

September 2007

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Recommended Citation

Matthew Sonn, *Hamdan v. Rumsfeld: A Bad Decision with the Best Intentions - Why the Court Was Wrong in Interpreting the Geneva Conventions and What Should Be Done*, 19 Pace Int'l L. Rev. 143 (2007)

DOI: <https://doi.org/10.58948/2331-3536.1064>

Available at: <https://digitalcommons.pace.edu/pilr/vol19/iss2/1>

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PACE UNIVERSITY
SCHOOL OF LAW
INTERNATIONAL LAW REVIEW

Volume XIX, Number II

Fall 2007

ARTICLES

***HAMDAN V. RUMSFELD: A BAD DECISION
WITH THE BEST INTENTIONS –
WHY THE COURT WAS WRONG IN
INTERPRETING THE GENEVA
CONVENTIONS AND WHAT
SHOULD BE DONE***

Matthew Sonn*

I. INTRODUCTION

On September 11, 2001, the terrorist group, al Qaeda, attacked the United States by flying hijacked, commercial airplanes into the twin towers of the World Trade Center, the Pentagon, and a field in Pennsylvania.¹ In response to these attacks, the United States Congress authorized the President to use the United States military against those organizations and countries who either played a direct role in the attacks or those

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¹ Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

who aided the commission of the attacks.² Following this authorization, the President ordered the military forces of the United States to Afghanistan in order to suppress al Qaeda and remove the Taliban regime which was known to provide aid to al Qaeda.³ This marked the start of what has become known as the War on Terror.⁴ Over the course of the War on Terror, the United States military has captured hundreds of al Qaeda and Taliban combatants involved in the conflict in Afghanistan and has detained them at the United States Naval Base in Guantanamo Bay, Cuba.⁵

One such prisoner was Salim Ahmed Hamdan, a Yemeni national who was captured by military forces in Afghanistan and sent to Guantanamo Bay, Cuba.⁶ Hamdan filed a petition for a writ of habeas corpus and challenged the military tribunal that was hearing his case.⁷ The Supreme Court held, in *Hamdan v. Rumsfeld*, that the prisoners being held at Guantanamo Bay, both al Qaeda and Taliban, were entitled to protections under the Geneva Convention.⁸

The way in which war is fought has changed since the signing of the last Geneva Convention almost 60 years ago.⁹ The United States no longer engages states in large scale combat; no longer are large armies, navies, and air forces clashing in battle.¹⁰ Instead, war is now being fought with extremist groups who are not members of any state.¹¹ This is not how the draft-

² *Id.*

³ *Id.*

⁴ President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

⁵ Lieutenant Colonel Joseph P. "Dutch" Bialke, *Al Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 1 (2004).

⁶ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006).

⁷ *Id.*

⁸ *Id.* at 2795.

⁹ See generally Donna Miles, *QDR Provides Vectors for Defense Transformation*, AMERICAN FORCES PRESS SERVICE, Jan. 27, 2006, <http://www.defenselink.mil/news/newsarticle.aspx?id=14502>; Vice Admiral Arthur Cebrowski, Director of Force Transformation, Department of Defense, Speech to the Network Centric Warfare 2003 Conference (Jan. 22, 2003), in TRANSFORMATION TRENDS, February 2003, available at http://www.oft.osd.mil/library/library_files/trends_170_Transformation%20Trends—17%20February%20Issue.pdf.

¹⁰ See generally Miles, *supra* note 9; Cebrowski, *supra* note 9.

¹¹ See generally *id.*

ers of the Geneva Convention envisioned warfare;¹² they instead thought of warfare as state versus state, such as what occurred during World War II, which ended four years prior to the signing of the 1949 Geneva Conventions.¹³

This casenote asserts that the Supreme Court in *Hamdan v. Rumsfeld* erroneously interpreted the Geneva Convention to grant protection to members of al Qaeda and other terrorist organizations. In addition, this paper argues that the Geneva Convention, as currently written, does not encompass the new face of war – fighting between states and non-state international organizations. As such, a new convention is necessary to provide a minimal amount of protection to all people. Part II of this casenote provides general background information about the conflict with al Qaeda, the history of the Geneva Conventions, and a brief history of the various generations of warfare. Part III discusses the Supreme Court's decision in *Hamdan v. Rumsfeld*, examining the majority decision, the concurrences, and the dissents. Part IV discusses where the court erred in its decisions and why al Qaeda prisoners do not qualify as prisoners of war. In addition, Part IV discusses how warfare has changed since the 1949 Conventions and proposes changes to the Conventions in order to expand protections to all combatants.

II. BACKGROUND

The Conflict with al Qaeda

The conflict with al Qaeda has been ongoing for more than a decade and spans many countries on multiple continents.¹⁴ In

¹² Ari Fleischer, White House Press Sec'y, Statement by the Press Sec'y on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> ("The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949."). *Id.*

¹³ INT'L COMM. OF THE RED CROSS (ICRC), INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS, 11 (2002) [hereinafter *Answers to Your Questions*].

¹⁴ See *Hamdan*, 126 S. Ct. at 2846 (Thomas, J., dissenting) (stating that "[t]he conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also 'occurring in the territory of more than 'one of the High Contracting Parties.'"); Brief for American Center for Law and Justice & European Center for Law and Justice as Amici Curiae Supporting Respondents, *Hamdan v. Rumsfeld*, (2006) (No. 05-184) (noting that attacks from al Qaeda occur around the globe).

