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The War Crimes Act: Current Issues

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Summary

The War Crimes Act of 1996, as amended, makes it a criminal offense to commit certain violations of the laws of war when such offenses are committed by or against U.S. nationals or Armed Service members. Among other things, the Act prohibits violations of Common Article 3 of the 1949 Geneva Conventions, which sets out minimum standards for the treatment of detainees in armed conflicts of a non-international character. Common Article 3 prohibits protected persons from being subjected to violence, outrages upon personal dignity, torture, and cruel, humiliating, or degrading treatment. In the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court rejected the Bush Administration's long-standing position that Common Article 3 was inapplicable to the present armed conflict with Al Qaeda. As a result, questions have arisen regarding the scope of the War Crimes Act as it relates to violations of Common Article 3 and the possibility that U.S. personnel may be prosecuted for the pre-*Hamdan* treatment of Al Qaeda detainees. This report provides a brief overview of these issues as well recent legislative proposals, including S. 3901, the Military Commissions Act of 2006, proposed by Sen. John Warner and voted out of the Senate Armed Services Committee on September 14, 2006; S. 3861, the Bringing Terrorists to Justice Act of 2006, and S. 3886, the Terrorist Tracking, Identification, and Protection Act of 2006, both introduced by Sen. Bill Frist; and H.R. 6054, the Military Commissions Act of 2006, introduced by Rep. Duncan Hunter.

The 1949 Geneva Conventions proscribe certain conduct by High Contracting Parties toward specified categories of vulnerable persons during armed conflict.[1] High Contracting Parties are also required to provide effective penal sanctions against any person who commits (or orders the commission of) a "grave breach" of one of the Conventions, which is defined to include the wilful killing, torture or inhuman treatment,

[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 [*hereinafter* "Third Geneva Convention"]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516. All four Conventions entered into force for the United States on Feb. 2, 1956.

and the causing of great suffering or serious injury to body or health of protected persons.[2] Congress approved the War Crimes Act of 1996 (P.L. 104-92) specifically to implement the Conventions' penal requirements.[3]

The War Crimes Act (18 U.S.C. § 2441)

The War Crimes Act imposes criminal penalties against persons who commit certain offenses under the laws of war, when those offenses are either committed by or against a U.S. national or member of the U.S. Armed Forces. The Act applies regardless of whether the offense occurs inside or outside the United States. Offenders are subject to imprisonment for life or any term of years and may receive the death penalty if their offense results in death to the victim.

At the time of enactment, the War Crimes Act only covered grave breaches of the 1949 Geneva Conventions. During congressional deliberations, the Departments of State and Defense suggested the Act be crafted to cover additional war crimes, but these recommendations were not immediately followed.[4] However, Congress amended the War Crimes Act the following year to cover additional war crimes that had been suggested by the State and Defense Departments, including violations under Article 3 of any of the 1949 Geneva Conventions (Common Article 3). Common Article 3 is applicable to armed conflicts "not of an international character" and covers persons taking no active part in hostilities, including those who have laid down their arms or been incapacitated by capture or injury. Such persons are to be treated humanely and protected from certain treatment, including "violence to life and person," "cruel treatment and torture," and "outrages upon personal dignity, in particular, humiliating and degrading treatment."

Implications of *Hamdan v. Rumsfeld*

There has been controversy concerning whether activities by military and intelligence personnel relating to captured Al Qaeda suspects might give rise to prosecution under the War Crimes Act, particularly in light of the Supreme Court's ruling in the 2006 case of *Hamdan v. Rumsfeld*.[5] The following sections provide relevant background and briefly discuss possible implications that the Court's ruling may have on issues relating to the War Crimes Act.

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[2] *E.g.*, Third Geneva Convention, *supra* note 1, at Articles 129-130.

