

2007

# The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview

James G. Stewart

*Allard School of Law at the University of British Columbia, [stewart@allard.ubc.ca](mailto:stewart@allard.ubc.ca)*

Follow this and additional works at: [http://commons.allard.ubc.ca/fac\\_pubs](http://commons.allard.ubc.ca/fac_pubs)

 Part of the [International Humanitarian Law Commons](#), [International Law Commons](#), [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

---

## Citation Details

James G Stewart, "The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview" (2007) 5:1 J Int'l Crim J 26.

This Article is brought to you for free and open access by the Faculty Scholarship at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

# The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview

James G. Stewart\*

## Abstract

*The Military Commissions Act codifies a wide range of provisions that are inconsistent with binding international humanitarian law standards. In spite of the Act's title, these inconsistencies go well beyond the rules and procedures governing the trial of terrorist suspects before military commissions. In addition to violating fundamental fair trial guarantees defined in international humanitarian law, the Act misapplies the Geneva Conventions by adopting a 'one size fits all' approach to the characterization of all counter-terrorist operations, provides for an overly broad definition of unlawful combatant status that effectively deprives terror suspects of applicable law of war protections, repudiates longstanding 'elementary considerations of humanity' contained in common Article 3 and entrenches a detention regime that does not comport with the terms of the Geneva Conventions. These departures from international humanitarian law are reinforced by provisions of the Act that purport to insulate US government personnel and their agents from contrary interpretation and judicial scrutiny. The Act is thus best described as a series of breaches rather than developments of international humanitarian law, and as such, signals a stark departure from the US's historical commitment to the laws of war.*

## 1. Introduction

On 17 October 2006, President Bush announced that 'in memory of the victims of September 11th, it is my honor to sign the Military Commissions Act of 2006 into law' (MCA). Only three months earlier, the US Supreme Court had

\* Appeals Counsel, Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia. The views expressed in this comment are personal and do not necessarily reflect those of the Tribunal or the United Nations. Kind thanks to Gabor Rona and Stephanie Brancaforte who offered critique of an earlier version without endorsing errors or oversights.

declared the previous incarnation of US Military Commissions inconsistent with fundamental rules of international humanitarian law.<sup>1</sup> Unfortunately, the successor commissions established by the MCA suffer from similar deficiencies. Indeed, the United Nations Expert on Human Rights and Counter Terrorism has declared that the Act 'contains a number of provisions that are incompatible with the international obligations of the United States under human rights law and humanitarian law.'<sup>2</sup> In spite of the Act's title, these incompatibilities are not limited to the rules and procedures governing the trial of foreign terrorist suspects.

In addition to violating fundamental fair trial guarantees defined in international humanitarian law, the MCA misapplies that body of law to circumstances outside armed conflict, codifies the discredited US approach to unlawful combatant status that does not square with the Geneva Conventions, abrogates and amends longstanding 'elementary considerations of humanity' contained in common Article 3 despite emotive protest from high ranking US military officials and, at least according to the government, precludes civilian courts from ruling on habeas applications brought by 'alien unlawful combatants', thus allowing detention and interrogation practices that violate international humanitarian law to continue unchecked. The Act ends by purporting to monopolize interpretation of the Conventions in the executive, precluding 'alien unlawful combatants' from invoking their terms before domestic courts and granting all US government personnel retrospective immunity from domestic war crimes legislation. As the President of the International Committee of the Red Cross (ICRC) euphemistically announced, 'the new legislation raises certain concerns and questions.'<sup>3</sup> Of necessity, this overview is limited to highlighting but a few of these concerns.

