EAGLE OR OSTRICH? THE APPLICATION OF THE *GENEVA CONVENTION (III)* IN THE JURISPRUDENCE OF THE UNITED STATES SUPREME COURT

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This article will examine the extent to which the Geneva Convention (III) (Convention relative to the Treatment of Prisoners of War) *has been applied, if at all, by the United States Supreme Court. While the direct application of the* Convention *will be considered, emphasis will be given to other, arguably less direct, instances of application. For instance, the use of the well-established canon of statutory interpretation that Acts of Congress be read, as much as possible, in conformity with international law. In this context, the recent judgments of the Court in* Hamdi v Rumsfeld *and* Rasul v Bush *will be considered.*

It will be observed that enforcement of the Convention, *which is an example of direct application, is often left to military commissions rather than the Court itself. That is not to say the Court does not perform an oversight function at the fulcrum of the United States judicial hierarchy. However, the level of oversight is dependent on a multitude of factors that include whether the victim/detainee is a United States citizen, whether the detention is on United States' sovereign territory, etc. The article will consider these 'threshold' factors.*

In a nutshell, the contention will be that the Court has shown a surprising deference in its jurisprudence to the Convention. *Of course, its deference has been within the constraints of the overarching United States' constitutional structure, which divides power amongst three arms of government, namely, the executive, legislature and judiciary. Within this framework, as we will see, the Court has a limited but important role to play.*

I INTRODUCTION

'[I]f this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.'[1] The

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1 *Rasul v Bush*, 124 S Ct 2686, 2690 (2004). Stevens J delivered the opinion of the Court, with whom O'Connor, Souter, Ginsburg and Breyer JJ joined. The statement is repeated in *Rumsfeld v Padilla*, 124 S Ct 2711, 2735 (2004) by Stevens J (this time in dissent), with whom Souter, Ginsburg and Breyer JJ joined.

preceding statement invokes images of good and evil seldom seen in judgments of the Supreme Court of the United States (the 'Court') or for that matter, any other national court. We might ask, why did members of the Court employ such vivid remarks? The answer might reside in the elevated importance of the issues before the Court.[2] As oft quoted, what can be more important than the protection of 'life and liberty'?[3]

On 28 June 2004, the Court delivered three separate but related judgments in *Rasul v Bush* ('*Rasul*'); *Hamdi v Rumsfeld* ('*Hamdi*') and *Rumsfeld v Padilla* ('*Padilla*')[4], which dealt with the availability of the writ of habeas corpus to persons held in detention,[5] both within and outside the territory of the United States, pursuant to a Presidential Executive Order.[6] These cases had been keenly anticipated by United States constitutional lawyers, international lawyers and laypersons alike. As we shall see, one aspect of these cases was whether the United States had accorded the detainees rights conferred under the *Geneva Convention (III)* (the '*Convention*')[7]. Despite the importance of this issue to international lawyers, as evidenced by the plethora of commentary,[8] the critical issue for the Court was whether federal courts in the United States had jurisdiction to judicially review the detention of these persons.[9] This did not

2 The vivid language used in *Rasul v Bush* is not exceptional. For instance, in *Rumsfeld v Padilla*, 124 S Ct 2711, 2735 (2004), Stevens J, with whom Souter, Ginsburg and Breyer JJ joined, said: 'At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.' See also *Watts v Indiana*, 338 US 49, 52, 54 (1949).

3 A citizen shall not be 'deprived of life, liberty, or property, without due process of law': *United States Constitution* amend V. See also *Mathews v Eldridge*, 424 US 319 (1976) for a statement of the balancing test. 'The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive': see *Hamdi v Rumsfeld*, 124 S Ct 2633, 2661 (2004) (Scalia and Stevens JJ). In an Australian context, see *Al Kateb v Godwin* (2004) 208 ALR 124, 130 (Gleeson CJ) and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 86-95.

4 *Padilla* will not be examined in detail in this article as it was concerned with issues of jurisdiction amongst the District Courts of the United States. Its relevant findings will, however, be incorporated.

