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Essay

President Obama's March
2011 Detainee Policy: Will it
Make a Difference to Those
Detained?

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INTRODUCTION

Over the last ten years, American and international observers have fiercely criticized U.S. detention policies for the perceived abuse of detainees and the allegedly unfair criminal process applied to them.¹

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1. See, e.g., UN Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Situation of Detainees at Guantanamo Bay, ¶¶ 41–94, UN Doc. E/CN.4/2006/120 (Feb. 15, 2006) (alleging abuse of detainees held at Guantanamo Bay through U.S. interrogation practices and everyday maltreatment); HINA SHAMSI, COMMAND’S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 1–4 (Deborah Pearlstein ed., 2006) (discussing suspected cases of detainee abuse since 9/11, including homicides, and arguing that the military has not held its leaders properly accountable); Carol J. Williams, *Guantánamo Criticism Intensifies*, L.A. TIMES, June 11, 2008, <http://tinyurl.com/3h77evg>; *US Rejects Guantánamo Criticism*, BBC NEWS, Jan. 10, 2006, <http://tinyurl.com/42l733n>; *Time Report Fuels Guantánamo Criticism*, CNN U.S., June 13, 2005, <http://tinyurl.com/43fru3d>.

Rightly or wrongly, at times the United States has seemed to place security concerns above legal ones for at least two reasons: first, a belief that strict adherence to detainee well-being inhibited the ability of the United States to acquire critical intelligence regarding future terrorist actions; and second, a belief that criminal due process for detainees increased the chance of release of dangerous, security-threatening actors.² As former President George W. Bush said in 2010, in detainee interrogations “the choice between security and values was real.”³

Both the Bush and Obama Administrations have sought to quiet criticisms concerning U.S. detainee policy, with the most recent pronouncement, putting forth a more “values-oriented” approach, coming in a March 7, 2011, White House press statement.⁴ Pursuant to the policy announced in the press release, military commissions, which President Obama had halted upon entering office, were reinstated, and the Administration vowed to seek repeal of congressional restrictions on trials of detainees in federal courts.⁵ Moreover, the Administration promised “that individuals who we have determined will be subject to long-term detention continue to be detained only when lawful and necessary to protect against a significant threat to the security of the United States.”⁶ Finally, the Administration committed itself to the humane treatment and enlarged rights of detainees by both encouraging the Senate to ratify Additional Protocol II of the Geneva Conventions (AP II), which expands legal protections for those detained pursuant to a noninternational armed conflict, and recognizing “a sense of legal obligation to treat the principles set forth in Article 75 [of Additional Protocol I of the Geneva Conventions] as applicable to any individual it detains in an international armed conflict.”⁷

This Essay focuses on the Administration’s proclamations regarding the Additional Protocols, analyzing what, if any, practical effect they will have on detainee treatment. Section I briefly reviews key post-9/11 U.S. decisions on the treatment of detainees and their Geneva-based status as detainees. Sections II and III analyze whether the March policy will change the day-to-day treatment of detainees, as well as the policy’s impact on detainee trials. This Essay concludes that the announcement has little

2. See Edward F. Sherman, *Terrorist Detainee Policies: Can the Constitutional and International Law Principles of the Boumediene Precedents Survive Political Pressures?*, 19 TUL. J. INT’L & COMP. L. 207, 208–11, 240–41 (2010).

3. See Haroon Siddique & Chris McGreal, *Waterboarding is Torture, Downing Street Confirms*, GUARDIAN, Nov. 9, 2010, <http://tinyurl.com/37f5v7h>.

4. Press Release, White House, Office of the Press Sec’y, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), <http://tinyurl.com/4n9jqgj>.

5. *Id.*

6. *Id.*

7. *Id.*

effect beyond symbolism, although this symbolism may have positive implications for international law.

I. BACKGROUND: DETAINEE OPERATIONS SINCE 9/11

In the last ten years, the United States has detained tens of thousands of persons as part of the Afghan and Iraqi conflicts,⁸ as well as persons from other countries as part of the Global War on Terrorism (GWOT).⁹ The extent of rights afforded to these detainees depends on the classification of the conflict at issue and the detainees' adherence to the Law of Armed Conflict (LOAC).¹⁰ The Geneva Conventions potentially offer relatively extensive protections to those involved in state versus state, international, Common Article 2 (CA 2) armed conflicts.¹¹ Common Article 3 (CA 3) of the Conventions, which concerns intrastate, internal armed conflicts, offers lesser, but still important, general protections of "humane treatment" and "judicial guarantees which are recognized as indispensable by civilian peoples."¹² However, beginning in 2002, the Office of Legal Counsel (OLC) issued a series of memos effectively concluding that these detainees were not entitled to any Geneva-based status, deeming both CA 2 and CA 3 protections inapplicable.¹³

8. The number of detainees held in Iraq reportedly peaked at 26,000 in 2007 and has since fallen significantly. *U.S. Military: Number of Iraq Detainees Falling*, FOX NEWS, Mar. 3, 2009, <http://tinyurl.com/c9xe8n>. The number in Afghanistan is much lower, with a 2009 report stating that some 600 detainees were being held in Bagram Air Base in Afghanistan. Nedra Pickler & Matt Apuzzo, *Obama Backs Bush on Bagram Detainees*, HUFFINGTON POST, Feb. 20, 2009, <http://tinyurl.com/bjnke5>.

