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BOFAXE



U.S. District Court Discovers and Applies International Humanitarian Law

Replies and Comments

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Focus

Briefs of the *Amici Curiae* filed by

- Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, Marco Sassoli, et al.
- Generals and Admirals, including former head lawyer (TJAG) of the U.S. Navy
- 271 U.K. and European MPs

Article 5 GC III

"Should any doubt arise [...] until such time as their status has been determined by a competent tribunal."

U.S. District Court, DC, Civil Action Nr 04-cv-1519

"The President [Bush] is not a 'tribunal'."

The Geneva conventions are self-executing.

Hamdan was taken captive in Afghanistan in late 2001 and transferred to Guantanamo. In July 2003 he was designated for trial by a military commission created by an executive order of the president as commander-in-chief of the U.S. armed forces. In December 2003 he was assigned military legal counsel. In April 2004 he was formally charged with *conspiracy to commit* the following acts: attacking civilians; attacking civilian objects; murder by an unprivileged combatant; and terrorism.

In his petition Hamdan raised the following points, among others: 1. the denial of his right to a speedy trial; 2. the nature and length of his pretrial detention as a violation of the Third Geneva Convention and of Common Article 3.

Probably one of the most important points in the decision of the U.S. District Court in *Hamdan* is that, besides deciding in favour of a detainee, it discusses elements of international humanitarian law.

The Court stated that only three facts were important to its decision:

1. Hamdan was captured in Afghanistan during hostilities;
2. He has asserted his entitlement to prisoner of war (POW) status under GC III;
3. The government has not convened a competent tribunal to determine Hamdan's status (article 5 GC III).

The court concluded that GC III is applicable to the conflict in Afghanistan, at least while it was characterised as an international armed conflict. Notably, it cites article 102: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."

The government argued that members of al Qaeda are not entitled to POW status because they do not satisfy the test of article 4A(2) GC III in that they do not carry their arms openly and do not operate under the laws and customs of war. In this regard, the court discusses article 5 GC III and US Army Regulation 190-8 which confirms article 5 GC III. The court rejects the government's argument in the following manner: "[...] the government's position that no doubt has arisen as to Hamdan's status does not withstand scrutiny." The court asserts that there has been no competent tribunal and that the President is not such a tribunal. "Until and unless such a tribunal decides otherwise, Hamdan has and must be accorded the full protection of a prisoner of war."

The court cited the International Court of Justice judgment in the *Nicaragua* case that in international armed conflict CA 3 constitutes a minimum standard. The District Court also affirmed that CA 3 applies in both international and non-international armed conflict. The court stated that GCIII applied to all persons detained in Afghanistan during hostilities there and that if it is determined that Hamdan is not entitled to POW status, he would still be entitled to the protections and rights conferred by CA 3.

The court discarded the government's argument that GC III is not enforceable by a court inasmuch as it noted that "[b]ecause the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty."

Further, the Court declared that "Hamdan may not be tried for the war crimes he is charged with except by a court-martial duly convened under the UCMJ." (Uniform Code of Military Justice) The Court found that, in at least one critical respect, the procedures of the military commission are fatally contrary to those of the UCMJ: the right to a trial in one's presence, which right is established as a matter of international humanitarian and human rights law (notably citing article 14 of the ICCPR).

Because the court in the *Hamdi* case held that an enemy combatant could be detained for the duration of hostilities in Afghanistan the detention of Hamdan is not unlawful *per se*.

Consequently, the order of the court is that:

1. "[...] unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners of war under article 4 of GC III, he may not be tried by Military Commission; and
2. unless and until the rules for Military Commissions are amended so that they are consistent with and not contrary to UCMJ [...] petitioner may not be tried by Military Commission."

The government filed a Notice of Appeal to the Court of Appeals for the DC Circuit. Argument before the court is set for 8 March 2005.

Responsibility

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