5 The writ of habeas corpus, which originated in the medieval period, takes numerous forms but now usually appears in the form *habeas corpus ad subjiciendum*. The purpose of the writ is to enable review by a superior court of the legality of imprisonment or detention but not to subvert the normal processes of appeal where a superior court of record has, correctly or not, determined its jurisdiction and made an order. In an Australian context, see generally *Ex parte Williams* (1934) 51 CLR 545, 550 (Dixon J). Note that the writ's ancestry was dealt with, in detail, by the Majority Opinion in *Rasul*, 124 S Ct 2686 (2004) (as defined later in this paper at n 75) and the dissenting opinion in *Hamdi* (as defined later in this paper at n 47). The reference to 'persons' includes US citizens, in *Hamdi*, and aliens, in *Rasul*.

6 The order was issued pursuant to an Act of Congress: *Authorization for Use of Military Force* (2001) Pub L 107-40 §§1-2, 115 Stat 224 (the 'Force Resolution'). It should be noted that the Government contended that 'no explicit congressional authorization [was] required, because the Executive possesses plenary authority to detain pursuant to Article II of the *Constitution*': *Hamdi* 124 S Ct 2633, 2639 (2004). The Court did not ultimately resolve this issue as the Court found that the Force Resolution authorised detention: see *Hamdi*, 124 S Ct 2633, 2639, 2640, 2659 (2004).

7 The *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 6 UST 3316, 75 UNTS 135.

8 See generally Omar Akbar, 'Losing Geneva in Guantanamo Bay' (2003) 89 *Iowa Law Review* 195, 215-20; Diane Marie Amann, '"Raise the Flag and Let it Talk": On the Use of External

mean that international law, in general, and the *Convention*, in particular, did not have any application. On the contrary, this article will examine the subtleties of their application evident in these cases. However, this article will not examine the rather more vexed issue of whether the United States has, in fact, complied with the *Convention*. The main purpose of this paper is to examine the various methods of constitutional and statutory interpretation employed by the Court that are affected by the existence of the *Convention* and international law. In other words, how has the *Convention* affected the critical constitutional and statutory questions raised by these cases?

This article will have four parts. Part A will discuss the history of the *Convention* and its status under international law. Part B will set out the Court's findings in *Hamdi* and *Rasul* and identify references to the *Convention* in the Court's reasoning. Part C will assess the role of international law and the *Convention* in the jurisprudence of the Court. Part D will discuss the usefulness of the 'enemy/unlawful combatant' classification.

II PART A: THE *CONVENTION* AND THE LAW OF ARMED CONFLICT

In ancient times, the concept of 'prisoner of war'[10] was unknown and the defeated often became the victor's chattel.[11] In the Middle Ages, it became customary to free captives upon payment of a ransom.[12] The scholar Clausewitz, writing in 1832, observed that:

(cont'd) Norms in Constitutional Decision Making' (2004) 2 *International Journal of Constitutional Law* 597; Marjorie Cohn, 'Rounding Up Unusual Suspects: Human Rights in the Wake of 9/11' (2003) 25 *Thomas Jefferson Law Review* 317; Joan Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War On Terrorism' (2002) 96 *American Journal of International Law* 345; George P Fletcher, 'Black Hole in Guantánamo Bay' (2004) 2(1) *Journal of International Criminal Justice* 121; Derek Jinks and David Sloss, 'Is the President Bound by the Geneva Conventions?' (2004) 90 *Cornell Law Review* 97, 111; Neil McDonald and Scott Sullivan, 'Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"' (2003) 44 *Harvard International Law Journal* 301; Jordan J Paust, 'War and Enemy Status After 9/11: Attacks on the Laws of War' (2003) 28 *Yale Journal of International Law* 325, 328; Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005) and Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) 2 *Journal of International Criminal Justice* 96. For a discussion of the principal holdings in Hamdi and Rasul see Daniel Moeckli, 'The US Supreme Court's "Enemy Combatant" Decisions: A Major Victory for the Rule of Law"?' (2005) 10 *Journal of Conflict & Security Law* 75; and Tim Otty and Ben Olbourne, 'The US Supreme Court and the "War on Terror": *Rasul and Hamdi*' (2004) 5 *European Human Rights Law Review* 558.

