

I. Military Commission Act of 2006

[**N.B.**: The Military Commissions were first established by President George W. Bush in 2001. Following the Supreme Court’s judgement in Hamdan, in which the Court ruled that the military commissions did not comply with common Article 3’s requirements, the Congress passed the Military Commission Act of 2006, with the view to re-establishing the commissions.]

[**See** United States, President’s Military Order ^[1]; **and** United States, Hamdan v. Rumsfeld ^[2]
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I. Military Commission Act of 2006

[**Source**: United States Department of Defense, “Military Commission Act of 2006”, 17 October 2006; available at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf

^[3]

MILITARY COMMISSIONS ACT OF 2006

[...]

An Act

To authorize trial by military commission for violations of the law of war, and for other purposes.

[...]

(a) **SHORT TITLE.**—This Act may be cited as the “Military Commissions Act of 2006”.

[...]

SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require.

[...]

“CHAPTER 47A—MILITARY COMMISSIONS

“SUBCHAPTER I—GENERAL PROVISIONS

“§ 948a. Definitions

“In this chapter:

“(1) UNLAWFUL ENEMY COMBATANT.—

(A) The term ‘unlawful enemy combatant’ means—

“(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);

or

“(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

“(B) CO-BELLIGERENT.—In this paragraph, the term ‘cobelligerent’, with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

“(2) LAWFUL ENEMY COMBATANT.—The term ‘lawful enemy combatant’ means a person who is—

“(A) a member of the regular forces of a State party engaged in hostilities against the United States;

“(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible

command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

“(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

“(3) ALIEN.—The term ‘alien’ means a person who is not a citizen of the United States.

[...]

“§ 948b. Military commissions generally

“(a) PURPOSE.—This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

“(b) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.—The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.

[...]

“(f) STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.— A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.

“(g) GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

“§ 948c. Persons subject to military commissions

“Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

“§ 948d. Jurisdiction of military commissions

“(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

“(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

[...]

“SUBCHAPTER III—PRE-TRIAL PROCEDURE

[...]

“§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

“(a) IN GENERAL.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

“(b) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

“(c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

“(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

“(2) the interests of justice would best be served by admission of the statement into evidence.

“(d) STATEMENTS OBTAINED AFTER ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

“(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

“(2) the interests of justice would best be served by admission of the statement into evidence; and

“(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

[...]

“SUBCHAPTER IV—TRIAL PROCEDURE

“§ 949j. Opportunity to obtain witnesses and other evidence

“(a) RIGHT OF DEFENSE COUNSEL.—Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.

[...]

“SUBCHAPTER VII—PUNITIVE MATTERS

[...]

“§ 950p. Statement of substantive offenses

“(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military

commission.

“(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

[...]

“§ 950v. Crimes triable by military commissions

“(a) DEFINITIONS AND CONSTRUCTION.—In this section:

“(1) MILITARY OBJECTIVE.—The term ‘military objective’ means—

“(A) combatants; and

“(B) those objects during an armed conflict—

“(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s warfighting or war-sustaining capability; and

“(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

“(2) PROTECTED PERSON.—The term ‘protected person’ means any person entitled to protection under one or more of the Geneva Conventions, including—

“(A) civilians not taking an active part in hostilities;

“(B) military personnel placed hors de combat by sickness, wounds, or detention; and

“(C) military medical or religious personnel.

“(3) PROTECTED PROPERTY.—The term ‘protected property’ means property specifically protected by the law of war (such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.

“(4) CONSTRUCTION.—The intent specified for an offense under paragraph (1), (2), (3), (4), or (12) of subsection (b) precludes the applicability of such offense with regard to—

“(A) collateral damage; or

“(B) death, damage, or injury incident to a lawful attack.

“(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

(1) MURDER OF PROTECTED PERSONS. [...]

(2) ATTACKING CIVILIANS. [...]

- (3) ATTACKING CIVILIAN OBJECTS. [...]
- (4) ATTACKING PROTECTED PROPERTY. [...]
- (5) PILLAGING. [...]
- (6) DENYING QUARTER. [...]
- (7) TAKING HOSTAGES. [...]
- (8) EMPLOYING POISON OR SIMILAR WEAPONS. [...]
- (9) USING PROTECTED PERSONS AS A SHIELD. [...]
- (10) USING PROTECTED PROPERTY AS A SHIELD. [...]
- (11) TORTURE. [...]
- (12) CRUEL OR INHUMANE TREATMENT. [...]
- (13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY. [...]
- (14) MUTILATING OR MAIMING. [...]
- (15) MURDER IN VIOLATION OF THE LAW OF WAR. —Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

(16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR. [...]

(17) USING TREACHERY OR PERFIDY. [...]