9. See Mark Denbeaux & Joshua Denbeaux, *Report on Guantánamo Bay Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* 14–15, SETON HALL UNIV. SCH. OF LAW (Feb. 8, 2006), <http://tinyurl.com/42w7uvl>; *Names of the Detained: Results*, WASH. POST, (Aug. 7, 2011, 10:32 PM), <http://tinyurl.com/3fe43db> (last visited Nov. 2, 2011).

10. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (describing the qualifications for POWs and prescribing their treatment by the enemy); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (discussing general protections of civilians and "protected persons" of a conflict).

11. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 150–54 (2010).

12. *Id.* The nature of an armed conflict may shift from a CA 2 to a CA 3 and vice versa, or have both types occurring at the same time, affecting the level of protections afforded to the conflict's participants. See *id.* at 154–56.

13. A January 2002 Office of Legal Counsel (OLC) memo reasoned that CA 2 did not apply to al-Qa'ida because al-Qa'ida was not a state who could be a Geneva party; likewise, CA 3 did not apply because the U.S. conflict with al-Qa'ida spanned many nations besides Afghanistan. Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice on the Application of Treaties and Laws to al-Qaeda and Taliban Detainees for Alberto Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def., 8–9 (Jan. 22, 2002), available at <http://tinyurl.com/3wdanwe>. The Taliban was similarly ineligible for CA 2-based POW status, in part because of its failure to carry weapons openly, wear a distinct uniform, and obey the laws of war; it was also categorically CA 3 ineligible because "the Afghanistan war is international in nature." *Id.* at

These widely criticized legal opinions went hand-in-hand with widely criticized executive decisions,¹⁴ leaving many GWOT-related detainees without any Geneva-based protections. As a result, detainees' only guarantees of humane treatment and due process rights were those the United States chose to grant within the parameters of U.S. laws. Initially, the United States did not grant detainees such rights. The inapplicability of Geneva-based protections allowed the United States to authorize aggressive interrogation techniques,¹⁵ and, some argue, led to the public relations nightmare of alleged detainee abuses at Abu Ghraib and other detention facilities.¹⁶

Things changed with the 2006 U.S. Supreme Court case *Hamdan v. Rumsfeld*,¹⁷ which held that, at a minimum, CA 3 protections applied to GWOT detainees held in Guantánamo.¹⁸ The case immediately impacted

31. See generally Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, on the Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 for Alberto Gonzales, Counsel to the President (Feb. 7, 2002), available at <http://tinyurl.com/4y9lqx2>. A similar OLC memo denied critical Geneva protections to many of those detained pursuant to the U.S.-Iraq armed conflict. See Memorandum of Opinion from the Office of Legal Counsel, U.S. Dep't of Justice on the Protected Person Status in Occupied Iraq Under the Fourth Geneva Convention for the Counsel to the President (Mar. 18, 2004), available at <http://tinyurl.com/3lvcxo4>.

14. See Carrie Johnson & Julie Tate, *Authors of Waterboarding Memos Won't be Disciplined*, WASH. POST, Feb. 20, 2010, available at <http://tinyurl.com/ybpbjora>. One author of the OLC memos has asserted that certain alleged abusive interrogation practices went beyond the scope of OLC authorization. See Charlie Savage & Scott Shane, *Bush Aide Says Some C.I.A. Methods Unauthorized*, N.Y. TIMES, Jul. 15, 2010, at A12. It nevertheless appears that top officials in the Bush Administration based their approval of harsh interrogation techniques on the OLC memos, techniques that included "stripping detainees of [their] clothes, placing them in stress positions, and using military working dogs to intimidate them." S. ARMED SERVS. COMM., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xx-xxiv (Comm. Print 2008), available at <http://tinyurl.com/crq4bj>.

15. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A 15 n.8 (Aug. 1, 2002), available at <http://tinyurl.com/3errk> (concluding that aggressive interrogation techniques were permissible). This memo was superseded by a December 30, 2004, OLC memo which broadened the definition of impermissible "torture," but did not consider the application of CA 3 to detainees. See Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., Legal Standards Applicable under 18 U.S.C. 2340-2340A (Dec. 30, 2004), available at <http://tinyurl.com/3qgyjm8>. Although this memo broadened the definition of impermissible "torture," it found that the conclusions of "prior [OLC] opinions addressing issues involving treatment of detainees" would not "be different under the standards set forth in this memorandum." *Id.* at 2 n.8.

16. See, e.g., *Bush Policy Led to Abu Ghraib*, BBC NEWS, Apr. 22, 2009, <http://tinyurl.com/dd7bk3>.

17. 548 U.S. 557 (2006).