9 On whether jurisdiction emanates from 'due process' protections in the *United States Constitution*, see amend V and amend XIV, or Acts of Congress in relation to writs of habeas corpus, is a contentious issue. See later discussion under heading '*Rasul v Bush*' and n 81.

10 The *Convention* rejects the use of the technical term 'war' in favour of 'armed conflict'. However, the custom leading up to the *Convention* was based on war.

11 Allan Rosas, *The Legal Status of Prisoners of War – A Study in International Humanitarian Law Applicable in Armed Conflicts* (1976) 44-7.

12 However, the practice only applied to aristocracy in Christian Europe. Common foot soldiers, including archers and crossbowmen, were sometimes slaughtered on the battlefield once their army was defeated. See generally Leslie C Green, 'The Law of War in Historical Perspective' in Michael N Schmitt (ed), *The Law of Military Operations, International Law Studies* (1998) vol 72, 39, 45-49.

> [T]o impose our will on the enemy is [the] object of force ... The fighting force must be destroyed: that is they must be put in such a condition that they can no longer carry on the fight ... War is an act of force, there is no logical limitation to the application of force ... Attached to force are certain imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it ... [In fact,] kind-hearted people might ... think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine that is the true goal of the art of war. Pleasant as that sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst ... [However,] if civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods [than was the case among savages] and has taught them more effective ways of using force than the crude expression of instinct.[13]

In modern times, from approximately 1850 onwards, we began to see the adoption of detailed national regulations on the treatment of prisoners of war, and later, the codification of this law into multilateral conventions, notably the *Hague Conventions* of 1899 and 1907.[14] Examples of national legislation during this period included the French regulations on prisoners of war of 1859 and 1893, and temporary Russian regulations of 1877 on the same subject.[15] In addition, the general manuals on the laws and customs of war such as the United States' *Lieber Code of 1863* usually contained a part dealing specifically with prisoners of war.[16]

In 1941, the principles of international law on the treatment of prisoners of war were described by a German admiral in the following terms:

> Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war. This principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill and injure helpless people ...[17]

13 Leslie C Green, 'What is – Why is there – the Law of War?' in Michael N Schmitt and Leslie C Green (eds), *The Law of Armed Conflict: Into the Next Millennium, International Law Studies*, (1998) vol 71, 141.

14 Jean de Preux et al (eds), *Commentary – III Geneva Convention relative to the treatment of prisoners of war* (1960) 4.

15 Rosas, above n 11, 69.

16 The American Civil War produced the first modern codification of regulations concerning the treatment of prisoners of war - *Instructions for the Government of Armies of the United States in the Field*, issued by President Abraham Lincoln, General Orders No 100, 24 April 1863. The instructions were drafted by Professor Francis Leiber of Columbia College (the '*Leiber Code*'). The rules stated in the *Leiber Code* were so consistent with what were generally accepted practices that they formed the basis for similar codes or manuals in Prussia (1870), the Netherlands (1871), France (1877), Russia (1877 and 1904), Serbia (1878), Argentina (1881), Great Britain (1883 and 1904) and Spain (1893). See Thomas Erskine Holland, *The Laws of War on Land* (1908).

17 Cited in 'War Crimes and Crimes Against Humanity' in *Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg Trial Proceedings* (1947) vol 1, 232.

