International Humanitarian Law Teaching Supplement

VOLUME 1: NATIONAL SECURITY LAW

Produced by the
International Humanitarian Law Clinic
at Emory University School of Law
with the support of the
Regional Delegation for United States and Canada,
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Volume 1: NATIONAL SECURITY LAW

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National Security Law and International Humanitarian Law

International humanitarian law offers several excellent illustrations of important national security law concepts. The examples provided below are intended to facilitate the incorporation of these illustrations into a national security law curriculum. This pamphlet will provide a brief narrative proposal for how to do so, references to suggested cases and potential questions and topics for classroom discussion. Section I provides a brief introduction to the key principles of IHL. The subsequent sections deal topically with National Security concepts into which IHL can be integrated as part of the teaching methodology.

I. Brief Introduction to IHL

International humanitarian law (also referred to *inter alia* as the law of armed conflict, the law of war, *jus in bello*, *jus belli*) is the body of law that regulates the conduct of hostilities during armed conflicts. The law is built on two complementary pillars: necessity and humanity. The necessity pillar permits belligerents to employ measures necessary to bring about the prompt submission of the enemy. The humanity pillar protects persons and objects falling outside the scope of necessary harm during armed conflict. A separate body of law, *jus ad bellum*, governs the resort to military force by States to achieve some national objective. The primary sources of IHL are the Hague Conventions (and Annexed Regulations) of 1899 and 1907, the four Geneva Conventions of 1949, the two 1977 Additional Protocols to the Geneva Conventions, and customary international law.

A. Basic Principles

IHL is based on four fundamental core principles: distinction, proportionality, military necessity and humanity. The principle of distinction requires all parties in a conflict to distinguish between those who are fighting and those who are not and only target the former when launching attacks. It also requires those who are fighting to distinguish themselves from innocent civilians. The principle of proportionality seeks to balance military goals with protection of civilians. It prohibits an attack when the expected civilian casualties will be excessive compared to the anticipated military advantage. Military necessity recognizes that the goal of war is the complete submission of the enemy as quickly as possible and allows any force necessary to achieve that goal as long as not forbidden by the law. Destroying enemy capabilities is legitimate, therefore; wanton killing and destruction is not. Finally, humanity aims to minimizing suffering in armed conflict. To that end, the infliction of suffering or destruction not necessary for legitimate military purposes is forbidden. This principle stems from the code of chivalry, itself an early manifestation of the laws of war.

B. Types of Conflicts

IHL applies to all armed conflicts. The term armed conflict was deliberately adopted when the Geneva Conventions were drafted in 1949 to ensure that all *de facto* situations of armed hostilities trigger application of IHL, irrespective of how the participating states choose to characterize the situation. Accordingly, international armed conflicts exist any time a dispute between two states leads to the intervention of their armed forces. This includes situations where one state

refuses to recognize the legitimacy of the government of the other state, or when the intervention of armed forces into the territory of another state is unopposed. Non-international armed conflicts—traditionally understood to mean internal armed conflicts—occur when there is protracted armed violence between a state and one or more non-state armed groups or among two or more non-state armed groups. In certain situations some internal armed conflicts may be treated as international within the meaning of the law: when the organized dissident group controls national territory and is fighting against colonial domination, alien occupation, or a racist regime (but only for states bound by a certain treaty provision, which do not include the United States); or when an internal armed conflict becomes "internationalized" by the involvement of foreign states (such as in the conflict in Bosnia and Herzegovina, sometimes termed "internationalized internal armed conflict"). Hostilities outside the territory of the state between state armed forces and non-state organized belligerent groups operating transnationally, such as al Qaeda and Hezbollah, pose new questions in this area. The Supreme Court held in *Hamdan v. Rumsfeld* that the category of non-international armed conflict includes such conflicts, as many experts believe. Other experts contend, however, that these operations are more properly considered militarized law enforcement actions falling outside the scope of IHL.

C. Persons and Objects

In international armed conflicts, all persons are either combatants or civilians. Combatants are all persons entitled to prisoner of war status under Article 4 of the Third Geneva Convention. All members of armed forces of a party to the conflict are combatants. Members of militias and organized resistance groups belonging to a party to the conflict also qualify as combatants as long as they have a fixed emblem or sign, are commanded by a person responsible for his subordinates, carry their arms openly and follow the laws of war. Combatants are legitimate targets of attack at all times and enjoy the privilege of combatant immunity. Civilians are all persons who are not combatants and are protected from attack except when directly participating in hostilities. Military objectives are objects that, by their nature, purpose, location or use, make an effective contribution to military action and are therefore legitimate targets. Certain objects, such as hospitals and houses of worship, enjoy special protection from attack unless used for military purposes.

II. Separation of Powers

Hamdan v. Rumsfeld ***as a case study in Justice Jackson's Trilogy from Youngstown: Comparing Justice Kennedy's rejection of Military Order #1 with Justice Thomas' endorsement.***

The Supreme Court's 2006 decision to strike down the military commissions created by President Bush in his capacity as Commander-in-Chief of the Armed Forces pursuant to Military Order Number One is a classic illustration of Justice Jackson's Youngstown three-tier trilogy. A comparison between the ratio decidendi of Justice Kennedy and Justice Thomas provide an ideal illustration for students to understand the consequence of executive action contrary to the express will of the legislature. At its core, the *Hamdan* opinion focused on whether the military commissions President Bush created to try captured Al Qaeda and Taliban operatives complied with existing legal obligations. Hamdan asserted *inter alia* that the process established for trial violated both common Article 3 of the 1949 Geneva Conventions and the Uniform Code of Military Justice, a statute enacted by Congress.

Justice Kennedy joined four other Justices to strike down the Military Order. Kennedy focused on the UCMJ, specifically Article 36, which requires procedures established for military commissions to be generally uniform with the procedures established for trial by courts-martial. This was a somewhat obscure article in the UCMJ, primarily because no military commission had ever been established subsequent to the UCMJ's enactment in 1950. Nonetheless, Justice Kennedy concluded that, through Article 36, Congress had placed legitimate limits on the discretion of the president acting as Commander-in-Chief to create military commissions. Justice Kennedy then concluded that the procedures the President and his subordinates established were inconsistent with this statutory mandate, and that therefore the President had exceeded the scope of his power as commander-in-chief by acting contrary to the express will of Congress.

Justice Kennedy's opinion in the decision is a clear invocation of Justice Jackson's lowest ebb of executive power. As Jackson noted, when the President acts contrary to the express or implied will of Congress, his action can be sustained only by concluding that it is based on the unilateral power vested in the president by Article II of the Constitution. Because Justice Kennedy concluded that the procedures for trial of alleged war criminals were a matter of shared constitutional power—the power vested in Congress to make rules for the land and naval forces and captures on land and sea, and the power vested in the president as commander-in-chief—the president could not prevail against the express will of Congress.

Question for Discussion:

Contrast Justice Kennedy's opinion with that of Justice Thomas and highlight the issues relevant to the three-tier approach to presidential power and separation of powers.

- For Justice Thomas, the creation of the military commission, selection of charges, and procedures for trial by military commission were all valid exercises of the president's unilateral power as commander-in-chief. Accordingly, unlike Justice Kennedy, Justice Thomas concluded that even assuming the president acted contrary to the UCMJ, the conflict between the statute and the order issued by the president must be resolved in favor of the order.