1993, al Qaeda detonated a bomb in the parking garage of the World Trade Center Towers, causing the deaths of six people and injuring thousands.¹⁵ On August 7, 1998, al Qaeda again attacked the United States, this time striking the embassies in Kenya and Tanzania.¹⁶ In response, the United States retaliated against al Qaeda facilities in Sudan and Afghanistan.¹⁷ In January 2000, al Qaeda attacked the *USS Cole*, a Navy destroyer, while it was in port in Yemen, killing 17 and wounding 40.¹⁸ The most notable attacks against the United States are those that occurred on September 11, 2001, striking the World Trade Center and the Pentagon and killing 2,973 civilians.¹⁹ This brief thumbnail of al Qaeda actions against the United States does not include their attacks on other countries, but does show that their actions span the globe.²⁰

The Geneva Conventions

The Geneva Conventions bind its signatories to grant certain protections to those involved in armed conflicts.²¹ The Conventions are not stagnant documents; instead, they are dynamic documents that have been modified as needed to encompass the new face of war.²² The first Geneva Convention was written in 1864 and signed by sixteen states.²³ The Swiss gov-

¹⁵ See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 69, 71 (2004).

¹⁶ *Id.* at 115-16.

¹⁷ *Id.* at 117.

¹⁸ *Id.* at 190.

¹⁹ *Id.* at 311.

²⁰ See, e.g., United States Dep't of State, Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism, 2005*, 217 (2006), available at <http://www.state.gov/documents/organization/65462.pdf>; Council on Foreign Relations, *al-Qaeda* (updated July 7, 2005), <http://www.cfr.org/publication/9126/>. The Council on Foreign Relations listed a series of other attacks linked to al Qaeda: the March 2004 bomb attacks on Madrid commuter trains, which killed nearly 200 people and left more than 1,800 injured; the May 2003 car bomb attacks on three residential compounds in Riyadh, Saudi Arabia; the November 2002 car bomb attack and a failed attempt to shoot down an Israeli jetliner with shoulder-fired missiles, both in Mombassa, Kenya; the October 2002 attack on a French tanker off the coast of Yemen; several spring 2002 bombings in Pakistan; the April 2002 explosion of a fuel tanker outside a synagogue in Tunisia.

Id.

²¹ See *Answers to Your Questions*, *supra* note 13, at 12, 16.

²² *Id.* at 11.

²³ *Id.* at 8.

ernment, at the urging of Henry Dunant, Guillaume-Henri Dufour, Gustave Moynier, Louis Appia, and Théodore Maunoir,²⁴ first called for the Convention to provide for minimum protections for those engaged in armed conflicts.²⁵ The first Convention set forth a minimal standard for the treatment of wounded armies in the battlefield and for the protection of medical personnel who were properly identified, along with other protections.²⁶

After the First World War, it was apparent that the Geneva Convention needed to be modified in light of the advancements in warfare that had occurred, such as the use of mustard gas, along with other noxious gases.²⁷ In 1925, the Geneva Protocol was adopted prohibiting the use of such gases and bacteriological weapons.²⁸ In 1929, the Second Geneva Convention was created, adopting provisions regarding the "treatment of prisoners of war."²⁹ The biggest change to the Geneva Convention occurred in 1946, after World War II. Recognizing that warfare had changed once again, and that it was necessary to revise the Conventions to protect those involved in the conflict, a new set of Geneva Conventions was created.³⁰ The 1949 Geneva Convention, which remains in force today, created four conventions, including the new fourth convention giving protection to civilian persons in a time of war.³¹ Since 1949, the Geneva Conventions

²⁴ *Id.* at 2. These men are the five founding members of the International Committee of the Red Cross. *Id.*

²⁵ *See id.* at 8.

²⁶ *See* Answers to Your Questions, *supra* note 13, at 8. The 1864 Convention established:

standing written rules of universal scope to protect the victims of conflicts; its multilateral nature open to all States; the obligation to extend care without discrimination to wounded and sick military personnel; respect for and marking of medical personnel, transports and equipment using an emblem (red cross on a white background).

²⁷ *See id.* at 11.

²⁸ *See id.* at 10.

²⁹ *Id.*

³⁰ *Id.* at 11. During World War II the ratio of civilians to military personnel killed jumped from 1:10 in the First World War, to nearly a ratio of 1:1. *Id.*

³¹ *Id.* at 10. The Four Conventions are entitled: I) Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; II) Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea; III) Treatment of Prisoners of War; IV) Protection of Civilian Persons in Time of War. They are known respectively as the First, Second, Third, and Fourth Conventions. *Id.*

have been supplemented three times (with the first two Additional Protocols in 1977 and the third in 2005) as shortcomings in the original Conventions were found or the face of war changed.³² This brief history of the Geneva Conventions reveals that throughout their existence these treaties have constantly evolved in order to adapt to and encompass the new ways that war is waged, and should continue to fulfill that role in the future.

The Way War Has Been Fought

Military historians note that there have been four generations of modern warfare, beginning in 1648. The first generation of war – military culture and order – from 1648 to 1860, brought the arrival of modern things such as uniforms, saluting, and a system of ranks for the maintenance and enforcement of this culture and order.³³ The second generation evolved from the French after the First World War, seeking the use of mass fire, such as artillery fire, to cause as much damage to the enemy as possible before sending in infantry troops.³⁴ William Lind argues that this is the type of warfare that the United States still engages in, using air power instead of artillery to bomb enemies into submission before sending in ground troops.³⁵ The third generation of warfare was developed by the German army after the first World War, and is also known as Blitzkrieg, and is based not on massive firepower and grinding down the enemy, but instead is based on speed and surprise.³⁶ In a third generation type war, the objective is to surround the enemy, get behind him, and then collapse the enemy.³⁷ The

³² See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 16 I.L.M. 1391, 1125 U.N.T.S. 609; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of Additional Distinctive Emblem (Protocol III), 8 December 2005, 45 I.L.M. 558.

