

## NOTES

# THE GUANTANAMO MILITARY COMMISSION: THE MCA 2009 AS A VIOLATION OF INTERNATIONAL LAW

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### INTRODUCTION

The September 11, 2001 (9/11), terrorist attacks started a conflict between terrorist organizations around the world and the United States (US) that would continue for more than a decade to come. In response to the attacks, President Bush issued an Executive Order on November 13, 2001, to provide for a military commission for individuals subject to the order to be tried via commission for “violations of the laws of war.”<sup>1</sup> Nineteen years, a congressional act supporting the order, and an amendment to the act later, the military commission (“Commission”) is set to try five detainees of Guantanamo Bay in January 2021 for their roles in plotting and executing the terrorist attacks on 9/11. In that Commission, a problem emerges: almost twenty years after President Bush’s Executive Order, the military commission to be used to try the Guantanamo detainees is no longer valid under international law.

With so much time passing between the terrorist attacks that sparked the order of the Commission and its use, the geopolitical landscape related to the War on Terror has shifted such that international treaties and customary law no longer support the necessity of this Commission, which is reflected by the fact that armed conflict between the parties has subsided. Without armed conflict remaining between the terrorist organizations and the US, the necessity for a commission in the context of war has largely dissipated. As a result, the Commission formed in 2001 that was upheld by Congress through the Military Commissions Act of 2006 (MCA 2006)<sup>2</sup> and its amendment, the Military Commissions Act of 2009 (MCA 2009),<sup>3</sup> is no longer valid under Common Article 3 (CA3)<sup>4</sup> and lacks the necessity required for its valid exercise of

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1. Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law?*, 30 *FORDHAM INT’L L.J.* 780, 793 (2007) (quoting Military Order of November 13, 2001, 66 *Fed. Reg.* 57833, 57833 (Nov. 16, 2001)).

2. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 *Stat.* 2600 (codified as amended at 10 U.S.C. § 948 et seq. (2018)).

3. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801 et seq., 123 *Stat.* 2190, 2574 (amending the 2006 Act) (codified as amended at 10 U.S.C. § 948 et seq. (2018)).

4. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 *U.S.T.* 3316, 75 *U.N.T.S.* 135.

jurisdiction. Therefore, the more suitable forum for such trials lies in the US criminal justice system.

### I. BACKGROUND OF MILITARY COMMISSIONS

Military commissions have existed for centuries. Their use has provided military commanders with efficient means of “investigating and punishing violations of the law of war since before the existence of the United States.”<sup>5</sup> Military commissions are useful in balancing the power that military commanders have over their battlefields and the laws that govern such environments.<sup>6</sup> By allowing for military commissions that are separate from domestic courts, military leaders can exercise necessary power during times of war through the expedient justice that wartime measures sometimes require.

Military commissions have been used in three different situations.<sup>7</sup> Historically, they have either served as a replacement for civilian courts when martial law was declared, were established to try civilians “as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function,”<sup>8</sup> or were used as commissions that were “incident to the conduct of war.”<sup>9</sup> Since the first two categories do not apply to the military commission at hand, in that martial law had not been declared following the attacks on 9/11, and the Commission is not in connection to enemy territory, the Commission can only qualify as a commission that is incident to the conduct of war.<sup>10</sup>

Commissions that are incident to the conduct of war emerged centuries ago. This type of commission is used where the accused is charged with violations of the laws of war.<sup>11</sup> Military commanders began using these commissions during the Mexican-American War, where General Winfeld Scott created the mechanism exemplifying military commissions today.<sup>12</sup> General Scott started using military commissions to try crimes committed by indigenous people against the American forces occupying Mexico,<sup>13</sup> and later began trying unlawful combatants during the conflict, specifically for violations of the laws of war.<sup>14</sup> This was a valuable asset to militaries during conflict, as these

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5. Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 41.

6. *See id.* at 47.

7. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 595 (2006).

8. *Id.* at 595 (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 314 (1946)).

9. *Id.* at 596 (quoting *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942)).

10. *See id.* at 600–01.

11. *See* Scott L. Silliman, *On Military Commissions*, 36 CASE W. RESV. J. INT'L L. 529, 530 (2004).

12. *See* David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 136 (2008).

13. *See* Lacey, *supra* note 5, at 43.

14. *See* Glazier, *A Self-Inflicted Wound*, *supra* note 12, at 136–37.

violations could not, at the time, be tried by courts-martial under the Articles of War.<sup>15</sup>

By the American Civil War, the term “military commission” developed into its current definition.<sup>16</sup> General Henry W. Halleck established that military commissions served as an appropriate venue for dealing with issues of illegality of unlawful combatants during times of war.<sup>17</sup> In support of this, President Abraham Lincoln issued General Order No. 100, the Lieber Code,<sup>18</sup> establishing “military commissions as the appropriate forum for trying cases which do not come within the ‘Rules and Articles of War.’”<sup>19</sup> Military commissions subsequently became popular during the war, with the North using them over two thousand times between 1861 and 1865 to try individuals violating the laws of war.<sup>20</sup> General Halleck also gave valuable guidance as to the procedure of military commissions, as he claimed the commissions “should be ordered by the same authority, be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.”<sup>21</sup> The use of military commissions in this context was restricted even further in *Ex parte Milligan*. There, the Court barred a military commission from applying the laws of war to citizens in states that have “upheld the authority of the government, and where the courts are open and their process unobstructed.”<sup>22</sup> This established a need for using the laws of war in a military commission in such contexts.

Military commissions trying violators of the laws of war became the historical norm.<sup>23</sup> Such practice was codified into law in 1916, when Congress amended the Articles of War to preserve jurisdiction for such offenses to be tried by military commissions through Article 15.<sup>24</sup> By the time military commissions were being used in this context in WWII, many commissions were departing from the advice posed by General Halleck during the Civil War, that procedures should comply with courts-martial procedures.<sup>25</sup> Despite differing procedures, the Court in *Ex parte Quirin* reaffirmed the legitimacy of the military commission via Article 15 of the Articles of War, resulting in eight

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15. *See id.*

16. *See* Lacey, *supra* note 5, at 44.

17. *See id.* at 43.

18. *See Military Commissions History*, OFF. MIL. COMM’NS, <https://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> (last visited Dec. 31, 2020).

19. *Id.*

20. *See* Lacey, *supra* note 5, at 43.

21. Glazier, *A Self-Inflicted Wound*, *supra* note 12, at 137 (quoting Jno. C. Kelton, Assistant Adjutant-Gen., *General Orders No. 1 (Jan. 1, 1862)* in 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIALS RECORDS OF THE UNION AND CONFEDERATE ARMIES 247–49 (1894)).

22. *Id.* (quoting *Ex parte Milligan*, 71 U.S. 2, 121 (1866)).

23. *See* Lacey, *supra* note 5, at 45. Violators were tried in military commissions for violating laws of war during the Indian Wars, the Spanish American War, and WWI. *See id.*

24. *See id.* at 45.

25. *See* Glazier, *A Self-Inflicted Wound*, *supra* note 12, at 139.

