

THE UNILATERAL CREATION OF INTERNATIONAL LAW DURING THE “WAR ON TERROR”: MURDER BY AN UNPRIVILEGED BELLIGERENT IS NOT A WAR CRIME

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INTRODUCTION

On July 4, 2006, just five days after the Supreme Court ruled in *Hamdan v. Rumsfeld*,¹ prosecuting attorneys Professor Neal Katyal of Georgetown University Law Center and Lieutenant Commander Charles Swift flew to Guantánamo Bay, Cuba (Guantánamo) to meet their client, Salim Hamdan, and tell him the Supreme Court declared the military commissions he was to be tried under unconstitutional.² While explaining their seminal victory to Hamdan, they said that “[i]n 50 to 100 years, law students will be reading this case and reading your name.”³ Hamdan responded that “[m]aybe I’ll change my name. I just want to go home.”⁴

While Hamdan’s resignation is understandable considering his five-year confinement at Guantánamo, the legal community believed Katyal and Swift did the impossible.⁵ They won a case striking down a judicial system that deprived its participants of constitutional rights.⁶

In eight Military Commissions Instructions (MCI No. 1-8), the Department of Defense (DOD) delineated procedures to guide the

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

² See T.R. Goldman, *Katyal’s Crusade: How an Overachieving Law Professor Toppled the President’s Terror Tribunals*, LEGAL TIMES, Jul. 31, 2006 at 1, 18, <http://www.law.com/jsp/article.jsp?id=1155027927847> (describing Neal Katyal’s unexpected win where the Supreme Court declared President George W. Bush’s post-9/11 military commissions system unconstitutional).

³ *Id.*

⁴ *Id.*

⁵ See, e.g., *id.* at 17 (reporting a “prominent law professor’s” advice to Katyal as “My real advice to you is to give up the argument”).

⁶ *Hamdan*, 126 S. Ct. at 2759.

war-crimes trials of the Guantánamo detainees.⁷ This Comment discusses “murder by an unprivileged belligerent,” an offense chargeable by military commissions in MCI No. 2.⁸

During the United States’ hostilities with the Taliban in November 2001, militia forces captured Hamdan and turned him over to the U.S. military.⁹ In June 2002, the U.S. transported him to Guantánamo where he was later charged with one count of conspiracy “to commit . . . offenses triable by military commission.”¹⁰ While Hamdan’s charge included conspiracy to commit murder by an unprivileged belligerent, it did not include a direct charge of murder by an unprivileged belligerent. The only detainees charged with either attempted murder by an unprivileged belligerent or murder by an unprivileged belligerent in the original ten commission trials prior to the enactment of the Military Commissions Act of 2006 were Omar Khadr¹¹ and David Hicks.¹²

⁷ DEP’T OF DEF., MILITARY COMM’N INSTRUCTIONS, NOS. 1–8 (2003), available at http://www.defenselink.mil/news/Aug2004/commissions_instructions.html (follow hyperlinks for individual Military Commission Instructions) [hereinafter MCI]. See also *Hamdan*, 126 S. Ct. at 2777 (defining the jurisdiction of a law of war military commission as extending only to (1) “[v]iolations of the laws and usages of war cognizable by military tribunals,” and (2) “[b]reaches of military orders or regulations which are not legally triable by court-martial” (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 839 (2d ed. 1920))); DEP’T OF THE ARMY, FM 27–10 DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE ¶ 505(a), at 180 (1956), available at http://www.loc.gov/frd/Military_Law/pdf/law_warfare-1956.pdf [hereinafter U.S. ARMY FIELD MANUAL] (providing that “[a]ny person charged with a war crime has the right to a fair trial on the facts and law”).

⁸ MCI No. 2, *supra* note 7, § 6(B)(3), available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>. The Department of Defense defines the crime of “Murder by an Unprivileged Belligerent” as: a. *Elements*: (1) The accused killed one or more persons; (2) The accused: (a) intended to kill or inflict great bodily harm on such person or persons or (b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard for human life; (3) The accused did not enjoy combatant immunity; and (4) The killing took place in the context of and was associated with armed conflict; b. *Comments*: (1) The term ‘kill’ includes intentionally causing death, whether directly or indirectly; (2) Unlike the crimes of willful killing or attacking civilians, in which the victim’s status is a prerequisite to criminality, for this offense the victim’s status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy ‘belligerent privilege’ or ‘combatant immunity.’ *Id.*

⁹ *Hamdan*, 126 S. Ct. at 2759.

¹⁰ *Id.*

¹¹ See Charging Document at ¶¶ 23–24, *United States v. Khadr*, available at <http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf> (charging Khadr with the murder of a U.S. soldier “while in the context of and associated with armed conflict and without enjoying combatant immunity”).

¹² See Charging Document at ¶ 21, *United States v. Hicks*, available at <http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf> (charging Hicks with the attempted murder of Coalition forces “while he did not enjoy combatant immunity and such conduct taking place in the context of and associated with armed conflict”).

The charge murder by an unprivileged belligerent illustrates the arbitrary nature of the military commissions. The legal situation surrounding the “War on Terror” and the 9/11 attacks on the World Trade Center and the Pentagon has created questions unanswerable through codified law.¹³ The issues became more complex as President George W. Bush continued to use war powers without a formal declaration of war,¹⁴ which caused confusion regarding whether military law would be applicable during the “War on Terror.”¹⁵

Murder by an unprivileged belligerent, like the charge of conspiracy used against Hamdan, is an unprecedented war crime absent from international law. International law governing the use of force in armed conflict is traditionally termed *jus in bello* (“the law of war”), or more frequently “the law of armed combat,” and constitutes part of United States law.¹⁶ This framework comprises the body of rules that governs hostilities between States and hostilities within States.

Customary international law plays a significant role in the law of war. Various laws-of-armed-combat conventions compose a body of customary law that binds even non-parties to the conventions.¹⁷

¹³ See Michael Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT’L L. 227, 228 (2002) (noting the undertaking necessary to define the status of non-state actors involved in terrorist acts as a largely unexplored question).

¹⁴ See STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE U.S. MARINE CORPS, “TIME OF WAR” AND THE UNIFORM CODE OF MILITARY JUSTICE, <http://sja.hqmc.usmc.mil/jam/time%20of%20war.doc> (last visited Apr. 15, 2007) (declaring that since September 11, 2001, there has not been a declaration of war by Congress “nor a special finding by the President that UCMJ [Uniform Code of Military Justice] ‘Time of War’ exists”).

¹⁵ See *id.*

¹⁶ See *Filártiga v. Peña-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (integrating international law into the U.S. common law by reviewing the history surrounding the adoption of the United States Constitution). See generally UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § (A)(1.2), at 2 (2004) (providing the United Kingdom’s interpretation of the law of armed combat and listing other synonymous terms including “international humanitarian law applicable in armed conflict,” and “international humanitarian law”).

¹⁷ See Affidavit of Michael N. Schmitt at 1, *United States v. Hicks*, available at <http://www.defenselink.mil/news/Oct2005/d20051006vol10.pdf> [hereinafter Schmitt Aff.] (asserting that even though conventions require signatures to be binding, broad conventions followed by many nations create customary international law that remains binding on all nations). The Schmitt affidavit was written for the trial of David Hicks, an Australian detainee being tried by the previous commission system. See also Karma Nabulsi, *The Law: Jus ad Bellum/Jus in Bello*, in CRIMES OF WAR 223, 223 (Roy Guttman & David Rieff eds., 1999) (adding that “military thinkers, backed by other scholars, emphasize that the laws of war are drawn directly from the customs and practices of war itself”).

For example, even though the U.S. is not a signatory to the 1977 Additional Protocol I to the 1949 Geneva Conventions, it concedes that the Protocol reflects the customary law of international conflicts.¹⁸

In order to show that murder by an unprivileged belligerent is not a war crime, this Comment begins with background on the elements of the charge, including the definitions of “privilege” and “war crimes” in Part I. Part II describes the potentially lawful status of members of the Taliban and concedes the correct categorization of members of al Qaeda as unprivileged belligerents. After illustrating the charge’s absence in both international and domestic law, Part III shows that the charge of murder by an unprivileged belligerent does not conform to any instrument or interpretation of law. Next, Part IV uses the Supreme Court’s reasoning in *Hamdan v. Rumsfeld* to refute the charge while simultaneously using the case for guidance in the construction of a new trial system for the Guantánamo detainees. Part V explains how the Military Commissions Act of 2006 treats the charge of murder by an unprivileged belligerent. Lastly, Part VI describes the various court systems available to adjudicate the charge and ultimately argues for a new court system based on the U.S. courts martial. The Comment concludes that the executive overstepped its bounds by creating a crime that does not comply with international and domestic legal standards.