The path to a multilateral convention, codifying the custom, can be traced back to 1874 when Russia invited the European states to an official conference in Brussels to consider its draft 'Project of International Rules on the Laws and Usages of War', which included provision for the treatment of prisoners of war, apparently influenced by an earlier draft prepared by the International Society for the Amelioration of the Conditions of Prisoners of War.[18] The outcome of the Brussels Conference, the unratified *Brussels Declaration* of 1874, contained one part[19] dealing with the qualifications of belligerents and another part[20] devoted to prisoners of war. Shortly afterwards, in 1880, the Institute of International Law adopted a set of rules known as the *Oxford Manual*, which were intended to codify the laws of war and included a part on prisoners of war.[21]

The first multilateral convention dealing with prisoners of war, as indicated above, was the *Hague Convention* of 1899, renewed in 1907. The *Hague Conventions* were further enhanced by the *Geneva Convention* of 1929, which developed and particularised the provisions dealing with prisoners of war. This was done again some 25 years later when four conventions, including the *Convention*, were adopted on 12 August 1949.[23] While the *Convention*,[24] with its 143 articles, constituted a further development and particularisation of earlier laws and customs relating to prisoners of war, it can be said that many of the principles were based on the *Geneva Convention* of 1929 and the earlier *Hague Conventions* of 1899 and 1907.

The *Convention* entered force on 21 October 1950. By the end of 1958, 74 states had ratified or acceded to it.[25] That number has since increased to 192 states.[26]

18 Rosas, above n 11, 69. Particularly active in this field was Henry Dunant, the founder of the Red Cross movement. While the subject was not included in the agenda of the 1864 *Geneva Convention*, which adopted the *Convention* relating to the wounded and sick, a draft convention was prepared in 1874 by the International Society for the Amelioration of the Conditions of Prisoners of War.

19 Articles 9-11.

20 Articles 22-3.

21 de Preux, above n 14, 5.

22 For instance, the *Geneva Convention* of 1929 contained 97 articles as compared to three articles on lawful belligerents and 17 articles on the treatment and repatriation of prisoners of war contained in the *Hague Conventions*. It is important to note that the *Geneva Convention* of 1929 did not replace the *Hague Conventions* but rather supplemented it. To the extent that the latter instrument did not regulate a matter the earlier instrument would remain in force.

23 The *Convention* replaced the earlier *Geneva Convention* of 1929: see art 134 of the *Convention*. If, however, both parties to a conflict are bound by the *Geneva Convention* of 1929 and none or only one of them by the *Convention*, the former applies to their mutual relation.

24 For a detailed discussion of the negotiations leading up to the *Convention* and the *travaux préparatoires*, see Geoffrey Best, *War and Law Since 1945* (2002) chs 3-5. See also *Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, 1125 UNTS 3 and *Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, 1125 UNTS 609. For information regarding the Protocols, see Claude Pilloud et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 13 August 1949* (1987).

25 de Preux, above n 14, 9.

26 Details of the states party to the *Convention* and protocols are available at the International Red Cross Committee website: International Committee of the Red Cross, *International Committee of the Red Cross (ICRC)*: Home <http://www.icrc.org> at 25 May 2005. See also Derek Jinks and David Sloss, above n 8, 111 and Manooher Mofidi and Amy E Eckert, '"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels' (2003) 36 *Cornell International Law Journal* 59, 66. The protocols have less states parties: 163 states have ratified Protocol I and 159 states have ratified Protocol II. It should be noted that the United States has not ratified either protocol.

The District Court in *Hamdan v Rumsfeld* ('*Hamdan*') observed in relation to Article 3 of the *Convention* (which is common to all four conventions) that:

> ... by the generally accepted law of nations, ... Common Article 3 embodies 'international human norms' [citing *Mehinovic v Vuckovic*, 198 F Supp 2d 1322, 1351 (2002)] and that it sets forth the 'most fundamental requirements of the law of war' [citing *Kadic v Karadzic*, 70 F 3d 232, 243 (1995)].[27]

Indeed, scholars have observed that at least the main principles of the *Convention* now represent customary international law.[28]

The obligations covering prisoners of war under the *Convention*[29] are comprehensive and founded upon the following principles. Article 13 provides that prisoners of war must, at all times, be humanely treated and protected from 'violence ... intimidation ... insults and public curiosity'. This means that displaying prisoners of war on television confessing to 'crimes' or criticising their own government are regarded as breaches of the *Convention*.[30] While prisoners of war are bound to divulge their name, date of birth and serial number, Article 17 provides that '[n]o physical or mental torture, nor any other form of coercion, may be inflicted ... to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.'

