

Defining Unlawful Enemy Combatants: A Centripetal Story

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SUMMARY

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I. INTRODUCTION

The assignment of unlawful enemy combatant status plunges an individual into a legal limbo relieved by few rights. Although the exact range of rights under U.S. law likely depends on citizenship and place of detention,¹ the Supreme Court has stated that all unlawful enemy combatants may, at a minimum, (1) be detained until the end of the conflict,² and (2) be punished for crimes associated with having taken up arms.³ Given the uncertain duration of the war against terrorism, identification as an unlawful enemy combatant could amount to a sentence of lengthy—perhaps life—imprisonment.

This essay examines the concept of unlawful enemy combatant as it has developed in the United States since 2001. It argues that the idea of enemy combatant oscillates uneasily between the poles of war and crime and international and domestic law. These tensions have resulted in a concept whose plasticity renders

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1. This is the subject of ongoing litigation. *See, e.g.*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195).

2. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

3. *Ex parte Quirin*, 317 U.S. 1, 34 (1942).

it unhelpful as a tool for legal regulation and whose indeterminacy vests vast discretion in the Executive.

The essay is divided into two parts. The first examines the history of the use of the term in the United States and the evolution of the legal process that accompanies an unlawful enemy combatant determination. The second considers the fractures between the law of war and the law of crime and between international and domestic law that have marked these developments.

II. EVOLUTION OF THE PROCEDURES AND PARAMETERS OF UNLAWFUL ENEMY COMBATANCY

Both the process through which an individual is labeled an unlawful enemy combatant and the definition of the term have changed several times since 2001. In the early post-2001 cases, the President asserted that “multiple layers” of executive branch review constituted the only process necessary for determining enemy combatant status.⁴ This vaguely described intra-branch review does not follow the procedures set out for determining combatant status by the Third Geneva Convention, which requires determination in contested cases be made by a “competent tribunal.”⁵ In *Hamdi*, the Supreme Court did not explicitly mandate that the Geneva Convention process be followed, but a plurality of the Court found that, at least for U.S. citizens, an alleged unlawful enemy combatant “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”⁶

After the *Hamdi* and *Rasul* decisions, the Department of Defense instituted the Combatant Status Review Tribunals (CSRTs) at Guantánamo Bay, Cuba that today serve as the primary mechanism for determining unlawful enemy combatant status. In the CSRT process, a panel of three U.S. military officers, not otherwise involved in the apprehension or detention of the alleged combatant, determines whether the detainee meets the definition of unlawful enemy combatant given in the CSRT policy.⁷ In this process, the detainee is provided a “personal representative,” but not a lawyer. The detainee may—but need not—participate in the hearing.

Although the President established the CSRT process without input from the legislative branch, Congress twice gave its implicit blessing to the CSRT scheme: once in the Detainee Treatment Act of 2005 (DTA) and again in the Military Commissions Act of 2006 (MCA). In each act, Congress determined that individuals who had appeared before a CSRT would have more limited appellate and habeas review than they would otherwise have received following the Supreme Court’s *Rasul* decision.⁸ In addition, Congress made few amendments to the pre-existing

4. *Hamdi*, 542 U.S. at 537.

5. This requirement forms the basis of one of the principal claims that the United States has violated the Geneva Conventions in the war on terrorism. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135 [hereinafter Geneva III].

6. *Hamdi*, 542 U.S. at 533.

7. Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense For Policy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba, July 14, 2006, available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

8. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e) [hereinafter DTA]; see also Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2636 (2006) [hereinafter MCA].

CSRT process, although it did insert a rule on the consideration of new evidence and regulated the use of statements derived from coercive tactics.⁹ Interestingly, neither the DTA nor the MCA provides that CSRTs constitute the exclusive method for determination of enemy combatant status,¹⁰ and it is unclear what rights, if any, individuals declared enemy combatants pursuant to some other process currently possess in the U.S. system.¹¹

While procedural protections surrounding the unlawful enemy combatant designation are important, it is in the debate over the definition of the concept itself that the tensions underlying the term are most apparent. Although the label has roots in some writing on the law of war, the phrase “unlawful enemy combatant” does not constitute a term of art in the mainstream law of war.¹² It does not appear, for example, in any of the major law of war treaties. Indeed, the drafters of the Geneva Conventions in 1949 and the Additional Protocols in 1977 consciously declined to “create a third status or class of persons known as ‘unlawful combatants’” in the treaties.¹³