## 2. The Misapplication of International Humanitarian Law

The MCA makes no mention of the fundamental distinctions between the law applicable in law enforcement contexts, the law governing international armed conflicts between states, and the rules applicable during conflict 'not of an international character'. On the contrary, the Act tacitly circumvents these

- 1 *Hamdan v. Rumsfeld*, Secretary of Defense *et al.* No. 05–184, 29 June 2006, available at: <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf> (visited 3 December 2006).
- 2 United Nations Press Release, *UN Expert on Human Rights and Counter Terrorism Concerned that Military Commissions Act is now Law in United States*, 27 October 2006, available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/13A2242628618D12C12572140030A8D9?opendocument> (visited 3 December 2006).
- 3 J. Kellenberger, *Developments in US policy and legislation towards detainees: the ICRC position*, 19 October 2006, available at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/kellenberger-interview-191006> (visited 3 December 2006).

distinctions by adopting what the ICRC describes as a ‘one size fits all’ approach to characterization of armed violence,<sup>4</sup> inaccurately borrowing selected privileges from international humanitarian law without fully granting the corresponding protections.

Fundamentally, the Act’s one-size approach is a continuation of the deeply troubling view that the law of war automatically applies to all global counter-terrorist operations. While armed violence between a state and a terrorist group is capable of constituting a non-international armed conflict, that violence must reach a prescribed degree of intensity and involve a military-like formation that possess a command structure enabling it to maintain internal discipline and respect international humanitarian law. Clearly, not all terrorist acts satisfy these requirements. In the aftermath of the Oklahoma City bombing, for example, Timothy McVeigh was arrested and prosecuted on the basis of domestic criminal law, not the law of war. The British government treated the IRA similarly. When ratifying Additional Protocol I, it reaffirmed that ‘it is the understanding of the United Kingdom that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation’.<sup>5</sup> The MCA is wrongly premised on a blanket classification that adopts the opposite conclusion in all conceivable circumstances.

The Act’s blanket classification also misapplies privileges applicable uniquely during international armed conflict to all counter-terrorist operations, even though the terms of the Geneva Conventions plainly specify that international armed conflict denotes hostilities between states.<sup>6</sup> A blanket declaration that all terrorist acts fall within the rubric of international armed conflict misreads these provisions in order to expropriate the exceptional rules permitting detention without charge for the duration of hostilities during inter-state armed conflict to individuals in countries as diverse as Malawi, Thailand, Bosnia and Pakistan. The misappropriation is disingenuous since outside the international armed conflict between the US and Afghanistan between 7 October 2001 and 19 June 2002, the ‘War on Terror’ is no more an international armed conflict within the meaning of the Geneva Conventions than the ‘War on Drugs’. In short, the terms of the Geneva Conventions require qualification of each specific circumstance in which armed conflict occurs for its protections and privileges to adhere, which is regrettably, the very enquiry the Act now precludes. Instead, the application of the MCA’s single body of law turns only on an overly broad definition of unlawful combatant status, the legitimacy of which is addressed elsewhere in this set of editorial comments.

4 *Ibid.*

5 United Kingdom Reservation to Additional Protocol I, 28 January 1998, available at: <http://www.icrc.ch/IHL.nsf/NORM/OA9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (last visited 3 December 2006).

6 Common Art. 2 of the Geneva Conventions applies to ‘all cases of declared war or of any other armed conflict which may arise between two or more of the *High Contracting Parties* . . .’.

### 3. Fundamental Judicial Guarantees Denied

A host of international humanitarian law provisions protect fair trial rights during armed conflict,<sup>7</sup> precisely in order to counter the understandable temptation to offer enemy prisoners lesser justice in exceptional circumstances. While to a certain extent the scope of these legal protections vary depending on the status of the detainee and the qualification of the armed conflict, several apply to all individuals subject to criminal charges during either international or non-international armed conflict. Common Article 3 of the Geneva Conventions, for example, prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'. According to the US Supreme Court, the judicial guarantees contemplated by the provision are to be interpreted in light of Article 75 of Additional Protocol I, which is 'indisputably part of customary international law'.<sup>8</sup> International human rights standards are also of vital importance, both as a means of defining the terms of the judicial guarantees enshrined in the Article and as an independent and complementary body of rules simultaneously applicable during armed conflict.<sup>9</sup> Several aspects of the MCA do not square with these protections. The discrepancies are cause for alarm since as the US Naval Handbook aptly recognizes, 'failure to provide a fair trial for the alleged commission of a war crime is itself a war crime'.<sup>10</sup>