This part of the article will set out the judgments of the Court in *Hamdi and Rasul*, and, in particular, the role of the *Convention* in the Court's reasoning. At the outset, however, it is necessary to briefly discuss the division of power amongst the three arms of government in the United States. That is because, as we shall see below, it is important to recognise that in a polity that has separate

27 *Hamdan v Rumsfeld*, 344 F Supp 2d 152, 163 (2004). The District Court also adopted the reasoning of the International Court of Justice in *Nicaragua v United States* [1986] ICJ 14, 114.

28 Jordan J Paust, 'Judicial Power to Determine the Status and Rights of Persons Detained Without Trial' (2003) 44 *Harvard International Law Journal* 503, 517; and Rosas, above n 11, 86: 'The relationship between the 1949 Convention and previous law is particularly conspicuous with respect to the treatment of prisoners of war during captivity. Thus, all the 12 principles ... on the relationship between customary law and practice in the late nineteenth century and the Hague Regulations of 1899 can in one way or another be said to be included in the present Convention.' Further, '[i]n view of the close relationship between the Hague Regulations, the 1929 Convention and the 1949 Convention, the judgments of [the International Military Tribunal for the Far East and the United States Tribunal at Nuremberg] imply that at least the main principles of the 1949 Convention form part of customary law': at 99.

29 It applies to all cases of declared war or any other armed conflict and to all cases of partial or total occupation of the territory of a party to the *Convention*: art 2. Also, unlike the *Hague Convention* 1907, the *Convention* expressly rejects the 'all participation clause' and applies as between the parties, even though one of the belligerents is not a party to the *Convention*: art 2. If the latter abides by the *Convention*, belligerents that are parties are obliged to observe the provisions of the *Convention* with regard to that belligerent. See generally Leslie C Green, *The Contemporary Law of Armed Conflict* (2nd ed, 2000) 44.

30 See Malcolm Shaw, *International Law* (5th ed, 2003) and Roberta Arnold, 'The Abu Ghraib Misdeeds – Will There Be Justice in the Name of the Geneva Conventions?' (2004) 2 *Journal of International Criminal Justice* 999. For instance, see the treatment of allied prisoners of war by Iraq in the Gulf War (1991) ('The Fragile Rules of War', *The Economist* (London), 26 January 1991, 22) and the treatment of Iraqi prisoners of war (including Saddam Hussein) by the United States in the Iraq War (2003), 'Just a few bad Apples?', *The Economist* (London), 22 January 2005, 29).

loci of power, jurisdictional issues often emerge amongst them. In this constitutional setting, critical questions of power and jurisdiction are often posited.[31] For instance, does the President (the 'Executive') have power to order the detention of aliens and citizens without authorisation by an Act of Congress (the 'Legislature')? Similarly, does the Court and other inferior federal courts (hereafter referred to collectively as the 'Judiciary') have power to review Executive and Legislative detention of aliens and citizens? Invariably, these questions of power are resolved by the *United States Constitution*. As we shall see in the recent cases of *Hamdi* and *Rasul*, questions of jurisdiction play a critical role. This part of the article will examine the application of the *Convention* in determining the questions of power/jurisdiction amongst the arms of government.

III PART B: COMMON FACTS

On 11 September 2001, operatives of the al Qaeda terrorist network hijacked four commercial aeroplanes and used them to attack prominent targets in the United States, including the World Trade Centre in New York and the Pentagon in Washington. Approximately 3000 people were killed and many more were injured in the attacks. One week afterwards, the Legislature passed a resolution authorising the Executive to 'use all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks' or 'harboured such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons'.[32] Soon thereafter, the President ordered the United States military to attack Afghanistan, with a mission to destroy al Qaeda and remove the Taliban from power.

