



NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Military Commissions and the Law of Armed Conflict

Rulings:

- *United States v. Hamdan*, 1 M.C. 22 (2007) (On Reconsideration: Ruling On Motion to Dismiss for Lack of Jurisdiction)
- *United States v. Hamdan*, 1 M.C. 60 (2008) (Ruling on Motion to Dismiss (Res Judicata))
- *United States v. Hamdan*, 1 M.C. 91 (2008) (Ruling on Motion in Limine (Transportation Services) and Start of Hostilities)

The Military Commissions Act (“MCA”) of 2006 prescribes personal jurisdiction over unlawful enemy combatants who participate in or purposefully and materially support hostilities against the United States. The punitive articles of the MCA purport to be grounded in traditional violations of the law of armed conflict (or “law of war”). Therefore, the law of armed conflict has become an important issue in military commission litigation. Two issues dealt with at length in Salim Hamdan’s commission were whether the law of armed conflict applied to the U.S./al-Qaeda relationship, i.e. whether hostilities existed in the first place, and second, whether Hamdan was “directly participating” in those hostilities.

When do hostilities exist?

In *U.S. v. Hamdan*, 1 M.C. 22 (2007), Judge Allred was asked to determine whether hostilities were ongoing on the date of Hamdan’s capture. The MCA does not define “armed conflict,” “hostilities,” or “acts of war.” Several international tribunals and bodies, however, have provided definitions of those important phrases. Judge Allred quoted Professor Michael N. Schmitt for the proposition that hostilities are “acts of war which are intended by their nature or their purpose to hit specifically the personnel and the materiel of the armed forces of the adverse Party.” *Id.* at 27. This provided Judge Allred with a working definition of “armed conflict” and “hostilities.”

Judge Allred noted that on November 24, 2001, the date of Hamdan’s capture, U.S. and other Anti-Taliban forces were actively engaged in a firefight with Taliban forces. *Id.* Both sides suffered casualties. *Id.* In conjunction with the local battle for control of Takta Pol, there was the ongoing battle for the more distant Kandahar. *Id.* Clearly, according to Judge Allred, “hostilities” existed at the time of Hamdan’s capture. *Id.*

Yet, Judge Allred needed to analyze the phrase “hostilities” more deeply because Hamdan was charged with acts that predated September 11, 2001. Previously, the United States Supreme Court threw out a military commission against Hamdan. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). In that decision the Court held that, to be triable by military commission, a violation of the law of war must have been committed “within the period of the war.” The plurality decision held that the

common law of war did not grant jurisdiction for the conspiracy charges Hamdan faced, since they allegedly occurred prior to September 11, 2001. *Id.* Since that decision, however, Congress legislated that “offenses occurring before, on or after September 11th may properly be tried by military commission.” 10 U.S.C. § 948d.

According to Judge Allred, “Congress intended to enact a system of offenses broader than the common law of war, and that in doing so, it has relied on its express Constitutional authority to define and punish offenses against the law of nations.” *U.S. v. Hamdan*, 1 M.C. 60, 65 (2008). Judge Allred ruled that offenses committed prior to September 11, 2001, by unlawful enemy combatants may be tried by military commission so long as they affected or were related to the period of hostilities. *Id.* Therefore, the Supreme Court’s opinion regarding the period of hostilities, based on the common law of war, does not apply to Hamdan’s commission where the MCA defines when hostilities began. *Id.*

In *U.S. v. Hamdan*, 1 M.C. 91 (2008), the defense argued for a ruling that “hostilities” began no earlier than September 11, 2001. The government argued that hostilities against al-Qaeda began as early as 1996. *Id.* The defense argued that the action taken against al-Qaeda in the years prior to September 11, 2001, did not amount to “hostilities,” relying on its interpretation of international law and a number of statements made by various national leaders suggesting that those leaders did not consider the United States to be at war before September 11, 2001. *Id.* at 92.

Judge Allred decided not to rule on this issue. He left the determination of the date of the beginning of “hostilities” for the panel to decide at trial as an element of the offense to be proven by the government. *Id.* The panel adopted the broader view of the start of “hostilities.” It acquitted Hamdan of conspiracy but convicted him of several specifications of providing material support for terrorism for acts that occurred before September 11, 2001.

Direct Participation in Hostilities

Whether hostilities were occurring does not answer the question of whether a particular person was participating in those hostilities. Hamdan argued that his service as a driver and personal bodyguard of Osama bin Laden did not amount to direct participation in hostilities. *U.S. v. Hamdan*, 1 M.C. 22 (2007). In effect, he challenged his designation as an unlawful enemy combatant because his actions were not that of a “combatant.” International law scholars and experts have long debated the exact meaning of “direct participation in hostilities” within the context of the law of armed conflict. These debates were reflected in Judge Allred’s ruling. *Id.* at 26. Judge Allred limited his ruling on this issue by focusing on the narrow circumstances surrounding Hamdan’s capture – driving ammunition to enemy forces. It was enough for purposes of this motion to find that, at some point, Hamdan directly participated in hostilities.

Judge Allred quoted Professor Yoram Dinstein as explaining, “It is not always easy to define what active participation in hostilities denotes. Usually, the reference is to ‘direct’ participation in hostilities. However, the adjective ‘direct’ does not shed much light on the extent of participation required. For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities.” *Id.*

In examining other experts’ opinions, Judge Allred noted that “the issue of ‘direct participation’ should depend on how close the driver actually is to the ongoing hostilities.” *Id.* at 27. Judge Allred referenced Jean-Francois Quguiner, a law of armed conflict expert, who indicated that direct participation is broad enough to encompass “direct logistical support for units engaged directly in battle such as the delivery of ammunition to a firing position.” *Id.*

Following this logic, Judge Allred ruled that Hamdan directly participated in hostilities by “driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity” to an area of ongoing combat operations. *Id.* The “accused’s past history of delivering munitions to Taliban and al-Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of ‘direct participation.’” *Id.* The evidence supported a “finding that the accused ‘engaged in hostilities, or...purposefully and materially supported hostilities against the United States or its cobelligerents...’” *Id.*

Judge Allred did not rule upon the specific question of whether Hamdan “purposefully and materially supported hostilities” by serving as the personal driver and bodyguard of bin Laden between 1996 and 2001. *Id.* at 28. He left this question for the panel to resolve at trial. Judge Allred noted that these issues will likely “provide grist for the debates of future generations of Law of Armed Conflict Scholars...” *Id.*