



## NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

### ***Application of the Fourth Geneva Convention to the Conflict in Afghanistan***

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Rulings:

- *United States v. Hamdan*, 1 M.C. 53 (2008) (Ruling on Motion for Order Implementing Fourth Geneva Convention)

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949) (“GC IV”) establishes responsibilities warring parties owe civilians during armed conflicts. Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949) (“GC III”) protects prisoners of war (POWs) and combatants. It is generally thought that at least one of the four Geneva Conventions of 1949 protects everyone on the battlefield. Jean Pictet wrote, “There is no intermediate status; nobody in enemy hands can be outside the law.” Pictet, Jean, *Commentary on the Geneva Conventions, Vol. IV*, International Committee of the Red Cross, at 51. Article 4 of GC IV identifies who is covered under the treaty:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

At his military commission, Salim Hamdan argued that he was entitled to GC IV protections. *United States v. Hamdan*, 1 M.C. 53, (2008). Judge Allred ruled otherwise. *Id.* at 59. According to the ruling, even assuming Hamdan did have protected status, that status was properly derogated by virtue of Hamdan’s unlawful participation in hostilities as an unlawful enemy combatant. *Id.*

Judge Allred outlined the three different circumstances in which GC IV applies. These include: 1) “all cases of declared war or any other armed conflict between two or more high Contracting Parties;” 2) in “cases of partial or total occupation of the territory of a High contracting Party;” and 3) when a non-signatory “Power in conflict” “accepts and applies” the provisions of the Geneva Conventions. *Id.* at 53.

Before examining Hamdan’s status, Judge Allred determined that GC IV applied to the conflict in Afghanistan in 2001. *Id.* The major factor supporting that conclusion was that, at the time of Hamdan’s capture, the Taliban was the *de facto* government of Afghanistan, a High Contracting Party to GC IV. *Id.* at 54.

Next, Judge Allred analyzed Hamdan's status in relation to the ongoing conflict in 2001. He ruled that Hamdan met the first half of Article 4's definition. Hamdan found himself "in the hands of a Party to the conflict or Occupying Power of which [he is] not [a] national." *Id.* Hamdan was captured by the U.S. – the occupying power of which Hamdan was not a citizen.

The language in Article 4's second paragraph, however, excludes nationals of a neutral state who find themselves in the territory of a belligerent state when the state of their nationality has normal diplomatic relations with the state who is detaining the individual. *Id.* Since Hamdan was a Yemeni national, a country with normal diplomatic relations with the United States, he was not entitled to the protection of GC IV since he was captured by the U.S. in Afghanistan. *Id.* at 55.

In effect, this ruling meant Hamdan was left unprotected by GC III and GC IV. Judge Allred found this outcome acceptable. The ruling cited Helen Duffy, an academic, for the proposition that, in limited cases, a person may be excluded from protected person status as a civilian and a POW. *Id.* Hamdan's status was such that he was not a lawful combatant or POW and not a civilian within the meaning of Article 4 of GC IV.

"Because the definition of protected person also makes reference to "occupied" territory, and because the specific relief [sought by the defense] is required in "occupied territory," Judge Allred examined whether the U.S. was an "occupying power" in Afghanistan. *Id.* at 55. According to Judge Allred, the situation did not meet the traditional definition of occupation. *Id.* at 56. The definition was taken from Article 42 of The Hague Regulations and the U.S. Army Field Manual, 27-10, both of which describe occupation as an assumption of the functions of government and undertaking of full control over the territory. Judge Allred felt the U.S. did not exercise that level of authority over Afghanistan at the time of Hamdan's capture. *Id.*

Finally, Judge Allred held that, even if the accused was initially entitled to the protections of GC IV, Article 5 warranted derogation from this entitlement. *Id.* at 57. Article 5 provides: "Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favor of such individual person, be prejudicial to the security of such State." Therefore, by previously holding that Hamdan was an unlawful enemy combatant, he could not be considered a person entitled to the protections of Article 4. In conclusion, Judge Allred placed Hamdan in that unusual class of persons not protected by either GC III or GC IV, but entitled to the minimal protections of Common Article 3. *Id.* at 58.