



NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Detainee Status: Prisoner of War or Alien Unlawful Enemy Combatant?

Rulings:

- *United States v. Hamdan*, 1 M.C. 18 (2007) (Ruling on Defense Motion for Article 5 Status Determination)
- *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. 47 (2008) (Ruling on Motion to Dismiss (Unlawful Combatant Status))

The Military Commissions Act (“MCA”) of 2006 subjects “unlawful enemy combatants” to military commission jurisdiction. Given the language and effect of the MCA, the law of armed conflict (or “law of war”) is necessarily implicated. The law of armed conflict governs warring parties, not only with respect to how they may carry out attacks and determine targets, but also regarding whom they may detain and how they may detain these individuals. Typically, opposing forces captured on a battlefield are considered prisoners of war (“POWs”) and receive the protections afforded by Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949) (“GC III”). The MCA-created status of “alien unlawful enemy combatant” (“AUEC”) specifically excludes these individuals from POW status.

Salim Hamdan claimed that under the law of armed conflict, he was a POW and, thus, entitled to the protections offered by GC III. Article 4 of GC III defines a POW as any person belonging to one of the following categories, who have fallen under the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;
 - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the

The Military Commissions Act of 2006, § 948a defines an “unlawful enemy combatant” as:

(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-Qaida, 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.”

...

“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.”

welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

If doubt arises about the status of an individual, the capturing party must convene a hearing to determine the person’s status pursuant to Article 5 of GC III. That article reads: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belongs to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

Army Regulation (“AR”) 190-8 provides the process by which the U.S. military implements Article 5 of GC III when detaining people on the battlefield. However, the U.S. military did not utilize AR 190-8 in Afghanistan, or elsewhere, for individuals later transferred to Guantanamo Bay and subjected to the MCA.

The plain language of the MCA provides that AUEC status is to be determined by a “Combatant Status Review Tribunal (CSRT) or another competent tribunal...” § 948a. As discussed in *NIMJ Briefs on the Guantanamo Military Commissions: Personal Jurisdiction*, an issue arose because the Hamdan CSRT only decided he was an *enemy combatant*, not an *unlawful* one. On appeal to the Court of Military Commission Review, the Court ruled that a military judge could determine whether an individual meets the definition of an AUEC.

In arguing that Hamdan was not an AUEC in *U.S. v. Hamdan*, 1 M.C. 18 (2007), the defense requested a status determination pursuant to Article 5 of GC III. Hamdan claimed to be entitled to POW status, and, therefore, not subject to trial by military commission, absent a determination of his status. *Id.*

In deciding this issue, Judge Allred ruled that the government bears the burden of proving by a preponderance of the evidence an initial showing of personal jurisdiction. *Id.* Of course, if the defense raises the affirmative defense of lawful combatancy at trial, the government must disprove that defense beyond a reasonable doubt. *Id.* In the Hamdan ruling, the lower standard applied. *Id.*

Despite government protestations, Judge Allred applied the Geneva Conventions. *Id.* He ruled: “because the United States, as Detaining Power, proposes to try the accused for his participation in hostilities, the Geneva Conventions clearly contemplated a judicial determination of his status before any such proceeding.” *Id.* at 19. While the MCA exempted the Geneva Conventions as a source of rights, Judge Allred noted that the MCA denies those rights to “alien unlawful enemy combatants.” *Id.* Here, Hamdan had “not yet been determined to be an alien unlawful enemy combatant by” the tribunal. *Id.* at 21.

However, Judge Allred believed that Congress intended the CSRT to satisfy the requirements of Article 5. *Id.* at 19. Yet, differences exist between the CSRT process and an Article 5 hearing. For one, “[t]he CSRT did not address [Hamdan’s] entitlement to Prisoner of War Status, cite or discuss the Geneva Conventions or Article 5, or address the lawfulness of the accused’s participation in hostilities. Indeed, it was not tasked to do so...” *Id.* at 21. Instead, the CSRT was tasked to “make a different determination: whether the accused was an ‘enemy combatant,’ as defined in those references, for the purpose of continuing his detention.” *Id.* Due to the divergent purposes of the CSRT and Article 5 hearings, Judge Allred could not accept Hamdan’s 2004 CSRT determination as satisfaction of his entitlement to a POW status determination. *Id.* “Even if the Commission were to agree with the Government that the 2004 CSRT process satisfied Article 5, it is clear from the Commentaries on the Geneva Conventions that a second status determination must be made by a judicial officer for detainees the Detaining Power proposes to punish.” *Id.*

Therefore, Judge Allred ordered a hearing to determine Hamdan’s status. *Id.* The hearing was used to determine if Hamdan was an AUEC and his Article 5 status. *Id.* Judge Allred saw this solution as “consistent with the intent of Congress, the Law of Armed Conflict, and the decision of the Court of Military Commission Review in *United States v. Khadr.*” *Id.*

After a two-day hearing, Judge Allred ruled that Hamdan was not entitled to either lawful combatant or POW status. In *U.S. v. Hamdan*, 1 M.C. 22 (2007), Judge Allred examined the factors enumerated in Article 4 of GC III. Judge Allred easily dismissed the possibility of applying (1) and (2) by noting that “[w]hile the Defense showed...that the Ansars [a group of al-Qaeda fighters who supported the Taliban] were ‘members of the armed forces of a Party’ or members of a militia or volunteer corps ‘forming part of such armed forces’ there is no evidence that the accused was a member of the Ansars or any other militia or volunteer corps.” *Id.* at 29. Category (3) clearly did not apply, since the actions for which Hamdan was prosecuted were not performed in the service of any nation.

Neither did Hamdan fall under category (4). Judge Allred ruled that Hamdan failed “to fit into any of the suggested categories of civilians who might properly accompany the armed forces, or any similar categories of persons, there is no evidence that he ‘accompanied’ such forces, or that he was properly identified as required by the rule.” *Id.* Even assuming he

did qualify as such a civilian, civilians “can forfeit their entitlement to prisoner of war status by directly participating in hostilities.” *Id.* There was no evidence that the “accused was a member of a merchant marine or civil aircraft crew, or that he engaged in the traditional levée-en-masse” making category (5) inapplicable. *Id.* Finally, category (6) was summarily dismissed as inapplicable. *Id.*

In *U.S. v. Hamdan*, 1 M.C. 47 (2008), the defense moved to dismiss certain charges and specifications because of the “special defense of combatant immunity.” The defense argued that Hamdan “was transporting missiles to Taliban and Ansar fighters in Kandahar. These forces were lawful combatants. Because these fighters were lawful combatants entitled to combatant immunity, Mr. Hamdan’s support for these fighters necessarily qualifies him to share in their immunity.” *Id.* Judge Allred reviewed several sources of the law of armed conflict concerning the combatant’s privilege, or combatant immunity. *Id.* However, as discussed in the *United States v. Lindh*, 21 F. Supp. 2d 541, 553 (E.D. Va. 2002), “this lawful combatant immunity is not automatically available to anyone who takes up arms.” *Id.* at 47 citing *Lindh*, 21 F. Supp. 2d at 553. The “immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants.” *Id.* Based on Judge Allred’s previous ruling that Hamdan’s participation was unlawful, the accused was not a member of the armed forces or otherwise entitled to engage in hostilities. *Id.* at 48.

As previously noted, the defense could introduce evidence at trial of lawful combatant status. *Id.* At trial expert testimony was proffered to prove to the panel that Hamdan was a lawful combatant with the Ansar Brigade, a unit that provided military support to the Taliban. Hamdan was convicted of providing material support to al-Qaeda as an AUEC, but cleared of conspiracy.