UNITED STATES OF AMERICA vs. SALIM AHMED HAMDAN	**D-013** **RULING ON MOTION** For Order Implementing Fourth Geneva convention 24 March 2008

The Defense has moved this Commission for an order implementing the provisions of the Fourth Geneva Convention (GC IV). The Defense argument is simple: the Commission has determined that the accused is not entitled to Prisoner of War status or the protections of the Third Geneva Convention (GC III), thus he must be considered a civilian protected by the Fourth Geneva Convention. The Defense asks the Commission to enforce, *inter alia,* Articles 49, 65, 66, and 76, which provide certain protections to civilians in occupied areas. The Government opposes the motion, arguing variously that the Fourth Convention does not apply to the conflict with al Qaeda; that the accused is not a "protected person" within its terms; that GC IV is not self-executing; and that Congress has expressly foreclosed appeal to the Geneva Conventions as a source of rights. The Commission heard oral argument from both sides in Guantanamo Bay, Cuba on 7 February 2008.

BURDEN OF PROOF

The Defense characterizes this motion as one challenging jurisdiction, and urges assignment of the burden of proof/persuasion to the Government. RMC 905(c)(2)(B) The Government considers the burden to be on the Defense, as the moving party. RMC 905(c)(2)(A); The Commission concludes that this Motion is not a challenge to the jurisdiction of the Commission, and that the burden belongs to the defense. MCTJ Rule 3(7)(a). The Commission's conclusions would be the same were the burden assigned to the Government.

DOES THE FOURTH GENEVEA CONVENTION APPLY TO THE CONFLICT IN AFGHANISTAN?

The Defense argues that the Commission "implicitly recognized" that the Geneva Conventions apply to the conflict in Afghanistan when it ruled that the accused is entitled to an Article 5 status hearing. In fact, that ruling was based on Congress's clearly expressed intent that in case of doubt, a detainee's' status should be determined under Article 5, that the CSRT's would make this determination, and on the Commission's conclusion that Mr. Hamdan's CSRT had not properly done so.

The Fourth Geneva Convention applies, by its terms, in three different circumstances: "all cases of declared war or any other armed conflict between two or more of the high Contracting Parties;" in "cases of partial or total occupation of the territory of a High contracting Party;" and when a non-signatory 'Power in conflict' 'accepts and applies' the provisions of the Geneva Conventions.

The Government argues that the conflict between the Coalition and the Taliban is separate from the conflict between the Coalition and al Qaeda, and that the Geneva Conventions do not apply to the conflict with al Qaeda. These conflicts may be separate for many purposes, but the Commission is not persuaded that on 21 November, 2001, when the accused was apprehended transporting missiles on the battlefield, the United States was engaged solely in a conflict with al Qaeda. The most likely recipients of the missiles appear to have been Taliban forces around Takta Pol or those defending Kandahar. At that time and place, Major Smith and the coalition forces under his command (his "Anti Taliban Forces") were engaged in combat against primarily Taliban forces. Afghanistan was a High Contracting Party to the Geneva Convention, and the Taliban was then its *de facto* government. For the purposes of this motion, the Commission concludes that the accused was unlawfully engaged in, and apprehended during the course of, "an armed conflict between two or more High Contracting Parties." The Fourth Geneva Convention applies to such a conflict.

IS THE ACCUSED PROTECTED BY THE FOURTH GENEVA CONVENTION?

The Defense cites the work of several International Law scholars for the proposition that every person on the battle field must be protected by one of the Geneva Conventions. "There is no intermediate status; nobody in enemy hands can be outside the law." Pictet, Commentary on the Geneva Conventions, Vol. IV, 51. This is undoubtedly the general rule. Article 4 of GC IV identifies "Persons protected by the Convention" in these terms:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