I. BACKGROUND

A. *Privileged and Unprivileged Belligerency under U.S. Law and the Geneva Conventions*¹⁹

The term “unprivileged belligerent” is related to the term “unlawful combatant,” adopted by the United States Supreme Court in

¹⁸ See Michael J. Matheson, Deputy Legal Advisor, U.S. Dep’t of State, Remarks at the Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions (Jan. 22, 1987), in 2 AM. U. J. INT’L L. & POL’Y 415, 419–20 (1987) (considering the United States legally bound only by the provisions of Protocol I to the Geneva Conventions that reflect customary international law despite the failure of the United States to ratify that Protocol).

¹⁹ See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III];

*Ex Parte Quirin*²⁰ “to describe the German saboteurs tried by military commissions during World War II.”²¹ Terrorists are better termed unprivileged belligerents because privileged belligerents operate during armed hostilities and within the law of war, while unprivileged belligerents operate outside the rules of war, whether in times of war or relative peace.²²

“Privileged” conflict refers to the mantle of protection that comes with lawful combatancy under the law of armed combat, particularly combatant immunity.²³ According to Article 4(2) of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva Convention III), to gain privileged status one must: belong to an organized group, belong to a party to the conflict, be commanded by a person responsible for his subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct one’s operations in accordance with the laws and customs of war.²⁴

Not all who fight in wars are guaranteed this privilege. For example, since guerrillas²⁵ conduct war in secret, it is improbable that the group would comply with the wearing of insignia, automatically disqualifying them from Geneva Convention protection.²⁶ Though Article 44 of Additional Protocol I relaxed the insignia requirement, it was recommended for rejection by the U.S. President.²⁷ There are, however, other ways of gaining privilege outside

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

²⁰ 317 U.S. 1 (1942).

²¹ Hoffman, *supra* note 13, at 228 (describing the attempt by the executive branch to adopt the Supreme Court’s definition of unlawful combatant).

²² *Id.* at 229 (contrasting unlawful combatants with terrorists, the latter of which often attack during times of peace and against sites and people protected under international humanitarian law); see also William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 320 (2003) (labeling terrorists as belligerents who lack rights of those lawfully engaged in combat).

²³ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 234 (2004) (indicating that when the law of international armed conflict negates a lawful status, the perpetrator is then vulnerable to ordinary penal sanctions for acts in the domestic legal system).

²⁴ Geneva Convention III, *supra* note 19, at 3320.

²⁵ See Major Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 333 (1951) (defining guerrilla warfare as armed hostilities by private persons or groups who do not meet the qualifications established under Article 4 of Geneva Convention III).

²⁶ See *id.* at 336 (discussing the accounting of guerrilla tactics during war in customary international law).

²⁷ United States: Message of the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, Relating to the Protection of Victims of Noninternational Armed Conflicts, Jan. 29, 1987, 26 I.L.M. 561. See also LESLIE C. GREEN, *THE*

the Geneva Conventions. Genuine allegiance and creditable support from the State on whose behalf they are undertaking the combat would likely preclude international criminality.²⁸

An irregular combatant is often a “part-time combatant[] who do[es] not wear a uniform or carry arms openly when on active duty,” but the term is not synonymous with guerrilla.²⁹ Guerrillas are distinguished from irregulars by the guerrillas’ choice to use tactics such as “ambushes, sniping, and sabotage,” whereas irregulars “might not use such tactics at all”³⁰ Irregulars may be considered lawful combatants in international conflicts if they adhere to the law of armed combat.³¹

As an unprivileged belligerent, an individual becomes vulnerable to criminal prosecution under the domestic legal system.³² If an individual’s status is questionable, the detaining power must

CONTEMPORARY LAW OF ARMED CONFLICT 111 (2d ed. 2000) (recognizing that armed forces of national liberation movements in World War II and conflicts since 1945 are frequently not professional soldiers, but “farmers by day and soldiers by night”).

²⁸ See Baxter, *supra* note 25, at 337 (interpreting customary international law as it should apply to the reality of post-WWII warfare).

²⁹ Ewen Allison, *The Law: Irregulars*, in CRIMES OF WAR, *supra* note 17, at 216 (describing common traits of irregular combatants).

³⁰ *Id.*

³¹ *Id.*

³² U.S. ARMY, JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 17 (Maj. Joseph B. Berger III et al. eds., 2004), available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf> (follow “2004 Operational Law Handbook” hyperlink; then follow “OLH2004.pdf” hyperlink) [hereinafter U.S. JAG OP. LAW HANDBOOK] (“Unprivileged belligerents are not entitled to prisoner of war status, and may be prosecuted under the domestic law of the captor.”); see also Schmitt Aff., *supra* note 17, ¶ 38, at 12–13 (deducing that an unprivileged belligerent who kills a lawful combatant is subject to prosecution under the domestic law of the State because lacking combatant immunity makes an individual vulnerable to domestic law if their alleged crime is not a violation of the law of armed conflict); DINSTEN, *supra* note 23, at 237 (stating that as long as unlawful combatants do not commit crimes under international law, they may only be prosecuted under domestic courts); ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 92 (1996) (stating that terrorists are jurisdictionally isolated within domestic criminal law); George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L LAW 891, 898 (2002) (emphasizing that members of al Qaeda are not entitled to lawful status under international law and are subject to trial and punishment under U.S. domestic law). *But see* ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, AM. SOC’Y OF INT’L LAW, TASK FORCE ON TERRORISM, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 19–20 (2002), available at <http://www.asil.org/taskforce/goldman.pdf> (stating that if a member of al Qaeda were captured off United States soil for the 9/11 attacks, he could be tried as a common criminal; but because al Qaeda is fighting alongside a State party to the Geneva Conventions in an international armed conflict there must be careful analysis to determine their exact status in the conflict).

guarantee protection of Geneva Convention III until they determine the individual's status by a competent tribunal.³³ But the actual nature of the tribunal still remains in the hands of the captor.³⁴ The U.S. Army Field Manual defines a competent tribunal as a "board of not less than three officers acting according to such procedures as may be prescribed for tribunals of this nature."³⁵ A military commission could potentially serve as a competent tribunal.³⁶ The DOD did create Combatant Status Review Tribunals (CSRTs), though it is questionable whether or not they constituted competent tribunals since they did not decide a detainee's entitlement to prisoner-of-war (POW) status, but whether a detainee qualified as an "enemy combatant."³⁷

After the tribunal's determination, the detainee would gain or lose his rights accordingly.³⁸ Since individuals subject to captivity

³³ See Geneva Convention III, *supra* note 19, 6 U.S.T. at 3324, 75 U.N.T.S. at 142 (emphasizing that status must be competently and fairly determined before an individual's POW rights can be taken away).

³⁴ See GREEN, *supra* note 27, at 112 (providing that a captive whose POW status is in doubt will enjoy the protection of Geneva Convention III until his or her status is determined by a "competent tribunal," the nature of which is determined by the captor).

³⁵ U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 71(c), at 30.

³⁶ See Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantánamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 619 (2002) (believing that a military commission could serve this role if it fulfilled the requirements of Article 75 of Additional Protocol I by being a "regularly constituted court with regular judicial procedures and impartiality").

³⁷ See *Guantánamo Bay Detainees Overview: Current Status and Legal Challenges*, INT'L DEBATES, Apr. 2006, at 98, 99 (stating that critics viewed the CSRTs as insufficiently complying with the Supreme Court's ruling in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), because many believe *Hamdi* applies to all detainees, regardless of citizenship). See also *Hamdi*, 542 U.S. at 533 (concluding that a citizen-detainee seeking to challenge his status as an enemy combatant must be given an opportunity to do so). See also DEPUTY SEC'Y OF DEF., DEP'T OF DEF., COMBATANT STATUS REVIEW TRIBUNAL PROCESS § (B), (2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (providing a non-adversarial proceeding to determine whether each detainee meets the criteria to be designated an enemy combatant). The Department of Defense defines an enemy combatant as:

[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Id.

³⁸ See Press Release, Dep't. of Def., Combatant Status Review Tribunal Order Issued (July 7, 2004), <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=7530> ("Any detainee who is determined not to be an enemy combatant will be transferred to their country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy."); see also *Guantánamo Bay De-*

of a detaining power retain the protection of the Geneva Conventions until determined otherwise, only an “unprivileged” determination would remove the POW protection of the Geneva Conventions. Ultimately, the term “unprivileged” refers to a status to be determined, not any particular crime.³⁹ A combatant who failed to follow the law and customs of war, or Article 4(A)(2) of Geneva Convention III, may have committed a war crime as well.⁴⁰

Even if a belligerent is deemed unprivileged, he or she is protected by Common Article 3 to all four Geneva Conventions, which applies to the treatment of all persons no longer taking part in the hostilities.⁴¹ By its very nature Common Article 3 applies to unlawful combatants and to “conflicts ‘not of an international character’”⁴² since the International Committee of the Red Cross created the Article to “ensur[e] respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself.”⁴³ The International Committee of the Red Cross formulated a similar but more specific provision in Article 75 of Additional Protocol I to the 1949 Geneva Conventions.⁴⁴ It similarly estab-

tainees Overview, *supra* note 37, at 99 (“Of the 38 detainees determined not to be enemy combatants, 23 have been transferred to their home states.”).

