment with dispositions of international humanitarian law represents benefits not only for prisoners of war, but for citizens of every state, including the US, and particularly US-citizens abroad. A major concern of many organizations has been the situation in which the actions and dispositions of the Bush administration during the War on Terror might put US soldiers that could be captured in hostile territory. Violation of humanitarian law by the United States is an incentive for enemy states not to apply it either. It must be taken in consideration that roles of captor and prisoner, defendant and prosecutor, can be inverted at any time of the war.

Departure from an international protection system that the United States helped to construct is a major concern for many organizations around the world, but mostly in the US, for disclosure of methods and procedures used by this controversial detention system has shown that many of the dispositions that have been approved have a clear intention to avoid international law provisions. An indisputable example was the creation of the term 'enemy combatant', inexistent under the Geneva Law, to determine the status of detainees to avoid providing prisoners of war the appropriate protections. The Bush Administration has tried hard to persuade the other branches of government and the public opinion that the terrorist threat on national security justifies these decisions. The re-statement of international principles by the Supreme Court in the *Hamdan v. Rumsfeld* set forth an important precedent in favor of a fair, lawful system in the United States to try the prisoners of war in this particular circumstance. Furthermore, it provides the foundations for the possibility to construct an international system than can efficiently prosecute and try terrorist activities to protect not only the United States from this threat, but also every menaced nation, without violating the rights of individuals.

Even though undisputed principles were considered in *Hamdan v. Rumsfeld*, it is, as every Supreme Court decision, a picture of the specific moment, circumstances and legislation at the moment of debate. The final statement was not, of course, based only on one source of law. It considered the principles of law, doctrine, international law and US legislation that was enforceable at the time, trying to respect what the Court considered was the will of the Congress of the United States. Determinant was, for example, the non-application of the Detainees Treatment Act 2005 to the Hamdan case given that the Court considered it was most probable that the intention of the Congress was not to ban civil court's jurisdiction on Guantanamo Tribunals' cases pending at the moment of enactment. This allowed the Supreme Court to hear and decide over Hamdan's arguments. Federal legislation was, thus, a determinant factor for the outcome of this case and for the precedent it rose over the whole system of the Special Tribunals of Guantanamo. Yet, US legislation can be indeed modified according to the political tide.

AFTER *HAMDAN V. RUMSFELD.* WHAT IS NEXT?

After the decision of the Supreme Court was made public on June 2006, speculations about what would happen next, not only with the already appointed military commissions, but with the whole detention system off US territory, did nothing but rise.

International pressure to completely close all detention centers under US custody – particularly Guantanamo- has been rising since the *Hamdan v Rumsfeld* debate was granted certiorati by the Supreme Court. Human rights organizations hoped that this decision would be the first step to prove illegal the whole detention system put in place by President Bush's 'War on Terror'. Although there are numerous international reports on the abusive methods used in this centers, and very serious accounts on unlawfulness of the military commission's, *Hamdan v. Rumsfeld* has shown that the legitimacy battle will only be won at home, and it must be fought in the legal arena.

Even though many would like to see this decision as mandate to dismantle detention centers on the ground that their whole capture, detention and trial system has been'proven' illegitimate, this is unlikely to happen. First, because although the charges and procedures of the commission appointed to try Hamdan have been declared unlawful by the Court, nothing keeps the government to find a more suitable legal solution to the problem. Second, because the illegal condition of military commissions has not rendered illegitimate –for the public opinion in general- the detention of suspects of participating in terrorist activities, and certainly not the whole 'War on Terror'. International events along with the White House's communication strategy have made it difficult to forget the feeling of vulnerability that has been pending over the United States since the September 11 attacks.

One of the most probable scenarios is that, under pressure, the Government will feel more compelled to adjust (or at least show off it is adjusting) the conditions of its detention centers to international standards. This must, of course, be accompanied with a reform in

the trial system implemented for the detainees of the War on Terror, starting from the very charges detainees are being accused with. Still, after *Hamdan v Rumsfeld*, the Special Tribunals of Guantanamo have started to loose some legitimacy. A logical option would be that the Supreme Court –having determined these special commissions are not lawful-compel the Government to transfer all the appointed cases from the Guantanamo tribunals to either federal courts or to courts martial to ensure a fair trial and in accordance with the detainees' situation . Federal courts would be an option because the Supreme Court has already decided they do have jurisdiction over individuals held in these circumstances; and courts martial because even though detainees are not members of the Armed Forces, the procedures and jurisdiction of courts martial are fairly applicable to them.