18. The defendant, Hamdan, was a Yemeni citizen captured by U.S. forces in Afghanistan and transferred to the U.S. detention facility in Guantánamo Bay, Cuba. *Id.* at 566-68. President Bush ordered him tried by military commission in 2003, and Hamdan was charged with "conspiracy" to commit terrorist-type acts stemming from his duties as a driver for Osama bin Laden. *Id.* at 568-70. The majority expressly declined to give an opinion on whether Hamdan was detained pursuant to a CA 2 conflict, explaining that its holding of CA 3 applicability was enough to reach its intended result

the domestic rules governing detainee operations. In the realm of day-to-day detainee welfare, Department of Defense (DoD) and U.S. Army instructions were changed to incorporate the CA 3 concept of “humane treatment,”¹⁹ and the United States has since striven to increase reporting and transparency procedures relating to detainee welfare.²⁰ As for criminal trials, *Hamdan* prompted the passage of the 2006 Military Commissions Act (MCA),²¹ which attempted to provide more, but certainly not federal-equivalent, due process for detainees.²² Meanwhile, the U.S. government successfully pursued the prosecution of terrorists through the federal courts, while military commissions seem to have floundered.²³ However, despite the success of federal prosecutions, an oft-argued preference for

— the military commissions did not comply with international legal requirements. *Id.* at 628–31.

19. Steven C. Welsh, *Terrorism Detainees: Geneva Convention Common Article 3*, CTR. FOR DEF. INFO. (Sept. 12, 2006), <http://tinyurl.com/3sca4x6>; *see also* U.S. DEP’T OF DEFENSE, DEP’T OF DEFENSE DIRECTIVE NO. 2310.01E, DEPARTMENT OF DEFENSE DETAINEE PROGRAM ¶¶ 4.1, 4.2 (Sept. 5, 2006), *available at* <http://tinyurl.com/3gr4cyw> (requiring that all detainees be treated humanely and in accordance with the minimum standards articulated in CA 3).

20. *See* U.S. DEP’T OF DEFENSE, DEP’T OF DEFENSE DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM (May 9, 2006), *available at* <http://tinyurl.com/3uzk3wl> (requiring DoD components to comply with the law of war and establishing command-wide responsibility to report violations, including violations of DoD Dir. 2310.01E); *see also* Stephanie Nebehay, *U.S. More Open on Detainees in Iraq, Afghanistan: ICRC*, REUTERS, Jan. 28, 2011, <http://tinyurl.com/44pkh5k> (discussing increased International Committee of the Red Cross access to U.S. detention facilities). Also of note, in 2009, President Obama declared CA 3 as a minimum baseline of detainee treatment on a worldwide scale, and applied Army instructions on detainee operations to all U.S. government agencies. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

21. *Hamdan* held that the military commissions did not meet the requirements of CA 3, as they were not a “regularly constituted court” as contemplated under that Article. 548 U.S. at 615–16, 631–33. MCA deviations from the Uniform Code of Military Justice included the ability to “be convicted based on evidence [the defendant] has not seen or heard, and that any evidence admitted against [the defendant] need not comply with the admissibility or relevance rules typically applicable in . . . court-martial proceedings.” *Id.* at 615–16.

22. *See* Captain Aaron L. Jackson, *Habeas Corpus in the Global War on Terror: An American Drama*, 65 A.F.L. REV. 263, 278–79 (2010). The 2006 MCA allowed consideration of hearsay evidence, “did not allow detainees an opportunity to review and respond to any classified evidence, and accepted evidence extracted by using unlawful interrogation techniques . . .” *Id.* Moreover, it denied the right of habeas corpus to detainees. *Id.* In 2008, the Court struck down the habeas corpus restrictions of the 2006 MCA, finding the detainees at Guantanamo Bay had a constitutional right to habeas corpus. *See Boumediene v. Bush*, 553 U.S. 723, 753–798 (2008). The decision prompted the passage of the 2009 MCA, which provided for habeas corpus rights but generally kept other controversial restrictions on detainee rights intact. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801–1807, 123 Stat. 2190 (2009) (codified at 10 U.S.C. §§ 948a–950w).

23. Ctr. On Law and Sec., *Terrorist Trial Report Card: September 11, 2001–September 11, 2010* 4 (2010), <http://tinyurl.com/3tmycsw>. This report finds that since 2001, the Department of Justice has prosecuted 688 defendants for terrorism-related offenses and achieved a successful conviction in 86.9% of those cases. *Id.* *See also* Laura M. Olson, *Prosecuting Suspected Terrorists: The “War on Terror” Demands Reminders About War, Terrorism, and International Law*, 24 EMORY INT’L L. REV. 479, 484 n.37 (2010). As of mid-2011, the military commissions had produced only 6 convictions. Editorial, *Terrorism and the Law: The Case of a Somali Accused of Terrorism is Ending Right, but Started Wrong*, N.Y. TIMES, Jul. 16, 2011, at SR11.

