

The Influence of International Law on the Military Commissions Act 2006: The Glass Half Full or Half Empty?

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Overview

The Military Commissions Act (MCA)¹ was signed into law on 17 October 2006.² Prior to the MCA, military commissions to try terrorists and unlawful combatants had been established by executive order.³ In *Hamdan v. Rumsfeld*⁴ the Supreme Court identified defects in the executive order and its concomitant military commissions process. The MCA is intended to overcome those defects and to establish a lawful and sustainable military commissions system. The extent to which the MCA achieves this objective will no doubt be determined in future litigation.

The MCA is domestic law enacted to achieve national ends. It is often the case that legislators have little enthusiasm for citing international law as having influenced the shaping of domestic legislation. It does not play well with some parts of the electorate who complain that such influence smacks of the subordination of United States' sovereignty to foreign interests and influence. To the contrary, entering treaties is an exercise of sovereignty provided for by the Constitution. The President is empowered to ratify a treaty, provided two-thirds of the Senate affirms the Executive's action.⁵ Once entered into force, such treaties enjoy a lofty status under the Constitution's Supremacy Clause. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.*"⁶ Thus, the United States' obligation to be mutually bound by international treaties of its own making reflects a conscious exercise of its sovereignty.

The influence of international law on the MCA is profound and wide-ranging. Critics of the MCA argue that aspects of the proposed trial system do not comport with international law. This article does not attempt to adjudicate that debate. Rather, it attempts to identify how international law has shaped and influenced the MCA, from its inception to the specific language of its provisions.

International Law in *Hamdan v. Rumsfeld*

The influence of international law, in particular the law of armed conflict, is overt and explicit in the majority opinion of the United States Supreme Court delivered by Justice Stevens in *Hamdan v. Rumsfeld*. The Court found that the law of armed conflict had been incorporated by Congress into Article 21 of the Uniform Code of Military Justice (UCMJ)⁷ and that this legislation brought the Geneva Conventions within the scope of law that was to be applied in U.S. courts.

The majority⁸ held that military commissions convened under Military Commission Order (MCO) No. 1⁹ did not comply with the conditions found in Common Article 3 of the Geneva Conventions.¹⁰ Of particular concern to the Court was that

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¹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. § 948a) [hereinafter MCA].

² President Bush Signs Military Commissions Act of 2006, Oct. 17, 2006, *available at* <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html>.

³ Dep't of Defense, Military Commission Order No. 1 (21 Mar. 2002), 32 C.F.R. §§ 9.1-9.12 (2007) [hereinafter DOD MCO No. 1].

⁴ *Hamdan v. Rumsfeld*, 548 U.S. ___ 2006, U.S. LEXIS 5185 (2006).

⁵ U.S. CONST. art. II, § 2, cl. 2.

⁶ *Id.* art. VI, § 2 (emphasis added).

⁷ 10 U.S.C. § 821 (2000).

⁸ Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.

⁹ *Supra* note 3.

military commissions did not constitute “a regularly constituted court affording all the judicial guarantees . . . which are recognized as indispensable by civilized peoples.”¹¹ The failure to attain this standard was explained as the military commissions not reflecting courts-martial practice without adequate reason. It is this judgment that resulted in Congress’s enacting the MCA.

The majority relied considerably upon the Geneva Conventions in reaching their decision. Justice Stevens made the following observations regarding the Geneva Conventions:

The procedures adopted to try Hamdan also violate the Geneva Conventions.¹²

. . . .

[W]e need not decide the merits of [the Government’s] argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories, Article 3 often referred to as Common Article 3.¹³

. . . .

Common Article 3 then, is applicable here and, as indicated above, requires that Hamdan be tried by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹⁴

The *Hamdan* decision asserts the authority of treaty law, one of the bases of international law,¹⁵ over certain forms of U.S. executive branch action. This result should be unsurprising given the status granted treaty law under the U.S. Constitution.¹⁶ That said, not all treaties or executive agreements automatically become supreme law of the United States per Article VI, Section 2 of the Constitution. Rather, this depends upon whether the treaty is self-executing or non-self executing.

