I. United States Supreme Court Decision - Part 1

[**Source**: United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al*, 548 U.S. 557 (2006), No. 05.184, 29 June 2006; **available at** http://www.supremecourt.gov/]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

SUPREME COURT OF THE UNITED STATES

[…]

SALIM AHMED HAMDAN, PETITIONER v. DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 29, 2006]

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court […]

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy "to commit ... offenses triable by military commission." […] [**See** United States, President's Military Order]

Hamdan filed petitions for writs of *habeas corpus* and *mandamus* to challenge the Executive Branch's intended means of prosecuting this charge. He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ), […] would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy, an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him. […]

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, **see** Part V, *infra*, that the offense with which Hamdan has been charged is not an "offens[e] that by ... the law of war may be tried by military commissions." […]

[…] The charging document, which is unsigned, contains 13 numbered paragraphs [**See** Part B. of this case]. The first two paragraphs recite the asserted bases for the military commission's jurisdiction, namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled "General Allegations," describe al Qaeda's activities from its inception in 1989 through 2001 and identify Osama bin Laden as the group's leader. Hamdan is not mentioned in these paragraphs.

Only the final two paragraphs, entitled "Charge: Conspiracy," contain allegations against Hamdan. Paragraph 12 charges that "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." […] There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four "overt acts" that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy":

1. he acted as Osama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 1f1, 2001;
2. he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them);
3. he "drove or accompanied [O]sama bin Laden to various al Qaida-sponsored training camps, press conferences, or

lectures," at which bin Laden encouraged attacks against Americans; and
4. he received weapons training at al Qaeda-sponsored camps. […]

After this formal charge was filed, the United States District Court for the Western District of Washington transferred Hamdan's *habeas* and *mandamus* petitions to the United States District Court for the District of Columbia. Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "enemy combatant." Separately, proceedings before the military commission commenced.

On November 8, 2004, however, the District Court granted Hamdan's petition for*habeas corpus* and stayed the commission's proceedings. It concluded that the President's authority to establish military commissions extends only to "offenders or offenses triable by military [commission] under the law of war," […] that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, […] (Third Geneva Convention); that Hamdan is entitled to the full protections of the Third Geneva Convention until ad-judged, in compliance with that treaty, not to be a prisoner of war; and that, whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. […]

The Court of Appeals for the District of Columbia Circuit reversed. Like the District Court, the Court of Appeals declined the Government's invitation to abstain from considering Hamdan's challenge. […] On the merits, the panel rejected the District Court's further conclusion that Hamdan was entitled to relief under the Third Geneva Convention. All three judges agreed that the Geneva Conventions were not "judicially enforceable," […] and two thought that the Conventions did not in any event apply to Hamdan […].

IV

[…] Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II, reads as follows:

"Jurisdiction of courts-martial not exclusive.

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

We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions. […]

V [Justice Stevens joined by Justice Souter, Justice Ginsburg and Justice Breyer]

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. […] First, they have substituted for civilian courts at times and in places where martial law has been declared. […] Second, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function." […]

The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," […] has been described as "utterly different" from the other two. […] Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a fact finding one, to determine, typically on the battlefield itself, whether the defendant has violated the law of war. […]

The classic treatise penned by Colonel William Winthrop, whom we have called "the 'Blackstone of Military Law,'" […] describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." […] The "field of command" in these circumstances means the "theatre of war." […] Second, the offense charged "must have been committed within the period of the war." […] [J]urisdiction exists to try offenses "committed either before or after the war." […] Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." […] Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." […]

The charge against Hamdan, described in detail in Part I,*supra*, alleges a conspiracy extending over a number of years, from 1996 to November 2001. All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF, the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions. Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission; as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore – indeed are symptomatic of – the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission. […] ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war"). […]

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war. […]

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above, […] none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." […] As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." […]

The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition – at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities. Cf. *Rasul v. Bush* […] (KENNEDY, J., concurring in judgment) (observing that "Guantanamo Bay is ... far removed from any hostilities"). Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001 and the AUMF. That may well be a crime, but it is not an offense that "by the law of war may be tried by military commissio[n]." […] None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