- Contrasting these two interpretations of the validity of the president's military order within the constitutional framework is a useful illustration of both the three-tier concept, and the consequence of a determination that a presidential decision is an exercise of a power vested exclusively in the Executive by Article II. Although Justice Thomas's opinion was in the minority, it provides an opportunity to remind students that the conclusion that executive action conflicts with the express or implied will of Congress does not *ipso facto* lead to the conclusion that the action is constitutionally invalid. Instead, *Hamdan* reflects the bifurcated analysis that must be conducted within Justice Jackson's three-tier framework. First, there must be determination of the relative consistency or inconsistency between presidential action and the will of Congress. Second, where there appears to be inconsistency there must be subsequent analysis of the source of the authority invoked by the president and whether that authority is sufficient to prevail against the will of Congress.

III. Congress's War-Making Powers

A. The Military Commissions Act (MCA) can be a useful vehicle to explore the exercise of enumerated legislative powers.

In the aftermath of the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006, which has subsequently been amended as the Military Commissions Act of 2009. This statute provides for the prosecution of unprivileged enemy alien belligerents before a military tribunal currently convened at Guantánamo Bay, Cuba. The statute was a direct reaction to the *Hamdan* decision invalidating the original military commission created by President Bush. According to the MCA, Congress acted pursuant to its authority in Article I of the Constitution. The MCA therefore provides a useful vehicle to explore the various national security powers vested within Congress by Article I.

The most obvious starting point is to analyze the Article I provisions that vest Congress with the authority to enact such legislation. First is the grant of authority to define and punish offenses in violation of the law of nations, which raises some complicated issues vis-à-vis the MCA. If Congress did in fact rely on this vested authority, then ostensibly the subject matter jurisdiction created by Congress in the MCA should be restricted to violations of the laws and customs of war and perhaps other international law and norms. Another potential source of congressional authority for the creation of the military commission is the "captures" clause of Article I. Whether Congress is authorized to provide for the criminal sanction of individuals captured by the United States during periods of armed conflict through the "captures" clause is uncertain. The "necessary and proper" clause is perhaps the most significant provision of Article I in relation to this exercise of congressional power. This clause becomes particularly significant in relation to the question posed earlier in this discussion, namely whether the MCA provided for the criminal prosecution before a military court of offenses that do not fall within the category of international law violations. If this is true, then Congress has effectively used the MCA to create an Article I criminal tribunal for the prosecution of offenses that do not fall under the traditionally very narrow scope of authority vested in military tribunals (violations of the laws and customs of war).

Questions for Discussion:

1. Review the offenses established in the MCA and assess whether these offenses define violations of international law or instead reflect domestic criminal proscriptions.

- Determining that certain offenses do not fall within the category of international law violations raises a difficult question of whether Congress exceeded its constitutional authority by vesting a military tribunal with jurisdiction over what are in essence domestic criminal violations. However, it also raises an equally difficult issue of the scope of the "define and punish" authority. One theory is that this provision of Article I simply allows Congress to codify in criminal statute well-established prohibitions of international law. However, an alternate interpretation is that Congress is granted plenary authority to determine what it believes qualifies as a violation of the law of nations and then provide for criminal sanction of such violations. This is an issue that has yet to be resolved in military commission litigation, but certainly offers a valuable thought experiment for students assessing the

legitimacy of Congressional action in the realm of national security.

2. **The disposition of individuals captured by the United States certainly seems related to the "captures" clause of Article I. Does this clause provide additional constitutional authority for the creation of the military commissions?**

- The emerging government theory of subject-matter jurisdiction for the military commissions reflects an amalgamation of powers derived from the Constitution. The government has recently asserted that military commissions reflect a legitimate exercise of the aggregate "war powers" of the government (not merely the Executive Branch). Accordingly, the captures clause is one of a number of enumerated powers considered an important ingredient in this amalgamation. It is unlikely, however, that the captures clause itself provides authority for the use of military commissions.

3. **What limits, if any, exist on Congress' authority to create tribunals to effectuate vested powers of the government? The "necessary and proper" clause provides the constitutional foundation for other Article I courts, such as the Court of Claims, bankruptcy courts, and immigration courts. Does this authority extend to criminal courts? Is it "proper" for Congress to vest a non-Article III tribunal with criminal adjudicative powers?**

- The Supreme Court has long recognized and endorsed the use of such Article I courts for the armed forces, an authority expressly vested in Congress by Article I. The court has also approved of the use of military tribunals as venues for the prosecution of violations of the laws and customs of war, a customary incident of the power to wage war vested in the government. However, there does not seem to be any precedent for the use of non-Article III courts to adjudicate criminal misconduct that falls outside either of these narrowly defined categories. Accordingly, the MCA provides an opportunity to contemplate the limits of Congress's authority to create specialized courts for criminal adjudication of offenses such as terrorism, or perhaps in the future, crimes such as piracy, organized crime, and other offenses deemed a threat to national security.

B. Hamdi, Boumediene, *and Due Process*

It is an axiom of U.S. constitutional jurisprudence that no individual should be denied life, liberty, or property without due process of law. In the context of national security issues, however, the predicate question of what process is due has become increasingly central to the application of this axiom. Furthermore, substantive due process imposes certain limitations on the basis asserted by the government for such deprivations, irrespective of the process provided. The challenge of identifying and complying with substantive and procedural due process requirements in the context of vital national security decision-making is best illustrated by the Supreme Court's first "war on terror" decision, *Hamdi v. Rumsfeld*.

Hamdi involved a challenge to the legality of the preventive detention regime President Bush established in the wake of the September 11th terror attacks. Military Order Number One, the same military order the President used to create military commissions, also directed the Secretary of Defense to establish a long-term detention facility at Guantánamo Bay, Cuba for the preven-

tive detention of captured members of Al Qaeda and the Taliban. Hamdi, captured in Afghanistan by Northern Alliance forces and turned over to U.S. forces, found himself as one of the original detainees at Guantánamo. Following his arrival at Guantánamo, U.S. interrogators learned that Hamdi had actually been born in the United States and, as a result of his U.S. citizenship, did not fall within the category of individuals subject to detention at Guantánamo pursuant to the President's order. Accordingly, Hamdi was moved to a military confinement facility in Charleston, South Carolina. Nonetheless, the substantive basis for his detention was not altered: once designated an unlawful enemy combatant, his detention was based on the customary law of war principle of military necessity.

Hamdi's challenge reached the Supreme Court in 2004. The court was confronted with two fundamental questions. First, could a U.S. citizen be detained without charge, trial, or conviction based on a determination that the citizen was an enemy combatant? Second, if detention of enemy combatants without charge or trial comported with substantive due process, to what procedural rights, if any, is such a citizen entitled? Underlying these questions, at the core of the *Hamdi* decision, is the application of the due process clause in the context of armed conflict.

The next issue the Court addressed proved equally important to the ongoing preventive detention regime adopted by the United States: what process are these detainees due? Of course, it is important to emphasize that the Court was dealing with U.S. citizens. However, this offers the students a good opportunity to gain insight into how the proverbial national security sausage is made. Students should recognize that compliance with the standards required for a U.S. citizen detainee would be viewed by the Executive as a virtual ticket to approval for standards applied to alien detainees. Indeed, this is exactly how the detention story played out after *Hamdi*, when the Department of Defense implemented procedures responsive to the decision for the alien detainees held in Guantanamo.

What process was Hamdi due? The government asserted that because Hamdi had been designated an enemy combatant by Executive Branch officers, he had received all the process he was due. There certainly is merit to this argument. If the legal basis for Hamdi's detention was, as the Court noted earlier in the opinion, the laws and customs of war, then historically the determination of who is subject to detention to prevent a return to hostilities has been a uniquely executive function. Although there were several habeas decisions related to the capture and detention of enemy personnel during World War II, prior to *Hamdi* the Court had consistently deferred to the Executive in such matters. This history was unpersuasive for a majority of Justices in the *Hamdi* decision.