the broader rights and protections attendant to them,²⁴ and despite President Obama's temporary halting of the commissions on entering office, Washington has resisted abandoning the commissions, effectively taking away funding for federal prosecutions in mid-2010 and leaving the commissions as virtually the only option for prosecuting terrorists held in Guantánamo Bay.²⁵

The unavailability of the federal courts undoubtedly led to the Obama Administration's March 7, 2011, announcement reinstating the military commissions, but, perhaps in part to ease the inevitable criticisms of MCA due process that would result from this decision, the Administration proclaimed it would seek to ensure defendants benefitted from the added protections of the APs. AP I to the Geneva Conventions applies to CA 2 (state versus state) armed conflicts, expanding on the 1949 Geneva-based protections applied to those involved in or directly impacted by such conflict.²⁶ Generally, commentators assert the United States accepts approximately two-thirds of AP I as customary international law, including, at least at one time, Article 75.²⁷ Article 75 provides protection to those without status under the GC,²⁸ and includes the right to be free from violence, "torture of all kinds, whether physical or mental," and "humiliating and degrading treatment."²⁹ In addition, detainees must be informed of the reasons for their detention, should either be tried or released within a prompt time, and benefit from "generally recognized principles of regular judicial procedure."³⁰ These principles include notice of charges, a prohibition on *ex post facto* application of law, a presumption of innocence, a right against self-incrimination and coerced confessions, a right to examine witnesses, and double jeopardy-type protection.³¹

24. See, e.g., Stephen J. Schulhofer, *Prosecuting Suspected Terrorists: The Role of the Civilian Courts*, 2 ADVANCE: THE J. OF ACS ISSUE GRPS. 63 (Fall 2008).

25. See Peter Landers, *Congress Bars GITMO Transfers*, WALL ST. J., Dec. 23, 2010, <http://tinyurl.com/2alscvf>; see also Kevin Johnson, *Military Panels Will Try 9/11 Cases*, USA TODAY, Apr. 4, 2011, <http://tinyurl.com/4xus39l> (explaining comments of Attorney General Holder that, although the Administration preferred federal trials for certain suspected terrorists held in Guantánamo Bay, "fierce opposition from Congress made such a plan impossible"). These congressional restrictions do not strictly apply to transfers of overseas, non-Guantánamo detainees directly to the United States for federal trial.

26. See SOLIS, *supra* note 11 at 120–21. The United States signed the Protocol as soon as it was open for signature in 1977, but the Senate has never ratified it. See *id.* at 132.

27. See *id.* at 134; Martin P. Dupuis et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. INT'L L. REV. 415 (1987).

28. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

29. *Id.* art. 75(2).

30. *Id.* arts. 75(3), (4).

31. *Id.* art. 75(4).

AP II, also signed by the United States, but not ratified, applies to noninternational armed conflicts and is primarily an expansion on the general requirements of CA 3 of Geneva, with some of its most important provisions covering the same ground as Article 75.³² However, particularly after *Hamdan's* apparent expansive holding that CA 3 applies to any Geneva-defined noninternational armed conflict, including transnational conflicts, AP II is clearly more limited in applicability than CA 3. AP II is triggered only when “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”³³ This is a high hurdle to jump, and even if the Senate ratified AP II, the United States might rarely apply AP II if it were to literally adhere to this threshold requirement.³⁴

Interestingly, when a plurality of the *Hamdan* Court sought to define the protections of CA 3 pursuant to an international framework, they turned not to AP II, but to AP I, Article 75, believing at least some aspects of the latter to be customary international law.³⁵ Because only a plurality chose to address Article 75, that part of the opinion lacks precedential value.³⁶ It is significant, however, that a part of AP I might apply to a CA 3 analysis, and the plurality’s decision to refer to AP I reflects a growing trend to blur distinctions between CA 2 and CA 3 protections.³⁷ Indeed, upon hearing the Administration’s March 2011 announcement, some commentators speculated that the Administration intended to apply Article 75 to all detainees in Guantánamo, despite most of them not having CA 2 status.³⁸

32. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. Additional Protocol II sets minimum standards of humane treatment and discusses specific trial-related due process protections to detainees and other civilians. *Id.* arts. 4–6.

33. See *id.* art. 1; Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29 (1983).

34. For a general discussion of the differences in scope of CA 3 and Additional Protocol II, see SOLIS, *supra* note 11, at 129–30. Unlike CA 3, Additional Protocol II requires reciprocity from the enemy, and Professor Solis concludes al-Qa’ida does not follow the law of armed conflict (and thus does not “implement” Additional Protocol II as required). See *id.* at 216. Moreover, al-Qa’ida “does not control sufficient territory from which to launch sustained and concerted military operations, so the threshold for application of Additional Protocol II is not met.” *Id.* at 219.

35. *Hamdan v. Rumsfeld*, 548 U.S. 557, 633–35 (2006). A number of international law scholars endorse the idea that Article 75 is customary international law. See, e.g., Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, INT’L REV. RED CROSS, Mar. 31, 2003, at 45, 70, 73.