Part 2

VI [Opinion of the Court]

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," […] including, *inter alia*, the four Geneva Conventions signed in 1949. […] The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005, after Hamdan's trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. […] The presiding officer's job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. […] The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U.S. citizen with security clearance "at the level SECRET or higher." […]

The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a

presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. […] These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable ...; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." […] Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein. […]

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." […] Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. […] Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," […] so long as the presiding officer concludes that the evidence is "probative" […] and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." […] Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members. […]

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-third vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). […] Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. […] The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." […] Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. […] The President then, unless he has delegated the task to the Secretary, makes the "final decision." […] He may change the commission's findings or sentence only in a manner favorable to the accused. […]

C

[…] The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. […]

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. The Court of Appeals dismissed Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions are not judicially enforceable; (2) Hamdan in any event is not entitled to their protections; […]

i

The Court of Appeals relied on *Johnson v. Eisentrager*, [**See** United States, Johnson v. Eisentrager] […] to hold that Hamdan could not invoke the Geneva Conventions to challenge the Government's plan to prosecute him in accordance with Commission Order No. 1. *Eisentrager* involved a challenge by 21 German nationals to their 1945 convictions for war crimes by a military tribunal convened in Nanking, China, and to their subsequent imprisonment in occupied Germany. The petitioners argued, *inter alia*, that the 1929 Geneva Convention rendered illegal some of the procedures employed during their trials, which they said deviated impermissibly from the procedures used by courts-martial to try American soldiers. […] We rejected that claim on the merits because the petitioners (unlike Hamdan here) had failed to identify any prejudicial disparity "between the Commission that tried [them] and those that would try an offending soldier of the American forces of like rank," and in any event could claim no protection, under the 1929 Convention, during trials for crimes that occurred before their confinement as prisoners of war. […] Buried in a footnote of the opinion, however, is this curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument:

"We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, […] concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." […]

The Court of Appeals, on the strength of this footnote, held that “the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court.” […]

Whatever else might be said about the*Eisentrager* footnote, it does not control this case. We may assume that “the obvious scheme” of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that that scheme would, absent some other provision of law, preclude Hamdan’s invocation of the Convention’s provisions as an independent source of law binding the Government’s actions and furnishing petitioner with any enforceable right. For, regardless of the nature of the rights conferred on Hamdan, […] they are, as the Government does not dispute, part of the law of war. […] And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.

ii

For the Court of Appeals, acknowledgment of that condition was no bar to Hamdan’s trial by commission. As an alternative to its holding that Hamdan could not invoke the Geneva Conventions at all, the Court of Appeals concluded that the Conventions did not in any event apply to the armed conflict during which Hamdan was captured. The court accepted the Executive’s assertions that Hamdan was captured in connection with the United States’ war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. […] We, like Judge Williams, disagree with the latter conclusion. The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” […] Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a “High Contracting Party”, i.e., a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan.

We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories.

[61]

Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions protecting “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by ... detention.” […] One such provision 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.” […]

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being “‘international in scope,’” does not qualify as a “‘conflict not of an international character.’” […] That reasoning is erroneous. The term “conflict not of an international character” is used here in contradistinction to a conflict between nations. So much is demonstrated by the “fundamental logic [of] the Convention’s provisions on its application.” […] Common Article 2 provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” […] High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a non signatory “Power,” and must so abide vis-a-vis the nonsignatory if “the latter accepts and applies” those terms. […] Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory “Power” who are involved in a conflict “in the territory of” a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase “not of an international character” bears its literal meaning. See, e.g., J. Bentham, Introduction to the Principles of Morals and Legislation 6, 296 (J. Burns & H. Hart eds. 1970) (using the term “international law” as a “new though not inexpressive appellation” meaning “betwixt nation and nation”; defining “international” to include “mutual transactions between sovereigns as such”); Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1351 (1987) (“[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other”).