Self-executing treaties take effect as domestic law of the land without the requirement for domestic implementing legislation.¹⁷ Once a self-executing treaty enters into force, the treaty is as legally binding on the United States as an act of Congress that has become a law. The Supreme Court defines self-executing agreements as treaties wherein “no domestic legislation is required to give them the force of law in the United States.”¹⁸ To paraphrase Professor Anthony Aust, determining whether a treaty is self-executing is not an exact science and requires a case by case analysis, and often a case by

¹⁰ See Common Article 3, present in the four Geneva Conventions [hereinafter Geneva Conventions] which are (1) 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 [hereinafter GC I]; (2) 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. [hereinafter GC II]; (3) Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. The provision is known as Common Article 3 because it is the third article in each of the 1949 Conventions.

¹¹ See Common Article 3, *supra* note 10.

¹² *Hamdan v. Rumsfeld*, 548 U.S. __ 2006, U.S. LEXIS 5185, ***118 (2006).

¹³ *Id.* at ***123.

¹⁴ *Id.* at ***129.

¹⁵ See Statute of the International Court of Justice art. 38, para. 1, June 26, 1945, 59 Stat. 1031, T.S. 993. The ICJ Statute lists sources of international law applied by the ICJ as:

[I]nternational conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; [and] . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Id.

¹⁶ *Supra* note 6.

¹⁷ See Stephen I. Vladeck, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 YALE L.J. 2007 (2004); Howard S. Schiffman, *Breard and Beyond, Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT’L & COMP. L. 27 (2000).

¹⁸ *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

case decision, for American courts.¹⁹ Key factors in the analysis are: intent of the treaty parties, whether treaty terms expressly require implementing legislation, the level and type of obligations imposed, and whether a private cause of action is implied or permitted without a requirement for domestic implementing legislation.²⁰

United States constitutional law scholars note that “[a]mong the major treaties presently considered entirely or partially non-self-executing are nearly all of the most significant covenants in international humanitarian law, including the International Covenant on Civil and Political Rights and the Geneva Conventions [of 1949].”²¹ As one scholar notes, “[t]he body of international law conferring rights on U.S. detainees is almost entirely embodied within these treaties . . . , and most of their key provisions, as of this writing, have been held unenforceable . . . precisely because they are non-self-executing.”²² Of note, recent dicta from the John Walker Lindh and General Manuel Noriega opinions suggest that aspects of the Geneva Conventions may in fact be self-executing as they relate to habeas petitions.²³ This matter has not been decided by the Supreme Court.²⁴ Accordingly, international law and United States treaty practice will continue to influence domestic legislation regarding how U.S. forces deal with combatants, lawful and unlawful, encountered on the battlefield.

Hamdan v. Rumsfeld is a clear example of international law, in this case the law of armed conflict, being enforced by a national tribunal of the United States. The application of the law of armed conflict is indirect, insofar as the Supreme Court construed it to be incorporated by reference to an Act of Congress, namely the UCMJ.

The Influence of International Law on Legislators

On 28 September 2006, the U.S. Senate debated the MCA.²⁵ The bill passed the Senate by a vote of sixty-five to thirty-four; the House of Representatives had passed the bill earlier.²⁶

The drafting of the MCA included a significant level of discourse on international law and the effect of the MCA on U.S. obligations. During the Senate debate there were specific references to international law, in particular the law of armed conflict: “[t]he bill provides legal clarity for our treaty obligations under the Geneva Conventions.”²⁷

Part of the discussion focused upon the need to balance treaty obligations with the authority of the President to conduct the “war on terror.” Some obligations in the Geneva Conventions are clear and unambiguous, while others are more susceptible to interpretation. One purpose of the MCA is to resolve some of those tensions: “[t]his bill acknowledges the President’s authority under the Constitution to interpret the meaning and application of the Geneva Conventions, and to promulgate administrative regulations for violations of our broader treaty obligations which are not grave breaches of the Geneva Conventions.”²⁸

¹⁹ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 159 (2000).

²⁰ See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999); see generally *id.* at 157-61.

²¹ Vladeck, *supra* note 17, at 2014.