36. *Hamdan*, 548 U.S. at 654–55.

37. See generally Emily Crawford, *Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflict*, 20 LEIDEN J. INT’L L. 441 (2007) (documenting the historical international trend towards blending CA 2 and CA 3 distinctions in the LOAC, and arguing a uniform approach towards the treatment of LOAC participants is the best approach for the future).

38. See, e.g., David B. Rivkin & Lee A. Casey, *With the Stroke of a Pen, Obama Gives Terrorists an Edge*,

II. OBAMA'S PRONOUNCEMENTS AND DETAINEE ABUSE PREVENTION

Although the United States may have once considered Article 75 to be customary international law, in the wake of the September 11 attacks and, at least initially, the CA 2 conflicts in Afghanistan and Iraq, the country's leadership no longer appeared concerned with the intricacies of this Article. Indeed, the OLC memos barely considered the Additional Protocols. Further, in the last ten years, GWOT-related detainees have alleged a number of abuses related to interrogation that, if they occurred, would not meet the standard of "humane treatment" as contemplated in CA 3. These alleged abuses include "inadequate food or healthcare; physical mutilation during torture with glass and cigarettes; sleep deprivation; light and sound manipulation; and exposure and temperature extremes," as well as "sexual assault, religious persecution, and sexual degradation."³⁹ Such allegations have not been confined to Guantánamo Bay, but are also raised in relation to U.S. detention facilities in Iraq and Afghanistan.⁴⁰ One human rights study found that as of April 2006, there were 330 credible allegations of abuse against U.S. military and civilian personnel.⁴¹

An earlier implementation of Article 75 might have helped prevent abuses such as those alleged, assuming that the Articles would apply to detainees with both CA 2 and CA 3 status, as the majority of today's detainees have CA 3 status.⁴² As one international law scholar points out, much like CA 3, some of Article 75 has already been applied to detainee treatment throughout the DoD in the wake of *Hamdan*.⁴³ While allegations

USA TODAY, Mar. 17, 2011, at 13A; John Bellinger, *Obama's Announcements on International Law*, LAWFARE (Mar. 8 2011, 8:33 PM), <http://tinyurl.com/3obv9e3> ("My assumption is that the Administration does plan to apply Article 75 to al Qaida and the Taliban and that it does not agree with (or overlooked) the Supreme Court's conclusion that the conflict is a non-international armed conflict.").

39. Jerica M. Morris-Frazier, *Missing in Action: Prisoners of War at Guantánamo Bay*, 13 D.C. L. REV. 155, 158 (2010).

40. See S. ARMED SERVS. COMM., *supra* note 14, at xxvi–xxix. According to one legal writer, the notorious abuses at Abu Ghraib "sparked global outrage and caused a devastating effect to America's image—one from which the Bush Administration likely never recovered." Jackson, *supra* note 22, at 287.

41. HUMAN RIGHTS FIRST, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2 (2006), *available at* <http://tinyurl.com/3hepg9b>.

42. Most current detainees would be considered CA 3 because of the relatively short period of time the Afghanistan and Iraq conflicts were in a CA 2 status, the varying places of capture of GWOT detainees, and the holding of *Hamdan*. See *supra* notes 8–9 and accompanying text.

43. See Robert Chesney, *Cully Stimson on Art. 75 and Its Implications for Hearsay in Military Commissions*, LAWFARE (Mar. 10, 2011, 10:49 PM), <http://tinyurl.com/4yzaow6>; see also U.S. DEPT OF DEFENSE, *supra* note 19, at encl. 4. In particular, detainees, as matter of "minimum standards," in addition to CA 3, shall have "[a]dequate food, drinking water, shelter, clothing, and medical care," the "[f]ree exercise of religion," "will be protected against acts of violence including rape, forced

of abuse have occurred since the DoD's implementation of CA 3 and some of Article 75,⁴⁴ the allegations seem to have been relatively sporadic when compared to the pre-2006 time period. Moreover, the Administration's own examination of detainee operations concluded that "current [U.S. military] policies and practice" are already consistent with Article 75.⁴⁵ In short, the 2006 application of CA 3, along with its AP I, Article 75 implications, has already improved detainee welfare.

Thus, the White House's March pronouncements do not have significant practical impact on the treatment of today's detainees; however, the apparently narrow scope of the Administration's March statement cannot be discounted. It applies only to *international* armed conflicts,⁴⁶ a narrower stance than existing DoD instructions implicitly applying Article 75 to detainee welfare. Geneva status unfortunately still plays a limiting role, further narrowing the scope of application. Amid the fallout of alleged detainee abuses (including international accusations of human rights violations,⁴⁷ which embolden the enemy),⁴⁸ as well as a reluctance of foreign nations to relinquish custody of suspected terrorists to the United States,⁴⁹ it is prudent to completely eradicate the perception of potential abuse. To this end, detainee treatment should not be based on status, but on the uniform amount of dignity and respect demanded under Article 75.⁵⁰ Again though, given DoD's current policy that protects detainees,

prostitution, assault and theft, public curiosity, bodily injury . . . [and] will not be subjected to sensory deprivation."