Nazi saboteurs being convicted for violating the laws of war.<sup>26</sup> The Supreme Court followed a similar line of logic in the case of *Eisentrager*, where twenty-one German nationals were convicted in a military commission for violating the laws of war by sending Japanese military officials information concerning American military forces.<sup>27</sup> The Court supported the jurisdiction of the commission as a valid place to try enemy offenses against the laws of war.<sup>28</sup> By the end of WWII, military commissions established to try violations incident to the conduct of war had an expansive jurisdiction that was only limited by the *Milligan* Supreme Court decision.<sup>29</sup>

## II. THE EVOLUTION OF THE GUANTANAMO MILITARY COMMISSION

On November 13, 2001, President Bush issued an Executive Order establishing individuals subject to it would be tried by the military commission for “violations of the laws of war” and “other applicable laws.”<sup>30</sup> This order, exercised under his authority as Commander in Chief, provided for the detainment of international terrorists that violated such laws until their trial by the military commission.<sup>31</sup> The Bush administration saw potential for these violators to be held at Guantanamo until their trials, although for many this was turned into an indefinite detention.<sup>32</sup> Under this order, the Commission would be able to try al-Qaeda members, persons who have engaged in international terrorism, and persons who harbored, aided, or abetted terrorists.<sup>33</sup> Any evidence that would have “probative value to a reasonable person” could be admitted at trial,<sup>34</sup> and acts of terrorism and conspiracy, not traditionally seen as violations of the laws of war, were triable.<sup>35</sup>

This Commission was struck down as both a violation of domestic and international law by the *Hamdan v. Rumsfeld* Court.<sup>36</sup> In *Hamdan v. Rumsfeld*, Hamdan, a Yemeni national and Osama bin Laden’s former chauffeur, was being detained in Guantanamo while awaiting trial for a charge of conspiracy with al-

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26. See Lacey, *supra* note 5, at 46.

27. See Silliman, *supra* note 11, at 531.

28. See *id.*

29. See *id.*

30. Trahan, *supra* note 1, at 793 (quoting Military Order of November 13, 2001, 66 Fed. Reg. 57833, 57833 (Nov. 16, 2001)).

31. Lacey, *supra* note 5, at 41.

32. See Samuel Estreicher & Diarmuid O’Scannlain, *Hamdan’s Limits and the Military Commissions Act*, 23 CONST. COMMENT 403, 420 (2006). In 2005, five hundred detainees had been charged, and none of the cases had gone to trial.

33. See Trahan, *supra* note 1, at 794 (citing Military Order of November 13, 2001, 66 Fed. Reg. 57833, 57833 (Nov. 16, 2001)).

34. *Id.* at 796 (quoting 32 C.F.R. § 9.6(B)(3)).

35. See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 1–2 (2001).

36. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Qaeda to commit terrorist acts.<sup>37</sup> Hamdan filed a petition for a writ of habeas corpus in a federal court to challenge his detention, moving the district court to find that Hamdan was a prisoner of war.<sup>38</sup> According to the district court, the president's power to create military commissions could only extend to the laws of war, and the court found those laws did not apply.<sup>39</sup> While the appellate court reversed, finding that the Geneva Conventions did not apply because Hamdan was not a combatant and the creation of military tribunals had been approved by Congress previously, the Supreme Court of the United States disagreed with the appellate court.<sup>40</sup> Justice Stevens wrote the majority opinion, holding that "President Bush lacked congressional authorization to provide for the trial of these Guantanamo detainees by military commission and that some of the procedures contemplated for these trials contravened the Uniform Code of Military Justice ("UCMJ")."<sup>41</sup>

The Court found that President Bush's order was in violation of the UCMJ and therefore domestic law, as it violated Article 36 of the UCMJ's uniformity principle without a determination by the President and approval by Congress that it was "impracticable" to comply with court-martial procedures.<sup>42</sup> The Court found the military commission went astray from various court-martial procedures without Congressional authorization,<sup>43</sup> and also violated international law, as it was not a regularly-constituted court as required under CA3 of the Geneva Conventions.<sup>44</sup> The Court established that CA3 applied to the situation, in that it was an armed conflict not of an international character. Therefore, the military commission needed to be "established and organized in accordance with the laws and procedures already in force in a country[,]"<sup>45</sup> unless necessity dictated otherwise.<sup>46</sup> No necessity existed for straying from normal court procedures.<sup>47</sup> While the case left many legal questions unanswered,<sup>48</sup> President Bush's order was set aside.<sup>49</sup>

In response to the *Hamdan* decision, Congress provided authorization in MCA 2006 for variations from court-martial procedure that the President's

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37. *See id.* at 566–72.

38. *See id.* at 570–71.

39. *See id.* at 571.

40. *Id.* at 571–72.

41. Estreicher & O'Scannlain, *supra* note 32, at 403–04.

42. *See id.* at 408.

43. *See id.*

44. *See id.* at 408–09.

45. *Hamdan*, 548 U.S. at 562–63.

46. *Id.* at 592.

47. *See* Estreicher & O'Scannlain, *supra* note 32, at 411–12.

48. *See id.* The Court did not give a detailed analysis of why the conflict at hand qualified as an "armed conflict" under international law and there was no majority view as to whether conspiracy was regarded by the Court as a violation of the laws of war. *Id.*

49. *See id.* at 403.

order was previously lacking.<sup>50</sup> Rather than complying with UCMJ principles, MCA 2006 made UCMJ procedures different for the purpose of Guantanamo military commissions to make the commissions valid under domestic law, as UCMJ procedures were separated from military commission procedures.<sup>51</sup> MCA 2006 also claimed that a military commission established under it would be “deemed ‘a regularly constituted court’ for the purposes of Common Article 3 of the Geneva Conventions of 1949.”<sup>52</sup> While this may have been sufficient in solving the problem of domestic law validity, the Commission was still in violation of CA3, if such laws applied. Congress has the power to reform the UCMJ, just as the body has the power to enact the statute in the first place.<sup>53</sup> However, Congress cannot unilaterally reform what is lawful under CA3 of the Geneva Conventions, a product of international law. Procedures, such as the right to be present,<sup>54</sup> which was absent from MCA 2006, and the definitions of who can be charged under the commission were still at odds with CA3, making the military commission still in violation of international law if CA3 was pertinent.<sup>55</sup>

The MCA 2006 was amended in 2009 to include jurisdiction over any “alien unprivileged enemy belligerent”<sup>56</sup> who commits crimes “subject to the laws of war.”<sup>57</sup> These changes did not fix the flaws in MCA 2006 that made it potentially a violation of CA3, in that the jurisdiction of those triable by the Commission is still, as it stands, too broad.<sup>58</sup> It includes offenses that have not traditionally been crimes under the laws of war, strays from procedures of a regularly-constituted court without necessity, and possibly places civilians under threat of trial by the commission, likely violating CA3 if such commissions apply.<sup>59</sup> However, this is taking for granted the question of whether CA3 is even an applicable source through which to validate the military commission under international law. Without the presence of an armed conflict, it is not.

In addition to the legal problems the Commission has caused, it has also generated waste for the American people that is neither practicable, nor an efficient use of the public’s funds. As of September 2019, eighteen years after the opening of Guantanamo Bay, the Commission and prison “have cost more than \$6 billion to operate . . . and still churn through more than \$380 million a

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50. *See id.* at 417.

51. *See Trahan, supra* note 1, at 806.

52. Estreicher & O’Scannlain, *supra* note 32, at 417 (quoting Military Commissions Act of 2006, 10 U.S.C. § 948b(f)).

53. *See Trahan, supra* note 1, at 810–11.

54. *See id.* at 806–07.

55. *See Estreicher & O’Scannlain, supra* note 32, at 416.

56. JENNIFER K. ELSEA, CONG. RSCH. SERV., R41163, THE MILITARY COMMISSIONS ACT OF 2009 (MCA 2009): OVERVIEW AND LEGAL ISSUES 8–9 (2014).

57. *Id.* at 9.

58. *See id.* at 17.