Applying this definition to the accused, the Commission finds, for the purposes of this motion, that the accused meets the initial, broad definition of a "protected person" in that he "at any given moment and in any manner whatsoever, [finds himself] . . . in the hands of a Party to the conflict or Occupying Power of which [he is] not [a] national." But the second paragraph excludes nationals of a neutral state (such as Yemen) who find themselves in the territory of a belligerent state (such as Afghanistan) "while the state of which they are nationals has normal diplomatic relations" with the State in whose hands they are (such as the United States). As the Government indicates in its reply brief, Yemen has long had and continues to have full diplomatic relations with the United States. U.S. Department of State, Background Note: Yemen, "U.S. –Yemen Relations," *available at* www.state.gov/r/pa/ei/bgn/35836.htm. The Government argues that Hamdan is clearly excluded from "protected person" status by this second paragraph.

Pictet's Commentary appears to modify the language of Article 4. He asserts that the definition of protected person "may be easier to grasp" under enumerated conditions that would apply "on the territory of belligerent states" or "in occupied territories." GC Commentary at 46.

Under Pictet's construction, Hamdan would be excluded from the definition of protected person "so long as the State in question [Yemen] has normal diplomatic relations in the State in whose *territory* [Afghanistan] they are." Unfortunately, his version does violence to the plain language of the Article, which excludes from its protection "Nationals of a neutral state [Yemen] who find themselves in the territory of a belligerent state [Afghanistan] . . . while the State of which they are nationals [Yemen] has diplomatic representation in the State in whose *hands* [American] they are." Pictet is correct when he acknowledges that "the meaning does not stand out very clearly," but it appears that he has changed the meaning of this Article in his Commentary. Applying the plain terms of Article 4, the Commission concludes that the accused is not a "protected person" within the meaning of Article 4 because Yemen then had and continues to have diplomatic relations with the United States. Pictet, *Commentary on the Geneva Conventions,* 48-49.

This construction of Article 4 is not without precedent. Helen Duffy acknowledges that "Certain limited categories of persons may, however, be excluded [from protected person status] by GC IV, which is principally directed towards the protection of civilians associated with the adversary against whom the state is engaged in conflict. The Convention appears on its face to exclude nationals of co-belligerent states and neutral states." Helen Duffy, THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW (Cambridge: Cambridge University Press) 2005, 402.

WAS THE UNITED STATES AN OCCUPYING POWER IN AFGHANISTAN?

Because the definition of protected person also makes reference to "occupied" territory, and because the specific relief the Defense requests is required in "occupied territory," it is important to determine whether the United States was an occupying power in Afghanistan in the fall of 2001 and the Spring of 2002. The Defense contends that the United States "occupied" Afghanistan during that time, and that the GC IV provisions relating to an "Occupying Power" therefore apply to its actions. In support of this argument, the Defense cites language in Pictet's Commentary urging a very broad and inclusive standard. Pictet suggests that the term "in the hands of" applies "in an extremely general sense. . . .{I}t simply means that the person is in territory which is under the control of the Power in question." GC Commentary, 47. He also writes "Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49 which prohibits the deportation or forcible transfer from occupied territory." GC Commentary, 60. The Government opposes this result, urging the Commission to use the more traditional definition of occupation, which would have the United States labeled an "Occupying Power" only when it actually assumes the functions of government and takes full control of Afghan territory.

Article 42 of the Hague Regulations provides "Territory is considered occupied when it is actually placed under the authority of the hostile army" and "[t]he occupation extends only to the territory where such authority has been established and can be exercised." This is the traditional meaning of the word "occupation" in the International Law of Armed Conflict. U.S. Army Field Manual, 27-10 defines occupation, consistent with the Hague Convention, in these terms: "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army" and "[t]he occupation extends only to the territory where such authority has been

established and can be exercised." *Id.* ¶351. Beyond this, the Government points to the remarks of delegates from Italy, Monaco, the Soviet Union, United Kingdom, Bulgaria and Switzerland, whose comments make plain that they, at least, adopted the Hague definition of occupation. *2A Final Record of the Diplomatic Conference of Geneva of 1949*, at 624-629, 718-720. A host of scholarly commentators agree. Government Response Brief at 11-14. GC IV Article 152 indicates that the Fourth Convention is "supplementary to" the Hague Regulations, yet the Defense cites Pictet for the proposition that Article 42 of the Hague Convention "has no direct influence on the application of the Fourth Convention to civilian personnel protected by its terms." If the drafters of GC IV intended a new and different definition of occupation than existed in International Law, it is surprising that they did not make the new definition clearer.