44. See, e.g., Heidi Vogt, *Afghans Allege Abuse at Secret U.S. Jail*, AIR FORCE TIMES, Oct. 14, 2010, <http://tinyurl.com/3lhv3h3>.

45. See Press Release, White House, Office of the Press Sec'y, Fact Sheet: New Actions on Guantánamo and Detainee Policy, *supra* note 4 ("An extensive interagency review concluded that United States military practice is already consistent with the [AP II's] provisions.").

46. *Id.*

47. See *supra* note 1 and accompanying text.

48. See S. ARMED SERVS. COMM., *supra* note 14, at xii ("Al Qaeda and Taliban terrorists are taught to expect Americans to abuse them. They are recruited based on false propaganda that says the United States is out to destroy Islam. Treating detainees harshly only reinforces that distorted view, increases resistance to cooperation, and creates new enemies."); Richard D. Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, 5 GEO. J.L. & PUB. POL'Y 113, 141 (2007) ("By its loose interpretation of the law of war and the resultant abuses at Abu Ghraib and elsewhere, the United States has played into al-Qaeda's hands, giving any allegations – no matter how baseless or outrageous – a ring of truth."); *Ex-Interrogator: Torture Doesn't Work*, MILITARY.COM, Dec. 6, 2008, <http://tinyurl.com/c4urky> (explaining that interrogation techniques utilizing torture assists al-Qa'ida in recruiting new members).

49. See Joshua L. Dratel, *Federal Criminal Trials for Terror Suspects a Clear Advantage over Military Commissions*, JURIST (Mar. 1, 2010, 1:03 PM), <http://tinyurl.com/4yraz8r> ("A significant obstacle to extradition is the European community's resistance to sending its nationals to the U.S. to be subject to sub-standard justice and inhumane conditions in . . . what the world recognizes as an illegitimate and failed system . . .").

50. The most often alleged benefit of "less than humane" detainee treatment that is the ability to gain intelligence. However, the validity of this idea is highly questionable. See, e.g., S. ARMED SERVS. COMM., *supra* note 14, at xxvi (concluding that post 9/11 interrogation techniques such as "stripping

this qualification is not of immediate practical import to the abuse issue. It is nevertheless potentially critical to the issue of criminal prosecution.

III. OBAMA'S PRONOUNCEMENT AND TRIAL OF DETAINEES

The Additional Protocols do not explicitly require treaty parties to try a detainee criminally, and the Administration's March announcement recognizes there are some detainees who may never have a trial and may continue to be held indefinitely.⁵¹ Should a nation choose to prosecute a detainee however, the APs prescribe rules for those trials.⁵² Such trials have taken place in the form of military commissions since 2001,⁵³ and as long as Congress continues to refuse to fund federal trials, the military commissions remain the most viable forum.

In the absence of federal trials and in the context of these military commissions, the MCA presents another set of difficulties for detainee rights by containing provisions that appear incompatible with AP I, Article

[detainees] of their clothing, placing them in stress positions, putting hoods over their heads, and treating them like animals . . ." are "inconsistent with the goal of collecting accurate intelligence information . . ."); *House Panel Gets Earful on Waterboarding*, CBS NEWS, Feb. 11, 2009, <http://tinyurl.com/ya9ffns> (describing the congressional testimony of two U.S. military experts who believe evidence obtained through torture-type techniques is not trustworthy). Another argument favoring the nonapplication of Geneva-based protections to GWOT-related detainees is based on deterrence principles. That is, if GWOT detainees, who certainly violate various aspects of LOAC, are provided the benefits and protections of the Geneva Conventions, then they have no incentive to abide by Geneva restrictions in conducting operations. See Brett Shumate, *New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan*, N.Y. INT'L L. REV. 1, 55–64 (2005) (describing LOAC violations characteristic of al-Qa'ida and their Taliban sympathizers and arguing the OLC analysis in the early years of the Bush Administration was technically correct). However, the incentive is ineffective as a practical matter. In the early years of GWOT, when the United States clearly did not apply certain aspects of the Geneva Conventions to detainee treatment, there was little evidence of an increased international lawfulness in the actions of terrorist operations. Intuitively, detainee maltreatment cannot be expected to engender much deterrence or Geneva-adherence when enemy actions are largely fueled by radical ideologies, or, in more historically traditional types of armed conflict, fueled by passionate and righteous nationalist or imperialist goals.