²² *Id.*

²³ See *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002); *United States v. Noriega*, 808 F. Supp. 791, 797-99 (S.D. Fla. 1992). Both cases provide dicta to advance the notion that certain articles of the 1949 Geneva Conventions are self-executing and therefore “supreme law of the Land.” This argument is further advanced in the Vladeck article, *supra* note 17.

²⁴ *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007), U.S. LEXIS 3783, ***1 (2007):

Despite the obvious importance of the issues raised . . . traditional rules governing our decision of constitutional questions . . . and our practice of requiring the exhaustion of administrative remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus . . . make it appropriate to deny these petitions . . .

Id.

²⁵ 152 Cong. Rec. S10,243 (2006), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006_record&page=S10223&position=all (Senate debate on the Military Commissions Bill).

²⁶ *Id.*

²⁷ *Id.* (statement of Sen. Frist).

²⁸ *Id.* S10,246 (statement of Sen. Warner).

The decision in *Hamdan v. Rumsfeld* was clearly at the center of the debate. It caused legislators to assess the status and meaning of the Geneva Conventions and their application to the non-traditional armed conflict in which the United States was engaged: “When the Geneva Conventions were applied to the war on terror, we had a problem. We had to renew the Military Commission Tribunal in line with Common Article 3. Common Article 3 is a mini-human-rights [treaty] that is common to all four Convention articles.”²⁹

The willingness with which international law was cited reflects the legal reality imposed on the executive and legislature by the Supreme Court in *Hamdan v. Rumsfeld*.

Jurisdiction under the MCA

The military commissions established under the MCA differ in many significant respects from those originally envisioned under MCO No. 1. There are differences in both personal jurisdiction (persons who are subject to the jurisdiction of the military commissions) and subject matter jurisdiction (nature of offenses which may be tried by military commissions).

These changes cannot all be traced to the implementation of U.S. obligations under the Geneva Conventions. They go further, providing additional evidence of the influence of international law on the drafters.

Personal Jurisdiction

Under the executive orders³⁰ that applied prior to the MCA, the jurisdiction of military commissions over individuals was to be applied through the exercise of executive discretion.³¹ It was to be applied to individuals identified by the President, where there was reason to believe they were members of the al Qaeda organization or otherwise engaged in or “associated with” acts of international terrorism affecting the United States.³²

This provision cast a wide net. It did not prescribe any particular form of review to determine if an individual was engaged in or associated with international terrorism. The term “terrorism” itself remains fraught with ambiguity under international law and is not defined in customary law or treaty. The personal jurisdiction of the military commissions under the executive orders did not draw from or rely upon international law.

Personal jurisdiction has significantly changed under the MCA.³³ The jurisdiction of military commissions now relates to alien “unlawful enemy combatants.”³⁴ The definition of this term in the MCA has two subsets.

The first subset of the definition includes persons who have engaged in hostilities, or purposefully and materially supported hostilities, and who are not “lawful combatants.”³⁵ The term “lawful combatant” is defined in terms similar, though not identical, to those of Article 4 of the Third Geneva Convention (GC III)³⁶ which defines prisoners of war entitled to the status and protection of that convention. The inclusion of persons who have “purposefully and materially supported hostilities” appears to be a wider definition of “unlawful combatant” than that suggested by international law,³⁷ though the term may be further interpreted through litigation.

²⁹ *Id.* S10,392 (statement of Sen. Graham).

³⁰ *See supra* note 3; Military Order of November 13, 2001, 3 C.F.R. tbl. 3 (2002) [hereinafter Military Order].

³¹ Military Order, *supra* note 30, § 2(a).

³² The term “associated with” is not used in Military Order, *supra* note 30, § 2(a). The term is used here to paraphrase the wide range of accessorial liability covered by § 2(a).

³³ *See MCA, supra* note 1, § 948c.

³⁴ *Id.* § 948a.

³⁵ *See supra* note 22.

³⁶ GC III, *supra* note 10.

³⁷ Civilians traditionally are not regarded as combatants unless they take a “direct part in hostilities.” *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; *see also* INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S.ARM.Y, JA 422, OPERATIONAL LAW HANDBOOK 17 (2006) (defining “unprivileged belligerent”).