The Commission concludes that Pictet's liberal view of the meaning of occupation is his personal view, perhaps a minority view, but is simply outweighed by other authorities who hold a more widely accepted view and by the express words of the Convention itself. Thus, the Commission concludes that the Defense has not shown, by a preponderance of the evidence, that the United States presence in Afghanistan was an occupation within the meaning of GC IV or traditional International Law of military occupation. This conclusion reinforces the Commission's determination that the accused is not a protected person under the Fourth Geneva Convention, and that the relief he seeks, which applies only in occupied territory, should be denied.

DEROGATIONS FROM THE PROTECTED STATUS OF ARTICLE 4

Even during the discussions surrounding the adoption of the Fourth Geneva Convention, the matter of derogations from its protections was addressed. Pictet describes the issue in these words "Some people considered that the Convention should apply without exception to all persons to whom it referred, while to others it seemed obvious that persons guilty of violating the laws of war were not entitled to claim its benefits. . . .Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves." Pictet, *Commentary* at 52, 53. The result of these debates was Article 5, which provides:

> Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

GC IV, Article 5

Even if the accused was initially entitled to the protections of the Fourth Convention, this article may warrant derogation from his entitlement, as he appears to meet its definition. "Where in the territory of a party to the Conflict [in this case, Afghanistan] the latter [a party to the conflict] is satisfied that an individual protected person [such as Hamdan] is definitely suspected of or engaged in activities hostile to the security of the State . . ." he loses his entitlement to the rights and privileges of the Civilian Convention to the extent they are prejudicial to the security

of the United States. A more restrictive reading of the Article might require *Afghanistan* to determine that Hamdan's activities were injurious to *its* security, but once again, the meaning is somewhat opaque.

Professor Dinstein gives support for derogation from the protected status of unlawful combatants when he writes that an unlawful combatant "... is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges pertaining to lawful combatancy. *Nor does he enjoy the benefits of civilian status*: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War specifically permits derogation from the rights of such a person. . . ." Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, (Cambridge: Oxford University Press, 2004), 29-30. (emphasis added). Ms. Duffy properly asserts the general rule that every person on the battlefield is entitled to the protection of one of the conventions, but acknowledges that there may be exceptions. "If any of the [Guantanamo] detainees are for any reason deemed excluded from both categories protected by GC III and GC IV, they are nonetheless protected by customary international law, binding on the United States." i.e. Common Article 3. Helen Duffy, THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW, (Cambridge: Cambridge University Press) 2005, 403.

In addition, the International Criminal Tribunal for the Former Yugoslavia has written

There is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war or of the First or Second Convention, he or she necessarily falls within the ambit of [the Fourth Convention], *provided that its Article 4 requirements are satisfied. Prosecutor v. Delialic et. al.,* Case IT-96-21-T, Judgment (Trial Chamber) 16 November 1998, para. 271. (emphasis added).

The general rule is clearly as the Defense describes it: every person on the battlefield is intended to be protected by one of the Conventions. But this is true only if they meet the requirements of Article 4. The Commission concludes that the accused does not meet those requirements, because he is a citizen of Yemen, which has full diplomatic relations with the United States, and because the United States did not occupy Afghanistan. If the Commission has erred with respect to this conclusion, it likewise appears that his status as an unlawful combatant permits derogation from those rights that would otherwise apply to civilians not engaged in hostilities. He is among that unusual class of persons not protected by either GC III or GC IV, but entitled to the minimal protections of Common Article 3.