³⁹ Compare DINSTEIN, *supra* note 23, at 31 (explaining that war criminals are brought to trial for serious violations of the law of international armed conflict itself, but the law of international armed conflict refrains from stigmatizing an unlawful combatant’s acts as criminal and instead merely takes off the mantle of immunity), with A.P.V. Rogers, *The Law: Combatant Status*, in CRIMES OF WAR, *supra* note 17, at 97 (asserting that noncombatants—those not directly participating in hostilities—who commit war crimes by directly participating in hostilities may be prosecuted for any attacks on people as common crimes, and that while their acts as noncombatants are, therefore not war crimes, their direct participation in hostilities is a war crime).

⁴⁰ See DINSTEIN, *supra* note 23, at 39 (acknowledging that ultimately privileged status requires adherence to the laws and customs of war, and if this is not properly followed, it is likely the individual committed a war crime).

⁴¹ See Geneva Convention III, *supra* note 19, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38.

⁴² Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367, 400–01 (2004) (articulating Common Article 3’s applicability between states and informal armed opposition groups).

⁴³ Geneva Convention III, *supra* note 19, 6 U.S.T. at 3320, 75 U.N.T.S. at 138. This provision includes prohibitions against: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. *Id.*

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. at 37–38 [hereinafter Additional Protocol I].

lished minimum humanitarian protections to all persons “in the power of” a belligerent State, irrespective of their role in the conflict, and whether they are entitled to “benefit from more favourable treatment under the Conventions or under this Protocol.”⁴⁵

B. War Crimes

War crimes represent serious breaches of the laws and customs of war.⁴⁶ The International Criminal Court defines war crimes as “serious violations of the laws and customs applicable in armed conflict not of an international character.”⁴⁷ Furthermore, violations that endanger protected persons, objects, or breach important values are treated as war crimes.⁴⁸ Offenses against the Geneva Conventions are referred to as “grave breaches,” and are also considered war crimes.⁴⁹ The U.S. definition mirrors these definitions in the War Crimes Act of 1996.⁵⁰ Murder by an un-

⁴⁵ *Id.* at 37.

⁴⁶ INT’L COMM. FOR THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS I OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 888 (Claude Pilloud et al. eds., 1987) [hereinafter RED CROSS COMMENTARY] (citing The Report of the Int’l Law Comm’n, 3d Sess. vol. 4, at 59 (1951)); see also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544 at 1547, 82 U.N.T.S. 279 at 288 (defining war crimes as “violations of the laws or customs of war” and enumerating, but not limiting, violations as “murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity . . .”).

⁴⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, Article 8(2)(e), U.N. Doc. A/CONF.183/9 (July 17, 1998), available at [http://www.un.org/law/icc/statute/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/statute/english/rome_statute(e).pdf) [hereinafter *Rome Statute*].

⁴⁸ See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. FOR THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOL. I: RULES 569 (2005) (using deductive analysis of lists of war crimes to define the roots of war crimes).

⁴⁹ See GREEN, *supra* note 27, at 292 (explaining that even though offenses against the Geneva Conventions are referred to as “grave breaches,” they carry the weight of war crimes in international law).

⁵⁰ 18 U.S.C.A. § 2441(c) (2006). This statute defines war crimes as: [A]ny conduct— (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a violation of Common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-

privileged belligerent must fulfill this standard in order to constitute a war crime.

It merits notice that unlike most international law sources, the U.S. Army Field Manual does not require a "serious" violation of the law of war to constitute a war crime, any violation of the law of war will do.⁵¹ The Field Manual enumerates offenses, in addition to grave breaches against the Geneva Conventions, to serve as representative war crimes to guide adjudication if new types of war crimes arise.⁵²

Though it is not unprecedented for a national court to find that a specific act is a war crime without international recognition, the rarity of such an event precludes customary use.⁵³ War criminality is not limited to violations of customary international law, and includes applicable treaty law.⁵⁴ Civilians are just as culpable for war crimes as soldiers.⁵⁵ While analysis of war crimes allows for flexibility in interpretation to avoid needless pain and suffering in wartime, murder by an unprivileged belligerent does not embody this avoidance and intention.

Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians. *Id.*

⁵¹ See U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 499, at 178 ("Every violation of the law of war is a war crime.").

⁵² *Id.* ¶ 504, at 180. The Field Manual prescribes that: In addition to the "grave breaches" of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ("war crimes"): a. Making use of poisoned or otherwise forbidden arms or ammunition; b. Treacherous request for quarter; c. Maltreatment of dead bodies; d. Firing on localities which are undefended and without military significance; e. Abuse of or firing on the flag of truce; f. Misuse of the Red Cross emblem; g. Use of civilian clothing by troops to conceal their military character during battle; h. Improper use of privileged buildings for military purposes; i. Poisoning of wells or streams; j. Pillage or purposeless destruction; k. Compelling prisoners of war to perform prohibited labor; l. Killing without trial spies or other persons who have committed hostile acts; m. Compelling civilians to perform prohibited labor; n. Violation of surrender terms. *Id.*

⁵³ See HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 571 (illustrating how national courts found alleged war criminals guilty of war crimes during World War II unlisted in the charters of the international military tribunals at Nuremberg and Tokyo).

⁵⁴ See *id.* at 572 (showing that war crimes can be both violations of customary international law or violations of applicable treaties).

⁵⁵ See *id.* at 573 (providing an example of the type of analysis involved in determining whether an offense is considered a war crime).

II. THE LEGAL DIFFERENCES BETWEEN THE TALIBAN AND AL QAEDA UNDER THE LAW OF WAR AND THE LAW OF INTERNATIONAL ARMED CONFLICT

Since combatant privilege is the central question in murder by an unprivileged belligerent, it is important to distinguish why members of the Taliban may be entitled to combatant privilege and why members of al Qaeda are correctly termed unprivileged belligerents. Al Qaeda's attacks on various military and civilian locations around the world categorize them as a terrorist organization.⁵⁶ The Taliban ruled Afghanistan as a theocratic government until the U.S. invasion in 2001.⁵⁷ The key difference being that the Taliban acted as a State, and al Qaeda did not.⁵⁸

The White House press secretary announced on February 7, 2002, that neither Taliban nor al Qaeda detainees "will be given POW legal designation" under the Geneva Conventions.⁵⁹ Yet, the President failed to distinguish between the Taliban as members of the actual government of Afghanistan, and al Qaeda as members of a non-state entity. Furthermore, since both the Taliban, as the government of Afghanistan, and the U.S. were parties to the Geneva Conventions, their conflict constituted an international armed conflict to which the Geneva Conventions and customary international humanitarian law should have applied.⁶⁰

⁵⁶ See Aldrich, *supra* note 32, at 893 ("Al Qaeda is evidently a clandestine organization consisting of elements in many countries and apparently composed of people of various nationalities; it is dedicated to advancing certain political and religious objectives by means of terrorist acts directed against the United States and other, largely Western, nations.").

⁵⁷ Compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in . . . formal relations with other such entities."), *quoted in* *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995), *with Afghanistan's Taliban Rulers*, CABLE NEWS NETWORK, Aug. 9, 2001, <http://archives.cnn.com/2001/WORLD/asiapcf/central/08/09/taliban.profile> (reporting that only three countries—Saudi Arabia, Pakistan, and the United Arab Emirates—recognized the Taliban's rule over Afghanistan).

⁵⁸ See Aldrich, *supra* note 32, at 894–96 (failing to understand the President's reasoning in denying POW status to members of the Taliban since they constitute government forces and thus fall under privileged status under the Geneva Conventions).

⁵⁹ Ari Fleischer, White House Spokesman, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (Feb. 7, 2002).

⁶⁰ See Aldrich, *supra* note 32, at 893 (emphasizing that the Taliban and al Qaeda should not be grouped together under international law because the Taliban constituted the ruling government of Afghanistan); *but cf. Kadic*, 70 F.3d at 245 (noting the "perverse effect" of immunizing leaders of unrecognized states from the consequences of violating international law, where recognized state actors would otherwise be liable).

Al Qaeda's classification as a terrorist group also precludes its members from certain POW protections under the Geneva Conventions⁶¹ because of their previous attacks on the U.S. Embassy in Kenya, the U.S.S. Cole bombing, and the 9/11 attacks.⁶² Even while acknowledging that the U.S.S. Cole bombing was on a military target, al Qaeda does not constitute part of the armed forces of a State and accordingly, lacked lawful authority to carry out the attacks.⁶³

Hostilities with a non-state actor, absent any related hostilities with a State, cannot trigger international armed conflict.⁶⁴ Al Qaeda's attacks preceding October 7, 2001, and any attacks post-October 7, 2001, without a clear, direct link to the armed conflict with Afghanistan did not constitute a international or non-international armed conflict.⁶⁵ Accordingly, members of al Qaeda do not qualify as lawful combatants under the law of international armed conflict and have been accurately described as unprivileged belligerents.