Understanding this aspect of the decision warrants discussion of the traditional process for determining who is subject to detention as a prisoner of war.

Determining Status and Detention During Armed Conflict

Articles 4 and 5 of the Third Geneva Convention Relative to the Treatment of Prisoners of War—applicable during international armed conflict—provide the framework for determinations of detention during armed conflict. Article 4 sets forth the categories of persons entitled to prisoner of war status:

** members of the regular armed forces;
** members of volunteer militia or organized resistance groups belonging to a party to the conflict who wear a fixed emblem or sign, are commanded by a person responsible for his subordinates, carry their arms openly and follow the laws of war;
** members of armed forces of a government not recognized by the detaining power;
** participants in a levee on masse

These categories represent status-based presumptions that members of an enemy belligerent force represent a continuing threat and therefore are subject to incapacitation until the termination of hostilities.

Article 5 mandates that if there is doubt whether persons captured during armed conflict fall into the categories above, such persons are entitled to determination of status by a competent tribunal (although Article 5 does not indicate how such doubt arises, leaving it to the detaining state to determine whether such doubt exists. In contrast, Additional Protocol I obligates a detaining state to conduct an Article 5 hearing whenever the captured individual claims POW status and the state is unwilling to grant that status). Army Regulation 190-8 implements U.S. obligations under Article 5 of the Third Geneva Convention to provide a "tribunal" to determine whether a captive qualifies as a prisoner of war when that status is in doubt.

Although the Geneva Conventions and Additional Protocols do not contain specific provisions regarding detention or combatant status in non-international armed conflict and there is no combatant or POW status, detention authority in non-international armed conflicts stems directly from the principle of military necessity and is a fundamental incident of waging war. Domestic law governs the parameters of detention, as informed by customary humanitarian law and (in the view of some states) international human rights law.

The status-based presumptions inherent in the law of war were central to the Supreme Court's *Quirin* decision in 1942, the key precedent on which the *Hamdi* Court relied. Application of this presumption is well settled in the context of inter-state armed conflicts, conflicts to which the Third Geneva Convention (treatment of prisoners of war) applies and provides definitions for determining who falls within the presumption. However, the Court's rejection of the government's

argument to simply extend the same deference applicable in "traditional" war to the "war on terror" was in large measure due to the uncertainties associated with defining who falls within the category of detainable captive. Accordingly, the Court invoked the seminal procedural due process case *Matthews v. Eldridge* to strike a balance between the legitimate need of the government to efficiently process captives destined for detention and the liberty interests of the captives. The Court concluded that at least for U.S. citizens, summary detainability determinations by the Executive did not provide sufficient procedural protections for the individual. Instead, the minimum acceptable process required a neutral decision-maker, notice of the basis for detention, and a meaningful opportunity to be heard. In a somewhat ironic aspect of the decision, the Court then cited the process included within the U.S. Army Regulation on detention operations as an example of the type of minimum process that would satisfy this requirement. By citing AR 190-8, the Court effectively indicated that had the U.S. complied with the requirements of Article 5 from the outset of the detention process at Guantanamo, the Court almost certainly would have endorsed that process.

Students can use this aspect of the decision to gain understanding of the implementation of international legal obligations through military service regulations. This also provides the essential backdrop to explaining to students why the Department of Defense created the Combatant Status Review Tribunals following the *Hamdi* decision. These tribunals were effectively identical to the tribunals the United States would have created pursuant to Article 5 of the Third Geneva Convention. However, because the United States continued to refuse to acknowledge that individuals captured in the context of the "war on terror" fell within the scope of a prisoner of war convention, the solution was to adopt a review tribunal analogous to those required by Article 5 without characterizing them as Article 5 tribunals. The CSRT, as it would come to be known, was therefore directly responsive to the *Hamdi* suggestion that following the process established in AR 190-8 would satisfy the requirements of the due process clause for U.S. citizens characterized as enemy belligerents, and by implication any requirements imposed by the due process clause for aliens detained pursuant to the same characterization.

Boumendiene v. Bush is the logical extension of *Hamdi*. In *Boumediene*, the Court confronted the issue of whether alien enemy combatants detained at Guantánamo could challenge their detention as a violation of due process through a writ of habeas corpus. *Boumediene* obviously involves significant issues related to the authority of Congress to suspend the writ of habeas corpus, and the scope of the constitutional privilege of habeas corpus. The rights the consolidated petitioner sought to invoke in *Boumediene* included due process protections. As a result, the ruling in the case extending the privilege of habeas corpus to these petitioners also extended the protection of due process to aliens captured by the United States in the context of what the Executive determines to be an armed conflict, held outside the sovereign territory of the United States, having been designated by a process that certainly satisfies the requirements of the Hamdi decision.

Questions for Discussion:

1. **The various opinions of the Hamdi decision provide a fascinating insight into the different perspectives of members of the Supreme Court. Dissect the opinion in order to analyze the lineup of these justices regarding the following questions:**

   a. Is preventive detention of captured enemy belligerents a legitimate exercise of government power?

b. Is the permissibility of such detention predicated on statutory authority, or is the President vested with the inherent authority to order such detentions during war *de jure* and/or war *de facto*?
c. Are individuals subject to preventive detention entitled to any procedural rights?
d. If so, what process are they due?

- A majority of justices in the *Hamdi* decision concluded that preventive detention of enemy belligerents is a necessary incident of waging war. Accordingly, they held that wartime preventive detention of a captured enemy belligerent without charge or trial—even if that belligerent is a U.S. citizen—is consistent with the substantive due process requirements of the Fifth Amendment. Justice Scalia, in contrast, staked out a fundamentally different position. For him, citizenship was a decisive element in the analysis of the substantive limitations on government power. Justice Scalia was willing to endorse the preventive detention concept adopted by the majority, but only for aliens. In contrast, U.S. citizens could be detained only pursuant to criminal process. Accordingly, he considered Hamdi's detention a violation of substantive due process. Justice Thomas had no difficulty endorsing preventive detention of enemy belligerents, irrespective of citizenship. His unwillingness to join the majority focused instead on his disagreement on the question of the procedural process such an individual is due. Justices Souter and Ginsberg concurred in the judgment, but rejected the conclusion that Congress had authorized Hamdi's detention when it enacted the Authorization for the Use of Military Force. For these two Justices, the stakes involved in preventive detention, even in wartime, required a clear statement of statutory authority, and not an implied authority such as an authorization to use military force.

- These various positions on the constitutional authority for the government to preventively detain wartime opponents, even those associated with a non-state enemy, provide an invaluable continuum of perspective on this issue. One suggested method of exploring this issue is to have students line up the number of justices who apparently would endorse preventive detention of alien opposition personnel pursuant to an express statutory authorization. Students will realize that based on *Hamdi*, the support for such detentions seems unanimous, a conclusion that often seems surprising considering the fractured nature of the opinion.

2. **What are the ramifications of – or challenges inherent in – extending status-based presumptions to hostilities between a state and non-state terrorist organizations where, unlike the inter-state armed conflict analogue, there are no defined categories of enemy operative?**

- Students should consider the competing interests related to this question. Without such an extension, the state may be severely inhibited in its ability to incapacitate an enemy operative. However, extension without consensus criteria for determining this status subjects the captive to potentially arbitrary power of the detaining state to deprive him of liberty indefinitely.