³³ William S. Lind, *Understanding Fourth Generation War* (Jan. 2004), <http://antiwar.com/lind/index.php?articleid=1702> (last visited Feb. 27, 2008).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

fourth generation of warfare is characterized by “cultures, not merely states, in conflict.”³⁸ It is in the fourth generation that “the state loses its monopoly on war” and engages in conflicts with non-state actors, such as al Qaeda.³⁹

III. HAMDAN V. RUMSFELD

A. *Facts of the Case*

Towards the end of November 2001, Afghani militia forces captured Salim Ahmed Hamdan.⁴⁰ Shortly after his capture Hamdan was turned over to the United States military and was then transported to the United States Naval Station in Guantanamo Bay, Cuba.⁴¹ Upon arrival at Guantanamo Bay, Hamdan was held with the general population, known as Camp Delta.⁴² On June 3, 2003, President George W. Bush determined that Hamdan was either a member of al Qaeda or had aided in terrorist activities against the United States, and he was designated for trial before a military commission.⁴³ He was then moved to solitary confinement in Camp Echo, away from the general population, and was appointed counsel in December 2003.⁴⁴ Counsel, however, was initially appointed solely for plea negotiations.⁴⁵

B. *Procedural History*

In April 2004, Hamdan filed for a writ of habeas corpus with the District of Columbia District Court, and the government formally charged him with “conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism.”⁴⁶ In addition, the government alleged that between 1996 and No-

³⁸ *Id.*

³⁹ William S. Lind, *Understanding Fourth Generation War* (Jan. 2004), <http://antiwar.com/lind/index.php?articleid=1702> (last visited Feb. 27, 2008).

⁴⁰ *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005). This casenote cites to the appellate decision and not the Supreme Court decision for the fact section only because the D.C. Circuit has more detailed facts in its opinion.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

vember 2001 Hamdan worked as Osama bin Laden's⁴⁷ personal driver, which Hamdan admitted to in an affidavit.⁴⁸ He also admitted that he worked as bin Laden's bodyguard, that he drove bin Laden to al Qaeda training camps, delivered weapons, and trained at al Farouq camp, a training camp sponsored by al Qaeda.⁴⁹ In addition, on July 7, 2004, a Combatant Status Review Tribunal affirmed Hamdan's status as an enemy combatant.⁵⁰ On November 8, 2004, the District Court granted Hamdan's petition for habeas corpus.⁵¹ The District Court halted the commission's proceeding.⁵² The District Court held that the commission violated the Geneva Convention (III) Relative to the Treatment of Prisoners of War, and that Hamdan was fully entitled to protections under the Convention.⁵³ In addition, the District Court held that both the Third Geneva Convention and the Uniform Code of Military Justice were violated by the procedures of the military commissions.⁵⁴

The Court of Appeals of the District of Columbia disagreed with the District Court and reversed the decision.⁵⁵ The Court

⁴⁷ Osama bin Laden is the founder of the radical Islamic terrorist group al Qaeda. He was born in 1957 in Saudi Arabia to a wealthy family, with ties to the Saudi royal family. During his education in both school and university he was a member of the Muslim Brotherhood. When the Soviet Union invaded Afghanistan Osama bin Laden traveled to Pakistan and met with rebel leaders resisting the invasion. He then set out collecting money and supplies for the rebels and later joined the fighting. He then opened a guesthouse and camps inside of Afghanistan to support those resisting the Soviets' invasion, thus founding al Qaeda. Bin Laden was a highly respected military commander. Once the Soviets were defeated bin Laden offered his army to defend Saudi Arabia in case Iraq expanded its invasion from Kuwait into Saudi Arabia. Saudi Arabia turned down his help and allowed the United States to assist. Osama bin Laden felt extremely betrayed and then turned his focus to attacking the United States and its allies in the Middle East. He was then thrown out of Saudi Arabia, and eventually stripped of his citizenship. In the mid-1990's he called for war against the United States and Jews around the world. *Who is Osama bin Laden?*, Brit. Broad. Corp. (July 26, 2007), available at http://news.bbc.co.uk/2/hi/south_asia/1551100.stm.

⁴⁸ *Hamdan*, 415 F.3d at 35.

⁴⁹ *Id.*

⁵⁰ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2761 (2006). The CSRT is required under the decision in *Hamdi v. Rumsfeld*. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁵¹ *Hamdan*, 126 S. Ct. at 2761.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 2762.

⁵⁵ *Id.*

of Appeals agreed that the Third Geneva Convention was not enforceable in the courts. Also, two of the judges agreed that Hamdan, even if he could enforce the Third Geneva Convention in court, was not entitled to protections of the Convention.⁵⁶ The Supreme Court of the United States granted certiorari on November 7, 2005, to decide the question of “whether the military commission convened to try Hamdan has the authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.”⁵⁷

C. *Holding of the Court and its Reasoning*

In a highly fragmented, majority decision, Justice Stevens writing for the Court joined, in parts, by Justices Kennedy, Souter, Ginsburg, and Breyer,⁵⁸ held that military commissions violated the Geneva Conventions.⁵⁹ The Supreme Court disagreed with the finding of the Court of Appeals that Article 2 of the 1949 Geneva Conventions⁶⁰ governs the conflict with al Qaeda because, unlike Afghanistan, al Qaeda is not a party to the Con-

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 2759. Justice Stevens announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, Parts VI through VI-D-iii, Part VI-D-v, and Part VII, and an opinion with respect to Parts V and VI-D-iv, in which Justice Souter, Justice Ginsberg, Justice Kennedy and Justice Breyer joined. *Id.*

⁵⁹ *Id.* at 2793.

⁶⁰ Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 2]. Common Article 2 (referred to as “common” because it appears in all four Conventions) states:

In addition to the provisions which shall be implemented in peace time, 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, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Id.

ventions, and thus it is not applicable to the conflict.⁶¹ The Court stated that it had no reason to decide if that argument has merit, because it finds that Article 3 of the Conventions⁶² does encompass the conflict with al Qaeda.⁶³ The Court interpreted the phrase "conflict not of an international character" to include any conflict not between nations, and noted that Common Article 3 only grants minimal protections to those individuals who are not members of any state but involved in a conflict within the territory of a signatory.⁶⁴ In addition, the Court stated that the official commentaries of the Third Geneva Convention note that the scope of the Article should be as broad as possible and that language limiting the scope of the Article was not included in the final version of Common Article 3.⁶⁵

Since the court finds that Common Article 3 applies to this conflict, Hamdan would be entitled to trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁶⁶ In addi-

⁶¹ *Hamdan*, 126 S. Ct. at 2759.