⁶¹ Compare Geneva Convention III, *supra* note 19, 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (defining persons entitled to prisoner of war status as "[m]embers of other militias and members of other volunteer corps . . . [who] fulfil [sic] the following conditions . . . that of conducting their operations in accordance with the laws and customs of war"), with RED CROSS COMMENTARY, *supra* note 46, at 526 (indicating that terrorists do not comply with the combatant obligation to follow the rules of international law applicable in armed conflict), and *id.* at 526 n.27 (defining terrorism as "the systematic attack on non-military objectives in order to force the military elements of the adverse Party to comply with the wishes of the attacker by means of the fear and anguish induced by such an attack").

⁶² Lieutenant Colonel Andrew S. Williams, *The Interception of Civil Aircraft Over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 77-78 (2007) (stating that al Qaeda has been held responsible for the August 7, 1998 bombing in Kenya, the October 12, 2000 bombing of the U.S.S. Cole, and the September 11, 2001 attacks).

⁶³ Hoffman, *supra* note 13, at 229 (distinguishing al Qaeda objectives as a terrorist organization from those of state actors involved in armed conflict). *But see* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 35 (2d ed. 2004) ("The problem with a distinct crime of terrorism lies in definition, it being often said that 'one person's terrorist is another's freedom fighter.'").

⁶⁴ See Schmitt Aff., *supra* note 17, ¶ 7, at 3 (specifying that an international armed conflict may involve non-State actors, but an actual international armed conflict requires at least one state on each side).

⁶⁵ See *id.* ¶¶ 10-11, at 4 (applying a *sine qua non* of international armed conflict that an international armed conflict only began on Oct. 7, 2001 between the U.S. and Afghanistan). See also Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2777 (2006) (in order to exercise jurisdiction by a tribunal convened to try Hamdan, the offense "must have been committed within the period of the war." (quoting WINTHROP, *supra* note 7, at 837)).

III. MURDER BY AN UNPRIVILEGED BELLIGERENT UNDER INTERNATIONAL LAW

War crimes involve inhumane methods of causing death, not causing the death itself, which is an inherent part of war. A comparison of the enumerated war crimes in each major international convention, court, and statute reveals that murder by an unprivileged belligerent is not listed in any international legal instrument.⁶⁶ This confirms the belief that while new offenses violating the law of war will continue to arise with the evolution of warfare, the unilateral creation of a war crime should be looked at with a high level of scrutiny.⁶⁷

Regardless of this evolution, murder by an unprivileged belligerent is not governed currently by the law of war. When a belligerent is declared unprivileged, international law removes the mantle of protection provided by lawful status under the law of armed combat.⁶⁸ But when an individual is not a formal member of an armed force that is party to the conflict, he falls outside international legal protection.⁶⁹ He is simply a plain belligerent or civilian and would automatically fall under the domestic rule of law, which

⁶⁶ See HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 574–99 (listing war crimes by international legal instrument with commentary on each charge under each instrument). The list of war crimes were based on:

(1) grave breaches included in the Geneva Conventions based on crimes pursued by the International Military Tribunals at Nuremberg and Tokyo; (2) crimes derived from other war crimes trials after the Second World War; (3) violations of customary international law listed in Additional Protocol I and as war crimes in the Statute of the International Criminal Court committed during an international armed conflict; (4) war crimes in the Statute of the International Criminal Court developed since the adoption of Additional Protocol I in 1977 and committed during an international armed conflict; (5) crimes not referred to in the Statute of the International Criminal Court but recognized as violations of customary international law committed during an armed international conflict; (6) serious violations of Common Article 3 of the Geneva Conventions; (7) other serious violations of customary international law during a non-international armed conflict included in the Statute of the International Criminal Court and in the Statutes of the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone; (8) violations of Additional Protocol II and of customary international law during a non-international armed conflict; (9) other serious violations of international humanitarian law during a non-international armed conflict listed as war crimes in the Statute of the International Criminal Court; (10) war crimes recognized by State practice during non-international conflict. *Id.*

⁶⁷ See *Hamdan*, 126 S. Ct. at 2780 n.34 (limiting the evolutionary nature of the common law to an incremental development by the judiciary). See also *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (“The requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one.”)

⁶⁸ See DINSTEIN, *supra* note 23, at 234 (contrasting the removal of immunity with an offense against the law of international armed conflict).

⁶⁹ See *Hoffman*, *supra* note 13, at 230 (distinguishing between formal combatants

is enforceable when an individual does not have combatant immunity.⁷⁰

The simplest explanation predicates war as a game. Playing this game is illegal, unless you fulfill certain conditions that give you benefits.⁷¹ Without these benefits, a player commits illegal acts (the domestic crime of murder) by simply participating (killing someone).⁷² Murder by an unprivileged belligerent is playing the game without benefits, illegal activity that places the individual under domestic law.

A benefited player plays the game according to specific rules.⁷³ A benefited player can be disciplined for breaking these specific rules. Breaking these rules constitutes a war crime.⁷⁴ An unbenefited player cannot break these rules because he is not part of the game. If he kills someone, he will be subject to a murder charge under domestic law *but not a war crime*.⁷⁵ A war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity, i.e. privileged status.⁷⁶

A more perplexing issue arises after realizing that the DOD created the crimes and offenses under MCI No. 2 after the war in

among nations and other individuals outside the law of war that promulgate attacks for their own ends, not the ends of a State).

⁷⁰ See Schmitt Aff., *supra* note 17, ¶ 38, at 12–13 (“[T]he unprivileged belligerent who kills a combatant is subject to prosecution for murder pursuant to the domestic law of States with subject matter jurisdiction over the offense and personal jurisdiction over the accused.”).

⁷¹ Cf. Geneva Conventions III, *supra* note 19, U.S.T. at 3320, 75 U.N.T.S. at 138 (delineating the conditions necessary to qualify as a prisoner of war, i.e. lawful combatant).

⁷² See U.S. JAG OP. LAW HANDBOOK, *supra* note 32 (establishing that the offense of murder, without privileged status under the law of war, is illegal under domestic law).

⁷³ Cf. U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 2, at 3 (stating that armed conflict is governed by the law of land warfare which includes law enumerated in legal treaties and customary law which may apply even if not enumerated in a written instrument of law).

⁷⁴ See *supra* Part I.B (defining war crimes as violations of the law of war, armed combat, and Geneva Conventions).

⁷⁵ See DINSTEN, *supra* note 23, at 234 (stating that domestically defined criminal acts committed by an individual without privileged status under the law of armed international combat removes the mantle of combatant immunity, thus placing the individual under domestic law). See also Mohammed Ali v. Public Prosecutor, [1968] 3 All ER 488, 497, 1 A.C. 430 (1969) (Judicial Committee of the Privy Council) (appeal taken from Malay) (holding that two members of the Indonesian armed forces who committed sabotage while wearing civilian clothes in Singapore could be tried under Malaysian domestic law because they did not comply with the requirements of Geneva Convention III Article 4(A)(2) and were not operating as members of the Indonesian armed forces at the time).

⁷⁶ See generally *supra* Part I.B.

Afghanistan began. The DOD charged the detainees with offenses that were not war crimes at the time of their commission, constituting a violation of international (and domestic) *ex post facto* laws.⁷⁷ Furthermore, even if a national court, trying an unprivileged combatant, finds a sufficiently-alleged war crime, the court cannot prosecute the accused under that war crime unless it was an offense at the time of commission.⁷⁸

The DOD created the charge of murder by an unprivileged belligerent well after the invasion of Afghanistan⁷⁹ in MCI No. 2,⁸⁰ making it impermissible to allow a detainee's prosecution under this charge. Furthermore, because of the *ex post facto* protections in the Geneva Conventions and other international law instruments, the charge is invalid and should not be evaluated by the "regularly constituted court" responsible for trying the detainee.⁸¹ Nevertheless, a nuanced view of war criminality during the war in Afghanistan requires an understanding of other possible war crimes, statuses, and categorizations that could be confused with murder by an unprivileged belligerent.

A. *Perfidy*

Perfidy is defined as "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."⁸² Con-

⁷⁷ See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 290-92 (1993) (defining the "[p]rotection from *ex post facto* laws" as a "guarantee[] that crimes and punishments will not be created *ad hoc* to be applied retroactively to particular cases" and stating that *ex post facto* protection is guaranteed by the United States Constitution, art. I, § 9, and by ninety-five other nations' constitutions).

⁷⁸ See generally *Calder v. Bull*, 3 U.S. 386, 397 (1798) (prohibiting the passage of criminal *ex post facto* law).

⁷⁹ Letter from the Permanent Representative of the United States of America to the President of the United Nations Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (The U.S. informed the U.N. Security Council that it was responding with military force in Afghanistan in reaction to "the armed attacks carried out against the United States.").

⁸⁰ MCI No. 2, *supra* note 8 (declaring that murder by an unprivileged belligerent is an offense on April 30, 2003, almost two and a half years after the invasion of Afghanistan on October 7, 2001).