3. **Is *Boumediene* consistent with *Hamdi*?**

- *Boumediene* actually reflects an evolution of the Supreme Court's view of the extent of executive authority to authorize preventive detention of captives in this ongoing conflict. As Justice Scalia noted in his dissenting opinion, the *Boumediene* majority opinion was in fact inconsistent with *Hamdi* because, contrary to that earlier decision, the Court concluded that the minimum procedures created by the government pursuant to AR 190-8 were insufficient to protect the interests of the detainees. It seems relatively clear that IHL does not mandate judicial review of detention decisions related to captives during armed conflict. However, the *Boumediene* majority did not even reference IHL in its analysis. Students should recognize that instead, the majority opinion implicitly concluded that compliance with the minimal procedural protections established by IHL is insufficient to protect the liberty interests of the alien detainees held at Guantánamo subjected to what Justice Kennedy characterized as potential "generational detention."

4. **The Supreme Court has been unwilling to extend the reach of habeas corpus beyond the very limited category of alien detainees at Guantánamo. Other cases decided during the same period rejected extending the writ to detainees in an active theater of military operations (*Maqaleh v. Gates*), even to U.S. citizens (*Munaf et al v. Geren, Secretary of the Army*). Is the distinction between Guantánamo and other detention facilities sufficient to justify expanded procedural protections at the former for individuals who have been designated as enemy belligerents by the Executive Branch?**

- The *Boumediene* majority considered the "maturity" of the detention process at Guantanamo to be a significant factor in extending habeas protection to the alien detainees. A major debate between the majority and dissenting Justices related to whether the decision would interfere with ongoing military operations. For the majority, the attenuation between the battle-space and Guantanamo was sufficient to conclude that the decision would not significantly interfere with the exercise of military discretion.

- *Munaf* and *Maqaleh* suggest that to date, courts consider detention operations within a theater of active operations to be too close to those operations to permit the intrusion of federal judicial review. Whether this will withstand further scrutiny is unclear. Nonetheless, the Executive has continually enhanced the procedures for these detainee operations, perhaps as a preventive measure to avoid inviting more intense judicial scrutiny.

IV. President's Powers

AUMF v. Inherent Executive Power: Case Study between Bush and Obama Administrations and justifications

Contrasting the assertions of Executive authority in time of war made by President Bush and President Obama illustrates two fundamentally different conceptions of Article II war powers. These contrasting positions on the source of constitutional authority to detain and punish captured enemy belligerents highlight the consequence of the distribution of war powers between the two political branches. This provides an excellent opportunity for students to consider the scope

and extent of the commander-in-chief powers, and the extent to which those powers overlap with the war powers of Congress.

From the outset of the "war on terror", the Bush administration asserted that Article II provided the President with plenary power to manage and direct all aspects of military operations, including the authority to order the detention and trial of captured enemy belligerents. Every judicial challenge to the legality of these actions was met by this assertion. However, because Congress enacted an Authorization for the Use of Military Force (providing a related opportunity for students to consider the effect of such statutory authorizations in comparison with declarations of war) in September 2001, every court presented with this assertion avoided the question by concluding that the President's orders were based on the collective war powers of both political branches.

In the first detainee litigation filings following the inauguration of President Obama, the government revealed a revised position on the President's authority. The Department of Justice indicated to the D.C. Circuit Court of Appeals that the administration would no longer assert unilateral Article II power as the source of authority for detentions, instead relying on the AUMF. However, it is important to highlight for students that the Obama administration has never conceded that it *requires* statutory authority to detain enemy belligerents, and it remains unclear whether the President would resurrect his predecessor's theory should Congress repeal the AUMF.

Question for Discussion:

How does the division of powers between the executive and legislature frame the understanding of commander-in-chief powers?

- Students should also consider whether the authority provided by the "commander-in-chief" clause to detain captured enemy belligerents varies from one context to another. Does it provide plenary authority at the point of capture but a less expansive authority as the detention process matures? Students should also consider war powers cases from earlier in the nation's history, especially the *Prize Cases*. If, as these cases suggest, the existence of war *de facto* triggers the authority provided by the *jus belli*, is the President not justified in ordering the detention and trial of captured enemy belligerents based on the principle of military necessity? Finally, students should consider the precedential consequence of the positions of the two administrations within the context of Justice Frankfurter's historical gloss theory of constitutional interpretation. Might future presidents regret the Obama Administration's reliance on express statutory authorization?

V. Court's Powers

Hamdan *and the declaration of IAC/NIAC understanding for the U.S. despite President Bush's statement*

The Court has also taken an active role in national security decisions that impact the law of war and can be used to teach national security law principles. Although the Court normally gives deference to the Executive Branch on decisions concerning the conduct of armed hostilities,

Hamdan v. Rumsfeld illustrates that the Court will step in when it feels the need to do so.

Shortly after the 9/11 attacks, Alberto Gonzales, the Counsel to the President, and William Haynes, then Secretary of Defense, asked the Department of Justice (DoJ) Office of Legal Counsel (OLC) for an opinion on the law applicable to detainees who were captured in the ongoing conflict in Afghanistan. The OLC responded with a memo on 22 January 2002 entitled "Application of Treaties and Laws to al Qaeda and Taliban Detainees." In that memo, the OLC opined that IHL treaties such as the Geneva Conventions

> do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war. We further conclude that that President has sufficient grounds to find that these treaties do not protect members of the Taliban militia. This memorandum expresses no view as to whether the President should decide, as a matter of policy, that the U.S. Armed Forces should adhere to the standards of conduct in those treaties with respect to the treatment of prisoners.

This decision was based on a literal and historical reading of the Geneva Conventions. The four Geneva Conventions of 1949 share the same first three articles, which have come to be known as the "common" articles.

The Geneva Conventions and International Armed Conflict

Common Article 2 of the Geneva Conventions defines the Conventions' application:

> In addition to the provisions which shall be implemented in peacetime, 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.

This article was understood and generally accepted to mean that the full body of the law of war applied only to conflicts between High Contracting Parties, or states. Due to the universal acceptance of the Geneva Conventions, this has come to mean that the laws of war in their entirety, including the Geneva Conventions, apply only in state-on-state conflicts.

Common Article 3 and Non-International Armed Conflicts

At the urging of the International Committee of the Red Cross (ICRC) and others, the State parties who formulated the Geneva Conventions also agreed to extend minimal provisions of IHL to situations of internal armed conflict such as insurgencies or civil wars. States were hesitant to allow too much international law to invade on the domestic affairs of the State but agreed to the following in Common Article 3:

> 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 judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The OLC argued that "Common article 3's text provides substantial reason to think that it refers specifically to a condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory." Since the attack had been accomplished by a transnational terrorist group, it did not meet the requirements of Common Article 3.

The President responded on the 7th of February by determining that "common article 3 of Geneva does not apply to either al Qaeda or Taliban detainees because, among other reasons, the relevant conflicts are international in scope and common article 3 applies only to armed conflicts not of an international character."

After challenge by several detainees, this issue reached the U.S. Supreme Court in the *Hamdan* case. In addition to the legality of the military commissions, as noted above, *Hamdan* addressed the application of common Article 3 to detainees who had been captured as part of the U.S. armed conflict with al-Qaeda. The government argued, in accordance with the statement by OLC that had then been adopted by President Bush in his February 7th memo, that common Article 3 did not apply to this type of conflict. As the Supreme Court stated, "The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being 'international in scope,' does not qualify as a 'conflict not of an international character.' That reasoning is erroneous." The Court went on to argue, "The term 'conflict not of an international character' is used here in contradistinction to a conflict between nations. . . . In context, then, the phrase 'not of an international character' bears its literal meaning."