Hamdi, *Rasul* and *Padilla* arise out of the detention[33] of men[34] whom the Executive alleges took up arms with either the Taliban or al Qaeda in the conflict in Afghanistan. Most of the men were eventually detained at a naval base in Guantanamo Bay, Cuba[35] but some were also detained in facilities on the United

31 See generally Samuel Issacharoff and Richard H Pildes, 'Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime' (2004) 2 *International Journal of Constitutional Law* 296 for a detailed consideration of the interplay between the arms of government during wartime.

32 See above n 6 for details of the Force Resolution. See generally Curtis A Bradley and Jack L Goldsmith, 'Congressional Authorization and the War on Terrorism' (2005) 118 *Harvard Law Review* 2047.

33 The detentions occurred pursuant to Presidential Order: Executive Order, 'Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror' (2001) 66 Fed Reg 57,833. Note that the order expressly excludes US citizens. In these circumstances, it is not clear the basis upon which Hamdi and Padilla, both US citizens, were held.

34 There is no reported case, as far as the author is aware, of any women held in detention.

35 *Rasul*, 124 S Ct 2686, 2690-1 (2004): The United States occupies the naval base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, 'the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]' while

States mainland.[36] Since early 2002, the United States military has held approximately 640 'non-Americans' captured outside the United States at the naval base in Guantanamo Bay.[37] No figure has been provided of the number of American citizens who have been detained either at Guantanamo Bay or on the United States mainland.[38]

IV *HAMDI v RUMSFELD*

Hamdi was born in the state of Louisiana in 1980. He moved with his family to Saudi Arabia as a child and resided in Afghanistan in 2001. At some point during that year, he was captured by members of the Northern Alliance, a coalition of military groups opposed to the Taliban, and was eventually turned over to the United States military.

Hamdi was initially detained and interrogated by the United States military in Afghanistan before being transferred, in January 2002, to the United States naval base in Guantanamo Bay, Cuba.[39] In April 2002, after discovering he was a United States citizen, the authorities transferred him to a naval brig in Norfolk, Virginia. In April 2004, shortly before his case was due to be heard before the Court, the authorities transferred him to a brig in Charleston, South Carolina. The Executive contends that Hamdi was, and continues to be, an 'enemy combatant', and that this status justifies his indefinite detention – without formal charges or proceedings – unless and until the Executive decides otherwise.[40]

In June 2002, Hamdi's father filed a habeas corpus application, on his son's behalf, with the District Court.[41] He alleged, amongst other things, that the Executive was holding his son in violation of the fifth and fourteenth

(cont'd) 'the Republic of Cuba consents that during the period of the occupation by the United States ... the United States shall exercise complete jurisdiction and control over and within the said areas': see Lease of Lands for Coaling and Naval Stations, 23 February 1903, US-Cuba, art III TS No 418. A supplemental lease agreement, executed in July 1903, obligates the United States to pay an annual rent in the amount of 'two thousand dollars, in gold coin of the United States' and to maintain 'permanent fences' around the base: see Lease of Certain Areas for Naval or Coaling Stations, 2 July 1903, US-Cuba, arts I-II, TS No 426. In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect, '[s]o long as the United States shall not abandon the ... naval station of Guantanamo': see *Treaty Defining Relations with Cuba*, 29 May 1934, US-Cuba, art III, 48 Stat 1683, TS No 866. For a concise background of the history of the US naval base at Guantanamo Bay, see Justice Mark Weinberg, 'Guantanamo Bay, Detention and Trial by Military Commission' (Paper presented at the 8th Annual International Criminal Law Conference, Melbourne, 2-6 October 2002).

36 The cases of *Hamdi* and *Padilla* both involved United States citizens held in detention on the US mainland.

37 *Rasul*, 124 S Ct 2686, 2690 (2004).

38 *Hamdi*, 124 S Ct 2633, 2673 (2004): Scalia J, with whom Stevens J joins, indicates that he knows of only two US detainees, Hamdi and Padilla.