⁸¹ See Geneva Convention III, *supra* note 19, 6 U.S.T. at 3320, 75 U.N.T.S. at 138 (affording all the judicial guarantees recognized as indispensable to civilized people, which likely includes protection from *ex post facto* criminality due to its enumeration in the U.S. Constitution and 95 other national constitutions); see also Bassiouni, *supra* note 77, at 290.

⁸² Additional Protocol I, *supra* note 44, 1125 U.N.T.S. at 21.

ceptually, perfidy is similar to murder by an unprivileged belligerent. Military manuals around the world,⁸³ including the U.S. Army Field Manual,⁸⁴ recognize perfidy as a war crime.

Yet, because perfidy relies on intentional subterfuge in order to kill, wound, or capture an enemy, it requires conduct beyond murder by an unprivileged belligerent. An unprivileged belligerent does not possess combatant immunity and other privileges inherent in lawful combat,⁸⁵ but does not necessarily kill through deceit. Because the DOD alleges it is solely the act of murder itself, without privilege, that creates war criminality,⁸⁶ an allegation of perfidy would require specific facts that an individual actively misled an enemy—outside the law of war—to actuate a killing.

B. *Guerrilla and Irregular Warfare*

The U.S. Army Field Manual states that “[p]ersons . . . who take up arms and commit hostile acts without having complied with the conditions pre-scribed by the laws of war for recognition as belligerents . . . [are] not entitled to be treated as prisoners of war”⁸⁷ Scholars disagree whether guerrillas by definition violate the law of war due to their status and non-compliance with the Geneva Conventions’ conditions for recognition as a privileged combatant.⁸⁸ Yet, ratification of Additional Protocol I does not require irregular or resistance forces to identify themselves. Irregular forces are only required to be under proper command, and

⁸³ See generally HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 203–26 (summarizing the customary international humanitarian rules against deception through an analysis of individual States’ military manuals).

⁸⁴ U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 50, at 22 (defining perfidy as securing an advantage over the enemy by lying or breaching faith or “moral obligation to speak the truth” such as feigning surrender to secure an advantage over an enemy).

⁸⁵ See *supra* Part I.A (providing background on the effects of lacking privilege under the law of armed combat).

⁸⁶ See MCI No. 2, *supra* note 8 (defining murder by an unprivileged belligerent based on the three primary elements of killing or severely injuring, lacking privilege, and occurring during an armed conflict).

⁸⁷ U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 80, at 34 (internal citations omitted).

⁸⁸ Compare Baxter, *supra* note 25, at 337 (asserting that “genuine allegiance” and “licit and laudable” purposes in the view of the State that they are supporting would provide sufficient justification to preclude international criminality), and *id.* at 337–38 n.4 (noting that “[a]lthough some guerrillas may engage in . . . the war crime [] of murder . . . , it is somewhat naïve to suppose that . . . guerrillas never devote themselves to the same missions as the regular armed forces[.]” so that guerrillas should not necessarily be considered “bandits” or “pirates” (citing Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 181–203 (1945))), with Green, *supra* note 27, at 117 (“Irregular forces and resistance movements are only protected so long as they satisfy the normal requirements for recognition as combatants . . .”).

carry their arms openly, when attacking or deploying preparatory to an attack.⁸⁹

It is unlikely that the Taliban would fall under such a classification since members of the Taliban army were combatants of a recognized government (even if they were not recognized by the U.S.).⁹⁰ With regard to al Qaeda, the operations conducted by al Qaeda against the Northern Alliance could categorize them as an irregular force.⁹¹ Although al Qaeda was located in Afghanistan prior to the invasion by the U.S.,⁹² its operations alongside the Taliban could confirm the presumption that the Taliban accepted al Qaeda's allegiance and fought alongside them in some instances.⁹³ Therefore, if a member of al Qaeda killed a soldier during battle alongside the Taliban, he could be categorized as a privileged combatant. This is still predicated on compliance with the Article 4(A) requirements for privileged combatancy.⁹⁴ Al Qaeda's terrorist operations outside Afghanistan flagrantly violate the laws of war and would immediately preclude them from privi-

⁸⁹ See Additional Protocol I, *supra* note 44, 1125 U.N.T.S. at 23.

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Id.

Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) During each military engagement, and (b) During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Id.

⁹⁰ See *supra* note 57 (acknowledging the Taliban's recognition by Saudi Arabia, Pakistan, and the United Arab Emirates).

⁹¹ See DINSTEIN, *supra* note 23, at 49 ("Al Qaeda fighters constitute irregular forces.").

⁹² See Memorandum from Richard Clarke to Condoleezza Rice on Presidential Policy Initiative/Review—The Al Qida [sic] Network (Jan. 25, 2001), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB147/clarke%20memo.pdf> (implying the presence of al Qaeda in Afghanistan by asking whether the National Security Council should support the Northern Alliance to provide a viable opposition force in Afghanistan against al Qaeda/Taliban).

⁹³ See GOLDMAN & TITTEMORE, *supra* note 32, at 30 (categorizing the al Qaeda fighters who fought alongside the Taliban in brigades or other units as irregular forces who still needed to comply with Article 4A(2) of Geneva Convention III to qualify for privileged status).

⁹⁴ Geneva Convention III, *supra* note 19, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

leged combatant status.⁹⁵

IV. MURDER BY AN UNPRIVILEGED BELLIGERENT UNDER *HAMDAN V. RUMSFELD*

While the Supreme Court did not directly discuss murder by an unprivileged belligerent within the four corners of *Hamdan v. Rumsfeld*, the opinion does provide a solid footing for an analysis of the charge.⁹⁶ Although U.S. military law does not consider the severity of the offense when determining a war crime,⁹⁷ *Hamdan* established that an act does not become a crime without its “foundations having been firmly established in precedent.”⁹⁸ Because murder by an unprivileged belligerent reflects neither the characteristics of any of the representative war crimes presented in the U.S. Army Field Manual⁹⁹ nor the war crimes recognized under international law,¹⁰⁰ the government did not make the “substantial showing” necessary to establish murder by an unprivileged belligerent as an offense violating the law of war.¹⁰¹ Murder by an unprivileged belligerent may be prosecuted as a domestic crime, not a war crime.¹⁰²

The Supreme Court explained that while it is permissible for the government to try the alleged offense even if the charge is not

⁹⁵ See DINSTEN, *supra* note 23, at 49 (asserting that “Al Qaeda’s contempt” for privileged combatancy “was flaunted in the execution of the original armed attack of 9/11”). See also GOLDMAN & TITTEMORE, *supra* note 32, at 29 (agreeing with the President and Defense Secretary’s depiction of al Qaeda as an international terrorist organization that conducted private hostilities against the U.S. for which they may be punished).

⁹⁶ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780–85 (2006) (providing an analytical procedure to determine whether an offense constitutes a war crime through the charge of conspiracy against Salim Hamdan).

⁹⁷ See *supra* note 51 and accompanying text.

⁹⁸ *Hamdan*, 126 S. Ct. at 2780 n.34. See also *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (interpreting international law as it has evolved among the nations of the world today through customary international law, rather than a static view of international law from 1789).

⁹⁹ U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 504, at 180. See also *supra* note 52 and accompanying text (failing to list any violation of the law of war involving the juxtaposition of combatant status and killing).

¹⁰⁰ See HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 574–99 (analyzing all the war crimes listed in any international legal instrument recognized by the International Committee of the Red Cross and finding no relationship to murder by an unprivileged belligerent).

¹⁰¹ Cf. *Hamdan*, 126 S. Ct. at 2780 (concluding that the conspiracy charge in Hamdan’s case did not meet the “substantial showing” burden because the charge had rarely been tried by any law-of-war military commission and did not appear in the Geneva Conventions or the Hague Conventions).

¹⁰² U.S. JAG OP. LAW HANDBOOK, *supra* note 32.

defined by statute or treaty,¹⁰³ the precedent must be “plain and unambiguous.”¹⁰⁴ Even if a source does exist, it must satisfy the Court’s “high standard of clarity required to justify the use of a military commission.”¹⁰⁵ In the Court’s analysis of the conspiracy charge against the defendant, the burden was “far from satisfied” since that crime has “rarely if ever been tried” in this country and is absent from the Geneva Conventions and Hague Conventions.¹⁰⁶

It is difficult to imagine that murder by an unprivileged belligerent would fulfill this burden without previous consideration by a law-of-war military commission.¹⁰⁷ The government’s difficulty in satisfying its burden is underscored by the charge’s absence from customary international law¹⁰⁸, and from the law of armed combat.¹⁰⁹ Thus, the Supreme Court’s reasoning in *Hamdan* substantiates the fact that murder by an unprivileged belligerent is not a war crime triable by military commission.