51. Additional Protocol I states that detainees "[e]xcept in cases of arrest or detention for penal purposes . . . shall be released with the minimum delay possible and in any event as soon as the circumstances justifying arrest, detention or internment have ceased to exist." Additional Protocol I, *supra* note 28, art. 75(3). From a strict interpretation of existing legal doctrine, as long as the United States is involved in ongoing armed conflict, detainees may remain detained indefinitely. See Sean D. Murphy, *Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants"*, 75 GEO. WASH. L. REV. 1105, 1149–50 (2007). The question arises, however, exactly how to determine the end of the *global* war on terror. At ten years and counting, it may not be possible to decisively end a conflict against nonstate actors spread across the world. Thus, the nature of the current conflict is likely a factor in the decision of U.S. leaders to criminally try detainees, as opposed to merely holding them until the end of the "war."

52. See Additional Protocol I, *supra* note 28, art. 75(3); Additional Protocol II, *supra* note 32, art. 6.

53. See CTR ON LAW AND SEC., *supra* note 23, at 10.

75, and, to a slightly lesser extent, AP II, Article 6.⁵⁴ For example, while the 2009 MCA makes statements inadmissible if obtained through “torture, cruel, or degrading treatment,” it in theory allows the admission at trial of an otherwise “involuntary” statement under certain circumstances.⁵⁵ In potential contravention, Article 75(4)(f) states that “[n]o one shall be compelled to testify against himself or to confess guilt,”⁵⁶ a provision that the International Committee of the Red Cross and other commentators have interpreted to prohibit the admission at trial of any “coerced” confession.⁵⁷

In addition, the Act sets the default in favor of admitting hearsay⁵⁸ and summaries of classified evidence.⁵⁹ Both provisions seem at odds with Article 75(4)(g), which states that “[a]nyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”⁶⁰

Finally, the 2009 MCA allows for the prosecution of *ex post facto* offenses,⁶¹ while Article 75(4)(c) prohibits convictions for offenses that “did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.”⁶² Those attempting to prosecute terrorists have previously struggled with the *ex post facto* issue, trying defendants who were apprehended for intelligence purposes and their danger to U.S. security, and not necessarily apprehended for having committed a typical war crime. For example,

54. Consistent with previous versions of the MCA, the 2009 Act specifically exempts the speedy trial, self-incrimination, and pretrial investigation provisions of the Uniform Code of Military Justice (UCMJ) from the MCA. *See* 10 U.S.C. § 948b(d) (Supp. 2010). For an issue-by-issue comparison of the UCMJ, 2006 MCA, and 2009 MCA see JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 41163, *The Military Commissions Act of 2009: Overview of Legal Issues 34–52* (2010), *available at* <http://tinyurl.com/3wnj44a>. Unlike AP I, Article 75, AP II does not contain language on the right of a defendant to examine witnesses and evidence. *Compare* Additional Protocol I, *supra* note 28, art. 75(4), *with* Additional Protocol II, *supra* note 32, art. 6.

55. *See* 10 U.S.C. § 948r (Supp. 2010). An otherwise “involuntary” statement may be admitted, as long as it was not obtained through “torture or cruel, inhuman, or degrading treatment” and the military judge finds “(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) that . . . the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.” *Id.*

56. Additional Protocol I, *supra* note 28, art. 75(4)(f).

57. See James G. Stewart, *The Military Commissions Act’s Inconsistency with the Geneva Conventions: An Overview*, 5 J. INT’L CRIM. JUST. 32 (2007).

58. *See* 10 U.S.C. § 949a(b)(3)(D) (Supp. 2010).

59. *Id.* § 949p–1 (Supp. 2010). The Act specifies that the Commission will only admit evidence that the defendant is permitted to see. *Id.*

60. Additional Protocol I, *supra* note 28, art. 75(4)(g).

61. *See* 10 U.S.C. § 948d (Supp. 2010).

62. Additional Protocol I, *supra* note 28, art. 75(4)(c).

some detainees have been charged with “conspiracy” to commit terrorist-related acts, a charge that the *Hamdan* plurality found not to represent a traditional war crime.⁶³

Given such divergences between the APs and the MCA, a uniform application of the APs to all detainees, regardless of status, seems unlikely. First, setting aside Article 75’s distinction between CA 2 and CA 3 and AP II’s high hurdle of applicability, if a court of review were to hold the commissions to the standard of the APs, some commission cases could be deemed invalid, particularly given some of the comments of the Court in *Hamdan*.⁶⁴ Second, if the APs were applied to all commission hearings, an increase in unsuccessful prosecutions seems probable, defeating what many commentators believe is the true reason for the commissions: lower evidentiary standards leading to easier convictions.⁶⁵ For such reasons, blanket application of the Additional Protocols would pose a serious risk to the Obama Administration’s primary means of trying non-U.S.-based terrorists. Therefore, it does not appear the Obama Administration intends to apply Article 75, and, if ratified, AP II, in a blanket fashion, but rather on the basis of detainee status.

If this is correct, the Administration’s March announcement will have little impact on trials, other than perhaps to make Article 75 a bit more relevant in a given judicial analysis of the extent of CA 3 protections. For

63. *Hamdan v. Rumsfeld*, 548 U.S. 557, 603–604 (2006). Although the 2006 MCA answered the plurality by statutorily defining “conspiracy” as a crime, potential *ex post facto* problems remain. See Charles H. Rose, *Criminal Conspiracy and the Military Commissions Act: Two Minds that May Never Meet*, 13 ILSA J. INT’L & COMP. L. 321, 326–27 (2007).