A regularly constituted Court must be independent and impartial.<sup>11</sup> The US Supreme Court found similarly in concluding that 'an acceptable degree of independence from the Executive is necessary to render a commission "regularly constituted" by the standards of our Nation's system of justice'.<sup>12</sup> Although the MCA explicitly professes its compliance with this requirement,<sup>13</sup> a closer inspection of the terms of the Act suggests otherwise. Under the MCA, the

7 Common Art. 3; Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Arts 102–108 and 130; Geneva Convention IV, Arts 5, 64–75, 146 and 147; Additional Protocol I, Arts 71(1), 75(4) and 85(4)(e).

8 *Hamdan*, *supra* note 1, Opinion of Stevens J, at 71.

9 See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, s 106.

10 Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, § 6.2.5(2) available at: <http://lawofwar.org/navalwarfare.publicationN-114M.htm> (visited 3 December 2006). Art. 130 Geneva Convention III and Art. 147 Geneva Convention IV define wilfully depriving a protected person or prisoner of war of the rights of fair and regular trial prescribed in the present Convention as a grave breach. In non-international armed conflicts, the war crime of 'sentencing or execution without due process' derives from common Art. 3.

11 See also common Art. 3; Geneva Convention III, Art. 84(2); Geneva Convention IV, Art. 66; Additional Protocol I, Art. 75(4).

12 *Hamdan*, *supra* note 1, at 9–10 (Kennedy J). The statement was endorsed by the majority, Opinion of Stevens J., at 71.

13 MCA, § 948b(f).

Secretary of Defense convenes the commissions;<sup>14</sup> prescribes regulations providing for the manner in which military judges, prosecution and defence counsel are detailed to those commissions;<sup>15</sup> stipulates pre-trial, trial and post-trial procedures, including elements and modes of proof he deems 'practicable or consistent with military or intelligence activities';<sup>16</sup> may promulgate additional regulations for the use and protection of classified evidence;<sup>17</sup> determines the oath to be sworn;<sup>18</sup> prescribes regulations determining defence counsel's right to a 'reasonable opportunity to obtain witnesses and other evidence';<sup>19</sup> determines defence counsel's access to the unredacted trial record;<sup>20</sup> prescribes maximum penalties<sup>21</sup> and assigns military judges to a Court of Military Commission Review.<sup>22</sup> The Secretary of Defense also appoints the Convening Authority, who in turn details 'any commissioned officer of the armed forces on active duty'<sup>23</sup> to serve on the commission. Even taking into account the Act's laudable inclusion of provisions intended to insulate commission members from executive influence,<sup>24</sup> and the right of appeal to civil courts on points of law,<sup>25</sup> these executive powers of influence over the Commission are still more extensive than those deemed sufficient to deprive other judicial bodies of claims to independence under basic international standards.<sup>26</sup>

The Commissions' independence from the Executive is also threatened by public statements made by senior US military officials. In response to a question that asked whether the President had concerns that Guantánamo detainees 'were not getting justice', he responded, '[n]o, the only thing I know for certain is that these are bad people...'.<sup>27</sup> The former Secretary of Defense intimated that '[y]ou're beginning with people that are very dangerous....

14 MCA, § 948h.

15 MCA, §§ 948k(a) and 948k(a)(4).

16 MCA, § 949a.

17 MCA, § 949d(f)(4).

18 MCA, § 949g(a)(2).

19 MCA, § 949j(a).

20 MCA, § 949o(c).

21 MCA, § 949t.

22 MCA, § 950f(b).

23 MCA, §§ 948h and 948i(b).

24 MCA, §§ 948j(f) and 949b.

25 MCA, § 950g.

26 In particular, see the European Court of Human Rights' condemnation of British Courts-martial in *Findlay v. UK*, Judgment, ECHR (1997) 25 February 1997; *Grievs v. UK*, Judgment, 16 December 2003; *Martin v. UK*, 24 October 2006. See also the same Court's treatment of the Turkish National Security Court in *Incal v. Turkey*, Judgment, 9 June 1998; Finally, see Kennedy J's analysis of the independence of the previous incarnation of Military Commissions in *Hamdan*, *supra* note 1, at 10–16 as endorsed by the majority at Opinion of Stevens J, at 71.