⁶² Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3]. The applicable sections of Common Article 3 state:

In the case of armed 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, the following provisions:

1. Persons 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 sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) 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.

Id.

⁶³ *Hamdan*, 126 S. Ct. at 2795.

⁶⁴ *Id.* at 2796.

⁶⁵ *Id.*

⁶⁶ *Id.* (quoting 6 U.S.T. at 3320).

tion, the Court noted that commentary for the Fourth Geneva Convention states that the term “regularly constituted” courts includes military courts, but excludes special tribunals.⁶⁷ Although the term “regularly constituted” is not defined in the Geneva Conventions, the Court states that it has been understood to include the minimum protections of customary international law, and did not encompass the military commissions at issue here.⁶⁸ Even though Common Article 3 is very broad in what it permits, the commissions here are outside of its scope.⁶⁹

D. *Concurrence of Justice Kennedy, joined by Justices Souter, Ginsburg, and Breyer*

Justice Kennedy’s concurring opinion echoes the statements of much of the Court’s opinion in that the military commissions are not in accordance with Common Article 3.⁷⁰ Justice Kennedy stated that these commissions are not *per se* invalidated just because the President and not Congress created them.⁷¹ For these commissions to be valid, they must adhere to the minimal protections of the regular courts.⁷² He further stated that even though Hamdan is charged with “overt acts in furtherance of a conspiracy to commit terrorism,” there is still “no exigency requiring special speed or precluding careful consideration of evidence.”⁷³ He also carefully points out a distinct difference between the normal military courts and these special commissions, namely that the ‘judges’ in the commissions were not the normal military judges and the Appointing Authority assigns them.⁷⁴ Justice Kennedy also noted that the Appointing Authority has much more power over the

⁶⁷ *Id.*

⁶⁸ *Id.* at 2797.

⁶⁹ *Id.* at 2798.

⁷⁰ *Id.* at 2799 (Kennedy, J., concurring). Justice Breyer, in addition to joining in part of the majority opinion also penned a brief concurrence, which has been omitted from this casenote because it does not fall within its scope. Also, Justice Breyer only joins Justice Kennedy’s concurrence in Parts I and II. *Id.*

⁷¹ *Id.* at 2804.

⁷² *Id.* at 2804.

⁷³ *Id.* at 2804-05.

⁷⁴ *Id.* at 2806.

commission than a Convening Authority does over a court martial.⁷⁵

E. *The Dissents of Thomas and Alito*

Justice Thomas dissented with the Court's opinion and is joined by Justice Scalia, and Justice Alito in part. Thomas's first contention is that he disagrees that the Supreme Court has the jurisdiction to hear the claim, and that it is the Court's "well-established duty to respect the Executive's judgment in matters of military operation and foreign affairs."⁷⁶ He also stated that in cases arising in similar circumstances the Court has decided that it is within the President's ability to detain and try prisoners, as an extension of his powers as Commander-in-Chief in times of war, so long as it does not conflict with the United States Constitution or validly enacted Congressional laws.⁷⁷ In addition, Thomas stated that the Supreme Court has already decided that it does not have jurisdiction over claims arising out of the Geneva Convention in *Johnson v. Eisentrager*, and that *Eisentrager* prohibits a person from evading prosecution from war crimes trials by using the Geneva Conventions.⁷⁸

Thomas' main argument against the Court's Geneva Conventions holding is that the opinion as based on "Common Article 3, [which] applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.'"⁷⁹ Thomas states that the President, under his authority as Commander-in-Chief, accepted the Department of Justice's decisions that Common Article 3 does not apply to al Qaeda members.⁸⁰ In addition, the dissent states that the Supreme Court has determined that Common Article 3 requires that the President make "a judgment about the nature and character of the conflict."⁸¹ The dissent further states that the

⁷⁵ *Id.* at 2807. Justice Kennedy notes that the Appointing Authority has supervisory powers during the trial, decides any interlocutory appeals, and has greater flexibility in appointing the members of the commission. *Id.*

⁷⁶ *Id.* at 2823 (Thomas, J., dissenting).

⁷⁷ *Id.* at 2824 (citing *Ex parte Quirin*, 317 U.S. 1, 25 (1942)).

⁷⁸ *Id.* at 2844 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950)).

⁷⁹ *Id.* at 2846 (citing 6 U.S.T. at 3318).

⁸⁰ *Id.* at 2846.

⁸¹ *Id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

current conflict with al Qaeda is international in nature because it occurs in various states around the world, including more than one High Contracting Party.⁸² In addition, the dissent goes on to state that Common Article 3 was designed to provide minimal protections for fighters involved in a civil war.⁸³

The dissent also takes issue with the fact that the majority claims that military commissions are not regularly constituted, noting their 150-year history of use, from the Civil War onward.⁸⁴ In concluding, Thomas states that Common Article 2⁸⁵ of the Geneva Convention is intended to control conflicts that are international in scope between two signatories.⁸⁶ However it is inapplicable to the current conflict with al Qaeda because “al Qaeda is not a High Contracting Party.”⁸⁷

Justice Alito wrote a separate dissent and was joined by Justices Scalia and Thomas in part.⁸⁸ Justice Alito notes that Article 66⁸⁹ of the Fourth Geneva Convention bans the “occupy-

⁸² *Id.* at 2846.

⁸³ *Id.*

⁸⁴ *Id.* at 2847.

⁸⁵ For the text of Common Article 2, see *supra* note 60.

⁸⁶ *Hamdan*, 126 S. Ct. at 2849.

⁸⁷ *Id.*

⁸⁸ *Id.* at 2849-55 (Alito, J., dissenting).