The Bush Administration, however, chose an alternative conception of detainees in the war on terrorism, labeling all involved “unlawful enemy combatants.” The use of this term by the Administration after 2001 is undoubtedly due to the 1942 *Quirin* case, in which the Supreme Court endorsed the use of military commissions to try seven individuals accused of spying on behalf of Germany.¹⁴ Perhaps the Administration also sought to maintain its ability to target with military force individuals who would be classified as civilians under the Geneva Convention approach but could arguably be described as “unlawful enemy combatants” under *Quirin*.

In fact, one of the attractions of *Quirin* for an Administration intent on preserving flexibility was that the case did not actually define the contours of the “unlawful enemy combatant” category. The closest the Court got to a general explanation of unlawful enemy combatant status was phrased solely in consequential terms. It stated “[I]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise

9. DTA § 1005(a)–(b).

10. For example, the MCA simply states that “[n]o court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” MCA § 7(a), *supra* note 8. The reference to “determined by the United States” does not explicitly reference the CSRT process, leaving open the possibility that other methods of determination are legally permissible. *Id.*; see also Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. INT’L CRIM. JUST. 10 (2007).

11. See Jennifer K. Elsea & Kenneth R. Thomas, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* 19 (Congressional Research Service Report for Congress, July 25, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33180.pdf> (stating that the MCA “expands the DTA to make its review provisions the exclusive remedy for all aliens detained as enemy combatants anywhere in the world, rather than only those housed at Guantánamo Bay, Cuba. It does not, however, require that all detainees undergo a CSRT or a military tribunal in order to continue to be confined. Thus, any aliens detained outside of Guantánamo Bay might be effectively denied access to U.S. courts.”).

12. Mark David “Max” Maxwell & Sean M. Watts, *‘Unlawful Enemy Combatant’: Status, Theory of Culpability, or Neither?*, 5 J. INT’L CRIM. JUST. 19, 19–20 (2007); Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?*, 38 ISR. L. REV. 378, 385 (2005).

13. Maxwell & Watts, *supra* note 12, at 22.

14. *Ex parte Quirin*, 317 U.S. at 24–25.

subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”¹⁵ In *Quirin*, the Court determined that the petitioners were properly found to have been unlawful combatants because they had entered the United States, acting under the direction of the armed forces of the enemy, for the purpose of destroying property used in prosecuting the war, and did not wear a uniform.¹⁶ Given that the Court assumed that all the petitioners were actual members of the German army, the decision to treat them as combatants seems unproblematic.

Like *Quirin*, *Hamdi* was an easy case from the perspective of the threshold issue of the definition of enemy combatant. Northern Alliance forces were “engaged in battle” with the Taliban when Hamdi’s Taliban unit surrendered. Hamdi himself was allegedly carrying a Kalishnikov assault rifle at the time of his surrender. Hamdi’s direct participation in hostilities at the time of his capture deprived him of civilian status under the Geneva Conventions. Indeed, in its decision, the Court repeatedly emphasized Hamdi’s direct participation in hostilities on a foreign battlefield.¹⁷

The *Hamdi* plurality, therefore, did not need to confront the potentially wide gulf between the Geneva Conventions approach and that of the Administration’s use of the term “unlawful enemy combatant.” The plurality declined to provide much content to the category, simply noting that “[t]here is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.”¹⁸ It ultimately crafted its own definition for purposes of the case and limited its decision to individuals “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States.”¹⁹ Other parts of the opinion are even narrower, seeming to limit the definition of enemy combatant to individuals who fought against the United States in Afghanistan.²⁰ The Supreme Court has not, to date, revisited the concept of unlawful enemy combatants, leaving its further development up to the lower courts, the President, and Congress.

The CSRT procedure promulgated by the Executive Branch in 2004 following the *Hamdi* and *Rasul* decisions constituted the Administration’s first official definition of the concept of unlawful enemy combatant. The CSRT policy declares an unlawful enemy combatant to be someone who “was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”²¹ This definition, while clearly based on the formulation used in

15. *Id.* at 31.