[3] When the Conventions were ratified in 1955, the Senate Foreign Relations Committee believed that the obligations imposed by the Conventions' "grave breach" provisions were met by existing federal law and no further legislation was required. H.Rept. 104-698, at 3-4 (1996) (*quoting* Sen. Exec. Rep. No. 9, at 27 (1955)). However, in 1996 the House Committee on the Judiciary found that in some cases the United States was legally unable to prosecute persons for the commission of grave breaches of the Conventions, including when members of the armed forces were found to have committed war crimes only after their military discharge. *Id.* at 5.

[4] *Id.* at 12-16.

[5] *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

Application of Common Article 3 to Al Qaeda. At least since early 2002, the Bush Administration had taken the position that the Geneva Conventions did not apply to members of Al Qaeda. Specifically, the Administration argued that the Conventions are applicable to international armed conflicts between High Contracting Parties and States that abide by Convention provisions, and therefore do not cover non-State actors such as Al Qaeda. The Administration further alleged that the conflict with Al Qaeda is international in scope, and Common Article 3 accordingly was inapplicable to the conflict because it only covers armed conflicts "not of an international nature."[6]

The issue in *Hamdan* primarily concerned military tribunals convened by Presidential order to try detainees for violations of the laws of war. The Court held that such tribunals did not comply with the Uniform Code of Military Justice or the laws of war, including the Geneva Conventions. However, the Court's interpretation of Common Article 3 had broader implications for U.S. policy towards captured Al Qaeda suspects. The Court rejected the Administration's interpretation of Common Article 3 as not covering Al Qaeda members, concluding that the provision affords "some minimal protection, falling short of full protection under the Conventions, to [any] individuals ... who are involved in a conflict in the territory of a signatory."[7] In the aftermath of the Court's ruling, the Department of Defense issued new treatment guidelines concerning military detainees (including Al Qaeda members) that required, at minimum, application of the standards articulated by Common Article 3.[8] Subsequently, fourteen high-level Al Qaeda operatives who had been held abroad by the CIA and subjected to aggressive interrogation techniques were transferred to DOD custody in Guantanamo Bay, Cuba.[9]

Scope of Prohibited Conduct under the War Crimes Act Relating to Common Article 3 Violations. The United States has apparently never prosecuted a person under the War Crimes Act. Perhaps as a result, there is some question concerning the Act's scope. Some have suggested that the War Crimes Act be amended

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[6] *See* White House Memorandum, *Humane Treatment of Taliban and Al Qaeda Detainees* (Feb. 7, 2002), available at [http://www.justicescholars. org/pegc/archive/ White_ House/ bush_memo_ 20020207ed.pdf].

[7] *Hamdan*, 126 S.Ct. at 2796 (internal quotations omitted). In interpreting Common Article 3 as ensuring *de minimis* protections of Al Qaeda members captured by the United States in Afghanistan, the Court noted that the official commentaries accompanying Common Article 3 made clear that "the scope of the Article must be as wide as possible." *Id.* (*quoting* Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 36 (1960)). In dissent, Justice Thomas (joined by Justice Scalia) disputed this reading, arguing that the relevant commentary indicated that the purpose of Common Article 3 was principally to furnish protections to persons involved in a civil war, rather than entities of international scope such as Al Qaeda. *Id.* at 2846 (Thomas, J., dissenting). However, the Court appeared to leave unresolved whether the Geneva Conventions apply with respect to Al Qaeda suspects captured in places where no armed conflict is occurring. For background on the *Hamdan* decision, see CRS Report RS22466, *Hamdan v. Rumsfeld: Military Commissions in the 'Global War on Terrorism'*, by Jennifer Elsea.

[8] Dept. of Defense Detainee Directive, *Definitions, Treatment Policy, and Compliance with Laws of War*, Sept. 5, 2006, *available at* [http://news.findlaw.com/hdocs/docs/dod/detainee90506directive.html].