V. THE MILITARY COMMISSIONS ACT OF 2006

President Bush signed the Military Commissions Act of 2006 (MCA) into effect on October 17, 2006. While recognizing presidential authority to constitute military commissions, the MCA provides a working legislative framework for the commissions. Previously, the DOD operated under a presidential military order by enforcing the MCI since there was no legislative mandate.¹¹⁰

¹⁰³ See *Hamdan*, 126 S. Ct. at 2780 (stating that Congress incorporated the common law of war through the adoption of Article 21 of the Uniform Code of Military Justice).

¹⁰⁴ *Id.* (fearing that lesser expectations would risk giving the military a degree of adjudicative and punitive power beyond the levels defined by statute or the Constitution).

¹⁰⁵ *Id.* at 2781 (determining that the three sources cited by the government to justify the trial of conspiracy in a military commission do not adequately meet the Court’s standard).

¹⁰⁶ *Id.* at 2780–81 (adding that other international law sources confirmed that conspiracy was not a violation of the law of war).

¹⁰⁷ See generally MCI No. 2, *supra* note 8 (defining murder by an unprivileged belligerent for the first time on the instructions’ April 30, 2003, release date).

¹⁰⁸ See HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 574–99 (recognizing the absence of murder by an unprivileged belligerent from any war crime defined by a customary international humanitarian legal instrument).

¹⁰⁹ See *supra* Part III (concluding that murder by an unprivileged belligerent is not a war crime under the law of armed combat).

¹¹⁰ See Press Release, George W. Bush, President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (relying on his authority as the President and Commander-in-Chief of the Armed Forces to constitute military commissions).

Because the MCI were based on the original presidential military order that has now been superceded, MCI No. 2 is no longer enforceable. It is replaced by the definitions in the MCA.¹¹¹

Rather than retaining the charge of murder by an unprivileged belligerent, the MCA splits the charge into two war crimes. The first charge is the murder of protected persons,¹¹² a clear violation of Geneva Convention IV,¹¹³ and the second, murder in violation of the law of war.¹¹⁴ Both apply only to those persons subject to military commissions under the MCA, defined as “[a]ny alien unlawful enemy combatant[s]”¹¹⁵ Since civilians, or “unlawful enemy combatants,” can commit war crimes,¹¹⁶ these two charges follow the norms of international law using the prior analytical critique of murder by an unprivileged belligerent.¹¹⁷ Congress corrected the DOD’s error in the MCIs.

VI. AVAILABLE SYSTEMS OF ADJUDICATION

A. Available Court Systems

If murder by an unprivileged belligerent is not a war crime triable by military commission, exploring other court systems will likely shed light on more appropriate options. Though it is possible for a national legislature to expand its definition of war crimes, the definition would only apply to its own nationals if it fell outside

¹¹¹ See Military Comm’ns Act of 2006 [hereinafter MCA], 10 U.S.C. § 950v(b) (2006) (defining the crimes triable by military commission).

¹¹² See *id.* § 950v(b)(1) (defining “Murder of protected persons” as “[a]ny person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct”); *id.* § 950v(a)(2) (defining “protected person” as “any person entitled to protection under one or more of the Geneva Conventions, including— (A) civilians not taking an acting part in hostilities; (B) military personnel placed hors de combat by sickness, wounds, or detention; and (C) military medical or religious personnel”).

¹¹³ Geneva Convention IV, *supra* note 19, 6 U.S.T. at 3618, 75 U.N.T.S. at 781, 788 (including the willful killing of a protected person as a grave breach of the Convention).

¹¹⁴ See MCA § 950v(b)(15) (defining “Murder in violation of the law of war” as “[a]ny person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct”).

¹¹⁵ *Id.* § 948c.

¹¹⁶ See HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 573.

¹¹⁷ See *supra* Part III (concluding that the primary discrepancy with murder by an unprivileged belligerent is its categorization as a war crime when it should be treated as a domestic crime and acknowledging that murder alone does not create war criminality, but murder in violation of other aspects of international humanitarian law may).

the bounds of international law.¹¹⁸ Domestic jurisdiction over international law derives from the universality principle¹¹⁹ that allows federal courts to assert jurisdiction over crimes of terrorism, torture, and war.¹²⁰ Assuming murder by an unprivileged belligerent is not a violation of the law of war, a detainee should be prosecuted under domestic instruments, which include the military's general courts-martial and federal courts.¹²¹

The universality principle would allow the U.S. to try war criminals in federal court,¹²² including war criminals of both international and non-international armed conflict.¹²³ Universal crimes encompass such "common crimes as murder," allowing the U.S. to prosecute a detainee for murder by an unprivileged belligerent.¹²⁴ Comity concerns regarding federal court involvement in military affairs would also be inapplicable because, like Hamdan, Guantánamo detainees are not a part of the U.S. military forces and their

¹¹⁸ GREEN, *supra* note 27, at 293. *But cf.* *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (establishing that a violation of "well-established, universally recognized norms of international law," and not "idiosyncratic legal rules," confers federal jurisdiction under the Alien Tort Act, 28 U.S.C. § 1350 (quoting *Filártiga v. Peña-Irala*, 630 F.2d 876, 888, 881 (2d Cir. 1980))).

¹¹⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (stating that the premise of universal jurisdiction is allowing a State jurisdiction to define and punish certain crimes recognized by the community of nations as of a universal concern). See also *id.* § 702 (universal violations of international law include "(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights").

¹²⁰ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (*per curiam*) (Edwards, J., concurring) (referencing the universality principle in order to assert domestic jurisdiction over certain international offenses). See also *Filártiga*, 630 F.2d at 890 (recognizing torture as a universally denounced crime); *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (mentioning universal jurisdiction to justify punishing terrorists).

¹²¹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785 (2006) (clarifying that the government's failure to meet the standard necessary to prosecute an offense under military commissions would not preclude its trial under domestic instruments); see also *Filártiga*, 630 F.2d at 887 ("Federal jurisdiction over cases involving international law is clear.").

¹²² See HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 604–05 (stating that universal jurisdiction is supported extensively by national legislation). States party to the Geneva Conventions are obligated to include universal jurisdiction in their laws for "grave breaches" of the Geneva Conventions in order to ensure that the world is free to try war criminals wherever it makes the most sense. *Id.* at 606–07.

¹²³ See *id.* at 604–05 (stating that several people have been tried in non-international armed conflicts for war crimes as a result of the universal jurisdiction principle).

¹²⁴ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (6th ed. 2003) (incorporating common criminality into the universality principle).

trial in the military's general courts-martial system is unlikely.¹²⁵

The Supreme Court considered trial in general courts-martial in the *Hamdan* decision.¹²⁶ Congressional hearings on the possibilities surrounding use of the Uniform Code of Military Justice (UCMJ) in trials after *Hamdan* heard from military lawyers encouraging the use of military commissions under the direction of general courts-martial.¹²⁷ Their proposals allowed for departures from general courts-martial procedure as deemed practicable by the President.¹²⁸ However, this may come into conflict with the stringent uniformity principle that surrounds departures from the procedures laid-out for use by courts-martial.¹²⁹ Regardless of this allowance for potential procedural deviations, Article 21 of the UCMJ still provides jurisdiction over a military commission system.¹³⁰

¹²⁵ See *Hamdan*, 126 S. Ct. at 2770–72 (citing that the two considerations of comity that favor abstention by federal courts from ongoing military proceedings, listed in *Schlesinger v. Councilman*, 420 U.S. 738, 752, 758 (1975), would not apply because *Hamdan* is not a member of U.S. armed forces and the system convened to try *Hamdan* is not a part of the U.S. military courts system).

¹²⁶ See generally *id.* at 2774–77 (discussing Article 21, 10 U.S.C.A. § 821 (2006), and Article 36, 10 U.S.C.A. § 836 (2006), of the Uniform Code of Military Justice, the governing law of the military).

¹²⁷ See, e.g., *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld Before the Subcomm. on Emerging Threats and Capabilities of the S. Comm. on Armed Services*, 109th Cong. 3 (2006) (statement of Eugene R. Fidell, President of the National Institute of Military Justice and Partner at Feldesman Tucker Leifer Fidell LLP [hereinafter Fidell statement] (urging Congress to use the *Manual for Courts-Martial*, so the commission procedures will be guided the rules for general courts-martial, while recognizing the President's power to depart from that framework). See generally Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1, 7–10 (2005) (providing a concise history of the development of U.S. military law).

¹²⁸ See 10 U.S.C. § 836 (2000). (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter; (b) All rules and regulations made under this article shall be uniform insofar as practicable. *Id.*

¹²⁹ See *Hamdan*, 126 S. Ct. at 2790 (stating that any “departure[] from the procedures” of court-martial “must be tailored to the exigency that necessitates it” (citing WINTHROP, *supra* note 7, at 835 n.81)). See also Fidell statement, *supra* note 127, at 4–6 (asserting three proposals that would check the President's power to change courts-martial procedure: (1) requiring the President to state with “particularity” the facts that render a procedure impracticable, (2) requiring that Congress be notified of impracticability, and (3) making an impracticability determination subject to judicial review for abuse of discretion or illegality).