39 See generally *Hamdi*, 124 S Ct 2633, 2635-6 (2004).

40 Ibid.

41 The application was made pursuant to 28 USC § 2241 which provides at § 2241(a) that '[w]rits of habeas corpus may be granted by the Supreme Court [and] the district courts ... within their respective jurisdiction' (the '*Habeas Corpus Act*').

Amendments of the *United States Constitution*.[42] Although the application did not elaborate on the factual circumstances of Hamdi's capture and detention, his father asserted that Hamdi went to Afghanistan to do 'relief work' less than two months before 11 September 2001 and could not have received military training while in Afghanistan.

The District Court initially ordered that Hamdi be given access to counsel. However, this order was reversed by the United States Court of Appeals for the Fourth Circuit on the basis that the District Court had failed to 'extend appropriate deference to the Government's security and intelligence interests'.[43] The case was then remitted to the District Court so that it could 'conduct a deferential inquiry into Hamdi's status'.[44] The Executive then filed with the District Court a declaration from Michael Mobbs ('Mobbs Declaration'),[45] a Defence Department official. The Mobbs Declaration alleged various details regarding Hamdi's trip to Afghanistan, his affiliation there with a Taliban unit during a time when the Taliban were fighting United States allies, and his subsequent surrender of an assault rifle.

The District Court found that the Mobbs Declaration, standing alone, did not support Hamdi's detention and ordered the Executive provide further materials for an *in camera* hearing so that it could assess the strength of the Executive claim that he was an 'enemy combatant'. However, the Fourth Circuit[46] reversed the order stressing that it was undisputed that Hamdi was captured in an active combat zone and, therefore, no factual inquiry or evidential hearing allowing Hamdi to be heard or rebut the Executive's assertions was necessary or proper. Concluding that the factual averments in the Mobbs Declaration, if accurate, provided a sufficient basis upon which to conclude that the Executive detention was permitted under the *Constitution*, the Fourth Circuit dismissed the habeas corpus application.

On appeal, the Court reversed the judgment of the Fourth Circuit. The Court split six to three.[47] The Core Majority Opinion held that 18 USC (the '*Non-Detention Act*') § 4001(a) which states that '[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress' was satisfied because Hamdi was being held pursuant to an Act of Congress - the Force

42 Gerald Gunther, *Individual Rights in Constitutional Law*, (5th ed, 1991) ch II.
43 *Hamdi v Rumsfeld*, 296 F 3d 278, 279, 283 (2002).
44 Ibid 283, 284.
45 See *Hamdi*, 124 S Ct 2633, 2637 (2004) for a detailed account of the Mobbs Declaration.
46 *Hamdi v Rumsfeld*, 316 F 3d 450, 462 (2003).
47 O'Connor J, with whom Rehnquist CJ, Kennedy and Breyer JJ joined, delivered the opinion of the Court (the 'Core Majority Opinion'). Souter and Ginsburg JJ concurred with the plurality but delivered a separate judgment, which dissented in certain parts (the 'Outer Majority Opinion'). Scalia J, with whom Stevens J joined, delivered a dissenting opinion (the 'Dissenting Opinion'). Thomas J delivered a separate dissenting opinion.

Resolution.[48] The Court concluded that detention of individuals,[49] for the duration of the particular conflict in which they were captured, was so fundamental an incident of war as to be an exercise of the 'necessary and appropriate force' power conferred by the Force Resolution. The Core Majority Opinion said the following when it concluded that detention was an incident of the power to use all 'necessary and appropriate force':

> The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice' are 'important incident[s] of war': *Ex parte Quirin* 317 US 1 at 28 ... The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. '[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war' (quoting decision of Nuremberg Military Tribunal, reprinted in 41 *American Journal of International Law* 172, 229 (1947)): Naqvi, Doubtful Prisoner-of-War Status, (2002) 84 *International Review Red Cross* 571 at 572.[50]

The recognition by the Core Majority Opinion of the preventative character of detention is important. It is evidence of the Court's deference to well-established international norms and the *Convention*. Perhaps equally important, although less obvious, is the Core Majority Opinion's use of the principles enunciated in the *Convention* as an aid in construing the Force Resolution. It suggests a type of adherence to the *Convention* that is not at first blush obvious. The nature of the adherence will be discussed in more detail later in this article.