Human Rights Watch, along with many other organizations, hope that the Supreme Court, on the ground of this last decision, will also compel the government to drop all pending criminal charges on detainees at the detention center[88]. Given that the government has the option of transferring those cases into federal courts or martial laws, this is not very likely to happen. Regarding the charges, it is more probable that, in sound cases, the charges will be made on uncontested and recognized crimes of war. Doubts remain over the cases of all those detainees (a vast majority) that have not yet being charged or that, like Hamdan, have been charged with conspiracy. If the government founds no other war crime, sustained by complete overt acts allegedly committed in the time and theater of war, it will have no option but to drop the intentions of charging them. Still, if this happens, no one really knows how many time will the government hold the detainees under U.S. custody that may find themselves in this situation, for to this day there is no governmental agency or organism that is formally looking after their liberation, and the White House has kept its argument that freeing these detainees could be great threaten to national security. Yet, it is possible that the Government will profit from its long announced liberation of an average of 130-140 prisoners that have not been found to have participated or aided terrorist activities, and add to that number all those

[88] Human Watch Reports on the Supreme Court's decision on *Hamdan v. Rumsfeld*.

detainees that have not yet being charged or cannot be charged now with conspiracy after *Hamdan v. Rumsfeld*, without making it appear as a failure of the whole detention system.

In the international arena there are also many voices calling for a long term solution to this detentions, with diverse alternatives. Along with those that believe the United Nations should compel the government of the United States to comply with all the dispositions of The Geneva Conventions regarding prisoners of war, there are others that think a Global War on Terror requires an international tribunal to try terrorist activities and those aiming to help terrorist organizations. Forcing the U.S. to fully respect the provision of the Geneva Law, even under the authority of the United Nations is, at least, complicated. It is no secret that the detention centers of Guantanamo, Afghanistan and Iraq are strategically placed there to avoid the intervention of the international community. Until today, there is uncertainty even on the number of detention centers kept by the United States and their location. Even if this information was disclosed, after all the controversy surrounding these centers, there is no reason to believe that this time it would work in favor of the enforcement of every applicable disposition of international humanitarian law.

Another proposition, to create an international tribunal to try terrorists with legitimacy under international humanitarian law,[89] would probably provide more certainties about the process but would require the fulfillment of a fundamental precondition: an agreement on the definition of such terms as *terrorism*, *terrorist*, and *terrorist activities*. Although the September 11 attacks greatly accelerated the debate on terrorism, it is also notorious than, since the, the word terrorism tends to be used indiscriminately, favoring confusion and misapplication. To use the existing tribunals under the system of the

[89] Ken Gude evaluates several alternatives to bring terrorists before an international tribunal, such as creating an specific court to see over cases of international terrorism, taking advantage of already existing institutions such as the ICC, and also creating ad hoc tribunals for specific events, as it happend, for example, as it was done with the International Tribunals at Nuremberg. He proposes a more legitimate International Tribunal for Terrorist Suspects, kept under international cooperation, and in accordance to international detention and trial standards.

United Nations, such as the International Criminal Court, although viable, posses exactly the same need to define the acts that will be tried and to determine the jurisdiction of the tribunals over such crimes.

In summary, it seems that, for the times ahead, both detainees and those concerned for International Human Rights and Humanitarian Law must rely on the enforcement of separation of powers and of U.S. legal resources to contest the activities of the Executive under the War on Terror.

UPDATE

The decision of the Supreme Court on *Hamdan v. Rumsfeld*, as expected, unleashed a series of political actions from the different branches of the US government. A great controversy over the strategy of the White House around the War on Terror has been taking place until this day. This debate did not spare, of course, the Congress of the United States.

The House of Representatives, at the time mostly dominated by the Republican Party, passed what has been called the Military Commissions Act of 2006, on September 28, 2006. One of the main arguments in *Hamdan v. Rumsfeld* to declare unlawful the appointed military commissions was that there was no express authorization from the Congress that allowed the President of the United States to establish such special tribunals. The Military Commission Act of 2006 (know as the MCA) has precisely the objective to provide such an authorization, establish special procedures, and 'correct' dispositions from the DTA that allowed Hamdan to scale his case up to the Supreme Court.

The new Military Commissions Act of 2006 has, as foreseeable, reformed some of the controversial provisions of the first special tribunals. Yet, several of the most problematic ones remain. Both Human Rights Watch and Amnesty International have called attention over the fact that the recently approved legislation does prevent those prisoners suspect of terrorism from challenging the legality of their detention through a writ of habeas corpus before and independent court.[90] This disposition includes the impossibility to seek relief

[90] Military Commissions Act of 2006, Section 7 Habeas Corpus Matters, reads:

> (a) In General- Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):
>
> '(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

from any kind of mistreatment during detention or trial, and extends even after the detainee has been released.[91] On the same line, those detainees that are actually brought before a Combatant Status Review Tribunal have the opportunity to appeal their status before a civilian court, while the vast majority of detainees who have not been appointed to such a tribunal have no way to be heard. Under the Military Commission Act of 2006 these prohibitions have been made retroactive and applicable to all non-US citizens under U.S. custody around the world. Moreover, the new legislation is also preventing any claim against the United States or US personnel under dispositions of The Geneva Conventions, one of the main arguments in the *Hamdan* case.