¹³⁰ See 10 U.S.C. § 821 (2000) (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other

Since war crimes are not applicable here, the unlawful belligerent should be prosecuted under domestic law.¹³¹ Under Additional Protocol I, international law prevails over national law in domestic courts, providing, at the very minimum, the fundamental guarantees delineated by Article 75.¹³² While it would be possible for an unlawful combatant to be a war criminal,¹³³ crimes by an unprivileged belligerent fall under the domestic law in their country of capture.¹³⁴ Ultimately though, the Guantánamo detainees will almost certainly be tried in the U.S. whether they committed a crime of murder under Afghan domestic law, or whether they committed a war crime of murder by an unprivileged belligerent, as the DOD asserts. The universality principle allows all States to punish in their own courts for both types of crime.¹³⁵

Presumably, the Administration created the “war crimes” and “other offenses” in MCI No. 2 to prosecute the detainees under international law. This is a strong concern because U.S. domestic law does not apply to “enemy personnel” charged with war crimes¹³⁶ and war criminality falls under the jurisdiction of several military and international courts.¹³⁷ Placing war crimes under international humanitarian law provides a flexibility that domestic

military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”).

¹³¹ See U.S. JAG OP. LAW HANDBOOK, *supra* note 32, at 16–17 (determining that even though murder alone does not qualify as a war crime under international law, it still requires prosecution under domestic law).

¹³² Additional Protocol I, *supra* note 44, 1125 U.N.T.S. at 38 (“In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply: (a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law . . .”).

¹³³ See DINSTEIN, *supra* note 23, at 234 (noting the possibility that an unlawful combatant may intentionally commit a serious breach of the law of international armed conflict).

¹³⁴ See U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 81, at 34 (“Persons who, without having complied with the conditions pre-scribed by the laws of war for recognition as belligerents . . . commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.” (internal citations omitted)).

¹³⁵ See Yoram Dinstein, *The Universality Principle and War Crimes*, in INT’L LAW STUDIES VOL. 71, THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 17 (Michael N. Schmitt & Leslie C. Green eds., 1998) (defining the bounds of the universality principle).

¹³⁶ U.S. ARMY FIELD MANUAL, *supra* note 7, ¶ 505(e), at 180–81 (asserting that “enemy personnel” are to be tried directly under international law).

¹³⁷ *Id.* ¶ 505(d), at 180 (allowing jurisdiction to general courts-martial, military commissions, provost courts, military government courts, other military tribunals of the U.S., and international tribunals).

law precludes, such as “forum shopping” or a higher evidentiary standard.¹³⁸ Both before and after *Hamdan*, international tribunals have been proposed to try detainees,¹³⁹ which would present a good framework¹⁴⁰ were it not for the U.S. aversion to international courts.¹⁴¹

Another option is repatriation and trial in the court system of the detainee’s national origin. This option presents a complex issue since a POW’s release after the end of hostilities necessarily “implies that another state is vouching for their future peaceable behavior.”¹⁴² Such an implication would be problematic for an organization whose command structure is unaffiliated with any particular State and stretches across many States rather than within just one.¹⁴³

Ultimately, the end result will be political and not legal.¹⁴⁴ In

¹³⁸ See Dinstein, *supra* note 135, at 18–19, 26, 30–33 (describing how the universality principle gives States great flexibility to prosecute war criminals in a court of their choosing).

¹³⁹ See, e.g., Human Rights First, *The U.S. Should Build on an Existing International Tribunal to Try Potential Al Qaeda or Taliban Suspects*, Nov. 28, 2001, http://www.humanrightsfirst.org/us_law/after_911/after_911_06.htm (recommending the creation of an international criminal tribunal mirroring the International Criminal Tribunal for the Former Yugoslavia shortly after the 9/11 attacks); Douglas W. Kmiec, *In the Wake of the Supreme Court’s Hamdan v. Rumsfeld Decision, Should We Opt for an International Tribunal for Gitmo Detainees?*, FindLaw.com, July 6, 2006, http://writ.news.findlaw.com/commentary/20060706_kmiec.html (describing alternatives to detaining enemy combatants without trial, including redirecting some more serious criminals to one of the ad hoc international tribunals such as that for Kosovo or East Timor).

¹⁴⁰ See Theodor Meron, *War Crimes Law for the Twenty-First Century*, in *INT’L LAW STUDIES*, VOL. 71: THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 325, 326 (Michael N. Schmitt & Leslie C. Green eds., 1998) (“The work of both tribunals[, the Hague Tribunal and the International Tribunal,] demonstrates that international investigations and prosecutions of persons responsible for serious violations of international humanitarian law are possible and credible.”).

¹⁴¹ See, e.g., Letter from John R. Bolton, U.S. Ambassador to the United Nations to Kofi Annan, Secretary General of the United Nations, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (withdrawing the United States’ signature from the Rome Statute of the International Criminal Court and resigning all legal obligations from its initial signing). *But see* Statement of the United States Delegation to the Preparatory Committee on the Establishment of an International Criminal Court (Mar. 23, 1998), *available at* http://www.amicc.org/docs/USDel3_23_98.pdf (urging congressional support for a “no war nexus” approach to crimes against humanity in the creation of the International Criminal Court).

¹⁴² Hoffman, *supra* note 13, at 230 (explaining problems likely to arise from categorizing terrorists as unlawful belligerents rather than as POWs).

¹⁴³ See Dinstein, *supra* note 23, at 49 (distinguishing between the relative uniformity of the Taliban forces and the “assemblage of Moslem fanatics from all parts of the world” of al Qaeda).

¹⁴⁴ *Compare In Retreat*, *ECONOMIST*, July 15, 2006, at 29 (contrasting the Bush Admin-

theory, any legal adjudicatory alternative to the commission system would provide justice and retribution to those detainees who committed crimes. Security issues, however, weigh heavily in the eyes of the U.S. government,¹⁴⁵ and compromise will be required to address those concerns while seeking an effective court for trial.

B. *The Needed Modification of the Commission System*

The court system chosen to try the Guantánamo detainees must comply with the *Hamdan* decision.¹⁴⁶ Congress must create “a regularly constituted court affording all the judicial guarantees that are recognized as indispensable by civilized peoples.”¹⁴⁷ While the Geneva Conventions did not directly define the term “regularly constituted court,” there remains some guidance in the Geneva Conventions IV commentary, Common Article 3, and the International Committee of the Red Cross.¹⁴⁸ It seems clear that an assumption of substantive and procedural uniformity with a State’s existing laws should be the overarching theme in a system created to try detainees.¹⁴⁹

istration’s eventual concession on the applicability of the Geneva Conventions with the consistently measured approach of State Department legal advisor John Bellinger on the applicability of international law in the “War on Terror”), with U.S. Dep’t of Def. Update - July 11, 2006, <http://www.defenselink.mil/home/dodupdate/For-the-record/documents/20060711.html> (asserting that the England Detainee Treatment Memo does not change any Defense policies as a result of the *Hamdan* decision because “the doctrine, policies, instructions, and procedures that have been in effect have always had humane treatment as their standard”).

¹⁴⁵ See Donald Rumsfeld, Dep’t of Defense News Briefing on Military Commissions (Mar. 21, 2002), available at http://www.dod.gov/transcripts/2002/t03212002_t0321sd.html (“The commissions are intended to be different . . . because the [P]resident recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed. . .”).

¹⁴⁶ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (holding that the commission convened by the President to try *Hamdan* “does not meet those [flexible, general] requirements” of Common Article 3, and therefore lacks the power to “try [him] and subject him to criminal punishment”).

¹⁴⁷ *Id.* at 2796 (quoting Geneva Convention III, *supra* note 19, 6 U.S.T. at 3320, 75 U.N.T.S. 136–38). The Court emphasized that “the scope of [Common Article 3] . . . must be as wide as possible.” *Id.* (internal citation omitted). See also Geneva Convention III, *supra* note 19, 6 U.S.T. at 3318–20, 75 U.N.T.S. 136–38 (stating Common Article 3 of the Geneva Convention III).

¹⁴⁸ See *Hamdan*, 126 S. Ct. at 2796–97 (equating “properly constituted” and “regularly constituted” in Article 66); HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 355 (defining “regularly constituted court” as used in Common Article 3 as “established and organised in accordance with the laws and procedures already in force in a country”). See also Geneva Convention IV, *supra* note 19, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention III, *supra* note 19, 6 U.S.T. at 3318–20, 75 U.N.T.S. 136–38.