59. *See id.* at 11–13.

year despite housing only 40 prisoners today.”<sup>60</sup> A former attorney who worked at Guantanamo filed complaints alleging Guantanamo has been a source of “‘gross financial waste’ and ‘gross mismanagement.’”<sup>61</sup> Despite this significant spending, the Commission has been, in the words of Guantanamo’s chief prosecutor from 2005 to 2007, Morris Davis, “an overwhelming failure.”<sup>62</sup> In nineteen years, there has only been one finalized conviction to come from the Commission.<sup>63</sup> Some of the eight hundred detainees that have passed through Guantanamo as prisoners sat in prison for almost eighteen years without any charges being filed against them, while others have been in legal squabbles that have been deadlocked for years.<sup>64</sup> Even if those cases were to come to a conclusion, the appeals process for trials could last another ten to fifteen years, “incurring costs of at least another \$1.5 billion.”<sup>65</sup> The mass economic waste alone speaks to the failure that Guantanamo is; what is worse is that the spending has not led to legal conclusions from the Commission. The Commission is both fraught with a troubling legal framework and an ineffective use of taxpayer funds.

### III. COMMON ARTICLE 3: INAPPLICABLE TO THE GUANTANAMO MILITARY COMMISSION

Courts, legislators, scholars, and presidents have taken for granted that Common Article 3, the lowest standard for a commission to be held to, applies to the Commission created by the MCA 2009. Today, CA3 cannot be used to validate the international legitimacy of the Commission, as it is no longer within CA3’s scope.

#### *A. Applicability of International Law*

To determine whether international laws apply, it is essential to determine whether there is an armed conflict from which a military commission can analyze its cases. Where circumstances indicate that an armed conflict is underway, the applicable law is international humanitarian law.<sup>66</sup> With an armed conflict present, the international humanitarian law presiding is the laws and customs of war.<sup>67</sup> Such laws are governed by the Geneva Conventions and

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60. Sacha Pfeiffer, *Guantánamo Has Cost Billions; Whistleblower Alleges ‘Gross’ Waste*, NPR (Sept. 11, 2019), <https://www.npr.org/2019/09/11/759523615/guant-namo-court-and-prison-have-cost-billions-whistleblower-alleges-gross-waste>.

61. *Id.*

62. *Id.*

63. *See id.*

64. *See id.*

65. *Id.*

66. *See* Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591, 614 (2002).

67. *See id.*

customary international law.<sup>68</sup> Where states are participating in an international armed conflict, Common Article 2 (CA2) applies;<sup>69</sup> where the conflict is of a non-international character, Common Article 3 applies.<sup>70</sup>

CA3 was created to provide a provision for the international legal community that states “a minimum set of humanitarian guidelines applicable to non-international armed conflicts which necessarily fall outside the scope of the full Geneva accords.”<sup>71</sup> Under CA3’s minimum standards for non-international conflicts, it is a violation of international law to pass sentences and carry out executions without a judgment pronounced by a regularly-constituted court,<sup>72</sup> consistent with court-martial procedure.<sup>73</sup> However, CA3 only applies when two conditions are present: one, where there exists an armed conflict, and two, where that “armed conflict is ‘not of an international character.’”<sup>74</sup> Where these conditions are not met, the conflict is such that legal action is better left to domestic criminal justice systems.

### *B. Applicability of Common Article 3: Not of an International Character*

To determine which, if any, set of international humanitarian laws may apply to the Commission, the first question that must be asked is what type of conflict the War on Terror appears to be. This question is answered based on who the parties of the armed conflict are.<sup>75</sup> Where the organized groups are sovereign states in conflict, CA2 will apply, whereas CA3 applies to all other armed conflicts.<sup>76</sup> Non-international armed conflicts, which trigger the use of CA3, are characterized as “protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State.”<sup>77</sup> As stated by Justice Stevens in *Hamdan*, conflicts that involve non-state actors, such as al-Qaeda,

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68. *See id.*

69. *See* David Glazier, *Full and Fair By What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT’L L.J. 55, 90 (2006).

70. *See id.*

71. *Id.* at 91.

72. *See id.*

73. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

74. *See* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 20 (2003) (quoting the Geneva Conventions of 1949 for the Protection of War Victims art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 3).

75. *See* INT’L L. ASSN., THE HAGUE CONFERENCE ON USE OF FORCE: FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 9 (2010) [hereinafter THE HAGUE CONFERENCE ON USE OF FORCE].

76. *See* Jinks, *supra* note 74, at 39.

77. THE HAGUE CONFERENCE ON USE OF FORCE, *supra* note 75, at 19 (emphasis omitted) (quoting INT’L COMM. OF THE RED CROSS, HOW IS THE TERM ‘ARMED CONFLICT’ DEFINED IN INTERNATIONAL LAW? 5 (2008)).

should be deemed not of an international character.<sup>78</sup> Al-Qaeda has never been linked to Afghanistan as a proxy for state-sponsored activity in the armed conflicts the terrorist organization has been a part of.<sup>79</sup> The group received funding from local jihadists, and did not have any connections to the Afghan government when committing their attacks.<sup>80</sup> Similarly, the Islamic State (IS) did not grow or act through the legitimacy of the Syrian government, but rather pushed against it.<sup>81</sup> Because there is no proof that the terrorists that could be tried under MCA 2009 acted on behalf of a state, nor has any state recognized the groups officially as “belligerents,” the only possible international law that could apply is that of internal armed conflicts in CA3.<sup>82</sup> The War on Terror has been, from its start, a battle between the US, a state actor, and unaffiliated terrorist organizations.

### *C. Applicability of Common Article 3: Armed Conflict*

While the conflict in relation to MCA 2009 appears to be not of an international character, there still needs to be an armed conflict for CA3 to apply. The phrase “armed conflict” signals to the international community that the “laws of war apply to this fight.”<sup>83</sup> Despite the importance of the phrase armed conflict in deciding if CA3 applies, the terminology does not have an express definition.<sup>84</sup> Therefore, to determine whether an armed conflict exists, a case-by-case analysis is required for each situation, taking into account both the organization of the parties involved and the intensity of the conflict.<sup>85</sup> These factors separate non-international armed conflicts from “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”<sup>86</sup>

#### 1. Organization

To determine whether there is sufficient organization of the parties to the conflict for an armed conflict to be present, the parties must be adequately

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78. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

79. See Daniel L. Byman, *Comparing Al Qaeda and ISIS: Different Goals, Different Targets*, BROOKINGS INST. (Apr. 29, 2015), <https://www.brookings.edu/testimonies/comparing-al-qaeda-and-isis-different-goals-different-targets/>.

80. See *id.*

81. See Jason Burke, *Rise and Fall of Isis: Its Dream of a Caliphate is Over, So What Now?*, GUARDIAN (Oct. 21, 2017), <https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqa-iraq-islamist>.

82. See Jinks, *supra* note 74, at 12.

83. Geoffrey S. Corn, *Questioning the Jurisdictional Moorings of the Military Commissions Act*, 43 TEX. INT’L L.J. 29, 31 (2007).

84. See Jinks, *supra* note 74, at 21.

85. See THE HAGUE CONFERENCE ON USE OF FORCE, *supra* note 75, at 15.

86. *Id.* (quoting *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997)).

organized so that they can confront one another through military means.<sup>87</sup> According to the International Law Association (ILA), factors to analyze whether such organization exists include: “the presence of a command structure,” “whether the group can carry out operations in an organized manner,” “factors indicating the level of logistics,” “factors that determine whether an armed group possesses the level of discipline and the ability to implement the basic obligations of Common Article 3,” and indicators of “whether the armed group was able to speak with one voice.”<sup>88</sup> Other factors that have been used include the “exercise of leadership control; governing by rules; providing military training; organized acquisition and provision of weapons and supplies; [and] recruitment of new members.”<sup>89</sup>

There is a valid question as to whether the terrorist organizations at the beginning of the War on Terror had sufficient organizational structure at the time of the 9/11 terrorist attacks. However, such groups do not have adequate organization now, almost two decades after the Commission was originally enacted. At the time the War on Terror began, al-Qaeda had an organizational structure that was robust, intricate, and led with purpose. Al-Qaeda had an organized vertical command structure, with clear leaders that dictated commands to subordinates.<sup>90</sup> Osama bin Laden was the driving force of al-Qaeda that all other members of the group looked to for guidance.<sup>91</sup> The terrorist group had between ten thousand and twenty thousand people that had received military and terrorist training through al-Qaeda training camps, and was comprised of thousands of members that were prepared to fight on its behalf.<sup>92</sup> The organization had cells active in up to sixty countries around the globe, suggesting a geographic presence that was substantial, powerful and was able to enact recruiting over wide swaths of territory.<sup>93</sup> Further, its mission in unifying forces against the US was so uniform, its stance so powerful, and its logistical planning so intricate that it was able to coordinate the attacks on 9/11 that resulted in “enormous property destruction and an astonishing loss of life.”<sup>94</sup>

Additionally, the IS emerged as an off-shoot terrorist organization of al-Qaeda in 2004, and as a result could be seen as a group covered under MCA 2009’s jurisdiction, where its members violate the laws of war.<sup>95</sup> When the IS developed, it was led by Abu Musab al-Zarqawi, a leader that was capable of

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87. *See id.* at 21.