27 White House Press Release, *President Bush, Prime Minister Blair Discuss War on Terrorism*, 17 July 2003, available at: <http://www.whitehouse.gov/news/releases/2003/07/print/20030717-9.html> (visited 3 December 2006).

They are the hardest of the hard core'.<sup>28</sup> And in a similar vein, Rear Admiral John D. Stufflebeem remarked that '[t]hey [Guantánamo detainees] are bad guys. They are the worst of the worst, and if let out on the street, they will go back to the proclivity of trying to kill Americans and others'.<sup>29</sup> Such statements expose the Commissions' members to the risk of executive and command influence and resemble comments that have constituted a violation of the presumption of innocence in other contexts.<sup>30</sup> In both regards, the statements may constitute or contribute to violations of fundamental fair trial guarantees owed to all individuals in situations of armed conflict.<sup>31</sup>

The MCA also purports to deprive accused persons from full access to evidence used against them at trial and adequate means of securing exculpatory evidence and witness testimony. The Act provides that the military judge will consider claims for national security privilege raised by the head of the executive or military department or government agency concerned and that such information 'shall not be disclosed to the accused'.<sup>32</sup> On its face, the provision contradicts international humanitarian law's requirement that 'anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.<sup>33</sup> Certainly, it would not appear that an accused will be offered a right to access witnesses comparable to that enjoyed by the Administration. Section 949j of the Act states that defence counsel 'shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.' Navy Secretary Gordon England, who supervises the implementation of the same 'reasonable availability' standard before Combat Status Review Tribunals (CSRTs) at Guantánamo has reported that few, if any, witnesses from locations such as Afghanistan would be likely to travel to Guantánamo in order to give evidence and that no budget was specifically

28 *Secretary Rumsfeld Roundtable with Radio Media*, US Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), News Transcript, 15 January 2002, available at: <http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2132> (visited 3 December 2006).

29 L.D. Kozaryn, 'U.S. Gains Custody of More Detainees, American Forces Information Service,' 28 Jan 2002, available at: <http://www.defenselink.mil/news/Jan2002/n01282002.200201284.html> (visited 3 December 2006).

30 In *Allenet de Ribemont*, the European Court of Human Rights found that an accused's right to the presumption of innocence was violated when the highest-ranking officers in the French police referred to the accused as one of the instigators of a murder (*Allenet de Ribemont v. France*, Judgment, 10 February 1995, §41). In *Gridin*, the United Nations Human Rights Committee found a violation of the presumption of innocence because of public declarations by officials, which were given wide media coverage, presenting the accused as guilty before his conviction (*Gridin v. Russia*, Views, 20 July 2000, § 8.3).

31 Art. 75(4)(d) AP I provides that 'anyone charged with an offence is presumed innocent until proved guilty according to law'.

32 MCA, § 949d(f).

33 Additional Protocol I, Art. 75(4)(g).

allocated for such costs.<sup>34</sup> Unsurprisingly, the CSRTs rejected three quarters of the requests for exculpatory witnesses to attend such hearings, most notably in all instances where witnesses were located outside Guantánamo.<sup>35</sup> In the event that the Secretary of Defense defines 'reasonably available' in similar terms, the MCA will fall well short of meeting international humanitarian law requirements.

In addition, the MCA condones the admission of coerced evidence, again contravening applicable international humanitarian law standards. Even though the Act declares that statements obtained by torture are not admissible,<sup>36</sup> it permits a military judge to admit statements 'in which the degree of coercion is disputed,' subject to two sets of limitations that turn on the date the statement was obtained.<sup>37</sup> Neither set of standards comports with international humanitarian law. Article 75(4)(f) of Additional Protocol I mandates that 'no one shall be compelled to testify against himself or to confess guilt.' Article 99(2) of Geneva Convention III provides for the same protection in greater detail by stipulating that 'no moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused'. The ICRC's study of customary international law concludes that compelling an accused to testify against him or herself or to confess guilt under these circumstances is prohibited in both international and non-international armed conflicts.<sup>38</sup> In fact, one of the key pieces of state practice cited in support of the conclusion stems from a US Supreme Court decision that described the types of coercion tolerated by the MCA as 'a denial of due process'.<sup>39</sup> Such practices are also a denial of international humanitarian law protections.