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of “conflict not of an international character,” i.e., a civil war, […] the commentaries also make clear “that the scope of the Article must be as wide as possible,” […] In fact, limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion,” was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. […]

iii

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." […] While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the commentary treats as identical to "regularly constituted"); […] see also *Yamashita*, […] (Rutledge, J., dissenting) (describing military commission as a court "specially constituted for a particular trial") [**See** United States, In re Yamashita]. And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005) [**See** ICRC, Customary International Humanitarian Law]; see also GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. […] As JUSTICE KENNEDY explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." […] At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice." […] As we have explained, see Part VI. C, *supra*, no such need has been demonstrated here.

iv [Justice Stevens joined by Justice Souter, Justice Ginsburg and Justice Breyer]

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." […]. Like the phrase "regularly constituted court," this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." […] Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e).

We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need," […] and for that reason, at least, fail to afford the requisite guarantees. […] We add only that, as noted in Part VI. A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. […] That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. […] But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

v [Opinion of the Court]

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge – viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction. The judgment of the Court of Appeals is reversed, and Opinion of the Court the case is remanded for further proceedings.

It is so ordered.

Footnotes

- [61] Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be "any doubt" whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a "competent tribunal." […] Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.

II. US v. Hamdan – Military Commission Formal Charge Sheet

[**Source**: United States of America v. Salim Ahmed Hamdan, Formal Charge Sheet; available at http://www.defense.gov/news/jul2004/d20040714hcc.pdf]

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN

a/k/a Salim Ahmad Hamdan

a/k/a Salem Ahmed Salem Hamdan

a/k/a Saqr al Jadawy

a/k/a Saqr al Jaddawi

a/k/a Khalid bin Abdallah

a/k/a Khalid wl'd Abdallah

CHARGE: CONSPIRACY

Salim Ahmed Hamdan […] is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan ([…] hereinafter "Hamdan") is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

1. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.
2. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
3. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
4. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; secunty committee; finance committee; media committee; and religious/legal committee.
5. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
6. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
7. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
8. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."
9. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

1. Salim Ahmed Hamdan […], in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
2. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:
    a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based

on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.

b. From 1996 through 2001, Hamdan:
    1. delivered weapons, ammunition or other supplies to al Qaida members and associates;
    2. picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security committee, in Qandahar, Afghanistan;
    3. purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and
    4. served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.
c. On diverse occasions between 1996 and Novemberof2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.
d. Between 1996 and November of 2001, Hamdan, on diverse occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

III. Office of the Secretary of Defense, Memorandum on the Application of Common Article 3

[**Source**: United States Office of the Secretary of Defense, Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense, 7 July 2006; available at www.defense.gov]

OFFICE OF THE SECRETARY OF DEFENSE

[…]

July 7, 2006

MEMORANDUM […]

SUBJECT: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense

The Supreme Court has determined that Common Article 3 to the Geneva Conventions of 1949 applies as a matter of law to the conflict with Al Qaeda. The Court found that the military commissions as constituted by the Department of Defense are not consistent with Common Article 3.

It is my understanding that, aside from the military commissions procedures, existing DoD [Department of Defense] orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3. […] In addition, you will recall the President's prior directive that "the United States Armed Forces shall continue to treat detainees humanely," humane treatment being the overarching requirement of Common Article 3.

You will ensure that all DoD personnel adhere to these standards. In this regard, I request that you promptly review all relevant directives, regulations, policies, practices, and procedures under your purview to ensure that they comply with the standards of Common Article 3.

Your reply confirming completion of this review should be submitted by a Component Head, General/Flag Officer, or SES member, including a reply of "reviewed and no effect" where applicable, to the Deputy Assistant Secretary of Defense (DASD) for Detainee Affairs, Office of the Under Secretary of Defense for Policy, no later than three weeks from the date of this memorandum. […]

IV. Hamdan's trial and conviction

[**N.B.:** Following the U.S. Supreme Court's decision in Hamdan, the U.S. Congress passed the*Military Commissions Act of 2006*, which established new military commission procedures and stripped Guantanamo detainees of their habeas corpus under

U.S. legislation. Under the *Military Commissions Act*, Mr. Hamdan was charged with conspiracy and providing material support for terrorism. On 12 June 2008, the U.S. Supreme Court held in the *Boumediene v. Bush* case [Boumediene et al. v. Bush et al. 553 U.S. 723 (2008) that Guantanamo detainees have a U.S. constitutional right to habeas corpus. On 21 July 2008, the military commission trial of Mr. Hamdan commenced. He entered a plea of not guilty.]