Question for Discussion:

How should the Court determine when it is appropriate to give deference to the Executive and when it is not?

- The decision in this case can be used to demonstrate that though the courts will generally give deference to the Executive on national security issues such as IHL, when they sense that there is a separation of powers problem or that the Executive may be overstepping its bounds, the courts have weighed in.

VI. Domestic Effect of International Law

A. Treaties, International Agreements and Other International Arrangements

1. Treaty Making

When discussing the domestic effect of international law, one of the topics often covered is the making and interpreting of treaties and other international agreements. Although numerous IHL treaties can be used to demonstrate the process and the give and take required between the branches of government, the Chemical Weapons Convention is one of the better examples.

The U.S. is a party to the 1993 *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction* (Chemical Weapons Convention or CWC). Parties to the Convention agree to "never under any circumstances" develop,

produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; use chemical weapons; engage in any military preparations to use chemical weapons; or assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention. Parties also agree to destroy all of their chemical weapons and production facilities.

Most controversial and important for teaching national security is Article I (5) which provides that "[e]ach State Party undertakes not to use riot control agents as a method of warfare." This language has caused a tremendous amount of consternation within the United States and internationally. Riot Control Agents are a useful tool for military operations, particularly in cases where crowd control is necessary, such as detention facilities or in areas of high civilian concentration. In many cases, the use of non-lethal riot control agents actually preserves life by giving the military a non-lethal method of dealing with civilians or detainees.

CWC Article II (7) defines a Riot Control Agent (RCA) as "[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure." This would include agents such as CS gas, as well as Oleoresin Capsicum (i.e., cayenne pepper spray), commonly used by U.S. military forces.

The use of RCAs during armed conflict (in war) is addressed in Executive Order 11850, promulgated by President Ford in 1975. E.O. 11850 provides that: "The U.S. renounces as a matter of national policy . . . first use of RCAs in war except in defensive military modes to save lives such as: [*"Such as" indicates the listed uses are intended as examples and not to be an exhaustive list*]

(a) Use of RCAs in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war;
(b) Use of RCAs in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided;
(c) Use of RCAs in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners;
(d) Use of RCAs in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations."

As these four example uses indicate, the U.S. made a strong distinction between battlefield use of RCAs in an offensive mode, which was prohibited, and more limited humanitarian uses in war, which were permitted. This distinction would eventually form the central tenet of the U.S. negotiating position during CWC Geneva Conference.

During the Geneva Conference at which the CWC was negotiated and signed, the U.S. remained fully committed to its view that the humanitarian uses of RCAs contemplated under E.O. 11850, permitting use of RCAs in war in defensive military modes to save lives, were consistent with the CWC prohibition in Article I (5).

The phrase "method of warfare" was apparently selected as compromise language precisely because constructive ambiguity surrounded the phrase and it lacked a commonly accepted defini-

tion. Intentionally chosen, it permitted various nations with divergent views, including the U.S. and U.K., to sign the treaty, an action perceived by the participants at the Conference as in all nations' best interests. It was on this basis that the U.S. delegation agreed to the textual language on RCAs and signed the CWC text in 1993. Clearly, the U.S. signature on the CWC document in Paris was made with the understanding that the treaty allowed for the use of RCAs as permitted under Executive Order 11850. The U.S. position was then and continued to be a subject of extensive international and domestic debate until the U.S. ratified the treaty in 1997. The ratification process between the U.S. Senate and the Executive Branch was also marked by considerable U.S. internal debate, which gets to the point of this section.

On 24 April 1997, the U.S. Senate published Senate Executive Resolution 75 – (Senate Report, S3373) Relative to the Chemical Weapons Convention, in which the Senate provided its advice and consented to ratification of the CWC, subject to 28 conditions. The Senate's Resolution provided in relevant part that:

"[Condition] (26) RIOT CONTROL AGENTS—(A) PERMITTED USES—Prior to the deposit of the United States instrument of ratification, the President shall certify to Congress that the United States is not restricted by the Convention in its use of riot control agents, including the use against combatants who are parties to a conflict, in any of the following cases:

(i) UNITED STATES NOT A PARTY—The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict (such as recent use of the United States Armed Forces in Somalia, Bosnia, and Rwanda).

(ii) CONSENSUAL PEACEKEEPING—Consensual peacekeeping operations when the use of force is authorized by the receiving state, including operations pursuant to Chapter VI of the United Nations Charter.

(iii) CHAPTER VII PEACEKEEPING—Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the United Nations Charter. . . .

(B) IMPLEMENTATION—The President shall take no measure, and prescribe no rule or regulation, which would alter or eliminate Executive Order 11850 of April 8, 1975. . . ."

Responding to the Senate's condition to its advice and consent to ratification, on 25 April 1997, the President submitted his Letter of Certification to the Senate. This letter states, "the resolution . . . contains 28 different Conditions covering virtually every issue of interest and concern. I will implement these provisions. I will, of course, do so without prejudice to my Constitutional authorities, including for the conduct of diplomatic exchanges and the implementation of treaties. A Condition in a resolution of ratification cannot alter the allocation of authority under the Constitution."

In a letter the same day to Congress, the President stated: "In accordance with the resolution of advice and consent to ratification of the Convention . . . adopted by the Senate of the United States on April 24, 1997, I hereby certify that . . . . In connection with Condition (26), Riot Control Agents, the United States is not restricted by the Convention in its use of riot control agents, including the use against combatants who are parties to a conflict, in any of the following cases: [restates those instances enumerated by the Senate in its resolution]. . . . In accordance with Condition (26) on Riot Control Agents, I have certified that the United States is not restricted by the Convention in its use of riot control agents in various peacetime and peacekeeping operations.

These are situations in which the United States is not engaged in a use of force of a scope, duration and intensity that would trigger the laws of war with respect to U.S. forces."

To clarify and implement U.S. policy on RCA employment under the CWC and E.O. 11850, the Chairman of the Joint Chiefs of Staff promulgated Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3110.07A, "Nuclear, Biological, and Chemical Defense; Riot Control Agents; and Herbicides" on 15 December 1998.

CJSCSI 3110.07A provides in relevant part: "The CWC prohibits the use of RCAs as a 'method of warfare.' U.S. policy distinguishes between the use of RCAs in war and in situations other than war. Approval to use RCAs is dependent on the situation in which their use is contemplated . . . .

"Use in War: The Armed Forces of the U.S. are prohibited from using any RCA or chemical herbicides in war unless the President approves such use in advance. The term "war" means a use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces.

"Peacetime Military Operations and Operations Other Than War: IAW [*Presidential Letter to the Congress of the U.S., 25 April 1997*] the U.S. is not restricted by the CWC in its use of RCAs, including against combatants who are a party to a conflict, in any of the following cases. . .: The conduct of peacetime military operations within an area of ongoing armed conflict when the U.S. is not a party to the conflict; Consensual peacekeeping operations when the use of force is authorized by the receiving state including operations pursuant to Chapter VI of the UN Charter; Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN Charter. The subparagraphs above do not constitute an exhaustive list of authorized occasions for peacetime use of RCAs. Other scenarios, such as maritime interdiction / interception operations or other sanctions enforcement, may have to be evaluated on a case by case basis to determine whether Presidential authority is required under Executive Order 11850."

Question for Discussion:

Does the Executive Branch's response to the Senate's Advice and Consent comport with the Constitution? Is the President bound by the stipulations placed on their Advice and Consent?