The second subset of the definition includes persons determined to be unlawful combatants by a Combatant Status Review Tribunal (CSRT).³⁸ The procedures for the CSRT are similar in nature and purpose to prisoner of war status tribunals required by GC III³⁹ and provided for in regulations.⁴⁰ They involve a review of the individual circumstances of a detainee by a tribunal of fact.

The extent to which personal jurisdiction under the MCA complies with international law remains a matter for debate.⁴¹ It is undeniable, however, that international law has exerted an influence on the personal jurisdiction of military commissions. Following *Hamdan v. Rumsfeld*, the jurisdiction of the commissions has changed from vaguely defined “terrorists” as nominated by the President, to unlawful combatants, determined either by a procedure similar to a GC III Article 5 tribunal or in accordance with a legal definition that clearly draws upon international law.

Subject Matter Jurisdiction

The subject matter jurisdiction of the MCA, set out in Subchapter VII, states that the Act “codifies offenses that have traditionally been triable by military commissions.”⁴² The purpose of this provision is clear. There are prohibitions under the U.S. Constitution and international law on the retrospective application of new criminal offenses created by statute.⁴³ This assertion in the MCA may be the subject of debate as a global proposition,⁴⁴ but it is clear that many of the MCA offenses possess a substantial lineage under international law.

The Geneva Conventions criminalize grave breaches thereof.⁴⁵ Many of the offenses set out in the MCA reflect the Geneva Conventions’ grave breach provisions. These are traditional and undoubted war crimes offenses, which may be properly tried by a duly constituted domestic tribunal. Examples of such offenses include murder of protected persons,⁴⁶ attacking protected property,⁴⁷ torture,⁴⁸ and cruel or inhuman treatment.⁴⁹ The offense of murder of protected persons is particularly apposite to the trial of alleged terrorists given the common modus operandi of terrorist organizations, carrying out mass casualty attacks upon civilians.

Other offenses in the MCA do not strictly refer to the grave breaches provisions of the Geneva Conventions, but are cognizable under customary international law or other international treaties. The offense of using treachery or perfidy⁵⁰ is an offense under customary international law and prohibited by Protocol I.⁵¹ The offense of improperly using a distinctive emblem⁵² is an offense under customary international law and constitutes a grave breach of Protocol I.⁵³

³⁸ News Release, U.S. Dep’t of Defense, Combatant Status Review Tribunal Order Issued (July 7, 2004), available at <http://www.defenselink.mil/release/2004/nr20040707-0992.html>.

³⁹ See GC III, *supra* note 10, art. 5.

⁴⁰ U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997), available at http://www.usapa.army.mil/pdffiles/r190_8.pdf.

⁴¹ See, e.g., Human Rights First, Human Rights First Analyzes DOD’s Combatant Status Review Tribunals, http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (last visited Oct. 1, 2007).

⁴² See MCA, *supra* note 1, § 950p.

⁴³ U.S. CONST. art. III, § 9, cl. 3; Common Article 3, *supra* note 10; Protocol I, *supra* note 37, art. 75(4)(c).

⁴⁴ John Cerone, *The Military Commissions Act of 2006: Examining the Relationship Between the International Law of Armed Conflict and US Law*, 10 A.S.I.L. INSIGHT, Nov. 13, 2006, available at <http://www.asil.org/insights/2006/11/insights061114.html>.

⁴⁵ GCs I–IV, *supra* note 10.

⁴⁶ MCA, *supra* note 1, § 950v(b)(1).

⁴⁷ *Id.* § 950v(b)(4).

⁴⁸ *Id.* § 950v(b)(11).

⁴⁹ *Id.* § 950v(b)(12).

⁵⁰ *Id.* § 950v(b)(17).

⁵¹ Protocol I, *supra* note 37, art. 37.

⁵² MCA, *supra* note 1, § 950v(b)(19).

⁵³ Protocol I, *supra* note 37, art. 85(3)(f).

Some of the offenses in the MCA are not established war crimes but rather are domestic crimes, elements of which are shaped by international law. The offense of murder in violation of the law of armed conflict⁵⁴ is intended to cover, inter alia, the use of lethal force by unlawful combatants against U.S. or allied forces. The use of lethal force by an unlawful combatant (also referred to as an unprivileged belligerent) against a lawful combatant constitutes the domestic offense of murder. The defense of privileged belligerency open to the lawful combatant is not available to the unlawful combatant. It is not correct to describe the offense as a war crime.⁵⁵ However, it is a domestic crime, the elements of which are determined in accordance with international law.