A preliminary appraisal of only a limited number of fair trial concerns raised by the MCA thus suggests that trials convened pursuant to the Act will violate the fundamental fair trial guarantees defined in international humanitarian law, thereby exposing relevant US and foreign government personnel to the risk of criminal responsibility for willfully depriving accused of the rights of fair and regular trial prescribed in the Geneva Conventions.

34 *Secretary of the Navy England Briefing on Combatant Status Review Tribunal*, 9 July 2004 <http://www.defenselink.mil/transcripts/2004/tr20040709-0986.html> (last visited 3 December 2006).

35 M. Denbeaux et al., *No Hearing Hearings: CSRT the Modern Habeas Corpus? An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantánamo*, at 26–33, available at: <http://law.shu.edu/news/final.no.hearing.hearings.report.pdf> (visited 3 December 2006).

36 MCA, § 948r(a).

37 MCA, § 948r(c) and (d).

38 J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, vol. I (Cambridge: Cambridge University Press, 2005), at 67.

39 US Supreme Court, *Ward* case, Judgment, 1 June 1942 cited in *ibid.*, vol. II, Part 2, § 3505.

#### 4. A Departure from Elementary Considerations of Humanity: Common Article 3 Revised

In 1996, the US Government implemented the US War Crimes Act, criminalizing grave breaches of the Geneva Conventions as well as violations of common Article 3. The MCA abrogates the definition of common Article 3 contained in the US War Crimes Act, substituting an unprecedented concept of 'grave breaches of common article 3';<sup>40</sup> that excludes two particularly pertinent protections enshrined in common Article 3. The Act also unilaterally redefines remaining provisions of the article in terms that are inconsistent with established standards.

The Act's creation of 'Grave Breaches of Common Article 3' is both novel and unfounded. 'Grave breaches' of the Geneva Conventions are exhaustively defined,<sup>41</sup> do not include common Article 3 and only apply during international armed conflict. Conversely, common Article 3 is an autonomous 'convention within a convention', containing what the International Court of Justice has described as 'elementary considerations of humanity',<sup>42</sup> that apply in conflicts of either international or non-international character.<sup>43</sup> There is no precedent for their amalgamation. Moreover, the content of the reconstituted 'grave breaches of common article 3' revealingly excludes the provisions of common Article 3 that well-documented practices at Guantánamo unquestionably violate, namely the denial of the right to a fair trial and the prohibition against outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>44</sup> In this light, the Act's marriage of common Article 3 and the grave breaches regime appears more a pretext to subjugate certain inconvenient international humanitarian law provisions that the result of chance legal confusion.

40 MCA, § 6(a).

41 See Geneva Convention I, Art. 50; Geneva Convention II, Art. 51; Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147; Additional Protocol I, Art. 85.

42 *Military and Paramilitary Activities in and against Nicaragua (Merits)*, ICJ Reports 1986, at 113–114, § 218.

43 Although common Art. 3 stipulates that it applies to 'armed conflicts not of an international character,' customary international law has come to see the provision as a 'minimum yardstick' applicable in all types of armed conflict. See *Nicaragua*, *supra* note 42, § 218; Judgment, *Delalić and others* (IT-96-21-A), Appeals Chamber, 20 February 2001, § 150; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1-A), Appeals Chamber, 2 October 1995, § 102.