64. In addition to declaring that Article 75 (which under its own terms applies only to CA 2 conflicts) applied to a CA 3 analysis, the plurality pointed out that the military commissions as applied to *Hamdan* fell short in many ways of Article 75’s requirements. See *Hamdan*, 548 U.S. at 633–635 (plurality opinion). Among other matters, the Court found as problematic the failure of the commissions to follow the Military Rules of Evidence, including rules regarding admissibility of coerced evidence and hearsay. See *id.* at 651–53 (Kennedy, J., concurring). A number of discrepancies between the Military Rules of Evidence and the current MCA still exist. See JENNIFER K. ELSEA, *supra* note 54, at 34–52. While the majority in part, plurality, and concurrence repeatedly emphasized the then-lacking congressional authorization for the commissions’ deviations from courts-martial procedures, the Court’s subsequent decision in *Boumediene v. Bush* demonstrated that explicit congressional authorization does not immunize military commissions from judicial scrutiny under the U.S. Constitution. Compare *Hamdan*, 548 U.S. at 566–655 (focusing on the lack of authorization from Congress) with *Boumediene v. Bush*, 553 U.S. 723, 770–771 (2008) (holding that the Suspension Clause of the U.S. Constitution applies to detainees at Guantánamo Bay).

65. See, e.g., Randy James, *A Brief History of Military Commissions*, TIME, May 18, 2009, <http://tinyurl.com/y8tx73c> (describing the Obama Administration’s private worry of an inability to obtain convictions of suspected terrorists in civilian courts while publicly announcing an end to the commissions); Deborah Pearlstein, *Military Commissions Moving Ahead*, OPINIO JURIS (Jul. 29, 2009, 4:59 PM), <http://tinyurl.com/lgxjzbz> (criticizing the many proponents of the MCA who support the ability to “forum shop,” a mindset which creates “a huge legitimacy problem” – “[we] can’t prove it in an Article III court, so we’ll try to get a conviction under easier rules . . .”). But see *Hamdan*, 548 U.S. at 624 (“The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity . . .”).

example, defense lawyers may cite the March “Fact Sheet” to show the importance of Article 75, perhaps in support of an argument that Supreme Court-mandated CA 3 protections have not been afforded to a defendant. However, such an argument is merely another semi-useful arrow in a defense counsel’s quiver, certainly not controlling on a court.

The Administration’s announcement would have obviously been more powerful had it clearly declared Article 75 to be applicable to all detainee operations. Perhaps the fear of the effects of a non-status-based application of Article 75 or of a broad application of AP II seems more justifiable in the trial realm than in the realm of day-to-day detainee welfare: the potential acquittal and release of dangerous offenders endangers national security. However, it is clear the United States is not required to try any security detainee, and it can hold security detainees without trial in the context of an armed conflict. Moreover, if a detainee is tried and acquitted, he or she may still be held as a security threat.⁶⁶ The Obama Administration, like the Bush Administration before it, apparently intends to pursue this course, weakening the necessity of distinguishing the criminal procedure of military commissions from AP requirements. Moreover, if Article 75 is applied to all detainees, the perceived legitimacy of detainee-convictions will likely improve. Thus, U.S. leaders should consider amending the 2009 MCA to clearly meet the standards of the APs, or abolish the MCA and allow the recommencement of federal trials for all suspected terrorists.

CONCLUSION

In short, the Obama Administration’s March announcement has virtually no practical impact on the day-to-day operations of the U.S. military and its treatment of detainees. The spirit of Article 75 and AP II is already applied to detainee welfare. There could be an impact on the criminal trials of detainees in terms of the due process offered, but only if the Obama Administration were to advocate a non-status-based approach to the Protocols. The existing MCA is seemingly inconsistent with this approach, and the continued use of the MCA suggests the Administration will continue to focus on status. Under a status-based analysis, Article 75 does not apply to most detainees, while AP II, even if ratified, likely would not apply to current detention operations due to the failure of detainees to meet that Article’s high threshold of applicability.

Perhaps the more important impact of the announcement is in its symbolism. Cynically, some might see it as a hollow gesture to liberal constituents who had hoped President Obama would remain committed to

66. *See supra* note 51 and accompanying text.

ending the military commissions. Less cynically, and much more consequentially, after a decade of controversial U.S. decisions regarding the treatment of detainees, Obama's statements make clear that the United States is moving away from abuse and toward fair trials, a renewed adherence to international law, and the acceptance and ratification of the APs. Optimistically, this in turn will enhance U.S. esteem within the international community and lead to positive international cooperation and development in the international law of armed conflict. It remains clear, however, that this desired effect could be further enhanced by narrowing status-based distinctions in detainee operations.