16. *Id.*

17. *See Hamdi*, 542 U.S. at 522 n.1 (stating that “the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield . . .”).

18. *Id.* at 516.

19. *Id.* at 526.

20. *Id.* at 516 (stating that the Government “has made clear, however, that, for purposes of this case, the ‘enemy combatant’ that it is seeking to detain is an individual who, it alleges, was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States” there”) (citing Brief for Respondents 3).

21. Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense For Policy, Combatant Status Review Tribunal Process, July 14, 2006, available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

Hamdi, represents a potentially significant expansion of the concept because of its reference to forces “associated” with al Qaeda. In addition, it explicitly includes—but does not limit the definition to—anyone who has “committed a belligerent act” or who has “directly supported hostilities in aid of enemy forces” without further defining the key criteria of belligerent act, direct support, or hostilities.

In litigation over enemy combatants, the Executive branch has gone significantly further. As one court observed,

counsel for the [United States] argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: “[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,” a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.²²

The court in that case concluded that the sweeping scope of the Executive Branch’s definition of enemy combatant may constitute a violation of the due process clause of the U.S. Constitution.²³

Until the passage of the Military Commission Act, Congress had not weighed in on the proper scope of the definition of unlawful combatant, other than its oblique affirmation of the CSRT process in the DTA. As ultimately enacted into law, the MCA provides the broadest formal definition of unlawful enemy combatant to date. In fact, the Act effectively provides two definitions: one substantive and one process-based.

The term ‘unlawful enemy combatant’ means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.²⁴

The MCA’s definition of “*lawful* enemy combatant” is loosely based on the definition of prisoners of war used by the Third Geneva Convention. The changes made to the treaty text in the MCA seem clearly designed to ensure that the Taliban forces would not qualify for lawful enemy combatant status, even though they have a

22. In re Guantánamo Detainee Cases, 355 F.Supp.2d 443, 475 (D.D.C. 2005) (citations omitted).

23. *Id.* at 475–76.

24. MCA § 948a(1)(A)(i)–(ii), 120 Stat. at 2601.

strong claim to prisoner-of-war status under the text of the Third Geneva Convention itself.²⁵

That the MCA definition of unlawful enemy combatant represents a significant expansion—even over the broad definition used by the CSRTs—is self-evident. It includes anyone who has “purposefully and materially supported hostilities against the United States or its co-belligerents” and anyone found before, on, or after the date of enactment of the MCA (which seems to cover all the relevant temporal territory) to be an unlawful enemy by any “competent tribunal” established by the Department of Defense or the President.²⁶ The phrase “competent tribunal” is not otherwise defined, but explicitly extends beyond CSRTs. The reference to “material support” is particularly intriguing because it has no precedent in the international law of war but does have a close analogue to a provision of the U.S. federal criminal code. This definition requires a high mental state and perhaps some causal relationship—requiring that the individual have purposely supported hostilities and that this support be “material.”²⁷

Interestingly, the MCA’s definition of unlawful enemy combatant fluctuated dramatically in the drafts of the MCA considered by the Congress between the first, presented by Senator Frist, on September 9 and the bill’s passage on September 29. Frist’s version would have defined an unlawful enemy combatant as anyone “part of or affiliated with . . . any international terrorist organization, or associated forces—engaged in hostilities against the United States or its co-belligerents; in violation of the law of war;” anyone who “committed a hostile act in aid of such a force or organization so engaged;” or anyone who “supported hostilities in aid of such a force or organization so engaged.”²⁸ This definition, encompassing anyone who is merely “affiliated” with a terrorist organization or any “associated forces,” constitutes the broadest of all the definitions contemplated by the Congress and did not ultimately survive the debate. It also does not include the language about material support, which is such a striking feature of the final legislation.