⁸⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 66, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Article 66 of the Fourth Geneva Convention states: In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

The Commentaries for this article state that:

The powers referred to may only be exercised on certain conditions, the observance of which is imperative:

(a) The accused may only be brought before “military courts”, that is before courts whose members have military status and are subordinate to the military authorities (1). These courts, dealing as they do with the offences committed by the army of occupation, will normally sit in occupied territory, and can therefore try cases involving other people in such territory. That is doubtless the reason why military courts have been prescribed, since it will be seen that another of the conditions on which the right to exercise jurisdiction depends, is that the court should sit within the occupied territory.

(b) The military courts must be “non-political”. This clause forbids certain practices resorted to during the Second World War when the judicial ma-

ing power from trying *civilians* in courts set up specially for that purpose.”⁹⁰ In addition, Alito states that the term “special tribunals” does not apply to the current tribunals in use because “special” implies a single event whereas regular means standard in occurrence and practice.⁹¹

IV. ANALYSIS

A. *The Court Erroneously Qualified the Conflict with al Qaeda as “Not International in Scope”*

The United States Supreme Court erred when it classified the current conflict with the terrorist organization al Qaeda⁹² as not being international in character.⁹³ The Court inaccurately expands the Common Article 3 definition of “conflict not of an international character”⁹⁴ to apply to any conflict that is not between two nations, which serves as contrast to Common Article 2,⁹⁵ that provides the protections for conflicts that are international in scope.⁹⁶ The Court states simply that Common Article 3⁹⁷ serves as a catchall for all other conflicts that arise.⁹⁸

chinery was sometimes used as an instrument of political or racial persecution.

(c) The courts are to be “regularly constituted”. This wording definitely excludes all special tribunals. It is the ordinary military courts of the Occupying Power which will be competent. Such courts will, of course, be set up in accordance with the recognized principles governing the administration of justice.”

It will be seen later (Article 71 and following) that the proceedings in such courts are governed by a set of extremely detailed provisions, providing protected persons with every guarantee of respect for the human person.

Int'l Comm. of the Red Cross, Commentary, Convention (IV) Relative to the Protection of Civilian Persons in Times of War, at 340-41, *available at* <http://www.icr.org/ihl.nsf/COM/380-600073?openDocument> [hereinafter Convention IV Commentary].

⁹⁰ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2852 (2006) (Alito, J., dissenting).

⁹¹ *See id.*

⁹² Al Qaeda is a global terrorist organization founded by Osama bin Laden in 1988. Its main goal is to defeat the United States and Israel and establish a pan-Islamic caliphate. The group has been responsible for numerous terrorist attacks around the world, notably the attacks on September 11, 2001. United States Dep't of State, *supra* note 20, at 217. For information on other al Qaeda attacks, see *supra* note 20. For information on al Qaeda's leadership, see *infra* note 128.

⁹³ *Hamdan*, 126 S. Ct. at 2795.

⁹⁴ Common Article 3, *supra* note 62, ¶ 1.

⁹⁵ For the full text of Common Article 2, see *supra* note 60.

⁹⁶ *Hamdan*, 126 S. Ct. at 2795.

⁹⁷ For the relevant text of Common Article 3, see *supra* note 62.

This reading is erroneous and not supported by the Geneva Convention Commentaries, as the dissenting opinion points out.⁹⁹

Common Article 3 applies “in cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹⁰⁰ Compare Common Article 3 with the plain language of Common Article 2, which states that:

[t]he 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 Although one of the Powers in conflict may not be a party to the present Convention They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.¹⁰¹

It is evident from the plain language of the two articles that Common Article 2 applies in cases of international conflict, even when one of the warring parties is not a signatory to the Convention.¹⁰² The Supreme Court conducted a thorough analysis of Common Article 3, looking for any minutia on which to hang its argument, but if the Court had spent more time examining Common Article 2, they would have seen that this situation is contemplated and discussed in the commentaries accompanying Common Article 2.¹⁰³ The commentary of Common Article 2 discusses in depth the steps that a non-party to the Convention must take in order to continue being protected under the convention.¹⁰⁴ There are two conditions that must be fulfilled in order for a non-signing party to be protected under the Convention, “acceptance and . . . de facto application of the Convention.”¹⁰⁵ The commentary goes on to state that a declaration, while highly recommended, is not required, so long as the party

⁹⁸ See *Hamdan*, 126 S. Ct. at 2796.

⁹⁹ See *id.* at 2846 (Thomas, J., dissenting).

¹⁰⁰ Common Article 3, *supra* note 62, ¶ 1.

¹⁰¹ Common Article 2, *supra* note 60.

¹⁰² See *id.*

¹⁰³ See Int’l Comm. of the Red Cross, Commentary, Convention (III) Relative to the Treatment of Prisoners of War, at 24, available at <http://www.cicr.org/ihl.nsf/COM/375-590005?OpenDocument> [hereinafter Convention III Commentary].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 25.

adheres to the provisions of the Conventions.¹⁰⁶ In addition, the commentary states that the signatory to the Conventions is obliged to adhere to them until the non-signatory's intent can be determined.¹⁰⁷

In the United States' current conflict with al Qaeda, it was clear from the outset that al Qaeda did not intend to uphold the Conventions. Notably, the first attack in this current conflict – the terrorist attacks of September 11, 2001, the destruction of a civilian target, the World Trade Center – was an affront to the Conventions and other laws of war.¹⁰⁸ The Fourth Geneva Convention outlines what it terms “grave breaches” of the convention; these include “willful killing, torture, or inhumane treatment . . . of a protected person . . . taking hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”¹⁰⁹ The terrorist actions of al Qaeda on September 11, 2001, can be considered grave breaches of the Conventions, as are the ongoing kidnapping of soldiers and civilians in Afghanistan and Iraq, and as such the United States as signatory has no legal duty to uphold the Conventions.¹¹⁰ Despite this there still may remain a humanitarian reason to uphold the Convention but, “as a concession to legal form . . . a High Contracting Party may be legally released from its obligations.”¹¹¹ Thus, the United States has no legal duty to enforce the provisions of Common Article 2 to members of al Qaeda.