¹⁴⁹ See *Hamdan*, 126 S. Ct. at 2791 n.50 (“Indeed, the suggestion that Congress did not intend uniformity across tribunal types is belied by the textual proximity of subsec-

Pending Congressional authorization for military commissions as required by the Supreme Court,¹⁵⁰ the U.S. must simply follow the procedures of general courts-martial as stated under the UCMJ as far as practicable.¹⁵¹ Courts-martial law provides more clear standing than the civil cases in federal court, many of which relied on the Alien Tort Claims Act in addition to the universality principle for jurisdiction.¹⁵² While the Geneva Conventions are primarily concerned with administering justice with safeguards aimed at eliminating the possibility of judicial error, it merits emphasis to say that the Convention seeks to only prohibit “summary” justice.¹⁵³

An oversight system regarding changes in courts-martial procedure by the President should also be activated. The National Institute of Military Justice proposed a system sufficiently insulated from executive power: the President would be required to articulate the facts that render a procedure impracticable, to notify Congress of any determination of impracticability, and to subject a Presidential determination to judicial review.¹⁵⁴

The government will undoubtedly have security concerns regarding the dissemination of classified materials during trials.¹⁵⁵ In the previous military commission system, any evidence was admissible if it “would have probative value to a reasonable per-

tion (a) (which requires that the rules governing criminal trials in federal district courts apply, absent the President’s determination of impracticability, to courts-martial, provost courts, and *military commissions* alike) and subsection (b) (which imposes the uniformity requirement).”).

¹⁵⁰ See *Hamdan*, 126 S. Ct. at 2775 (stating that the “Presidential authority to convene military commissions” must be justified by the “Constitution and laws,” including the law of war and Uniform Code of Military Justice; Congress’s Authorization for the Use of Military Force, and the Detainee Treatment Act of 2005 do not meet this standard for Congressional authorization). See also Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

¹⁵¹ See *Hamdan*, 126 S. Ct. at 2791 (concluding that “the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable”). See also Uniform Code of Military Justice, 10 U.S.C.A. § 810 (2007).

¹⁵² See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (using the “universal concern” standard to justify federal jurisdiction).

¹⁵³ See RED CROSS COMMENTARY, *supra* note 46, at 40 (emphasizing that no sort of immunity is meant by the clause but that members of the “insurgent forces should not be treated as common criminals”), available at <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/466097d7a301f8c4c12563cd00424e2b!OpenDocument>.

¹⁵⁴ See Fidell statement, *supra* note 127, at 3–6 (recommending an appropriate oversight system to prevent the executive from exercising too much authority over the judicial system).

¹⁵⁵ See *Hamdan*, 126 S. Ct. at 2798 (stating that “the Government has a compelling interest in denying Hamdan access to certain sensitive information”). But see *id.* at 2792 n.52 (asserting that “the structural and procedural defects of Hamdan’s commission extend far beyond rules preventing access to classified information”).

son.”¹⁵⁶ This standard would have allowed testimonial hearsay and evidence obtained through coercion.¹⁵⁷ In order to rectify the government security concerns with the military rules of evidence, the rules should adopt a system like that of Rule 92 *bis* of the International Criminal Tribunal for the former Yugoslavia.¹⁵⁸ Rule 92 *bis* (D) and (E) require that a party seeking to admit any “transcript of evidence given by a witness” must “give fourteen days notice to the opposing party,” who then has seven days to object.¹⁵⁹ The trial chamber then decides whether to admit the evidence after hearing the parties’ arguments for or against admissibility, or requiring the witness to come in for cross examination.¹⁶⁰ Here, the admissibility determination would move beyond sole judicial determination while also allowing discussion of admissibility in camera to assuage security concerns. It would provide careful review of evidence obtained through means that “cast substantial doubt on its reliability” and are “antithetical to, and would seriously damage, the integrity of the proceedings.”¹⁶¹

It is unlikely that Common Article 3 would be subverted if the

¹⁵⁶ *Id.* at 2786 (citing DEP’T OF DEF., MILITARY COMM’N ORDER, NO. 1 § 6(D)(1) (2005), available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>).

¹⁵⁷ See KENNETH HURWITZ, HUMAN RIGHTS FIRST, TRIALS UNDER MILITARY ORDER: A GUIDE TO THE RULES FOR MILITARY COMMISSIONS (identifying the admission of testimony received through torture as “[o]ne of the most troubling features of the military commission rules”). *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 533–34 (2004) (“Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.”).

¹⁵⁸ *Cf. Hamdan*, 126 S. Ct. at 2792 (lacking a “suggestion . . . of any logistical difficulty” from the government “in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility”).

¹⁵⁹ See Prosecutor v. Sikirica, Case No. IT-95-8-T, Decision on Prosecution’s Application to Admit Transcripts Under Rule 92 *Bis*, ¶ 1 (May 23, 2001), reprinted in 7 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2001, at 120 (André Klip & Göran Sluiter eds., 2005) [hereinafter ANNOTATED LEADING CASES], available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf>.

¹⁶⁰ *Id.*

¹⁶¹ *Rome Statute*, *supra* note 47, at Article 69(7); International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY), Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 39 (2006), Rules 89(C) and 95, available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev39e.pdf>; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (2006), Rules 89(C) and 95, available at <http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf>. See also *Sikirica*, Case No. IT-95-8-T, ¶ 3 (balancing the sub-Rule 89 (C) and (D) regarding whether “a Chamber ‘may admit any relevant evidence which it deems to have probative value’ and may exclude evidence ‘if its probative value is substantially outweighed by the need to ensure a fair trial’” (internal citations omitted)); *id.* ¶ 4 (stressing that the determination of whether “a witness

UCMJ were utilized to try “unlawful combatants.” The procedures of the MCA are “based” on the UCMJ,¹⁶² purport to establish a regularly constituted court under Common Article 3 of Geneva Convention III,¹⁶³ and provide congressional oversight over changes in procedures.¹⁶⁴ Detainees, however, are prohibited from invoking the Geneva Conventions as a source of rights,¹⁶⁵ may not view “sensitive” information against them,¹⁶⁶ and may still have hearsay evidence used against them.¹⁶⁷ It is yet to be determined whether the MCA will provide the necessary checks and balances to mirror general courts-martial. However, the Supreme Court specified that the treatment and trials of the detainees were to comply with Common Article 3,¹⁶⁸ and it should thus act as a floor for the trials, and not a ceiling.

CONCLUSION

The end of hostilities brings even greater questions, especially in a rhetorical war like the “War on Terror.” The questions surrounding the legitimacy of the commission offenses will undoubtedly affect future questions after the “War on Terror” has ended. For instance, determining an end to the hostilities would likely be a contentious issue since an agreement on the cessation of hostilities depends on the nature of the conflict in question.¹⁶⁹ Only then would questions regarding possible repatriation be raised.

According to customary international law, the U.S. government would be required to grant the broadest possible amnesty to the detainees for their participation in non-international armed combat (or those imprisoned for reasons related to armed combat) except for those accused of, or sentenced for, war crimes.¹⁷⁰ However, the U.N. Security Council, among other national bodies, con-

should be required to appear for cross-examination” should hinge on whether, without such live testimony, the court could still “ensure a fair trial”).

¹⁶² MCA § 948b(c).

¹⁶³ *Id.* § 948b(f).

¹⁶⁴ *Id.* § 949a(d).

¹⁶⁵ *Id.* § 948b(g).

¹⁶⁶ *Id.* § 949d(f).

¹⁶⁷ *Id.* § 949a(b)(2)(E)(ii).

¹⁶⁸ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

¹⁶⁹ See CHRISTIANE SHIELDS DELESSERT, *RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1 OF THE 3RD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 100* (1977) (recognizing that a cessation of hostilities may take many forms under heavy dependence on the type of conflict involved).

¹⁷⁰ See HENCKAERTS & DOSWALD-BECK, *supra* note 48, at 611 (establishing a rule that grants broad amnesty to detainees participating in non-international armed combat

firmed that the amnesty does not apply to war crimes.¹⁷¹

The Department of Defense overstepped its bounds by trying to create law without the necessary precedent. Murder by an unprivileged belligerent lacks any legitimate basis in international law. While recognizing that the common law is “evolutionary in nature,”¹⁷² the U.S. judiciary will always require solid foundations in precedent.¹⁷³ But shifting an individual’s culpability from that of common criminality to that of war criminality through technicalities in combatant privilege is a contortion in law for an independent executive purpose. It is this type of contortion of executive power for independent, political purposes that the judiciary must check during both formal¹⁷⁴ and informal¹⁷⁵ times of war.

through State practice as a norm of customary international law applicable in non-international armed conflict).

¹⁷¹ See *id.* at 613 (showing that war crimes are the exception to the general amnesty at the end of hostilities).

¹⁷² See *Hamdan*, 126 S. Ct. at 2829 (Thomas, J., dissenting) (“... building upon the experience of the past and taking account of the exigencies of the present”).

¹⁷³ See *id.* at 2779–80 (plurality opinion). See also *id.* at 2780 n.34 (“The caution that must be exercised in the incremental development of common-law crimes by the judiciary is, for the reasons explained in the text, all the more critical when reviewing developments that stem from military action.”).

¹⁷⁴ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (declaring President Franklin Roosevelt’s interference in the steel industry strikes during World War II as overstepping executive constitutional powers as Commander in Chief).

¹⁷⁵ See, e.g., *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (declaring that the “War on Terror” did not give President George W. Bush a “blank check” for executive authority).