88. *Id.*

89. *Id.* at 29.

90. *See Reassessing the Threat: The Future of Al Qaeda and Its Implications for Homeland Security: Hearing Before the Subcomm. on Intel., Info. Sharing, and Terrorism Risk Assessment of the Comm. on Homeland Sec.*, 110th Cong. (2008).

91. *See id.* at 22.

92. *See* Glazier, *Full and Fair By What Measure?*, *supra* note 69, at 67–68.

93. *See id.*

94. Jinks, *supra* note 74, at 33.

95. *See* M. J. KIRDAR, CTR. FOR STRATEGIC & INT’L STUD., AL QAEDA IN IRAQ 2 (2011).

organizing, recruiting, and directing thousands under his ruling to turn the group into a high-functioning, powerful terrorist organization.<sup>96</sup> At the peak of the IS's existence, known as AQI at the time, Zarqawi used the roots of the organization, al-Qaeda, for vast funding that allowed it to expand into a militant force with highly-trained and organized terrorist cells that were recruited and spread throughout the Middle East and Europe,<sup>97</sup> including occupying about a third of Syria and forty percent of Iraq.<sup>98</sup> AQI was armed with "weapons, uniforms, and other military equipment," and it was trained cohesively under the mantra of spreading its jihadist values.<sup>99</sup> The group was so powerful and logistically savvy at its peak that it was capable of claiming "the lives of 185 people in a single day of coordinated attacks, maintain[ing] a complex and reliable web of regional smuggling and recruiting networks, and command[ing] thousands of conventional guerilla fighters and suicide bombers across the entire country . . . ."<sup>100</sup>

Based on the organizational structure of these two groups at their heights of influence during the War on Terror, both al-Qaeda and the IS were organized, as both were well-commanded groups capable of intricate planning, high levels of recruitment, and vast global influence. While these groups had impact at their peak, nineteen years after the declaration of the War on Terror and President Bush's establishment of the Commission, neither terrorist organization is sufficiently organized to the degree that conflicts with either would constitute an armed conflict.

Al-Qaeda's organizational structure at the present day is a far cry from the threat it posed at the time of 9/11. At a base level, its vertical command structure has been decimated, as the formidable leaders of the group have either disappeared or have been killed. Al-Qaeda's leader, Osama bin Laden, was killed by American Special Operations Forces on May 2, 2011.<sup>101</sup> The group's second-in-command, Ayman al-Zawahiri, became the leader after Bin Laden's death, but his current location is unknown.<sup>102</sup> Four other prominent leaders in the ranks—Mustafa Abu al-Yazid, Atiyah abd al-Rahman, Abu Yahya al-Libi, and Nasser al-Wuhayshi—have also been killed in US airstrikes since the death

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96. *See id.*

97. *See id.* at 6.

98. Cameron Glenn et al., *Timeline: The Rise, Spread, and Fall of the Islamic State*, WILSON CTR. (Oct. 28, 2019), <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state>.

99. KIRDAR, *supra* note 95, at 7.

100. *Id.* at 8.

101. *The Demise of Osama bin Laden*, U.S. DEP'T OF DEF., [https://archive.defense.gov/home/features/2011/0511\\_bin-laden/](https://archive.defense.gov/home/features/2011/0511_bin-laden/) (last visited Jan. 22, 2020).

102. Michael Smerconish, *Where is bin Laden's Partner in Crime, Ayman al-Zawahiri?*, CNN (Sept. 8, 2018), <https://www.cnn.com/2018/09/08/opinions/where-is-bin-ladens-partner-in-crime-ayman-al-zawahiri/index.html>.

of Bin Laden.<sup>103</sup> With the top ranks of al-Qaeda gone, the leadership structure that allowed the terrorist organization to gain and maintain power in the early and mid-2000s has been dissolved.

In addition to losing its command structure, al-Qaeda has suffered a loss of global influence and ability to recruit new members, as it has been driven out of its base in Afghanistan.<sup>104</sup> Further, with the death of the effective command structure, reports have surfaced that there is no longer a unified voice regarding the mission of the organization.<sup>105</sup> Rather, “internal discord” has caused the group to split into factions within itself.<sup>106</sup> This supports the belief that al-Qaeda was being weakly linked together by Bin Laden and his close associates, and now that they are dead, there is no driving force to keep the group together.<sup>107</sup> Reflective of this lack of leadership and organizational strength, it has been estimated that by as early as 2009, al-Qaeda had been reduced to at most two hundred to three hundred active members from the thousands that were a part of their ranks in 2001.<sup>108</sup>

The IS has experienced a similar degeneration of their organization since its rise to power. By 2015, the IS started to experience a weakening of resources from airstrike attacks, as oil field and agricultural products had been destroyed in the process of war.<sup>109</sup> These losses caused the IS to lose a great deal of its revenue that kept the organization growing and function properly.<sup>110</sup> This fragile funding spurred decreases in the physical power that had enabled the group to occupy so much territory before its fall. The IS had gone from occupying significant territory in Syria and Iraq, to losing ninety-five percent of its strongholds by December 2017, decreasing its ability to continue recruiting over these lands.<sup>111</sup> Its loss of manpower and physical weaponry led to the loss of the IS’s biggest territories, the cities of Mosul and Raqqa.<sup>112</sup> The IS lost Mosul on July 10, 2017,<sup>113</sup> while IS militants gave up the city of Raqqa

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103. *Al Qaeda*, STANFORD CTR. FOR INT’L SEC. AND COOP., [https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-qaeda#highlight\\_text\\_13266](https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-qaeda#highlight_text_13266) (last visited Jan. 22, 2020).

104. *Reassessing the Threat*, *supra* note 90, at 1.

105. *See id.*

106. *Id.*

107. *See The Power of Nightmares: The Shadows in the Cave*, (BBC television documentary broadcast Jan. 14, 2005).

108. *See* Timothy Noah, *The Terrorists-Are-Dumb Theory: Don’t Mistake These Guys for Criminal Masterminds*, SLATE (Feb. 25, 2009), <https://slate.com/news-and-politics/2009/02/the-terrorists-are-dumb-theory.html>.

109. *See* DIRECTORATE-GEN. FOR EXTERNAL POL’YS, EUR. PARL., THE FINANCING OF THE ‘ISLAMIC STATE’ IN IRAQ AND SYRIA (ISIS) 17–18 (2017).

110. *See id.*

111. *See* Cameron Glenn et al., *supra* note 98.