The version introduced on behalf of the Senate Armed Services Committee, described as the “compromise bill” in the debate, would have defined unlawful enemy combatant as “an individual engaged in hostilities against the United States who is not a lawful enemy combatant.”²⁹ In this bill, “lawful enemy combatant” is defined in the terms used in the MCA as ultimately enacted. The definition of unlawful enemy combatant in the compromise bill, while not conforming precisely to the international law definition provided by the Geneva Conventions, is the closest to the international law standard of all the formulations formally considered by the

25. The MCA definition requires, for example, that lawful combatants be “a member of the *regular* forces of a State party engaged in hostilities against the United States,” whereas Geneva III states that the individual must be a member of the “armed forces of a Party to the conflict.” In addition, the Geneva Convention adds that prisoner-of-war status should also be afforded to “members of militias or volunteer corps forming part of such armed forces” without reference to further qualification. The Geneva Convention adds four supplemental criteria (responsible command, fixed sign, carrying arms openly, and compliance with the laws of war) only for *other* “militias and members of other volunteer corps,” whereas the MCA adds the four supplemental criteria for *any* “member of a militia or volunteer corps.” Compare Geneva III, *supra* note 5, art. 4 with MCA § 948a(2), 120 Stat. at 2601.

26. MCA § 948a(1)(A)(i)–(ii), 120 Stat. at 2601.

27. For a view that there is no causal requirement, see George P. Fletcher, *On the Crimes Subject to Prosecution in Military Commissions*, 5 J. INT’L CRIM. JUST. 39, 45 (2007).

28. S. 3861, 109th Cong. § 4 (as introduced by Sen. Frist, Sept. 6, 2006).

29. S. 3901, 109th Cong. § 4 (as introduced by the S. Comm. on Armed Services, Sept. 14, 2006).

Congress. The compromise bill was apparently scuppered at the behest of the White House.³⁰

The earliest version of the material support language appears to be in the bill introduced in the House by Representative Duncan on September 25, 2006, just four days before the bill's final passage.³¹ The debate in the House gives little indication about why the material support language was added. Press reports indicate that the broader definition was viewed as necessary to ensure that Hamdan, the subject of the Supreme Court litigation striking down the original military commissions, could be tried by the new commissions, as well as detainees accused of making bombs.³²

Admittedly, the relevance of the MCA's definition of unlawful enemy combatant is uncertain. The MCA itself provides that its definitions apply "in this chapter" and presumably the Executive is free to argue for an alternative meaning in contexts other than the military commissions themselves. Nevertheless, as the only formulation to have the imprimatur of both the President and the Congress, the definition of unlawful enemy combatant used in the MCA will no doubt be influential in future litigation over the treatment of detainees in the war on terrorism.

It is possible that the definition of unlawful enemy combatant may change yet again. There will doubtless be further litigation in the courts on the propriety of the term as used in the CSRTs and in the MCA. Congress may also amend the MCA. Immediately after the November 2006 elections, Senator Dodd introduced a bill that would define unlawful enemy combatant as "an individual who directly participates in hostilities as part of an armed conflict against the United States who is not a lawful enemy combatant."³³ This definition is the narrowest of those to date (with the exception of the definition used by the plurality decision in *Hamdi*) and the closest to the framework used in the Geneva Conventions.

This history demonstrates the shifting understandings of the category of unlawful enemy combatant in the United States—particularly since 2001. While many legal and political cross-currents have produced this turbulence, this essay argues that two are particularly noteworthy: the tensions between law and crime in the war on terrorism and the conflicts between international law principles and domestic law exigencies.

30. R. Jeffrey Smith, *Detainee Measure to Have Fewer Restrictions*, WASH. POST, Sept. 26, 2006, at A1.

31. H.R. 6166, 109th Cong. § 948(a)(1)(i) (as introduced in the Comm. on Armed Services on Sept. 25, 2006).

32. Julian E. Barnes & Richard B. Schmitt, *Tribunal Bill Sets Up an Ironic Legal Limbo*, L.A. TIMES, Sept. 30, 2006, at A14.

33. S. 4060, 109th Cong. § 2 (as introduced by Sen. Dodd on Nov. 16, 2006). Dodd's bill further provides that "the term is used solely to designate individuals triable by military commission under this chapter."