[9] Presidential Address Creation of Military Commissions to Try Suspected Terrorists, Sept. 6, 2006, *available at* [http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html].

to specify that certain forms of treatment or interrogation violate the Act. They argue that the scope of the War Crimes Act is ambiguous, particularly as it relates to offenses concerning violations of Common Article 3. In a September 2006 address, President Bush suggested that some provisions of Common Article 3 provide U.S. personnel with inadequate notice as to what interrogation methods can permissibly be used against detained Al Qaeda suspects and requested legislation listing "specific, recognizable offenses that would be considered crimes under the War Crimes Act."[10] On the other hand, some argue that amending the War Crimes Act to cover specific acts would overly restrict the Act's scope, making certain unspecified conduct legally permissible even though it is as severe as conduct expressly prohibited by the Act.

Although some types of conduct prohibited by Common Article 3 are easily recognizable (e.g., murder, mutilation, the taking of hostages), it might not always be obvious whether conduct constitutes impermissible "torture," "cruel treatment," or "outrages upon personal dignity, in particular humiliating and degrading treatment." For discussion of U.S. and international jurisprudence and agency interpretations concerning the scope of these terms, particularly as they relate to interrogation techniques, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer Elsea; CRS Report RS22312, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia; and CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

Liability under the War Crimes Act for U.S. Personnel on Account of Pre-*Hamdan* Activities. Prior to the Court's ruling in *Hamdan*, the Bush Administration did not apply Common Article 3 protections to captured Al Qaeda agents. In some cases, such persons were allegedly subject to harsh treatment, especially in the context of interrogation, that might not have complied with Common Article 3 requirements. As a result, some have raised questions as to whether U.S. personnel might be criminally liable under the War Crimes Act for the pre-*Hamdan* treatment of some Al Qaeda detainees.

Although not immune from prosecution, U.S. personnel who could be charged with violating the War Crimes Act would have several possible defenses to criminal liability, so long as their activities were conducted with the authorization of the Administration and under the reasonable (though mistaken) belief that their actions were lawful. Section 1004(a) of the Detainee Treatment Act of 2005 (DTA, P.L. 109-148), enacted several months prior to the *Hamdan* decision, provides that

> In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States ... and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that ... [the] agent did not know that the practices were unlawful and a person of

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[10] *Id.*

> ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available ... or to provide immunity from prosecution for any criminal offense by the proper authorities.

It is unclear whether a reviewing court would interpret this defense to apply retroactively to conduct occurring before the DTA's enactment in December 2005. In addition to this statutory defense, a number of other legal defenses could be raised by U.S. personnel charged with War Crimes Act offenses based on conduct that had been authorized by the Bush Administration, assuming the defendants acted with government sanction and/or had been erroneously informed by responsible authorities that their conduct was legal.[11] Similar defenses may exist for military personnel in courts martial proceedings.[12]

Recent Legislative Activity

A number of bills have been introduced in the 109th Congress in response to the *Hamdan* decision, particularly as it relates to the establishment of military tribunals to try detainees for violations of the laws of war. Some of these bills contain provisions that would amend the War Crimes Act to more fully protect U.S. personnel from criminal liability. These bills include S. 3901, the Military Commissions Act of 2006, proposed by Sen. John Warner and voted out of the Senate Armed Services Committee on September 14, 2006; S. 3861, the Bringing Terrorists to Justice Act of 2006, introduced by Sen. Bill Frist; S. 3886, the Terrorist Tracking, Identification, and Protection Act of 2006, introduced by Sen. Frist; and H.R. 6054, the Military Commissions Act of 2006,

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[11] Although "mistake of law" defenses are generally rejected, such defenses have been recognized by courts in certain cases where defendants have acted with government sanction or after being erroneously informed by responsible authorities that their conduct was legal. These defenses can be divided into three overlapping categories: (1) *defense of entrapment by estoppel*, available when a defendant is informed by a government official that certain conduct is legal, and thereafter commits what would otherwise constitute a criminal offense in reasonable reliance of this representation; (2) *defense of public authority*, available when a defendant reasonably relies on the authority of a government official to authorize otherwise illegal conduct, and the official has actual authority to sanction the defendant to perform such conduct; and (3) *defense of apparent public authority*, which is recognized by some (but not all) federal circuits, and is similar to the defense of public authority, except that the official only needs to have apparent authority to sanction the defendant's conduct. United States v. Baptista-Rodriguez, 17 F.3d 1354, 1368 n. 18 (11th Cir. 1994). Unlike the other defenses, the defense of entrapment by estoppel stems from the due process notions of fairness, rather than from common law concerning contract, equity, or agency. United States v. Austin, 915 F.2d 363, 366 (8th Cir. 1990).