Other major issues of concern are lax rules on the admission of evidence that could have been obtained through coercive interrogation methods if the commission founds it is 'reliable' (with added difficulties for the defendant's counsel to be able to determine if coercion was used), and use of hearsay evidence under the same requisite. The International Committee of the Red Cross has also expressed its concern over the 'broad reading' the Congress of the United States has made of Common Article 3 of The Geneva Conventions, preservation of the term 'unlawful enemy combatant', nonexistent under the International Humanitarian Law.[92]

'(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.'.

(b) Effective Date- The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

[91] Human Rights Watch. Q&A: Military Comisión Act of 2006. November 2006. http://www.hrw.org and Amnesty International. Military Commission Act of 2006-Turning Bad Policy into Bad Law. September 29, 2006. http://web.amnesty.org/library/index/ENGAMR511542006

[92] ICRC. Developments in US policy and legislation towards detainees: the ICRC position. October, 19, 2006. http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/kellenberger-interview-191006?opendocument

Though flaws in the Military Commissions Act of 2006 are claimed to preserve untouched the military commissions system put in place by the Bush Administration in 2001, it was very clear that some provisions' reform showed the Congress' intention to gain some legitimacy for this trial system. Following this effort, the Defense Department issued the Rules for Military Commissions on January 18th, 2008[93] that provided the MCA with specific structural and general provisions. These new rules have also been generally condemned for not solving the main problems of the whole system in place to try suspects of terrorism, despite its clear purpose to show more concern for legality and, indeed, gain national and international legitimacy for these military commissions.[94]

The Bush Administration's concern for legitimacy responded to a crucial political event: the November 2006 United States midterm elections for the Congress.[95] The victory of the Democratic Party over the Republicans was widely interpreted as a 'referendum' on George W. Bush's strategy on the War on Terror and the support received from the Republican Party. The people's expression through vote in these elections certainly did call the attention of the White House.

Even before the November 2006 elections the Bush Administration had already reinforced its attempts to gain support to the War on Terror. The Office of National Intelligence presented a 'Summary of the High Value Terrorist Detainee Program' where it affirmed that the new interrogation program for suspects of terrorism would be "safe, effective, and legal", holding that procedures carried until then had been proven accurate and useful for the capture of other terrorist suspects and to prevent harm on the United

[93] Defense Department of the United States. http://www.defenselink.mil

[94] Several provisions of the Rules for Military Commissions aim clearly at the obtention of this necessary legitimacy. A clear example is a fragment of the preamble that reads: "The rules of evidence and procedure promulgated herein .....provide procedural and evidentiary rules that not only comport with the M.C.A. and enure protection of classified information, but extend to the accussed all 'necessary judicial guarantees' as required by Common Article 3."

[95] US midterm elections for the House of Representatives and one third of the Senate took place on November 7, 2006. United States General Elections, 2006 in Wikipedia. http://www.wikipedia.org

States. [96] George W. Bush has kept this discourse throughout the following months. On February 2007 he did not hesitate to repeatedly state the 'high value' of the detainee program, the effectiveness of its interrogation system to preserve homeland security, the need to continue bringing suspects of terrorism before 'justice', and the convenience to keep on going with the controversial detention centers. For the times to come, these are no good news for those who waited the end of these special commissions and the whole system that supports them.

[96] Office of the Director of National Intelligence. Summary of the High Value Terrorist Detainee Program. September, 2006. http://www.dni.gov/announcements/content/TheHighValueDetaineeProgram.pdf

GLOSSARY OF ABREVIATIONS

AUMF	Authorization for the Use of Military Force Issued by the Congress of the United States in 2001.
CSRT	Combatant Status Review Tribunal
DTA	Detainee Treatment Act of 2005
IHL	International Humanitarian Law
Hamdan	*Hamdan v Rumsfeld,* 548 U.S. (2006) Decision of the Supreme Court of the United States. Opinion by Justice Stevens.
ICRC	International Committee of the Red Cross
MCA	Military Commission Act of 2006
UCMJ	Uniform Code of Military Justice Enacted in 1950 by the Congress of the United States.
USSC	United States Supreme Court

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