- This example highlights the interaction between the Senate and the President on Treaty issues. The President's actions appear to be taken as a matter of policy and do not reflect that he is bound by the stipulations placed on the advice and consent granted by the Senate. As students study this example, they will also gain an awareness of the implementation of an international law agreement into domestic policy and practice.

2. Other International Arrangements

The United States has a long practice of using other international arrangements as opposed to formal treaties or international agreements. Such arrangements can include arrangements between executive or other agencies that are not considered to invoke the "treaty making" authority of Congress. Such arrangements are highlighted by the case of *Dames and Moore v. Regan*, which is normally covered in a National Security Law Course. One of the questions that is normally addressed is the determination of whether a particular international arrangement should be a treaty, requiring the advice and consent of the Senate, or whether the Executive can make such an arrangement without involving the Legislative Branch. The recent agreement between the United States and Iraq on the status of U.S. forces is an excellent case study on the issue.

As WWII came to an end and the Cold War began, the U.S. and its allies realized that there was going to be a continuing need for military forces in Europe. In order to facilitate the stationing of foreign forces in the territory of another sovereign, the members of the North Atlantic Treaty Organization (NATO) promulgated the NATO Status of Forces Agreement (SOFA). The NATO SOFA is a comprehensive document that deals with numerous legal issues such as criminal jurisdiction, mail and postal rights, exchange of currency, licensing, wear of uniforms and carrying of weapons, etc. The provisions of the SOFA provide binding legal norms between the parties that govern their dealings concerning their forces.

At the time the NATO SOFA was signed, the President determined that it was a treaty and sent it to the Senate for its advice and consent, which the Senate provided. Similar SOFAs with Japan and Korea were also sent to the Senate for advice and consent. In contrast, the 2008 agreement with Iraq was not. Rather, it was concluded as an Executive Agreement despite calls from Senators that it was clearly a treaty and should be sent to the Senate.

A study of SOFA-like agreements provides little clarity on how the Executive Branch determines whether a particular SOFA is a treaty or not. The provisions of the more than 100 such agreements around the world are strikingly similar in their scope and substance. One substantive argument has been that the NATO, Japan, and Korea SOFAs all have mutual assistance provisions that commit the U.S. military forces to come to the aid of the other country in the event of an attack. The Iraq SOFA contains no such provision. There is also an argument that the NATO, Japan, and Korea SOFAs were some of the earliest agreements and that as a matter of practice, the Executive Branch has determined subsequently that such agreements do not need to go to the Senate.

Question for Discussion:

Who should make the determination of whether a particular international agreement is a Treaty that requires the Advice and Consent of the Senate? If it is the Executive Branch, should the Senate be able to contest that determination at the Supreme Court?

- The answer to this is constitutionally unclear. The current practice appears to be that the Executive Branch makes that determination and that the Senate can only raise objections and try to negotiate with the President but has no formal mechanism to trigger some kind

of review of that decision. In the end, it appears that this is a political decision that highlights the roles of the Executive and Legislative Branches and provides an excellent medium for discussion with students.

B. Customary International Law

Al Bihani and the Limits of Customary IHL Principles

An important recent development related to the relationship between international and domestic law in the context of armed conflict is the D.C. Circuit Court of Appeals decision in *Al-Bihani v. Obama*. Al-Bihani challenged the legality of his detention as an unprivileged belligerent by asserting, *inter alia*, that as a cook for a volunteer group associated with the Taliban he did not qualify as an enemy combatant, and that even if he had been an enemy combatant at the time of his capture in 2001, he was captured in the context of the international armed conflict between the United States and the Taliban regime of Afghanistan, which was now over. Because, al Bihani argued, the conflict with Afghanistan terminated at the time the Taliban regime was replaced by the Karzai regime, his detention was no longer justified by the laws and customs of war. More specifically, al Bihani asserted that pursuant to a customary principle of IHL that prisoners are repatriated upon termination of hostilities, he was entitled to release. In addition, he asserted that pursuant to IHL (*i.e.*, Article 5 of GPW), he was entitled to a hearing to determine whether he was qualified as a POW and to be presumed to be a POW until such hearing found otherwise.

The District Court rejected Al Bihani's request for habeas relief, concluding that his role in the volunteer group indicated he was a person who supported the Taliban and was therefore subject to the detention authority of the AUMF as interpreted by the Supreme Court's *Hamdi* decision. Al Bihani appealed to the D.C. Circuit Court of Appeals. That court affirmed the District Court's decision. Like the lower court, the D.C. Circuit concluded that Al Bihani's IHL-based arguments lacked merit. However, the opinion also addressed the role of the customary laws of war in relation to the authority of the government to detain individuals like Al Bihani pursuant to the AUMF. The D.C. Circuit acknowledged that, pursuant to *Hamdi*, the AUMF authorized detention as part of the "necessary and appropriate force" that the AUMF directed the President to use against al Qaeda terrorists and other groups. However, the Court concluded that IHL "as a whole" had not been implemented into U.S. law and was not a source of authority for U.S. courts. The D.C. Circuit saw no indication that IHL was an "extra-textual" limit on the President's power under the AUMF. Indeed, the Court added that IHL was too "contestable and fluid" in its application to actual events in order to be relevant. Therefore, the D.C. Circuit concluded that detainees like Al Bihani could not invoke IHL as a basis for challenging an exercise of detention authority. According to the opinion:

> Before considering these arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken . . . . Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, *see Hamdi*, 542 U.S. at 520, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's

> war powers. Therefore, putting aside that we find Al-Bihani's reading of international law to be unpersuasive, we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles. The sources we look to for resolution of Al-Bihani's case are the sources courts always look to: the text of relevant statutes and controlling domestic case law. Under those sources, Al-Bihani is lawfully detained …

Al Bihani requested *en banc* review, a request that the D.C. Circuit rejected. The decision rejecting the request included seven concurring opinions, and emphatically endorsed the original panel's rejection of customary international law as a source of constraint on the government's execution of war powers.

Judge Brown

There is no indication that the AUMF placed any international legal limits on the President's discretion to prosecute the war and, in light of the challenge our nation faced after September 11, 2001, that makes eminent sense. Confronted with a shadowy, non-traditional foe that succeeded in bringing a war to our doorstep by asymmetric means, it was (and still is) unclear how international law applies in all respects to this new context. The prospect is very real that some tradeoffs traditionally struck by the laws of war no longer make sense. That Congress wished the President to retain the discretion to recalibrate the military's strategy and tactics in light of circumstances not contemplated by our international obligations is therefore sensible, and reflects the traditional sovereign prerogative to violate international law or terminate international agreements.

How does Judge Brown approach the role of Congress and the role of international law in the face of a transnational terrorist threat?

In his concurring opinion, Judge Kavanaugh acknowledged that although precedents from early in the nation's history did support such a role for customary international law, the Supreme Court's seminal *Erie* decision rejecting the notion of federal common law nullified any future relevance of customary international law.

Judge Kavanaugh

Relevance of customary law: "First, international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms. Congress and the President can and often do incorporate international-law principles into domestic U.S. law by way of a statute (or executive regulations issued pursuant to statutory authority) or a self-executing treaty. When that happens, the relevant international-law principles become part of the domestic U.S. law that federal courts must enforce, assuming there is a cognizable cause of action and the prerequisites for federal jurisdiction are satisfied. But in light of the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which established that there is no federal general common law, international-law norms are not enforceable in federal courts unless the political branches have incorporated the norms into domestic U.S. law. None of the international-law norms cited by Al-Bihani has been so incorporated into domestic U.S. law."