[12] While ignorance or mistake of law, including general orders or regulations, is not generally available as a defense, "mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency." Manual for Courts Martial, Rules for Courts-Martial rule 916(l) (discussion). In the case of war crimes, a defense based on superior orders is available only with respect to direct and specific orders to commit an act constituting a war crime, and the defendant must demonstrate both the existence of the order and his sincere and reasonable belief that the order was lawful. *See* DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE § 2-4(F) (5th ed. 1999)(*citing* United States v. Huet-Vaughn, 43 M.J. 105 (1995)).

introduced by Rep. Duncan Hunter. The provisions of these bills amending the War Crimes Act are largely similar, but there are a few notable differences between S. 3901 and the other bills. All four bills would amend the War Crimes Act provisions concerning Common Article 3, so that only specified violations would be punishable. The bills define such violations to include committing, or attempting or conspiring to commit

- torture (defined in a manner similar to that used by the U.N. Convention against Torture and 18 U.S.C. § 2340);
- cruel treatment (S. 3861, S. 3886, and H.R. 6054) or cruel, inhuman or degrading treatment (S. 3901);
- the performing of biological experiments;
- murder;
- mutilation or maiming;
- intentionally causing serious bodily injury;
- rape;
- sexual assault or abuse; and
- the taking of hostages.

The bills notably differ in that S. 3861, S. 3886, and H.R. 6054 would amend the War Crimes Act to specifically cover cruel treatment *rising to the level of torture*,[13] whereas S. 3901 would more broadly cover cruel, inhuman or degrading treatment prohibited by § 1003 of the DTA (commonly referred to as the McCain Amendment) — *i.e.*, conduct that would be unconstitutional under the Fifth, Eighth, or Fourteenth Amendments if it occurred in the United States.[14] The amendments made by S. 3861, S. 3886, and H.R. 6054 would apply retroactively, possibly precluding prosecution of personnel for some (but not all) conduct falling under the more general scope of the earlier version of the War Crimes Act. S. 3901 does not contain a similar provision, but unlike the other bills, it would amend the statutory defense contained in DTA § 1004 to cover any criminal prosecution (but not civil action) against U.S. personnel relating to the sanctioned treatment of detainees, if such conduct occurred between September 11, 2001, and December 30, 2005. All four bills would also amend the DTA to require the federal government to provide or employ counsel and pay fees related to any prosecution or civil action against U.S. personnel for authorized detention or interrogation activities.

All four bills would provide that the rights established by the Geneva Conventions are not judicially enforceable. S. 3861, S. 3886, and H.R. 6054 would also provide that satisfaction of the prohibition against cruel, inhuman, and degrading treatment set forth in § 1003 of the DTA (commonly referred to as the McCain Amendment) would fully satisfy U.S. obligations under Common Article 3 (except as Common Article 3 relates to the taking of hostage and the passing of unlawful sentences).

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[13] For purposes of international law, "torture" is considered a particularly severe form of cruel or inhumane treatment. *See* CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia, at 2, 17-18.

[14] *See generally* CRS Report RS22312, *Interrogation of Detainees: Overview of the McCain Amendment*, by Michael John Garcia. It is unclear whether the McCain Amendment's prohibition on cruel and degrading treatment is as stringent as that imposed by Common Article 3, which contains no reference to a shocks-the-conscience standard in its prohibition of such conduct.