III. UNLAWFUL ENEMY COMBATANTS AS A QUESTION OF WAR, CRIME, AND SOURCE OF LAW

A. *The Law of War*

The U.S. government's decision to cast its fight against terrorism as a war rather than a prosecution of transnational crime represented a break from the traditional approach to terrorism. War has long been seen as the province of sovereign states, and governments have sought to deny terrorists the status of warriors by describing them as criminals. Indeed, most assumed that the law of war simply did not apply to terrorist activities. The United Kingdom, for example, stated when ratifying Additional Protocol I that "it is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."³⁴ The vehemence with which Kalid Shaikh Mohammed described himself as a military commander at his CSRT represents precisely the kind of claim the traditional treatment of terrorism was designed to forestall.³⁵

Nevertheless, the U.S. administration has responded to the events of 2001 by using military force, and this approach has been endorsed—at least in part—by all three branches of the U.S. government,³⁶ as well as by the United Nations Security Council,³⁷ other international organizations³⁸ and nation-states.³⁹ In the debate over the MCA, Senator McConnell declared that "[w]e are a Nation at war . . . We are not conducting a law enforcement operation against a check-writing scam or trying to foil a bank heist."⁴⁰ The President has consistently claimed authority under the commander-in-chief powers of the U.S. Constitution and justified his actions with respect to the laws of war. The Supreme Court's endorsement of the treatment of

34. Letter from Christopher Hulse, HM Ambassador of the U.K., to the Swiss Gov't (Jan. 28, 1998), available at <http://www.icrc.org/ihl.nsf/NORM/OA9E03F0F2EE757CC1256402003FB6D2?OpenDocument>; see also L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 56 (2d ed. 2000) ("[A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism . . . are outside the scope of IHL.").

35. Mark Mazzetti & Margot Williams, *In Tribunal Statement, Confessed Plotter of Sept. 11 Burnishes Image as a Soldier*, N.Y. TIMES, Mar. 16, 2007, at 15.

36. Authorization for Use of Military Force, Pub. L. 107-140, 115 Stat 224 (2001) (codified at 50 U.S.C. § 1541 (2002)) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.") [hereinafter AUMF]; *Hamdi*, 542 U.S. at 521-22 (concluding that the AUMF authorized the establishment of military commissions).

37. See S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (Sept. 28, 2001).

38. See Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001) (recognizing the members' commitment to collective self-defense), available at www.nato.int/docu/pr/2001/p01-124e.htm; Press Release, Organization of American States, Terrorist Attacks on United States are an Attack on All Countries of the Americas, Foreign Ministers Declare, (Sept. 21, 2001) (OAS foreign ministers noting the same), available at <http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm>.

39. See Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT'L L. 905, 909 (2002).

40. 152 CONG. REC. S10402 (daily ed. Sept. 28, 2006) (statement of Sen. McConnell).

unlawful enemy combatants hinges directly on the Authorization to Use Military Force and the traditional practices of the law of war.⁴¹

In many ways, however, the Bush Administration's legal strategy with respect to the war on terrorism moves freely between the law of war and criminal paradigms, seeming to choose whichever imposes the fewest legal restrictions. This phenomenon is most obvious when considering the classification of detainees exemplified by the definition of unlawful enemy combatant.

A fundamental principle of the laws of war lies in the distinction between combatants and civilians. The traditional law of international armed conflict assumes that individuals are either combatants entitled to prisoner-of-war status or that they are civilians. As the Commentary to the Fourth Geneva Convention notes,

[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention *There is no intermediate status; nobody in enemy hands can be outside the law.*⁴²

The Law of War Handbook issued by the U.S. Army's Judge Advocate General's School similarly states, "[a]nyone not qualifying as a combatant, in the sense that they are entitled to PW [prisoner of war] status upon capture, should be regarded as a civilian."⁴³ Additionally, civilians lose their protected civilian status only "for such time as they take a direct part in hostilities."⁴⁴ This statement is widely viewed to constitute customary international law.⁴⁵

As described above, none of the definitions for unlawful enemy combatant (with the exception of that used in *Hamdi*) employs this law of war standard. Instead, as described further below, they rely much more heavily on concepts imported from domestic criminal law, particularly conspiracy and aiding and abetting. The process for determining unlawful enemy combatant status also departs from the law of war. The CSRTs, for example, do not have the legal authority to declare that any of the combatants are prisoners of war. The detainees must be

41. *Hamdi*, 542 U.S. at 520–21.

42. ICRC, Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 5 (Jean S. Pictet ed., 1958) (emphasis added) [hereinafter ICRC Commentary to Geneva IV]; see Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Int'l Armed Conflicts art. 50, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; U.S. ARMY FIELD MANUAL 27-10, LAW OF LAND WARFARE 31 (1956), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf.

43. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW OF WAR HANDBOOK 142 (2005) [hereinafter JAG Handbook], available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf.

44. Additional Protocol I, *supra* note 42, art. 51(3) ("Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a *direct* part in hostilities.") (emphasis added); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 13, June 8, 1977, 1125 U.N.T.S. 609 (same).

45. Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy* 3–4 (Program on Humanitarian Pol'y and Conflict Res., Harvard University, Occasional Paper Series, Winter 2005), available at <http://www.hpcr.org/pdfs/OccasionalPaper2.pdf>; HCJ 769/02 Pub. Comm. against Torture in *Isr. v. The Gov't of Isr.* [2006] IsrSC para. 30, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

judged either illegal combatants who may be detained indefinitely or innocent civilians who must be released immediately.⁴⁶ While the officers at the CSRTs inform the detainees before the proceeding that “this is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held,”⁴⁷ the definition used to determine the propriety of that detention has little resemblance to that of the law of war.

In addition, it is noteworthy that the Administration has made little attempt in litigation to fit its understanding of unlawful enemy combatant within contemporary international law of war. Some recent judicial decisions affirming the government’s treatment of unlawful enemy combatants do not even directly examine whether or not the individual is properly classified as a combatant.⁴⁸

A final area in which the treatment of unlawful enemy combatants seems to depart from the law of war lies in the stated purpose of detention. As the plurality noted in *Hamdi*, the purpose of detention under the law of war is to prevent combatants from rejoining the battlefield.⁴⁹ The *Hamdi* opinion pointedly stated that “we agree that indefinite detention for the purpose of interrogation is not authorized.”⁵⁰ Indeed, the Geneva Conventions provide that prisoners of war⁵¹ and civilians⁵² may not be subject to coercive interrogation. Nevertheless, the importance of securing vital information has served as a principal justification by the Bush Administration for the decision to classify terrorists as unlawful enemy combatants. For example, immediately after it was announced that Jose Padilla had been detained as an unlawful enemy combatant, Secretary Rumsfeld stated:

we are not interested in trying him at the moment; we are not interested in punishing him at the moment. We are interested in finding out what he knows. Here is a person who unambiguously was interested in radiation weapons and terrorist activity, and was in league with al Qaeda. Now our job, as responsible government officials, is to do everything possible to find out what that person knows⁵³

The Geneva Conventions bar coercive questioning of prisoners of war and civilians. Rumsfeld’s promise “to do everything possible” suggests a willingness to go beyond merely posing questions to Padilla. Such sentiments seem much more appropriate to a criminal investigation than to the law-of-war justifications for

46. See Paul Wolfowitz, Deputy Sec’y of Def., Order Establishing Combatant Status Review Tribunal paras. g(12), 13(i) (July 7, 2004) [hereinafter Order Establishing CSRT], available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

47. Combatant Status Review Tribunal Notice to Detainees, reprinted in Gordon England, Sec’y of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba* (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

48. See, e.g., *Al-Marri v. Hanft*, 378 F.Supp.2d 673, 680–81 (D.S.C. 2005) (mem.).

49. *Hamdi*, 542 U.S. at 595.

50. *Id.* at 521.

51. Geneva III, *supra* note 25, art. 17 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”).

52. Geneva IV, *supra* note 42, art. 31 (“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”).

53. Donald Rumsfeld, Sec’y of Defense, News Transcript of Secretary Rumsfeld Media Availability in Qatar (June 11, 2002), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3502>.

detention of combatants, although there are significant constitutional restraints on the government's ability to use coercion in criminal cases as well.

B. *The Law of Crime*

In contrast to the somewhat tenuous connection between the law of war and the classification and treatment of unlawful enemy combatants, there are strong parallels to the criminal law concepts of conspiracy and aiding and abetting. The CSRT definition of unlawful enemy combatant includes any individual “who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”⁵⁴ The extension of the definition to “associated forces” suggests that it may apply to any individual that directly aids a group that itself assists al Qaeda in some fashion.⁵⁵ The organizational structure of terrorist groups makes this definition of enemy combatants particularly expansive. Most experts agree that terrorist organizations exhibit a network-like structure.⁵⁶ The indictment of Zacarias Moussaoui, for example, asserts that