112. *See id.*

113. *See Battle for Mosul: Iraq PM Abadi Formally Declares Victory*, BBC NEWS (July 10, 2017), <https://www.bbc.com/news/world-middle-east-40558836>.

on October 17, 2017.<sup>114</sup> In just five years, the IS went from having a command structure that enabled it to control land comprising the homes of eleven million people, to only having small sects of group population surviving, leaving it with little voice, leadership, or resources to maintain the conflicts that got it such expansive power previously.<sup>115</sup>

With both al-Qaeda and the IS being reduced to struggling, small factions of what they once were, neither comprise well-organized groups capable of armed conflicts. Neither have the ability to coordinate the organized, calculated attacks that they previously had been able to, nor do they have the structures to be able to present against an enemy as a coherent, formidable group. Neither al-Qaeda nor the IS have the capability “to implement the basic obligations of Common Article 3,” making the provision inapplicable to conflicts with the groups that occur in the present day.<sup>116</sup> Although there was a time where both groups were organized such that they were capable of legitimate armed conflicts, this is no longer the case.

## 2. Intensity

Even if terrorist organizations involved in the War on Terror were still organized enough to participate in conflicts with the US, the fighting would still need to be high intensity for it to qualify as an armed conflict for CA3 to apply.<sup>117</sup> The ILA has determined a variety of factors that can speak to whether the intensity was so high that it constituted an armed conflict, including: “the number of fighters involved; the type and quantity of weapons used; the duration and territorial extent of fighting; the number of casualties; the extent of destruction of property; the displacement of the population; and the involvement of . . . actors to broker cease-fire efforts.”<sup>118</sup> This is meant to be a fact-intensive test, which should be used as a mechanism for differentiating between significant conflicts and “minor exchange[s] of fire” or “insignificant border clash[es].”<sup>119</sup> Fighting of such intensity that rises to the level of an armed conflict should be distinguished from its negative definition stated in the Rome Treaty, that armed conflicts are *not* “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”<sup>120</sup> This factor is also limited by a temporal element, in that a non-international armed conflict exists where organized groups begin intense

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114. Jared Malsin, *Raqqa Is in Ruins, and ISIS in Retreat*, TIME (Nov. 6, 2017), <https://time.com/raqqa-ruins-isis-retreat/>.

115. See SETH G. JONES ET AL., RAND CORP., ROLLING BACK THE ISLAMIC STATE (2017), [https://www.rand.org/pubs/research\\_reports/RR1912.html](https://www.rand.org/pubs/research_reports/RR1912.html).

116. THE HAGUE CONFERENCE ON USE OF FORCE, *supra* note 75, at 21.

117. See *id.* at 29.

118. *Id.* at 30 (footnotes omitted).

119. *Id.*

120. Rome Statute of the International Criminal Court art. 8(2)(c), July 17, 1998, 2187 U.N.T.S. 97. The Rome Treaty has been signed by more than 120 states, signaling it may be customary law, given the widespread acknowledgement of validity.

fighting, but the armed conflict *ends* when those criteria are no longer both present.<sup>121</sup>

At the start of the War on Terror, there was fighting between the US and terrorist organizations that was so intense that it extended beyond a level of isolated clashes to result in armed conflicts.<sup>122</sup> From the September 11, 2001 attack alone, New York experienced a loss of life of 3,000 people and billions of dollars in damage to the city.<sup>123</sup> By the time the War on Terror began, the US saw it as a worldwide fight. The War on Terror was primarily based in Pakistan, Afghanistan, and Iraq, but the fighting was so rampant and widespread that it extended throughout “Southeast Asia[,] . . . the greater Middle East, and Central Asia, all the way to Europe.”<sup>124</sup> The US created an intensive plan to carry out their mission of the global War on Terror—“defeat, deny, diminish and defend”—by turning all of its resources toward the threat.<sup>125</sup> This included “diplomatic, economic, military, financial[,] . . . law enforcement[,] and intelligence” all directed at pursuing the War on Terror as a widespread and coordinated attack against terrorists.<sup>126</sup> At the peak of the war in 2007, the US had almost 186,565 troops on the ground between Iraq and Afghanistan, supported by a Department of Defense budget that increased from 10.5 billion to 20.9 billion dollars in just a year.<sup>127</sup> In Afghanistan, the US experienced a loss of 2,349 troop deaths and 20,149 wounded soldiers.<sup>128</sup> In Operation Iraqi Freedom, 4,418 soldiers died and 31,994 were wounded in action fighting for the War on Terror.<sup>129</sup>

Meanwhile, at the peak of the war, terrorist organizations like the IS and al-Qaeda were fighting with just as much ferocity. As the War on Terror began, there was “a steep increase in terrorist activity . . . from 2003 to 2007 . . . .”<sup>130</sup> These attacks culminated in approximately 10,000 civilian deaths in 2007, and injuries from terrorist attacks peaked in 2009 at 19,000.<sup>131</sup> Attacks were not

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121. See THE HAGUE CONFERENCE ON USE OF FORCE, *supra* note 75, at 30.

122. See *id.* at 28 (discussing the difference between isolated clashes and armed conflicts in war, where the former are sporadic and infrequent and the latter are organized with consistency and high intensity).

123. See Jinks, *supra* note 74, at 37.

124. Ashley J. Tellis, *Assessing America's War on Terror: Confronting Insurgency, Cementing Primacy*, 15 NBR ANALYSIS 5, 14 (2004).

125. *Id.*

126. *Id.*

127. See Kimberly Amadeo, *War on Terror Facts, Costs, and Timeline: Who Spent More on War—Bush, Obama, or Trump?*, BALANCE (July 23, 2020), <https://www.thebalance.com/war-on-terror-facts-costs-timeline-3306300#citation-45>.

128. See DAVID A. BLUM ET AL., CONG. RSCH. SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 11 tbl.9 (2019).

129. See *id.* at 15 tbl.12.

130. INST. FOR ECONS. & PEACE, 2012 GLOBAL TERRORISM INDEX: CAPTURING THE IMPACT OF TERRORISM FROM 2002–2011 6 (2012).

131. See *id.*

sporadic and random, but rather proved to be well-planned and executed efficiently, as attacks were successful anywhere from 89% to 97% of the time during the war.<sup>132</sup> The conservative estimates of casualties coming from the War on Terror, aside from direct terrorist attacks themselves, proved massive: an estimated one million people died in Iraq, 220,000 in Afghanistan, and 80,000 in Pakistan.<sup>133</sup> By 2007, more than two million people had been displaced in Iraq alone, while Afghanistan was experiencing the longest war in NATO's history because of al-Qaeda being based there.<sup>134</sup>

The death toll on both parties and civilians, the number of US troops utilized, its geographic scope, and level of displacement resulting from the War on Terror suggest that the US was engaged in intense fighting with terrorist organizations at the peak of the war. However, as the organizational structures of these groups changed later on, the intensity did as well, as parties began to participate in conflicts that resembled the negative definition of armed conflict recited by the Rome Treaty rather than intense, sustained fighting that is indicative of armed conflict. First, the number of US troops that are participating in the War on Terror has drastically decreased from the number of boots on the ground in 2007. In June 2011, President Barack Obama announced the US would “be able to remove 10,000 of our troops from Afghanistan by the end of this year, and we will bring home a total of 33,000 troops by next summer . . . .”<sup>135</sup> This drawback of US presence in Afghanistan continued in May 2012, with the President announcing “another 23,000 [troops] will leave by the end of the summer.”<sup>136</sup> By 2017, there was a significant reduction in the number of American soldiers based in Afghanistan.<sup>137</sup> There are currently only around 6,000 U.S. troops still in Iraq and Syria combined, down from 138,445 in 2008, and 12,000 in Afghanistan, down from 102,077 in 2011.<sup>138</sup> This deduction of American forces was culminated with an announcement in 2020 by President Trump that the US had destroyed “100 percent of ISIS and its territorial caliphate, we killed the savage leader of ISIS, al-Baghdadi,”<sup>139</sup> reflected by the fact that the Department of Defense was spending 71 billion dollars less

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132. *See id.*

133. *See* PHYSICIANS FOR SOC. RESP., BODY COUNT: CASUALTY FIGURES AFTER 10 YEARS OF THE “WAR ON TERROR” 15 (2015).