44 For a harrowing account of acts that at the very least amount to degrading treatment, see *Al Odah et al. v. United States Of America*, Brief of Amici Curiae Retired Federal Jurists in Support of Petitioners' Supplemental Brief Regarding The Military Commissions Act Of 2006, available at: <http://www.pegc.us/archive/In.re.Gitmo/CADjudges.amicus.20061101.pdf> (visited 3 December 2006); for accounts establishing unfair trial, see UN Expert Report on the Situation of Detainees at Guantanamo Bay, Future E/CN.4/2006/120, 15 February 2006, §§ 34–40 and L. Lasry QC, *United States v. David Mathew Hicks, First Report of the Independent Legal Observer for the Law Council of Australia* (Melbourne, 30 August 2004).

The same motivation appears evident in the Act's redefinition of the prohibition against cruel and inhuman treatment in terms that diverge from previously accepted standards. Cruel treatment is constituted by an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.<sup>45</sup> The MCA on the other hand requires bodily injury that involves a substantial risk of death, extreme physical pain, a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or significant loss or impairment of the function of a bodily member, organ or mental faculty.<sup>46</sup> The New York Bar Association accurately pointed out the incongruity between these two definitions in a letter of complaint prior to the Act's adoption by noting that 'the language of the current draft would create a crime defined in terms different from the accepted Geneva meanings, thereby introducing ambiguity where none previously existed.'<sup>47</sup> Despite the warning, the MCA codified the higher standard of cruel and inhuman treatment, apparently in an attempt to justify continued coercive interrogation that falls below accepted international humanitarian law standards.

The consequences of these amendments are far-reaching. According to the ICRC, '[t]his distinction between the different violations disrupts the integrity of common Article 3'.<sup>48</sup> Various high ranking US military personnel apparently agree. One publicly decried that '[t]he idea that the United States would 'pick and choose' what portion of the Geneva Convention to follow . . . and what portion to redefine/reinterpret' . . . goes against who we are as a people and as a nation.'<sup>49</sup> Another lamented that redefining common Article 3 'would send a terrible signal to other Nations that the United States is attempting to water down its obligations under Geneva'.<sup>50</sup> Even former Secretary of State Colin Powell accepted that 'the world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at danger'.<sup>51</sup> The passage of the MCA renders these concerns a reality.

45 *Delalić and others*, *supra* note 43, §424. See also Art. 8(2)(c) (i)-3 Elements of Crimes, International Criminal Court, ICC-ASP/1/3.

46 MCA, § 6(b)(d)(2)(D). The definition also incorporates an equally stringent definition of 'serious mental pain or suffering.' See MCA, § 6(b)(d)(2)(E).

47 Letter from Barry M. Kamins, President New York City Bar Association, at 3, available at: <http://www.nimj.org/documents/NYCBBarMilitaryCommissionsLetterSept%2027.1.pdf> (visited 3 December 2006).

48 *Developments in US Policy*, *supra* note 3.

49 Letter From General Charles C. Krulak, available at: <http://www.humanrightsfirst.info/pdf/06920-etn-krulak-ltr-mccain-ca3.pdf> (visited 3 December 2006).

50 Letter From General H. Hugh Shelton, 20 September 2006, available at: <http://www.humanrightsfirst.info/pdf/06920-etn-shelton-ltr-mccain-ca3.pdf> (visited 3 December 2006).

51 Letter from Colin Powell on Common Art. 3, 13 September 2006, available at: <http://www.humanrightsfirst.info/pdf/06914-etn-powell-ltr-com-art-3.pdf> (visited 3 December 2006).

## 5. Habeas Revoked: Galvanizing a Detention Regime that Violates International Humanitarian Law

The MCA raises further concerns for international humanitarian law to the extent that its provisions deprive 'alien unlawful combatants' of habeas corpus rights before civilian courts,<sup>52</sup> thus leaving CSRTs with the sole authority to determine the legality of a detainee's detention. In so doing, the Act entrenches a detention regime that does not accord with international humanitarian law standards.