[a] Qaeda functioned both on its own and through some of the terrorist organizations that operated under its umbrella, including Egyptian Islamic Jihad . . . the Islamic Group . . . and a number of jihad groups in other countries, including the Sudan, Egypt, Saudi Arabia, Yemen, Somalia, Eritrea, Djibouti, Afghanistan, Pakistan, Bosnia, Croatia, Albania, Algeria, Tunisia, Lebanon, the Philippines, Tajikistan, Azerbaijan, and the Kashmiri region of India⁵⁷

This description could easily be characterized, in American-law terms, as a far-flung conspiracy.⁵⁸ The gravamen of the liability is associational, and it is legally permissible (if somewhat controversial) to allege conspiracies of wide scope.⁵⁹

54. Order Establishing CSRT, *supra* note 46, para. a.

55. Although the CSRTs do not directly adjudicate the criminality of an individual's action, the determination of enemy combatant status produces several critical results. *Id.* para. g(12) (stating that “the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant” but giving no option for determination that the individual is a “lawful combatant” or prisoner of war). This status allows the detention of the individual until the end of the conflict, provides for prosecution by military commission, and is a prerequisite of some of the crimes tried by military commission, such as murder by an unprivileged belligerent.

56. *See, e.g.*, NAT'L RES. COUNCIL, DISCOURAGING TERRORISM: SOME IMPLICATIONS OF 9/11 2 (Neil J. Smelser & Faith Mitchell eds., 2002) (stating that “[t]errorist organizations are typically far-flung networks”); Press Release, Office of the Press Secretary of the United States, National Strategy for Combating Terrorism, 8 (Feb. 14, 2003) (noting that “[t]he terrorist threat is a flexible, transnational network structure”), available at http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf.

57. Indictment para. 4, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. 01-455-A); *see also* *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003).

58. *See* Allison Marston Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 VA. J. INT'L L. 83 (2005) (exploring the link between conspiracy and the legal strategy of the war on terror).

59. To be sure, conspiracy can function either as an inchoate offense or as a method of attributing liability for the actions of a group, and it is in the latter sense that the link between the concept of unlawful

Indeed, most indictments in U.S. criminal courts for international terrorism include at least one conspiracy charge,⁶⁰ and many of the charge sheets in the military commissions (before they were struck down in *Hamdan*) also contained a conspiracy count.

The more recent formulations of unlawful enemy combatant demonstrate even more clearly the links between criminal law principles and the concept of unlawful enemy combatant. The definition of unlawful enemy combatant in the MCA borrows the concept of “material support” directly from a provision in the federal criminal code, 18 U.S.C. § 2339A. The legislative history of the MCA demonstrates that, with the broader definition of unlawful enemy combatant, supporters of the bill sought to ensure that those who provided logistical or financial support to combatants should be able to be prosecuted.⁶¹ While such an extension of the definition of combatancy has little support in the international law of war, it has a solid foundation in the domestic law of complicity, which targets those who aid and abet the principal perpetrators of crimes.

Indeed, much of the criticism of the evolving definition of unlawful enemy combatant extends precisely to those individuals who would not be considered combatants under the law of war but could be considered complicit in terrorist activities under criminal law principles.⁶² Much of the support voiced in favor of the MCA was described in terms appropriate to those directly involved in military operations against the United States. Representative Gingrey, for example, said, “I want to remind my colleagues that these detainees . . . are not there because they were caught chewing bubble gum in class, or throwing spitballs. These are very, very bad guys that were caught on the battlefield in Afghanistan. . . .”⁶³ Yet the principal thrust of the changes to the definition of the category in the MCA was to encompass individuals only peripherally involved (if at all) in military actions. Indeed, under the definition of unlawful enemy combatant used in the CSRTS and the MCA, there is no need to demonstrate presence or proximity to any particular battlefield at all.

Finally, the MCA makes both providing material support for terrorism and conspiracy punishable as crimes in the military commissions.⁶⁴ While Congress’s legal authority to take these steps is uncertain, it highlights the fusion of criminal law principles (exemplified by the criminalization of material support) onto the status-based system of the international law of war, which divides those caught up in war between a relatively narrow category of combatants and a broad residual category of civilians.

enemy combatant and the criminal law are most vivid.