134. *See id.* at 16, 59, 74.

135. President Barack Obama, President Obama on the Way Forward in Afghanistan (June 22, 2011), <https://obamawhitehouse.archives.gov/blog/2011/06/22/president-obama-way-forward-afghanistan>.

136. President Barack Obama, Remarks by President Obama in Address to the Nation from Afghanistan (May 1, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/05/01/remarks-president-obama-address-nation-afghanistan>.

137. *See id.* (addressing President Obama's intent to reduce troop numbers in Afghanistan).

138. *See* OFF. OF THE UNDER SEC'Y OF DEF./CHIEF FIN. OFFICER, DEFENSE BUDGET OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2020 BUDGET REQUEST 6–3 (March 2019).

139. President Donald Trump, Remarks by President Trump on Iran (Jan. 8, 2020), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-iran/>.

annually than it had previously.<sup>140</sup> The lack of American troops fighting the Operation Enduring Freedom currently is reflected in the death toll of US forces: deaths of American troops peaked in 2010 with 498 lives being lost that year, while from 2016 to 2019 there have been altogether 66 deaths of American troops.<sup>141</sup> This significant reduction in loss of life speaks to the lack of continuous, sustained fighting now present between terrorist groups and American forces.

The sporadic nature of current terrorist activity by al-Qaeda and the IS reflect this winding down of intense conflicts between them and the US. By 2008, attacks by al-Qaeda had lessened in intensity and frequency in comparison to their activity up to 2007. From 2008 to 2009, there were only two reported attacks by al-Qaeda, which were more than a year apart from one another.<sup>142</sup> The most recent attack reported by al-Qaeda was in 2015.<sup>143</sup> Deaths from terrorist organizations as a whole started to fall in 2014, with Iraq seeing a 75% decrease in terrorist fatalities from 2017 to 2018, resulting in 3,217 fewer deaths.<sup>144</sup> As a result, by 2019, for the first time since 2003, Iraq was “no longer the country most impacted by terrorism.”<sup>145</sup> The IS also reduced its ability to participate in intense conflict, as death attributed to the organization decreased by 63% in 2018 and 69% in 2019.<sup>146</sup> It is estimated that the IS has lost 52,000 fighters in Iraq in Syria between 2014 and 2018.<sup>147</sup> The reality of depleted terrorist forces culminated in President Trump declaring that the US “ha[d] won against ISIS” on December 19, 2018,<sup>148</sup> and a peace agreement being started with Afghanistan in 2020.<sup>149</sup> In fact, the War on Terror’s focus on South Asian,

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140. See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2020 (2019).

141. See *Afghanistan War: Soldiers Killed in Action in Afghanistan 2001–2009*, STATISTA RSCH. DEP’T (Jul. 9, 2020), <https://www.statista.com/statistics/262894/western-coalition-soldiers-killed-in-afghanistan/>.

142. See STANFORD CTR., *supra* note 103.

143. See Eric Schmitt et al., *Disputed Claims Over Qaeda Role in Paris Attacks*, N.Y. TIMES (Jan. 14, 2015), <https://www.nytimes.com/2015/01/15/world/europe/al-qaeda-in-the-arabian-peninsula-charlie-hebdo.html>.

144. See INST. FOR ECONS. & PEACE, GLOBAL TERRORISM INDEX 2019: MEASURING THE IMPACT OF TERRORISM 2 (2019).

145. *Id.*

146. *See id.*

147. *See id.*

148. Mark Landler et al., *Trump to Withdraw U.S. Forces from Syria, Declaring ‘We Have Won Against ISIS’*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/politics/trump-syria-turkey-troop-withdrawal.html?login=smartlock&auth=login-smartlock>.

149. See David E. Sanger et al., *A Secret Accord With the Taliban: When and How the U.S. Would Leave Afghanistan* N.Y. TIMES (Mar. 8, 2020), <https://www.nytimes.com/2020/03/08/world/asia/taliban-afghanistan-annexes-peace-agreement.html>; Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which is Not Recognized by the United States as a State and is Known as the Taliban and the United States of America, Afg.-U.S., Feb. 29, 2020.

African, and Middle Eastern Islamic extremist organizations now seems outdated; the most worrying trend in the global threat of terrorism in the past five years has been “the surge in far-right political terrorism” in North America, Oceania, and Western Europe.<sup>150</sup> While the IS and al-Qaeda have not completely stopped attack efforts, the situation appears closer to the definition of what intense fighting is *not*—these organizations’ threats are sporadic, infrequent, isolated, and no longer connected to larger attack efforts.<sup>151</sup>

Without any meaningful presence of American troops fighting the War on Terror, nor al-Qaeda or the IS forces prepared to attack through means that are more than random, opportunistic clashes, intensity of conflict between the parties has dissipated. What is left of the intense fighting in the mid- and late-2000s has been replaced with sporadic attacks of terrorist organizations that are mere memories of the fighting that previously occurred. The IS has lost its ability to participate in elongated battles, and al-Qaeda has become a shell of the organization it once was in the face of war. Further, peace agreements are currently being negotiated in Afghanistan, signaling the end of the conflict. While there are still incidents of bombings and attacks that are sometimes responded to with military involvement, random, sporadic violent acts are exactly what do not constitute intense fighting in relation to CA3.<sup>152</sup> Rather, the intensity of the fighting appears to be low, resembling more the definition of what an armed conflict is not under the Rome Treaty than what it is under the ILA’s analysis. Because of this, the prerequisites for an armed conflict are not satisfied and CA3 cannot be used as a source through which to justify the prosecution of the detainees at Guantanamo Bay under international law.

#### IV. NO ARMED CONFLICT, NO NECESSITY

For the Commission to be established incident to the laws of war, there must be necessity for its use. The analysis of both the historical justifications of necessity for military commissions incident to the conduct of war, and jurisdictional requirements meant to ensure necessity of such commissions, lead to a determination that such circumstances are not present with the Commission.<sup>153</sup> As reflected in the lack of armed conflict present between the US and the terrorist organizations that the Commission was created for, the current state of affairs does not fall within the threshold of military necessity that calls for commissions incident to the conduct of war. Deficient jurisdictional elements meant to speak to the necessity of the Commission under the laws of war support this conclusion.

##### *A. Historical Justifications for Military Commissions Incident to the Conduct*

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150. GLOBAL TERRORISM INDEX 2019, *supra* note 144, at 3.

151. See Rome Statute of the International Criminal Court art. 8(2)(c), July 17, 1998, 2187 U.N.T.S. 97.

152. See Jinks, *supra* note 74, at 25.

153. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 590–91 (2006).

*of War*

The use of military commissions incident to the conduct of war in the past shows the current Commission, no longer in armed conflict, does not trigger military exigency for its existence. As the authority for the creation and use of these commissions is derived from the “laws and customs of war,”<sup>154</sup> where required, “military ‘necessities’ . . . take center stage,” creating a space for these commissions to function.<sup>155</sup> Therefore, for a military commission to be proper, it must come from circumstances “when necessity demands and prudence dictates” the commission’s use.<sup>156</sup> In practice, necessity is present for a military commission where the theater of war is such that “there is a necessity to furnish a substitute for the civil authority” to prosecute crimes incident to the conduct of war.<sup>157</sup>

Historical practice indicates that necessity allows for military commissions for violations of the laws of war “during [the] time of war” where departures from typical court proceedings are necessary for continuing military pursuits in a timely fashion.<sup>158</sup> For instance, during the Civil War, US Attorney General James Speed permitted a military commission incident to the conduct of war to try eight violators of the laws of war, where all trials were executed within a year of the start of the commission, while the Civil War was still progressing.<sup>159</sup> When military commissions incident to the conduct of war were used again on account of wartime by an order from President Roosevelt in 1942, WWII presented the nation a great “threat to its own survival.”<sup>160</sup> When the commission was enacted, WWII was perceived as a “‘total war’ that mobilized the entire Nation,” in that there were “rubber shortages, gas rationing, and wage and price controls” throughout the country to keep up with the pace of the war.<sup>161</sup> One commission was used to prosecute low-level officials of the German army,<sup>162</sup> while another was convened to try Japanese General Tomoyuki Yamashita for violations of the law of war.<sup>163</sup> Both of these

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154. Corn, *supra* note 83, at 30.