Congressional statutory authority trumps international sources of law: "Even if international law were a judicially enforceable constraint on the President's authority under the AUMF and even if international law prohibited detention of mere supporters of al Qaeda, Al-Bihani's argument that al Qaeda supporters cannot be detained would be unavailing. An enemy belligerent may be detained for the duration of these hostilities. *See Hamdi*, 542 U.S. at 518 (plurality opinion of O'Connor, J.) (interpreting scope of AUMF's detention authority). And in the Military Commissions Act of 2006 and the Military Commissions Act of 2009, Congress provided that the category of enemy belligerents includes those who 'purposefully and materially supported hostilities against the United States or its coalition partners.' A statute may of course override pre-existing statutes, including any statutes that incorporate international law. Therefore, as the panel opinion explained, the Military Commissions Act definitively establishes that those who purposefully and materially support al Qaeda may be detained for the duration of the hostilities, regardless of what international law might otherwise say about detention of such supporters."

Judge Kavanaugh then concluded that nothing in the AUMF indicated Congress intended to incorporate customary international law norms into the grant of authority to the President to wage war against al Qaeda. Accordingly, the meaning of the AUMF's grant of authority for the President to use "necessary and appropriate" force is not limited by the laws of war. Nor, according to Judge Kavanaugh, do the Geneva Conventions impose any limitations on the President (at least judicially enforceable limitations), because these four treaties are non-self executing. (It should be noted that statements by the Legal Advisor to the Department of State during the end of the Bush Administration suggest that the United States considers the core principles of IHL applicable during any armed conflict (even if the U.S. does not consider them reflective of customary law), which is consistent with the Department of Justice's indication in opposing *en banc* review in *al Bihani* that it did not endorse the District Court's assertion that IHL in no way limited the authority of the Executive.)

Questions for Discussion:

1. In the aftermath of *Al Bihani*, what is the controlling authority defining the scope of detention?

- Unless the Supreme Court chooses to review the *Al Bihani* decision, this rejection of customary international law as a controlling source of authority for defining the scope of legitimate detentions will control all subsequent habeas challenges in the D.C. Circuit. Furthermore, the MCA must now be treated as providing the controlling definition of enemy belligerent subject to *Hamdi's* preventive detention authority. The fact that providing material support to al Qaeda may not in fact justify the conclusion that the detainee is an enemy belligerent within the broader meaning of the customary international law of war will simply be irrelevant to the courts reviewing habeas petitions.

2. What are the long-term consequences of this decision for the applicability of international law in the U.S. if not reversed by the Supreme Court?

- Essentially, the government is now free from any constraints derived from the laws and customs of war, and need only convince reviewing courts that a petitioning detainee falls under the broad category of enemy combatant derived from an amalgamation of the AUMF and the various versions of the MCA. On the other hand, the decision suggests any attempt by the present Administration or a future Administration to exercise authority in connection with an armed conflict solely on the basis of IHL, without clear statutory authority that in some manner incorporated the provision or principles of IHL relevant to that exercise of presidential authority, could be overturned by the courts.

- Regardless of the D.C. Circuit's holding, however, the current Administration has not expressly abandoned its position that designating individuals who are part of, associated with, or supporting terrorist organizations as unprivileged enemy belligerents pursuant to the AUMF triggers the customary IHL authority to preventively detain, and the *Hamdi* court's IHL-based interpretation of the AUMF would appear to support that position.

VII. What is War?

A. War versus Law Enforcement.

In response to the terror attacks of September 11th, 2001 the U.S. invoked the full war powers of the nation. This response created a myriad of questions related to the definition of armed conflict, IHL applicability to counter-terror operations, and the extent of IHL obligations and constraints to the conduct of these operations. Many of these questions were highlighted in the litigation discussed above. However, the *prima facie* issue presented by this response was the intersection of international norms defining armed conflict and the authority of the United States to interpret those norms to meet its national security interests.

A full discussion of the pre-September 11th understanding of IHL applicability is unnecessary to understand this issue. Instead, it is sufficient to note for students that prior to the U.S. response,

it was almost universally accepted that IHL applied only to two distinct situations. First, armed hostilities between two sovereign states (known as a common Article 2 international armed conflict). Second, armed hostilities between a state and dissident forces fighting within the state (or dissident forces fighting among each other within a state) (known as a common Article 3 non-international armed conflict). The law had not contemplated armed conflict between a state and a transnational non-state enemy like a terrorist group.

Nonetheless, it is clear that the United States treated the attacks of September 11th as an act of armed conflict triggering IHL. Students should review the language used by President Bush in his Military Order Number One, and the language of the Authorization for the Use of Military Force, both of which emphasize this determination. Students should then consider how this determination was implicitly (if not explicitly) endorsed by the Supreme Court in *Hamdi* and *Hamdan* as the result of the Court's reliance on IHL principles to resolve the issues presented.

There are many international law experts who reject the armed conflict characterization for the struggle against transnational terrorism. Students should recognize that the armed conflict characterization was a clear marker by the United States that it would no longer confine its response to law enforcement principles, but instead use the expanded authority of armed conflict to disable, disrupt, and defeat the terrorist threat.

This discussion will allow the student to appreciate several important lessons derived from the U.S. military response to the attacks of September 11th. First, how the status of the U.S. as a sovereign member of the community of nations allows the United States to interpret international law in a manner contrary to the interpretations of other states. Second, how the doctrine of dualism will often result in judicial endorsement of these interpretations. Third, how the government accrues powers to achieve national security objectives by invoking international law principles. Fourth, whether the government should be bound by international law obligations when it asserts power derived from international law (in this regard, it is important to consider the discussion of *Al Bihani* above).

Question for Discussion:

Consider the authority of the United States to invoke international law based on its sovereign interpretation of that law, even when the interpretation conflicts with existing understandings. Why would the United States adopt such an unconventional interpretation?

- There is a fundamental difference between the authority of the state to respond to a threat during peacetime and during armed conflict. The following comparison might be useful to provide insight for students:

Peacetime Law Enforcement Principles	Armed Conflict Principles
Kill Permitted only as a measure of last resort based on individualized determination of threat	**Kill** Permitted as a measure of first resort based on a determination of enemy belligerent status
Incapacitate by Detention: Punitive Requires allegation of criminal misconduct, prompt trial, and conviction based on proof beyond a reasonable doubt; duration determined by appropriate sentence.	**Incapacitate by Detention: Preventive** Requires determination that individual is associated with enemy belligerent force, based on preponderance of the evidence, with no charge, trial, or conviction; continues until the termination of hostilities.
Criminal Sanction Process Trial by Article III courts for violations of established statutory proscriptions affording all federal constitutional and procedural rights.	**Criminal Sanction Process** Trial by ad hoc military tribunals convened pursuant to commander-in-chief and/or Article I authority for violation of IHL norms, affording contextually tailored procedural rights.

B. IHL versus Human Rights Law

This topic also lends itself to a discussion about the applicable law. If the President deploys military forces into an armed conflict environment, he/she must provide some guidance on what law to apply. Two bodies of law that are sometimes complimentary and sometimes conflicting are human rights law and IHL. The chart below highlights some of the principles that bring these two bodies of law into disagreement in an armed conflict situation.