The Supreme Court, possibly realizing that under Common Article 2 the United States did not have to maintain its obligations under the Conventions, chose to apply Common Article 3 instead. This is a noble aim of the Court in an attempt to find a legal way for the United States to maintain its ethical obligations under the Conventions, but the Conventions as written do not justify such a reading. Common Article 3 sets forth provi-

¹⁰⁶ *Id.* at 26.

¹⁰⁷ *Id.*

¹⁰⁸ See Fourth Geneva Convention, *supra* note 89, art. 147; see also *Yamashita v. Styer*, 327 U.S. 1, 14 (1946) (stating that the destruction of property and killing of unarmed, noncombatant civilians without cause are violations of the laws of war).

¹⁰⁹ See Fourth Geneva Convention, *supra* note 89, art. 147.

¹¹⁰ See Convention III Commentary, *supra* note 103, at 26.

¹¹¹ *Id.*

sions that are to be upheld in cases of armed conflict that are not of an international scope.¹¹² And when the plain language of Common Article 2 and Common Article 3 are compared it is clear that Common Article 3 does not apply in conflicts that occur in more than one state.¹¹³

In addition to the plain language of Common Article 3, the commentaries accompanying Common Article 3 give a better understanding of what is encompassed by it. The commentaries note, after a discussion of the history of Common Article 3:

It applies to non-international conflicts only . . . It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented intolerable interference in the *internal affairs of a State*.¹¹⁴

The commentary goes on to give some of the language of the previously proposed versions of the article in order to provide a reference point, although it does say there is no criteria for determining whether or not a group is entitled to the protections under Common Article 3.¹¹⁵ Some of these criteria include that the revolting party has an organized military force, an authority responsible for the acts, or that the *de jure* government¹¹⁶ has recognized the insurgents. The commentary also notes that if the dispute has been submitted to the United Nations or if the insurgents have *de facto* authority over part of the population and a substantial part of the national territory, then they would fall under the scope of Common Article 3.¹¹⁷ As is noted in the

¹¹² Common Article 3, *supra* note 62.

¹¹³ Compare Common Article 2, *supra* note 60, with Common Article 3, *supra* note 62, ¶ 1.

¹¹⁴ Convention III Commentary, *supra* note 103, at 34-35 (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ A “*de jure* government” is defined as “[a] functioning government that is legally established. — Also termed *government de jure*.” In comparison, a “*de facto* government” is defined as “1. A government that has taken over the regular government and exercises sovereignty over a nation. 2. An independent government established and exercised by a group of a country’s inhabitants who have separated themselves from the parent state. — Also termed *government de facto*.” BLACK’S LAW DICTIONARY 716 (8th ed. 2004).

¹¹⁷ Convention III Commentary, *supra* note 103, at 36.

commentary and by the Court in *Hamdan*, the application of Common Article 3 must be as wide as possible.¹¹⁸ However, a further reading of the paragraph in which the admonition that the scope of Common Article 3 needs to be as wide as possible is necessary to frame its context. The commentary goes on to state that Common Article 3 should be applied in cases where conflict breaks out in a country but does not meet any of the previously mentioned criteria ("even in cases of *civil disturbance* which could justly be described as mere acts of banditry.").¹¹⁹ The conclusion of this paragraph states that the conflicts covered by Common Article 3 are "armed conflicts . . . which are in many respects similar to an international war, but take place within the confines of a single country."¹²⁰

The conflict with al Qaeda is certainly an international conflict, not being contained within one nation's borders, but instead spanning the globe. As such, the Supreme Court erred when it decided in *Hamdan* that Common Article 3 applied to the current conflict with al Qaeda. The Geneva Conventions Common Article 2 should be the controlling article, since it pertains to international conflicts,¹²¹ but in its current state the Geneva Conventions do not cover members of al Qaeda since, as a non-signatory to the Conventions, they have shown clear intent to not follow them. As such the United States is no longer bound to follow them in regard to al Qaeda.

B. *Detainees who are members of al Qaeda do not qualify as prisoners of war*

Under the Third Geneva Convention Relative to the Treatment of Prisoners of War, members of al Qaeda would not qualify for protection as prisoners of war.¹²² Article 4 lays out strict qualifications for "prisoner of war" status, specifically for militias or volunteer resistance groups, and mandates that they meet the following criteria:

that of being commanded by a person responsible for his subordinates;

¹¹⁸ *Id.*; *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006).

¹¹⁹ Convention III Commentary, *supra* note 103, at 36.

¹²⁰ *Id.* at 37.

¹²¹ See Common Article 2, *supra* note 60.

¹²² See *In re Guantanamo Detainees*, 355 F. Supp. 2d 443, 479 (D.C. Cir. 2005).

that of having a fixed distinctive sign recognizable at a distance;

that of carrying arms openly;

that of conducting their operations in accordance with the laws and customs of war.¹²³

Members of al Qaeda do not meet all of these conditions and as such are not entitled to protection under the Conventions.¹²⁴

Al Qaeda might meet the first criteria under Article 4, having a commander responsible for subordinates' actions. The commentaries do not speak much to the first provision, but Lieutenant Colonel Bialke states that in order for the first criteria to be met a "force must have an operative, structured hierarchical system of military good order and discipline acting under an authority that expressly subjects itself to international law."¹²⁵ Al Qaeda does, or did have, some chain of command led by Osama bin Laden and formerly by Abu Mus'ab al-Zarqawi.¹²⁶ But in order to qualify

¹²³ Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Convention]. The relevant text of Article 4 of the Third Convention reads:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into 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.

¹²⁴ See Brief for Former Attorneys General of the U.S. as Amicus Curiae Supporting Respondents, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (noting that al Qaeda does not qualify as a group under Article 4, and to hold them as such a group would undermine the entire Convention); see also Bialke, *supra* note 5, at 1.

¹²⁵ Bialke, *supra* note 5, at 23.