(18) IMPORPERLY USING A FLAG OF TRUCE. [...]

(19) IMPORPERLY USING A DISTINCTIVE EMBLEM. [...]

(20) INTENTIONALLY MISTREATING A DEAD BODY. [...]

(21) RAPE. [...]

(22) SEXUAL ASSAULT OR ABUSE. [...]

(23) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT. [...]

(24) TERRORISM. Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished [...].

(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.

“(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization

engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct. [...]

(26) **WRONGFULLY AIDING THE ENEMY.**—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

(27) **SPYING.**—Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

(28) **CONSPIRACY.**—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

[...]

SEC. 7. *HABEAS CORPUS* MATTERS.

“(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

[...]

[**N.B.:** In early 2009, shortly after taking office, President Barack Obama suspended the military commissions. However, he later decided to re-establish the commissions and requested the Congress to draft a new Act. The 2009 Military Commission Act replaces the 2006 Act.]

II. Military Commission Act of 2009

[Source: United States Department of Defense, “Military Commission Act of 2009”, 28 October 2009; available at <http://www.defense.gov/news/2009%20MCA%20Pub%20%20Law%20111-84.pdf> ^[4]]

TITLE XVIII—MILITARY COMMISSIONS

[...]

SEC. 1801. SHORT TITLE.

This title may be cited as the “Military Commissions Act of 2009”.

[...]

“CHAPTER 47A—MILITARY COMMISSIONS

[...]

“SUBCHAPTER I—GENERAL PROVISIONS

[...]

“§ 948a. Definitions

“In this chapter:

“(1) ALIEN.—The term ‘alien’ means an individual who is not a citizen of the United States.

[...]

“(3) COALITION PARTNER.—The term ‘coalition partner’, with respect to hostilities engaged in by the United States, means any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities.

“(4) GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.—The term ‘Geneva Convention Relative to the Treatment of Prisoners of War’ means the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 [...].

“(5) GENEVA CONVENTIONS.—The term ‘Geneva Conventions’ means the international conventions signed at Geneva on August 12, 1949.

“(6) PRIVILEGED BELLIGERENT.—The term ‘privileged belligerent’ means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

“(7) UNPRIVILEGED ENEMY BELLIGERENT.—The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who—

“(A) has engaged in hostilities against the United States or its coalition partners;

“(B) has purposefully and materially supported hostilities against the United States or its coalition partners;

or

“(C) was a part of al Qaeda at the time of the alleged offense under this chapter.

[...]

“(9) HOSTILITIES.—The term ‘hostilities’ means any conflict subject to the laws of war.

“§ 948b. Military commissions generally

“(a) PURPOSE.—This chapter establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.

“(b) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS

CHAPTER.—The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.

[...]

“(e) GENEVA CONVENTIONS NOT ESTABLISHING PRIVATE RIGHT OF ACTION.—No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.

“§ 948c. Persons subject to military commissions

“Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.

“§ 948d. Jurisdiction of military commissions

“A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, [...], or the law of war, whether such offense was committed before, on, or after September 11, 2001 [...].

“SUBCHAPTER III—PRE-TRIAL PROCEDURE

[...]

“§ 948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

“(a) EXCLUSION OF STATEMENTS OBTAIN BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 [...]), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

“(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter.

[...]

“SUBCHAPTER IV—TRIAL PROCEDURE

“§ 949j. Opportunity to obtain witnesses and other evidence

“(a) IN GENERAL.—(1) Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.

[...]

“SUBCHAPTER VIII—PUNITIVE MATTERS

[...]

“§ 950p. Definitions; construction of certain offenses; common circumstances

[...]

“(c) COMMON CIRCUMSTANCES.—An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.

“(d) EFFECT.—The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

[...]

“§ 950t. Crimes triable by military commission

“The following offenses shall be triable by military commission under this chapter at any time without limitation:

[**N.B.:** The list of offenses from (1) to (26) reproduce the list of offenses contained in the 2006 Act.]

“(27) SPYING.—Any person subject to this chapter who, in violation of the law of war

and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

“(28) ATTEMPTS.—

“(A) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

“(B) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

“(C) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

“(29) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this subchapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(30) SOLICITATION.—Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, shall be punished as a military commission under this chapter may direct.

[...]