[**See also** United States, Military Commissions; **and** United States, Habeas Corpus for Guantánamo Detainees]

[**Source**: Human Rights First, Law and Security Digest Issue #207, 25 July 2008]

FIRST GUANTÁNAMO MILITARY COMMISSION TRIAL BEGINS

The first military commission trial began on Monday, July 21, with Salim Hamdan, Osama bin Laden's alleged driver and bodyguard, entering a not guilty plea. Judge Allred ruled that evening that evidence from certain interrogations could not be used because it was obtained under "highly coercive" conditions. The ruling effectively prohibited the use of Hamdan's statements made during several interrogations held in Afghanistan following his capture in 2001, but allowed for the introduction of statements made after Hamdan's transfer to Guantánamo. Judge Allred also allowed evidence from two videotaped interrogations in Afghanistan, which were shown to the six-member jury on Wednesday. Hamdan appeared uncomfortable and left the courtroom soon after the first tape began to play. He reappeared during the showing of the second video and apologized to the jury for leaving. The videos showed Hamdan hooded, cuffed, at times wincing in pain, and surrounded by U.S. soldiers in masks and carrying weapons. While in the video Hamdan denied any involvement in al Qaeda, the prosecution painted a different picture. Key witnesses, including FBI interrogators and U.S. soldiers, stated that Hamdan had two missiles in his car at the time of his capture and that, during interrogations, Hamdan had admitted he was present when bin Laden praised the September 11 attacks and the destruction they caused.

[**N.B.**: On 6 August 2008, Hamdan was convicted by the Military Commission in Guantanamo for material support of terrorism, but acquitted of the charge of conspiracy of war crimes.]

Discussion

1.
    a. Should you distinguish, among persons captured in Afghanistan, between those captured in the framework of the conflict between the United States and the Taliban and those captured in the conflict between the United States and al Qaeda? Do you think that the latter are not covered by the IHL of international armed conflicts, even if the IHL of international armed conflicts applies to the conflict between the United States and Afghanistan? Does the Supreme Court classify the conflict during which Hamdan was captured? (GC I-IV, Art. 2; GCIII, Art. 4)
    b. Must Hamdan be treated as a prisoner of war until such time as his status has been determined by a competent tribunal? Does the Supreme Court decide this question? As a POW, could he be judged by a military commission? (GC III, Arts 5 and 102)
    c. Are the Geneva Conventions judicially enforceable? Is the question whether they are judicially enforceable the same as whether they are self-executing? Are at least the rules on the judicial guarantees from which prisoners of war benefit judicially enforceable? Does the Supreme Court answer these questions?
2.
    a. Why does common Art. 3 apply to Hamdan? (GC I-IV, Arts 2 and 3)
    b. What makes an armed conflict international? Is every armed conflict which does not fulfil the criteria of an international armed conflict perforce a non-international armed conflict? (GC I-IV, Arts 2 and 3)
    c. Why does common Art. 3 bar Hamdan from being tried by a military commission? Does common Art. 3 require that the persons it protects be tried by the same courts as government soldiers? (GC I-IV, Art. 3)
    d. If common Art. 3 bars Hamdan from being tried on the basis of evidence not disclosed to him, may an express statutory provision allow the contrary? In the view of the Supreme Court?
3.
    a. Are the acts Hamdan is alleged to have committed war crimes? (GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85; ICC Statute, Art. 8) Are they illegitimate acts of warfare? May a detaining power try persons protected by Convention III, by Convention IV or by common Art. 3 for such illegitimate acts of warfare even if the latter do not constitute war crimes? (GC III, Arts 3 and 85; GC IV, Arts 3 and 64; P I, Art. 43(2))
    b. Is conspiracy to commit war crimes a war crime? (ICC Statute, Art. 25 [**See** The International Criminal Court])
4. Does the Supreme Court explicitly or implicitly authorize the detention of Hamdan as an unlawful combatant, without any trial or individual determination?