155. MAROUF HASIAN JR., *IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES* 1 (2005).

156. *Ex parte Milligan*, 71 U.S. 2, 92 (1866).

157. See Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL’Y 653, 656 (2002).

158. *Military Commissions History*, DEP’T DEF. OFF. MIL. COMM’NS, <https://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx> (last visited April 20, 2020).

159. *See id.*

160. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 262 (2002).

161. *Id.* at 280.

162. *See Military Commissions History*, *supra* note 158.

163. *See In re Yamashita*, 327 U.S. 1 (1946).

commissions held trials close to the end of World War II, seeking immediate justice for the violations of the laws of war that occurred during the conflict.<sup>164</sup>

Ultimately, without a presence of an armed conflict under CA3 of the Geneva Conventions, any further claim of military necessity for the Guantanamo military commission belies reality. The commissions are not consistent with those commissions incident to the conduct of war that have been used in the Civil War or WWII, where commissions were used quickly in response to battlefield violations of laws of war. Here, there is no longer a theater of war that permits militaries to use commissions to try those caught in a violation of the laws of war “which military efficiency demands be tried expeditiously,” as there is no armed conflict where a theater of war would take place,<sup>165</sup> nor is America experiencing strains on domestic courts that prevent them from being suitable mechanisms for justice.<sup>166</sup> The US is not in an armed conflict with terrorist groups such that the military demands leniency to fulfill its objectives, nor is the US under attack, where these military commissions have been justified previously. In contrast to the commissions in WWII, the War on Terror has not required many sacrifices in the homeland; there have been relatively few changes in American life throughout the duration of the war, and there was no widespread call to service that was asked of people during WWII.<sup>167</sup> In fact, the War on Terror was at times so far removed from public understanding that many Americans did not know for sure where military forces were being deployed to, even at the height of the war more than ten years ago.<sup>168</sup>

Further, the close timing between violations and use of military commissions in the past shows the necessity of their use; this Commission has proven to lack necessity for quick results in the field of battle. It is “a gross usurpation of power” to continue to such military commissions when timing no longer requires it.<sup>169</sup> In *Hamdan*, the plurality criticized the military commission of Hamdan for lack of necessity, as Justices Stevens, Souter, Ginsburg, and Breyer agreed that in taking the military commission three years to charge Hamdan, there was no urgent necessity in prosecuting him that justified the use of the military commission.<sup>170</sup> This extended wait time between detention and charges being brought pales in comparison to the case at hand, where five men are set to stand trial on January 11, 2021 for plotting the September 11, 2001 attacks—just eight months from the twenty-year mark since the attacks have happened.<sup>171</sup> Justice Kennedy stated in *Rasul* that

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164. *See id.*

165. *Hamdan v. Rumsfeld*, 548 U.S. 557, 612 (2006).

166. *See* Goldsmith & Sunstein, *supra* note 160, at 281.

167. *See id.* at 280.

168. *See id.* at 280.

169. *Ex parte Milligan*, 71 U.S. 2, 127 (1866).

170. *See Hamdan*, 548 U.S. at 612.

171. *See* Carol Rosenberg, *Trial for Men Accused of Plotting 9/11 Attacks is Set for 2021*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/us/politics/sept-11-trial-guantanamo-bay.html?auth=login-email&login=email>.

“detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”<sup>172</sup> The extended time between the crime of the accused and their trial dates suggests a lack of necessity for the Commission, as the need to have a speedy trial during times of war has been refuted by reality—the accused have been in custody for almost two decades without meaningful legal action being taken against them. Necessity cannot be used as a justification for the Commission here, where “[a]ny urgent need for imposition or execution of judgement” is contradicted by the record.<sup>173</sup>

#### 1. Military Commission Jurisdiction Incident to the Conduct of War

In addition to the historical justification for such military commissions lacking, there are four jurisdictional elements that speak to whether military necessity is present such that commissions incident to the conduct of war may be established.<sup>174</sup> First, there must be a clear geographic limitation on the commission, typically known as the “theatre of war.”<sup>175</sup> The theater of war, where military commission jurisdiction prevails, must be within the area of armed conflict.<sup>176</sup> This area is typically defined as where “organized armed groups are engaged in intense armed fighting,” although sometimes war crimes may still be tried if they were committed some distance from this actual conflict.<sup>177</sup> Ultimately, the theater must “assume[] clear spatial boundaries between zones of war and zones of peace.”<sup>178</sup>

Second, military commission jurisdiction has a temporal limit, in that the offense being tried by the commission must have occurred during the period of war.<sup>179</sup> There is a distinction in this requirement between the armed conflict itself and “the cessation of hostilities,” or peacetime.<sup>180</sup> If a sufficient period between hostilities is such that the international community recognizes the conflict has come to an end, any acts after the fact cannot be tried in a military commission as a violation of the laws of war, for the armed conflict has ended.<sup>181</sup>

Third, a military commission created for violations of the laws of war may only try crimes that fall into two categories: those which are “violations of the

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172. *Rasul v. Bush*, 542 U.S. 466, 488 (2004).

173. *Hamdan*, 548 U.S. at 612.

174. *See id.* at 597.

175. THE HAGUE CONFERENCE ON USE OF FORCE, *supra* note 75, at 32.

176. *See id.*

177. *Id.*

178. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 720 (2004).

179. *See id.* at 725.

180. *Id.*

181. *See* THE HAGUE CONFERENCE ON USE OF FORCE, *supra* note 75, at 31.

laws and usages of war,” or “breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.”<sup>182</sup> Therefore, for such commissions to have valid subject matter jurisdiction here, the government must show the crime accused of is acknowledged to be a crime under international laws of war.<sup>183</sup> Fourth, the military commission must “only try members of the ‘enemy’s army’” who have been guilty of illegitimate warfare or other offenses in violation of the laws of war and “members of one’s own army, who” in time of war, “become chargeable with crimes or offenses not cognizable, or triable by the criminal courts or under the Articles of war,”<sup>184</sup> not extending to civilians.<sup>185</sup>

Here, the preconditions that speak to the presence of military necessity for the Commission are not met, preventing the Commission from having proper jurisdiction over any of the defendants it intends to try in January 2021. The third element presents a question of legality of the charges against the five defendants set for trial by commission, conspiracy and terrorism, and as a result, a question of the legality of the court’s jurisdiction over them. The military commission is only able to have subject matter jurisdiction over crimes under the laws of war, and a survey of international law suggests terrorism and conspiracy are both left off of that list of prosecutable offenses.<sup>186</sup>

For instance, there is no international consensus over what the definition of terrorism is.<sup>187</sup> Part of this difficulty stems from the fact that war crimes require both a contextual and mental element, and despite sixteen counter-terrorism conventions being held, there is no global agreement as to what intent for terrorism as a war crime should look like.<sup>188</sup> Without international treaties mentioning terrorism as a war crime, nor customary law providing material support for the assertion, the Commission, which may only try offenses that are violations of the laws of war, cannot prosecute such crimes.<sup>189</sup> Similarly, the conspiracy charges being filed against the five detainees at Guantanamo Bay also lack support under international law as war crimes triable by the Commission. In fact, there is more support for the proposition that conspiracy is *not* included within the possible violations of the laws of war. In Part V of *Hamdan*, a plurality piece, the Court stated that there is no international source

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182. Trahan, *supra* note 1, at 800. *See also* Reid v. Covert, 354 U.S. 1, 19 n.38 (1957).

183. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 608–09 (2006).

184. Trahan, *supra* note 1, at 800.

185. *See* Hamdan, 548 U.S. at 598.

186. *See* David Scheffer, *Why Hamdan is Right About Conspiracy Liability*, 15 ILSA QUART. 29 (2006). *See also* 18 U.S.C. § 2441; Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 38544. This topic extends much farther than the scope of this Note.

187. *See* Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RESV. J. INT’L L. 359, 360 (2004).

188. *See* War Crimes, UNITED NATIONS OFF. GENOCIDE PREVENTION & RESP. TO PROTECT, <https://www.un.org/en/genocideprevention/war-crimes.shtml> (last visited April 24, 2020).

189. *See* Rome Statute of the International Criminal Court art. 8(2)(c), July 17, 1998, 2187 U.N.T.S. 38544; *see also* Jinks, *supra* note 74, at 19.

saying that conspiracy is a recognized violation of the law of war,<sup>190</sup> and so there cannot be a violation of the laws of war subject to such military commissions under a conspiracy charge, for there would be no “warlike act.”<sup>191</sup> Foreign courts have also rejected the assertion that conspiracy falls within the realm of war crimes, as exemplified by the Nuremberg International Military Tribunal’s judges throwing out such charge during a 1945 trial.<sup>192</sup> Both domestic and international codes support these rulings. Article 25(3)(d) of the Rome Statute of the ICC does not include a charge of conspiracy within its description of criminal responsibility for war crimes, and holds joint criminal enterprise theory as the lowest threshold for a violation of a war crime, “which far exceeds the threshold for a conspiracy charge.”<sup>193</sup> Additionally, Title 18 of the United States Criminal Code, which includes the War Crimes Act of 1996, fails to include the crime of conspiracy as a violation of the laws of war.<sup>194</sup> As neither terrorism nor conspiracy appear to be violations of the laws of war, neither can be tried by a law-of-war commission—signaling that the use of the Commission for such purposes begs the question of what necessity is really present that justifies such action.<sup>195</sup>

Without the Commission charging offenses that are “cognizable during [the] time of war” as war crimes, there is a lack of exigency justifying their use.<sup>196</sup> This makes sense as an important jurisdictional requirement that a laws of war commission is necessary, in that these commissions grew from “[t]he need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield.”<sup>197</sup> These charges against the detainees at Guantanamo are not formalistic failures of the prosecutors of the military commission, but rather are “indicative of a broader inability” to establish “military necessity.”<sup>198</sup>

There is further uncertainty over the geographic and temporal requirements for jurisdiction as applied to the Commission. As Professor John Paust notes, Guantanamo Bay is “clearly outside any war zone or war-related occupied territory,” making the prosecution of the detainees there problematic.<sup>199</sup> Scholars argue that the acts being charged in the Commission

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190. *Hamdan*, 548 U.S. at 610.

191. *Id.* at 607; *see also id.* at 606–10.

192. *See Scheffer*, *supra* note 186, at 29.

193. *Id.* at 30.

194. *See* 18 U.S.C. § 2441.

195. *See In re Yamashita*, 327 U.S. 1, 13 (1946).

196. *Hamdan*, 548 U.S. at 596.

197. *Id.* at 607. *See* S. Rep. No. 64-130, at 40 (1916) (testimony that Article of War 15 enables the power of “the military commander *in the field in time of war*” to use commissions) (emphasis added).

198. *Hamdan*, 548 U.S. at 612.

199. Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 681 (2001).

were not committed “within the period of the war,” making the actions outside of the Commission’s temporal jurisdiction.<sup>200</sup>

### *B. Domestic Courts: The More Appropriate Alternative*

Without real threat of war or impact on the American populous today, nor certainty that the jurisdictional elements required for the Commission are present, civil courts are the better resource to use to prosecute Guantanamo Bay detainees. In fact, the Commission has proven to not ease burdens on account of necessity, but rather create them, as the cost to the American people to pay for prisoners waiting for trial through commission at Guantanamo Bay is around thirteen million dollars per prisoner, making it “the most expensive [prison] on earth.”<sup>201</sup> In the case of this Commission, where the situation is no longer an armed conflict, “then civilian rather than military trials seem more appropriate,”<sup>202</sup> given that the justification for reducing the civil liberties of the detainees without high conflict becomes “relatively weak.”<sup>203</sup> America is no longer actively engaged with the War on Terror like it was post-9/11, the five men set to be tried in January 2021 have been detained in Guantanamo Bay for almost twenty years without hearings, and, maybe most importantly, MCA 2009 lacked any justification for necessity of the Commission at the time it was amended, ten years ago.<sup>204</sup> Without an armed conflict, nor necessity for the Commission, CA3 cannot be used to justify the use of the Commission under international law.

### CONCLUSION

The impending trial by the Commission of five detainees in Guantanamo Bay regarding their parts in the September 11, 2011 terrorist attacks brings the question of legality of these commissions to the forefront. While the trials are set to begin in January 2021, the Commission is no longer valid under international law, and therefore cannot be used to prosecute the accused. Rather, if the US government wishes to try the five men allegedly involved in the 9/11 terrorist attacks planning, it must do so through the US criminal justice system, rather than a military commission, allowing the accused all the protections afforded to defendants in that forum.

CA3 represents the “barest of those trial protections that have been recognized by customary international law.”<sup>205</sup> It is “indisputably part of customary international law, that an accused must, absent disruptive conduct or

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200. Paust, *Courting Illegality*, *supra* note 35, at 5 n.14.

201. Carol Rosenberg, *The Cost of Running Guantánamo Bay: \$13 Million Per Prisoner*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html>.

202. Goldsmith & Sunstein, *supra* note 160, at 281.

203. *Id.*

204. *See* ELSEA, *supra* note 56, at 9.

205. *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006) (Kennedy, J., concurring).

consent, be present for his trial and must be privy to the evidence against him.”<sup>206</sup> The Article’s prevalence in international law solidifies that the trial procedures under it are a part of international law such that it sets a standard for trial conduct in all settings, including military commissions. For those bare minimum rules to be applied, there must be an armed conflict not of an international character. However, as established, the situation between the terrorist organizations involved in the War on Terror and the US no longer represents an armed conflict, and therefore the Commission cannot be analyzed under this low threshold of procedure. There is no longer an organizational structure that makes groups like al-Qaeda or the IS capable of structured and planned attacks against US forces. The conflicts between the US and these groups have become so sporadic and infrequent that armed conflicts of high intensity are no longer sustainable. Without armed conflict, the Commission that is supposed to be governing disputes within this conflict is not eligible to be subject to CA3 standards. There is, by extension of those circumstances, no necessity to justify the existence of the Commission at all. The laws of war cannot be invoked where there is no war to be governed.

Ultimately, without necessity justifying the Commission incident to the conduct of war, the Guantanamo detainees must be tried by a civilian court. This would allow the accused to be tried through the criminal justice system, affording the accused with all of the procedural protections they must be given outside the context of war in domestic settings. This will also end the toll Guantanamo has placed on American taxpayers that is a waste of government funds, as many “prisoners will die before they are found guilty” by the Commission because of its inefficiency.<sup>207</sup> There was a time the Commission may have been a valid means of prosecuting perpetrators of war crimes during the War on Terror; nineteen years later, this no longer proves true.

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206. *Id.* at 634.

207. Pfeiffer, *supra* note 60.