Discussion

1.
 - a. What do the expressions “unlawful enemy combatant” and “unprivileged enemy belligerent” mean? Do these expressions have a basis in IHL? Was it necessary to create these categories? In the first expression, why is the combatant referred to as “unlawful”? In the second expression, what does “unprivileged” mean for a belligerent? Why did the Obama administration decide to drop the term “unlawful enemy combatant”?
 - b. (*2006 Act, §948a*) Under the 2006 Act, who can be defined as an “unlawful enemy combatant”? Does IHL apply to these categories of persons?
 - c. (*2009 Act, §948a*) Under the 2009 Act, who can be defined as an “unprivileged enemy belligerent”? Does the definition refer to the same categories of persons as the definition of “unlawful enemy combatant”? Does IHL apply to these categories of persons?
2. (*2009 Act, §948a*)
 - a. Does the first category of persons defined as “unprivileged enemy belligerents” include all civilians who have participated in hostilities? Under IHL, can a civilian directly participating in hostilities be prosecuted by an enemy military court?
 - b. Does the second category mean that persons merely supporting hostilities can be defined as “unprivileged enemy belligerents”? Under IHL, can someone supporting a party to a conflict be automatically considered as participating in

hostilities? Can such persons be treated as belligerents? [See ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities ^[51]]

- c. What does the third category of persons mean (i.e. persons who were “part of al Qaeda at the time of the alleged offense”)? Does it mean that the new military commissions are authorized to prosecute all al-Qaeda members, even though they have not been involved in any armed conflict within the meaning of IHL? Would IHL apply to them? (See also 2009 Act, §950p(c)) [See ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities ^[51]]
3. Why can military commissions, according to both Acts, only prosecute foreign nationals? Before which instances are American citizens to be prosecuted if they commit the same offences as those listed in the Acts? Do you agree that there should be two different processes, one for foreign nationals and one for American citizens? Does IHL say anything about persons fighting against their State of nationality? What would be the status of such persons under IHL? [See United States, Trial of John Phillip Walker Lindh ^[61]]
4.
 - a. (2006 Act, §948b(f)) Why does the 2006 Act state that the military commissions are “regularly constituted” and afford all the necessary “judicial guarantees which are recognized as indispensable by civilized peoples”? Is it sufficient to say that the military commissions meet the requirements of Art. 3 common to the Conventions for them to actually do so? Would such a provision have prevented US courts from declaring military commissions unlawful? Why did the drafters of the 2009 Act remove this provision? Do you agree that the military commissions of 2006 afford all necessary judicial guarantees? (See also 2006 Act, §949j; 2009 Act, §949j; United States, Hamdan v. Rumsfeld ^[21])
 - b. (2006 Act, §948b(b); 2009 Act, §948b(b)) Do you think that these two provisions on the President’s authority to establish military commissions are in accordance with the Supreme Court’s conclusions in Hamdan? Can it be said that the military commissions, as established by the US President, are “regularly constituted”?
5. (2006 Act, §948b(g); 2009 Act, §948b(e)) What is the difference between the two provisions? Does the provision in the 2006 Act mean that the Geneva Conventions do not confer any right on individuals? What does the 2009 provision mean (i.e. that the

Geneva Conventions do not establish a private right of action)? Do you agree that the Geneva Conventions do not establish any private right of action? [See also United States, *United States v. Noriega* ^[7]]

6. (2006 Act, §948d(a); 2009 Act, §948d) What do you think of the fact that military commissions, in both Acts, may judge acts committed *before*, on or after 11 September 2001? Was the United States involved in an armed conflict before September 11? Would IHL apply to acts committed prior to that date? Should such acts be judged by a military commission? Do you think that all the acts mentioned in the list of offences can still be considered as crimes if committed before September 11? [See also 2009 Act, §950p(c)]
 7. (2006 Act, §950p; 2009 Act, §950p(d)) Do you agree that the Acts do not establish new crimes? Are the military commissions, when prosecuting crimes committed before the commissions were established, applying *ex post facto* law?
 8. (2006 Act, §950v(b); 2009 Act, §950t)
 - a. Are all the crimes listed under the two Acts war crimes? Is “providing material support for terrorism” a violation of IHL? Are an attempt and a solicitation to violate IHL war crimes? Should they be regarded as substantive crimes?
 - b. Is conspiracy to commit a war crime a war crime? Is the fact that it is listed in both Acts in keeping with the Supreme Court’s conclusion in *Hamdan*? [See United States, *Hamdan v. Rumsfeld* ^[2]]
 - c. (2006 Act, §950v(b)(15); 2009 Act, §950t (b)(15)) Is murder of a combatant by a civilian a war crime? Can the United States try enemy civilians for acts other than war crimes? Can it try them before military commissions? [See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* ^[5]]
 9. (2006 Act, Sec.7) What do you think of the provision on *habeas corpus* matters? Can Guantanamo detainees apply for a writ of *habeas corpus*? Why did the drafters of the 2009 Act remove this provision? [See United States, *Habeas Corpus for Guantanamo Detainees* ^[8]]
 10. In what ways is the 2009 Act an improvement over the 2006 Act? From an IHL point of view, what aspects of the new Act could be further improved?
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