60. By my count, approximately 86% of indictments issued in federal court that charge individuals with some link to international terrorism feature a conspiracy count. A November 2004 search of cases available on Westlaw and in the Terrorism Knowledge Base yielded 42 such cases, 36 of which included a conspiracy count in the indictment. The Terrorism Knowledge Base is maintained by the National Memorial Institute for the Prevention of Terrorism and is available at www.tkb.org.

61. See *supra* notes 28–31 and accompanying text.

62. Barnes & Schmitt, *supra* note 32, at A14.

63. 1200 CONG. REC. H7515 (daily ed. Sept. 27, 2006) (statement of Rep. Gingrey).

64. MCA § 948a(A)(1)(i).

C. *International or Domestic Law?*

From its first use by the Supreme Court in *Quirin*, the concept of unlawful enemy combatant in the U.S. has been an uneasy mix of international and domestic law. The *Quirin* court relied on international law to confirm the President's authority to establish military commissions to try unlawful enemy combatants, even if those combatants were U.S. citizens. Similarly, the plurality in *Hamdi* relied directly on international law in stating that detention may only last for the duration of active hostilities. In addition, the definition of unlawful enemy combatant the plurality adopted was entirely consistent with the standard set by the Geneva Conventions for when civilians lose their protected status because of direct participation in hostilities.

Nevertheless, it is more accurate to describe *Hamdi* as a decision rendered "in the shadow of international law."⁶⁵ While the decision in many ways paralleled the Geneva Conventions requirements, it did not mandate that the President abide by them. For example, it did not explicitly state that the President could not enlarge the parameters of the concept of unlawful enemy combatant to include individuals that would be considered civilians under international legal principles. The mixed signals sent by the Court with regard to the applicability of limits imposed by international law have provided legal cover for the expansion of the concept of unlawful enemy combatant seen in the CSRTs and MCA.

Other aspects of the Court's terrorism jurisprudence also make the link to international law difficult to interpret. For example, the Court has never answered the important question of whether it views the war on terrorism as an international or non-international armed conflict, which makes a significant difference in the law of war.⁶⁶ The status-based scheme for classifying individuals caught up in war set out by the 1949 treaties and Additional Protocol I is less clearly defined in the provisions applicable only to non-international armed conflict. Whether the Court will confront this question in future cases depends, in part, on whether it will hew to the international legal principles that informed the *Hamdi* and *Hamdan* decisions.

The definition of unlawful enemy combatant propounded by the President has strayed further and further from its roots in international law. Whether the gulf between the use of unlawful enemy combatant in U.S. law and its international law analogues will widen depends, in part, on the source of authority for its use by the President and the Congress. If the source derives from "longstanding law of war principles" or Congress's authority to "define and punish . . . offenses against the law of nations,"⁶⁷ then the term's increasing idiosyncrasy may matter. If, instead, the Court decides that the President and the Congress are simply exercising the wide latitude afforded to countries under the law applicable to non-international conflicts or some power not derived from international law at all, then the differences may prove less consequential.

65. Jenny S. Martinez, *International Decisions*, 98 AM. J. INT'L L. 782, 785 (2004).

66. The Court did not explicitly decide this question in *Hamdan*, although it did find Common Article Three applicable to the war on terrorism. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006).

67. U.S. CONST., art. I, § 8, cl. 10.

IV. CONCLUSION

The history of the development of the concept of unlawful enemy combatant is of more than academic interest. The increasing breadth and malleability of the term means that it can now catch many in its sweep that would not be considered combatants under the law of war. These developments effectively provide that, at least for unlawful enemy combatant status, potential detainees are back to the place they were before *Hamdi*—the Executive branch has the authority to make an essentially unreviewable decision about whether or not an individual can be detained indefinitely. When signing the MCA, President Bush stated,

Over the past few months, the debate over this bill has been heated, and the questions raised can seem complex. Yet, with the distance of history, the questions will be narrowed and few: Did this generation of Americans take the threat seriously, and did we do what it takes to defeat that threat?⁶⁸

The scope of the most recent definitions of unlawful enemy combatant in the U.S. suggests that the threat—and its cure—will be determined by the President and his advisors alone.

68. President George W. Bush, Remarks on Signing the Military Commissions Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1831 (Oct. 23, 2006).