During an international armed conflict such as that in Afghanistan, Article 5 of Geneva Convention III requires that should any doubt arise as to whether persons who have committed a belligerent act are protected as prisoners of war, they shall enjoy that status until such time as their status has been determined by a 'competent tribunal'. In addition, individuals not deemed to enjoy prisoner of war status can be interned without charge during international armed conflict provided 'the security of the Detaining Power makes it absolutely necessary'<sup>53</sup> and internment is reconsidered 'as soon as possible by an appropriate court or administrative board'.<sup>54</sup>

However, CSRTs are not empowered to determine these status and do not demonstrate the requisite characteristics of a competent tribunal, appropriate court or administrative board. A CSRT is only empowered to determine whether a detainee is an 'unlawful combatant'; not a detainee's status under the Geneva Conventions.<sup>55</sup> A US District Court reached precisely this conclusion in finding that 'Hamdan has appeared before the Combat Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions'.<sup>56</sup> Similarly, the United Nations Human Rights Committee concluded that CSRTs 'may not offer adequate safeguards of due process'.<sup>57</sup> The Committee cited the CSRTs lack of independence from the executive branch and the army, restrictions on the rights of detainees to have

52 MCA, § 7. The scope of the provision is presently under appeal. See *Al-Marri v. Commander S.L. Wright*, Brief of Appellants, 13 November 2006, at 24–25, available at: <http://www.pegc.us/archive/AlMarri.v.Hanft/CA4.appeal.20061113.pdf> (visited on 3 December 2006).

53 Geneva Convention IV, Art. 42. See also Geneva Convention IV, Art. 78(1).

54 Geneva Convention IV, Art. 43. See also Geneva Convention IV, Art. 78(2).

55 According to Secretary of The Navy, Gordon England, '... the CSRT is a one-time review to determine if a person, a detainee, is or is not an enemy combatant.' Gordon England, *Defense Department Special Briefing on Combatant Status Review Tribunals*, 29 March 2005, available at <http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html> (last visited on 3 December 2006).

56 *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, Civil Action No. 04–1519 (JR), United States District Court for the District of Columbia, at 18, available at: <http://news.findlaw.com/hdocs/docs/tribunals/hamdanrums110804opn.pdf> (visited on 14 June 2005).

57 *Concluding Observations of the Human Rights Committee, United States Of America*, 15 September 2006, CCPR/C/USA/CO/3, § 18, available at: <http://www.ohchr.org/english/bodies/hrc/hrcs87.htm> (visited 3 December 2006).

access to all proceedings and evidence, the inevitable difficulty CSRTs face in summoning witnesses, and the possibility given to CSRTs to weigh evidence obtained by coercion as bases for its conclusion.<sup>58</sup> Other sources unequivocally confirm the startling inadequacy of CSRT's procedures,<sup>59</sup> and ultimately, their inability to release individuals not deemed to constitute unlawful combatants.<sup>60</sup>

As a consequence, the MCA's attempt to preclude 'alien unlawful combatants' voicing habeas corpus petitions before domestic courts relegates those detainees to a status determination that does not conform to the terms of the Geneva Conventions in substance or form. Again, these inconsistencies are a matter of urgent concern since such practices amount to the grave breach of unlawful confinement,<sup>61</sup> at least as regards the numerous detentions effected during the international armed conflict in Afghanistan.

## 6. Interpretative Monopoly and Immunity from Prosecution

The MCA purports to vest exclusive interpretative authority in the President and retrospectively immunize state sanctioned breaches of the laws of war, presumably in order to insulate government and military personnel from continued judicial scrutiny. The MCA confers on the President the exclusive power to issue interpretations of the Geneva Conventions that are binding and authoritative as a matter of domestic law.<sup>62</sup> Consequently, no foreign or international source of law can supply the basis for interpretation of the revised 'grave breaches of common article 3'.<sup>63</sup>

The Act further provides that 'no alien unlawful combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights'.<sup>64</sup> In fact, other provisions of the Act extend the same limitation to any person acting 'in habeas corpus or other civil action

<sup>58</sup> *Ibid.*

<sup>59</sup> See *No Hearing Hearings*, *supra* note 35; See also M. and J. Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, 8 February 2006, available at: <http://law.shu.edu/news/guantanamo-report-final.2.08.06.pdf>; M. Denbeaux et al. *Second Report on the Guantanamo Detainees: Inter- and Intra-Departmental Disagreements About Who Is Our Enemy*, 20 March 2006, available at: <http://law.shu.edu/news/second-report-guantanamo-detainees.3.20-final.pdf> (visited 3 December 2006).