EFFECT OF 10 USC §948b(g)

Congress has decided that "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." The Parties have labored strenuously over the meaning of this provision of the Military Commissions Act. The Defense points to a "Joint Statement by Senators McCain, Warner, and Graham on Individual Rights Under the Geneva Conventions," in which these Senators declared "[T]his legislation would not bar individuals from raising to our Federal courts in their pleadings any allegations that a provision of the Geneva Conventions—or for that matter, any other treaty

obligation that has the force of law—has been violated. It is not the intent of Congress to dictate what can or cannot be said by litigants in any case." (September 26, 2006) reprinted in 152 Cong. Rec. S 10402 (daily ed. Sept. 28, 2006). The statement continued "this legislation would not stop in any way a court from exercising any power it has to consider the United States' obligations under the Geneva Conventions, regardless of what litigants say or do not say in the documents that they file with the court." *Id* at S 10401. To the extent there is legislative history regarding this provision, it suggests that the accused may claim rights under the Geneva Conventions before this Commission.

The Government argues, however, that there is no need to resort to legislative history. In its mind, the meaning of the words of the statute are clear, and expressly prevent Hamdan from invoking the Geneva Conventions as a source of rights. In support of its argument, the Government cites, in addition to the words of the statute, a series of federal cases that have held various international treaties, including the Fourth Geneva Convention, unenforceable as a source of rights in civil litigation. "According to every federal court that has considered the issue, the Fourth Geneva Convention does not create private rights that may be invoked by a private party." (Gov't Response Brief at 7-8) In *Huynh Thi Anh v. Levi*, 586 F. 2d 625, 629 (6th Cir. 1978), the plaintiff sought to rely on Articles 24 and 29 of the Fourth Geneva Convention to prevent the adoption of her grandchildren by an American foster family, after they had been evacuated from Viet Nam. The Sixth Circuit held that GC IV "does not create a private right of action in the domestic courts of the signatory countries." In *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 115 (D.D.C. 2007) the Court refused plaintiff's cause of action for money damages for violations of GC IV, writing that it was not convinced that GC IV "establishes individual rights that may be judicially enforced in private lawsuits in federal courts." In *Iwanona v Ford Motor Co.*, 67 F. Supp. 2d 424, 439 n.16 (D.N.J. 1999) a plaintiff alleged that Ford Werke forced her and thousands of others to engage in forced labor under inhuman conditions during World War II, and sought compensation under the Alien Tort Claims Act, relying on customary international law. The Court observed in a footnote that had she relied on GC IV, her claim would have been dismissed because non-self executing treaties do not "confer rights enforceable by private parties." In *Am. Baptist Churches v. Meese*, 712 F. Supp. 756, 770 (N.D. Cal. 1989) two individual illegal aliens from El Salvador and Guatemala sought to rely on GC IV to prevent their deportation to countries where non-international armed conflict was in progress. The Court concluded that Article 1 of the Fourth Geneva Convention is not self-executing because "it does not impose any specific obligation on the signatory nations, nor does it provide any intelligible guidelines for judicial enforcement."

The central theme behind each of these cases is that plaintiffs in civil cases cannot rely on the Fourth Geneva Convention in a private cause of action, especially for money damages. Those scenarios are quite different from a battlefield detainee seeking the protection of the Fourth Geneva Convention before a military commission. In any event, the Commission need not resolve the issue here. Because the Commission concludes that the accused is not a protected person under the Fourth Geneva Convention in any event, it does not reach this conflict over the meaning of 10USC 948b(g). Without resolving the issues regarding §948b(g) in a larger sense, the Commission has addressed this accused's claim of protection under the Fourth Geneva Convention here. The result is the same whether the Commission accepts the Government's restrictive construction of section 948b(g), or entertains but denies the claim.

CONCLUSION AND RULING

Because the Commission concludes that Hamdan is not a protected person within the meaning of the GC IV, and that his protected status (if he was a protected person) was properly derogated by virtue of his unlawful participation in hostilities as an unlawful combatant, the Motion for an Order Implementing the protections of the Fourth Geneva Convention is DENIED. This result is consistent with the result that would follow a literal application of 10 USC §948b(g).

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