¹²⁶ See Council on Foreign Relations, *supra* note 20; United States Dep't of State, *supra* note 20, at 219. A description of the al Qaeda chain of command: According to a 1998 federal indictment, al-Qaeda is administered by a council that

under Article 4 a group must meet all four qualifications.¹²⁷

Al Qaeda does not meet the second qualification of a group under Article 4, that of wearing a distinctive sign recognizable at a distance.¹²⁸ To meet this requirement, the commentary on the Third Geneva Convention states: "the sign must be the same for all the members of any one resistance organization, and must be used only by that organization."¹²⁹ Examples of types of signs include armbands, caps (which may not be fully adequate because they are frequently removed), a coat, shirt, or a symbol worn over the chest.¹³⁰ The symbol must also be affixed to any vehicle that is carrying members of the group.¹³¹ This requirement is designed to ensure the protection of civilians by not permitting combatants to hide their status.¹³² Al Qaeda does not distinguish itself from the civilian population, nor do they wear a distinctive symbol that would be recognizable, and as such, they fail to meet this vital criteria to qualify as a prisoner of war.¹³³

"discussed and approved major undertakings, including terrorist operations." At the top is bin Laden. Ayman al-Zawahiri, the head of Egyptian Islamic Jihad, is thought to be bin Laden's top lieutenant and al-Qaeda's ideological adviser. The Jordanian radical Abu Musab al-Zarqawi, who directed a series of deadly terror attacks in Iraq – including the beheadings of kidnapped foreigners – was also associated with al-Qaeda. Zarqawi pledged his allegiance to bin Laden in October 2004, and bin Laden praised Zarqawi as "the prince of al Qaeda in Iraq." Zarqawi was killed in a U.S.-led bombing raid in Baghdad in June 2006. At least one senior al-Qaeda commander, Muhammad Atef, died in the U.S. air strikes in Afghanistan, and another top lieutenant, Abu Zubaydah, was captured in Pakistan in March 2002. In March 2003, the alleged mastermind of the September 11 attacks, Khalid Sheikh Mohammed, and al-Qaeda's treasurer, Mustafa Ahmed al-Hawsawi, were also captured in Pakistan. Council on Foreign Relations, *supra* note 20; United States Dep't of State, *supra* note 20, at 219.

¹²⁷ Third Convention, *supra* note 123, art. 4, § 2.

¹²⁸ *Id.* § 2(b).

¹²⁹ Convention III Commentary, *supra* note 103, at 60.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Bialke, *supra* note 5, at 25.

¹³³ *Id.* at 32-33 (stating that the Taliban and al Qaeda had worked together and in fact the Taliban military force was made up in a large proportion of al Qaeda fighters, and that there was no uniform or distinctive symbol worn by either party); see also Fleischer, *supra* note 12 (noting that the Taliban and al Qaeda have failed to distinguish themselves from civilian populations).

The third qualification, “that of carrying arms openly,”¹³⁴ is also not met by al Qaeda members. The commentary also states that carrying arms openly does not mean that weapons cannot be hidden from view.¹³⁵ Rather, the combatants must be able to recognize each other as such, and a combatant should not be able to disguise himself as a civilian, take unfair advantage of this status, and open fire.¹³⁶ Al Qaeda’s failure to do this can be noted throughout its history of attacks, and failure to adhere to the second requirement of Article 4 by disguising themselves as civilians. It has been noted earlier in this paper that al Qaeda has failed to adhere to the laws and customs of war in conducting its operations.¹³⁷ As such, al Qaeda fails to meet the criteria of the final section of Article 4.

Therefore, Article 4 of the Third Geneva Convention fails to cover members of al Qaeda. In addition, Common Articles 2 and 3, despite what the Supreme Court ruled in *Hamdan*, also do not protect members of al Qaeda or other such organizations. Because of this lack of protection within the Conventions, an update must be made in order to provide a minimal level of protection to all people, regardless of their affiliation or conduct. An update would not condone these activities; instead, it would show a resolve to maintain our system of justice for all, and would give all people a bare minimal protection. It is not being argued that terrorist groups should have full protection of prisoner of war status, but some of the protections put forth in Common Article 3 should apply to people engaged in an international conflict not occurring between signatories to the Conventions. The Conventions were intended to give protections to those engaged in combat, regardless of their legal status. The proposals put forth in this casenote are intended to expand minimal protections to all people, as is within the spirit of the Conventions.¹³⁸

¹³⁴ Third Convention, *supra* note 123, art. 4, § 2(c).

¹³⁵ Convention III Commentary, *supra* note 103, at 61.

¹³⁶ *Id.*

¹³⁷ Third Convention, *supra* note 123, art. 4, § 2(d).

¹³⁸ See, e.g., Convention III Commentary, *supra* note 103, at 36 (noting that Common Article 3 should have a broad interpretation); *id.* at 26 (stating that as a concession to legal form a party may be released from its obligations under Common Article 2, but that a party should not forsake its duty).

C. *Warfare has evolved from state vs. state to state vs. non-state actor*

As stated in the introduction to this piece, the United States is no longer engaging in large-scale warfare, engaging other states in state versus state conflict.¹³⁹ This is a drastic change from the time when the Geneva Conventions were last updated en masse in 1949.¹⁴⁰ Military scholars are noting that conflicts are evolving into what has been called Fourth Generation Warfare.¹⁴¹

Fourth Generation War is not necessarily new. William S. Lind, the Director of the Center for Cultural Conservatism and the Free Congress Foundation, notes it can be traced back to the mid 1600s.¹⁴² He notes that Fourth Generation War is "marked by a return to a world of cultures, not merely states in conflict."¹⁴³ In a Fourth Generation Type conflict, it is hard to separate the leaders from the troops, both in physical location and in their mentality.¹⁴⁴ In addition, Fourth Generation Warfare is marked by the use of standard guerrilla¹⁴⁵ tactics.¹⁴⁶

This is not to say that all wars fought are not state versus state, but instead to say that merely state versus non-state actor is growing and has substantially changed the way the United States is fighting wars.¹⁴⁷ It has been noted though,

¹³⁹ See Miles, *supra* note 9; see also Cebrowski, *supra* note 9.