<sup>60</sup> At least three detainees are reported to have initially been found not to be enemy combatants and then subjected to multiple re-hearings until the contrary was established. See *No Hearing Hearings*, *supra* note 35, at 37–39; in addition, according to the UN Expert Report, various detainees deemed not to be unlawful combatants were still not released nine months after the determination. *UN Expert Report*, *supra* note 44, § 28(e).

<sup>61</sup> See J.G. Stewart, 'Rethinking Guantánamo: Unlawful Confinement as Applied in International Criminal Law', 4 *JICJ* (2006), available online at: <http://jicj.oxfordjournals.org/cgi/reprint/4/1/12> (visited 3 December 2006).

<sup>62</sup> MCA, § 6(3).

<sup>63</sup> MCA, § 6(a)(2).

<sup>64</sup> MCA, § 948b(g).

or proceedings to which the United States or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party . . . .'<sup>65</sup> With the exception of two offences defined in the Detainee Treatment Act, the MCA precludes criminal proceedings against the United States or its agents with respect to 'detention, transfer, treatment, trial, or conditions of confinement' of alien enemy combatants.<sup>66</sup> The immunity has retrospective effect for all offences perpetrated since 11 September 2001, at Guantánamo and elsewhere.

These provisions not only run counter to the terms of the explicit wording of the Geneva Conventions that require states to 'search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and . . . bring such persons, regardless of their nationality, before its own courts';<sup>67</sup> it is also inconsistent with the wider customary obligation to 'investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects.'<sup>68</sup> The MCA's opposition to these rules signals a stark departure from the US's historical commitment to the laws of war.

## 7. Conclusion: Illegitimacy and Fragmentation

The MCA misapplies international humanitarian law, provides for an overly broad status of unlawful combatant that effectively deprives terror suspects of applicable law of war protections, violates fundamental fair trial guarantees, repudiates longstanding 'elementary considerations of humanity' contained in common Article 3 and entrenches a detention regime that does not comport with the terms of the Geneva Conventions. The Act concludes by revoking all possibility for contrary judicial interpretation before domestic courts. These departures from the terms of the Geneva Conventions, customary international humanitarian law and orthodox international precedents are sobering, particularly given the projected lifespan of the 'War on Terror'.

Nonetheless, the United States has not crossed the Rubicon. One hopes that a change in political fortunes will bring this or a subsequent US Administration to reconsider the terms of the MCA in light of international humanitarian law obligations. In the interim, it is of some small consolation that internal law has never served as a basis for absolving states of international obligations,<sup>69</sup> much

65 MCA, § 5(a).

66 MCA, § 7(a)(2).

67 Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Fourth Geneva Convention, Art. 146.

68 *Customary International Humanitarian Law*, *supra* note 38, Rule 158, vol. I, at 607.

69 As the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia* noted, '[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.' *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)*, 25 May 1926, PICJ Reports, Series A, No 7, 19.

less individuals for violations of international humanitarian law.<sup>70</sup> As such, the Act's various departures from binding legal standards are best viewed as violations not developments. The much cited passage from *Nicaragua* confirms that 'instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.'<sup>71</sup> And ultimately, a situation of profound international legal crisis not only requires criticism; it also compels a commitment to withholding legitimacy from such practices for the duration.<sup>72</sup>

70 Principle II of the Nuremberg Principles states that '[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.' International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950).

71 *Nicaragua*, *supra* note 42, at 186.

72 L. Condorelli, 'A propos de l'attaque américaine contre l'Irak du 26 juin 1993: Lettre d'un professeur désemparé aux lecteurs du JEDI', 5 *European Journal of International Law* (1994), at 11–12; available at: <http://www.ejil.org/journal/Vol5/No1/art12.pdf> (visited 3 December 2006).