Human Rights: Law of Peace	IHL: Law of War
Developed to prohibit Arbitrary Treatment of Citizens by State	Developed to Regulate the Conduct of Hostilities Between States
Presumption that Individuals Act on Their Own Volition	Presumption that Hostile Groups Act Pursuant to Leader's Will

Human Rights: Law of Peace	IHL: Law of War
Presumes Individuals Normally Comply with State Authority and Are Therefore Inoffensive	Presumes Members of Hostile Groups Intend to Inflict Harm on Opponent and are Therefore Presumed Innocent
Requires State Actor to Make Individualized Judgment to Support Deprivations of Life or Liberty	Authorizes Deprivations of Life and Liberty on Presumption of Offensiveness
Allows Only That Force Necessary to Restore the Status Quo: *Deadly Force in a Measure of Last Resort*	Allows for Application of Overwhelming Force: *Deadly Force as a Measure of First Resort*
Protects the *object of state violence* from excessive application of force	Protects *collateral victims* from excessive effects of lawful attack

(This chart is extracted from Geoffrey S. Corn, Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict, Journal of International Humanitarian Legal Studies, Volume 1, Number 1, October 2010, pp. 52-94).

VIII. Intelligence Operations Abroad

The use of the CIA and other intelligence and Government personnel who are not members of the armed forces to conduct military activities is an issue of national security law that has received much discussion recently. Title 50 of the U.S. Code authorizes the President to conduct certain intelligence activities and does not limit those activities to peacetime. However, title 10 of the U.S. Code governs the military and clearly places the responsibility to fight and win wars with the Department of Defense.

Despite this seemingly clear distinction between intelligence and military operations, in practice the distinction is not as clear. An area that clearly highlights this potential national security issue is the area of computer operations. In a recent event documented in the media, the CIA was using a particular terrorist web site to monitor and infiltrate terrorist organizations. DoD claimed that the CIA was actually hurting their operations and potentially costing the lives of U.S. military members. Over the CIA's objection, DoD shut the web site down via cyber operations as part of its armed conflict against al-Qaeda.

Question for Discussion:

How should the intelligence collection responsibilities be divided between the various Executive Agencies and the Military? Should Congress have a role in the resolution of this question or is this a matter for the President?

- This question highlights the potential conflicts between Executive Agencies and the military and provides an IHL illustration that can be used in conjunction with a discussion on wiretapping and other national security issues concerning the gathering of intelligence. Intelligence gathering is now conducted by many governmental entities and steps have recently been taken to try and centralize all of those disparate efforts, including the creation of the Office of the Director of National Intelligence. However, as long as separate report-

ing and funding chains exist, it is not likely that the ODNI will be able to "control" the overall intelligence effort as much as monitor and facilitate.

IX. Detention and Trial of Terrorists

Many National Security texts now discuss military detention and prosecution and include key IHL documents and information. Listed here is a non-exhaustive and somewhat condensed compilation of some of the key national security and IHL documents that could be used to discuss this topic.

A. Detention

The basis for IHL detention is found in customary international law and is confirmed in the U.S. Supreme Court decision in *Hamdi*. Detention is a power incident to the conduct of hostilities and applies to both combatants and civilians. The treatment of those detained is based in the Geneva Conventions and their Additional Protocols. Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) details who is granted the protections of the Convention and Article 5 details the procedure for determining the status of a person when that status is in doubt. Article 5 was the basis for President Bush's instigation of the Combat Status Review Tribunals. The remainder of the Convention details precise treatment standards.

The Fourth Geneva Convention Relative to the Protection of Civilian Persons (GCC) also contains a definition of who is covered by the Convention (Article 4) and has a number of provisions dealing with detaining civilians. For example, Article 78 codifies the authority to detain civilians who are considered a security risk. Subsequent provisions describe the details of that detention. These two Conventions are supplemented by the provisions of the 1977 Additional Protocol Relating to the Victims of International Armed Conflict.

In cases of non-international armed conflict, common Article 3 of the Geneva Conventions describes the treatment standard for detainees and the 1977 Additional Protocol Relating to the Victims of Non-International Armed Conflict, particularly Article 5, provides clarification and expansion.

The U.S. Supreme Court case of *Hamdan v. Rumsfeld*, as mentioned above, made clear that the treatment standard in Common Article 3 was the minimum standard for all terrorists detained in the armed conflict and the DoD issued a memo confirming this standard.

Question for Discussion:

How do IHL provisions for detention apply to detainees at Guantánamo? Is there a difference between basis for detention, conditions of detention, duration of detention, and review of detention?

- It appears that currently the justification for, condition, duration, and review of detention for those at Guantánamo all are based in a different legal paradigm. Congressional statute makes the factual justification for detention reviewable by U.S. federal courts, although

conditions of detention are non-reviewable in that forum. The conditions of detention are regulated by the Army field manual, which is an Executive Branch directive to the armed forces that incorporates a variety of IHL principles and rules. Nor is duration of detention regulated by statute. Instead, the Executive Branch has invoked IHL principles to determine the permissible duration of detention. In contrast, the standards for granting relief pursuant to judicial review of detention seems to be based on an amalgamation of IHL principles, an increasing body of judicial precedent related to detention, and consideration of statutes related to the war on terror.

B. Prosecution

Both the GPW, Articles 99-108, and GCC, Articles 64-77, contain detailed provisions on prosecution for detainees. The Additional Protocols also offer added content to the substance of these provisions. President Bush's Military Commission Order No. One was influenced by these prior IHL provisions but did not comport with them. It was declared unconstitutional by the U.S. Supreme Court in *Hamdan v. Rumsfeld*. Congress then promulgated the Military Commissions Act of 2006, which was amended by the Military Commissions Act of 2009 to respond to requests by President Obama.

Even the MCA 2009 does not contain all the guarantees that a combatant would receive under the Prisoner of War convention. However, it is significantly closer than the original Military Commission Order No. One. Under the GPW, detainees can only be tried "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." In the case of occupied territory under the GCC, civilians would be tried under domestic law by military courts established by the occupying power. There is no provision for trying civilians outside of their own territory because the GCC precludes the removal of civilians from the occupied territory. For civilians who are protected persons but not in occupied territory, the only applicable provision states that they will be treated as aliens in time of peace.

Another forum that has been discussed is trial under the U.S. federal court system. This would not be allowed under the GPW in the case of the U.S. because we do not use the federal courts to try our military members. The occupation courts would not apply and treating the detainees as aliens might get them into the federal court system depending on the alleged facts.

Question for Discussion:

Compare the provisions of the MCA with the provisions of the Uniform Code of Military Justice, the federal court system, and international criminal tribunals, consider the GPW or GCC and Additional Protocols, and determine the protections under each system.

- This chart provides a useful start point for this exercise:

Comparison Chart of Procedures and Rights for Persons Being Tried by Military Commissions, Courts-Martial, U.S. District Courts, and International Criminal Courts

Procedures and or Rights	Military Commissions Act 2009 Manual for Military Commissions	Uniform Code of Military Justice (UCMJ)	U.S. District Court	Nuremberg Trials (WWII)	International Criminal Courts
Presumption of Innocence	Defendant is presumed innocent	Same	Same	Not specified	Same
Burden of Proof	Burden of proof on government	Same	Same	Same	Same
Standard of Proof	Burden of proof is "beyond a reasonable doubt."	Same	Same	Not specified	Same
Right to Speedy Trial	Right to Speedy trial—arraignment in 30 days, assemble commission in 120; unknown for MCA	120 days after the earlier of referral of charges, restraint or entry on active duty	Within 70 days of indictment	"Expeditious"	Without undue delay
Right to Be Informed of Charges	Defendant must be informed of charges as soon as practicable	As soon as practicable	After indictment	Reasonable time before trial	Promptly and to provide adequate time for defense

(This chart was extracted from Jeffrey Addicott, Terrorism Law: Cases, Materials, Comments 127-8 (6th Edition 2011).)

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