The MCA also contains offenses that are clearly domestic law offenses. The offense of rape⁵⁶ under the MCA does not contain limitations requiring a connection to armed conflict or a particular act of terrorism. There is no geographic limitation as to where the rape must take place before jurisdiction accrues, nor are there limitations relating to the location, nationality or any other characteristic of the victim. The offense of rape has been dealt with in the statutes of international tribunals⁵⁷ but never as a crime of universal jurisdiction without a connection to armed conflict or mass perpetration as a crime against humanity. The inclusion of the offense of rape in the MCA extends jurisdiction to circumstances where, in a transnational armed conflict against terrorists conducted partly in the territory of failed states, there may be no other tribunal willing or able to deal with the offense. But the inclusion of this offense clearly illustrates the domestic criminal law side of the jurisdiction of military commissions.

One of the more contentious applications of the MCA's subject matter jurisdiction is its retroactive application of conspiracy liability. The use of conspiracy liability is particularly relevant in the trial of alleged terrorists, particularly in the absence of evidence of participation in a specific attack. Many rank and file members of terrorist organizations may have received some form of training and possess a willingness to carry out attacks, but have not been involved with planning or carrying out a particular attack. Similarly, individuals may be members of, or associated with, an organization regarded by the United States as unlawful combatants such as the Taliban. However, although the individual was a member of, or associated with, that organization, there may be no evidence that the individual fired a shot or engaged in any other form of hostile act against U.S. or allied personnel.

The existence of the crime of conspiracy under the law of armed conflict was regarded skeptically by the Supreme Court in *Hamdan v. Rumsfeld*.⁵⁸ The use of conspiracy charges against relatively low-ranking members of al Qaeda and the Taliban may be one of the more hotly-contested aspects of the impending MCA litigation. It will be instructive to observe the extent to which international law is relied upon by litigants and jurists.

Conclusion

It is tempting to posit the thesis that, but for international law, the MCA would not exist. However tempting, two facts prevent this conclusion from being drawn with certainty. First, the majority in *Hamdan v. Rumsfeld* provided various reasons for striking down the military commissions process provided for in MCO No. 1. Not all relate to international law. Secondly, it could be argued that United States obligations under the Geneva Conventions are not strictly a matter of international law, but rather are a matter of domestic law given the status of the conventions under the U.S. Constitution.

Yet it is possible to conclude that international law has exerted a profound influence over the MCA. International law has been subject to unprecedented discourse by legislators in the passage of the MCA. The personal jurisdiction of the military commissions has changed from terrorists as designated by the executive, to unlawful combatants in accordance with criteria and processes thematically derived from international law. The subject matter jurisdiction of the Act includes both war crimes and domestic crimes, but draws heavily upon international law.

⁵⁴ MCA, *supra* note 1, § 950v(b)(15).

⁵⁵ See Norman A. Goheer, *The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent Is Not a War Crime* (Berkley Electr. Press, Working Paper No. 1871, 2006), available at <http://law.bepress.com/expresso/eps/1871/> (last visited Oct. 11, 2007).

⁵⁶ MCA, *supra* note 1, § 950v(b)(21).

⁵⁷ Statute of the International Tribunal (Former Yugoslavia) art. 5(g), May 25, 1993, 32 I.L.M. 1192; Statute of the International Tribunal (Rwanda) arts. 3(g), 4(e), Nov. 8, 1994, 33 I.L.M. 1602; Rome Statute of the International Criminal Court arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 90; 37 I.L.M. 1002.

⁵⁸ *Hamdan v. Rumsfeld*, 548 U.S. ___ 2006, U.S. LEXIS 5185, ***81 (2006).

As with all instances of international law concepts reduced to working domestic statutes, the devil is in the details. Whether the MCA passes muster in terms of compliance with international law is a matter for academic debate and litigation. To some extent, that question may now be determined by the discretion and integrity of appointed judicial officers. But, beyond a doubt, the MCA is strongly influenced by international law.