¹⁴⁰ See Cebrowski, *supra* note 9.

¹⁴¹ See Lind, *supra* note 33; see also Michael J. Mazarr, *Extremism, Terror, and the Future of Conflict* (2006), <http://www.hoover.org/publications/policyreview/4897841.html> (last visited Apr. 14, 2008); see also Victor Davis Hanson, Address at the University of Oregon: *War and the West, Then and Now* (Feb. 11, 2004), available at <http://www.victorhanson.com/articles/hanson072005.html> (last visited Apr. 14, 2008).

¹⁴² Lind, *supra* note 33.

¹⁴³ *Id.*

¹⁴⁴ *Id.* ("Osama bin Laden, though reportedly very wealthy, lives in a cave. Yes, it is for security but it is also leadership by example."). *Id.*

¹⁴⁵ Guerrilla is defined as:

Hostilities that are conducted by individuals or small groups who are usually not part of an organized army and who fight by means of surprise attacks, ambushes, and sabotage. Formerly, it was thought that the hostilities had to be conducted in enemy-occupied territory. Typically, guerrilla warfare is carried out only when geographical conditions are favorable and when the civilian population is at least partly cooperative.

BLACK'S LAW DICTIONARY 1615 (8th ed. 2004).

¹⁴⁶ Lind, *supra* note 33.

¹⁴⁷ Mazarr, *supra* note 141.

that this type of warfare is on the rise, that the major conflicts currently involve the United States, and that other states are in conflicts against non-state actors.¹⁴⁸ War is being fought in a different way, in a way not envisioned by the drafters of the 1949 Geneva Conventions. Therefore, they do not provide protections to those fighting in this new state of warfare, and they should be expanded to include some minimal protections for those involved in the conflict.

Proposed Changes to the Geneva Conventions

In order to provide a minimal level of protection for all people engaged in conflict, certain elements should be adopted into the Geneva Conventions. I propose amending Common Article 3 to extend provisions to all those engaged in combat against one or more signatories. As such, the first sentence of Common Article 3 should be changed to “in the case of armed conflicts between one or more signatories and a non-signing party, each Party to the conflict shall be bound to apply, as a minimum, the following provisions” In addition to the provisions already established by Common Article 3, a section (1)(e) should be added that would require that all combatants captured must go before a status review tribunal, such as those mandated by the United States Supreme Court in *Hamdi v. Rumsfeld*, in order to determine if they are entitled to further protections.¹⁴⁹ Also, a section (3) should be added which would state that any signatory is bound to uphold these minimal protections regardless of whether the other party to the conflict is a signatory or is upholding the convention. Finally, this new version of Common Article 3 would include in the concluding paragraph that members of the International Red Cross and Red Crescent shall not offer their services to illegal actors engaged in combat, such as al Qaeda, but shall be allowed to give aid to those captured by other forces. This final addition shall not apply to groups in rebellion or in cases of civil war.

¹⁴⁸ See Miles, *supra* note 9; Cebrowski, *supra* note 9; Lind, *supra* note 33; Mazzar, *supra* note 141; Hanson, *supra* note 141.

¹⁴⁹ It would be here that the determination would be made if a captured person was entitled to Prisoner of War Status or whether they were to be classified as an enemy combatant. See *Hamdan*, 126 S.Ct. at 2761.

These additions are derived from the idea that the Conventions should provide a minimum level of protection for all people, and they are intended to remedy the current situation in which a country may opt out of giving minimal protections to certain groups because they fail to conform to certain criteria. It is evident from the Commentaries that the drafters intended for the Conventions to protect as many people and be as broad as possible.¹⁵⁰ However, the current type of conflict was one which was not foreseen when the Conventions were written in 1949.¹⁵¹ These additions will ensure the minimal protections of people captured in modern combat, giving people who may be illegal combatants, such as al Qaeda members, the opportunity to challenge their status as illegal combatants. These additions will ensure that all signatories to the Conventions will uphold a minimal level of protection in all conflicts. The change prohibiting ICRC personnel from giving aid to illegal groups is justified because groups that are not willing to uphold these minimal provisions of the Conventions, such as al Qaeda, should not be given full protections. This withholding of ICRC aid may help persuade groups to follow the conventions in order to receive the appropriate aid.

V. CONCLUSION

The Supreme Court, in what appears to be an attempt to grant protections to those who are not legally entitled to them, extended protections under the Geneva Conventions to members of al Qaeda in its decision in *Hamdan v. Rumsfeld*. The Court erroneously applied Common Article 3, which applies to conflicts not international in scope; more specifically, Common Article 3 is intended to be used in cases of civil war, rebellion, and the like, not in conflicts against an international terrorist group. The dissent in *Hamdan* correctly states that the Common Article 2 should be the controlling article in the conflict with al Qaeda, and under Common Article 2, al Qaeda does not

¹⁵⁰ See, e.g., Convention III Commentary, *supra* note 103, at 36 (noting that Common Article 3 should have a broad interpretation); *id.* at 26 (stating that as a concession to legal form a party may be released from its obligations under Common Article 2, but that a party should not forsake its duty).

¹⁵¹ See Fleischer, *supra* note 12 (noting that the current type of conflict was not one envisioned by the drafters in 1949).

qualify for protections, and the United States has no legal obligations under the Geneva Conventions. In addition, al Qaeda members are not entitled to protection under Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War.

In addition, the way war is being fought has changed drastically since 1949; no longer is it state versus state, but instead it is now state versus non-state actor. Because of this drastic change in the way war is fought, and the fact that the current Geneva Conventions are anemic with regards to the protection of non-state actors in international conflict, it is time to once again update the Geneva Conventions, to provide minimal protections for these people, despite their status as illegal combatants.