The Core Majority Opinion concluded that although the Legislature has authorised the detention of combatants in the narrow circumstances of *Hamdi*,[51]

48 See n 6 for details of the Force Resolution. The Core Majority Opinion noted that the Force Resolution authorised the Executive to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the 11 September 2001 terrorist attacks: 115 Stat 224. The Core Majority Opinion held that '[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those [terrorist] attacks, are individuals Congress sought to target in passing the [Force Resolution]': see *Hamdi* 124 S Ct 2633, 2640 (2004).

49 The Core Majority Opinion made it plain that the category of individuals covered was limited: *Hamdi*, 124 S Ct 2633, 2640 (2004). Although the Core Majority Opinion did not define the 'limited category' it is highly probable that persons captured on the battlefield in a conflict 'associated' with the 11 September 2001 terrorist attacks (in accordance with the Force Resolution) will fall within this category.

50 *Hamdi*, 124 S Ct 2633, 2640 (2004). See also *In re Territo*, 156 F 2d 142, 145 (1946) in which the following was said: 'The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released'.

51 The Core Majority Opinion assumed, without deciding, that Congressional authorisation was necessary (the Executive contended that no explicit Congressional authorisation was required because the Executive possesses plenary authority to detain pursuant to art II of the *Constitution*). Similarly, the Core Majority Opinion assumed, without deciding, that § 4001(a) of the *Non-Detention Act* applied to military detentions (the Executive contended that in light of the legislative history of the section and its location in Title 18 of the Act, the section only applied to 'the control of civilian prisons and related detentions'). These matters were assumed because the Core Majority Opinion decided the case without having to resolve them.

due process protections are nevertheless available.[52] The remaining issue was the content of the due process protection. The Court engaged in a balancing exercise,[53] recognising, on the one hand, the right of a citizen to be free from involuntary confinement by his own government without due process of law[54] and, on the other hand, the 'weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States'.[55]

The Core Majority Opinion concluded that '[the] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the actual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker'.[56] It is noteworthy that the Core Majority Opinion said that they did not need to determine 'whether any treaty guarantees him similar access to a tribunal for a determination of his status'[57] as they had relied on the *Constitution* in concluding that due process was available in the circumstances of the case. The statement nevertheless suggests that the Core Majority Opinion was cognisant of the *Convention*, and would have explored the issue further if the due process protection was not available.

It should also be noted that the Core Majority Opinion made it clear that the detention was limited, in accordance with the Force Resolution, to the duration of the conflict in Afghanistan. Their Honours did so after extensive reference to

52 See *Hamdi*, 124 S Ct 2633, 2644 (2004). The Core Majority Opinion noted that it was common ground amongst the parties that, absent suspension, the writ of habeas corpus was available to every individual detained in the United States. It further noted that all agreed suspension had not occurred in this case. 'The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it': *United States Constitution*, art 1 § 9. See also *INS v St Cyr*, 533 US 289 (2001).

53 *Mathews v Eldridge*, 424 US 319 (1976): the balancing exercise is known as the 'Mathews calculus'.

54 See *Hamdi*, 124 S Ct 2633, 2646-8 (2004). See also *Foucha v Louisiana*, 504 US 71, 80 (1992): 'Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action'; *Parham v J R*, 442 US 584, 600 (1997) and *United States v Salerno* 481 US 739, 750, 755 (1987).

55 See *Hamdi*, 124 S Ct 2633, 2647 (2004). 'Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them': *Hamdi*, 124 S Ct 2633, 2645 (2004). See also *Department of Navy v Egan*, 484 US 518, 530 (1988) noting the reluctance of the courts 'to intrude upon the authority of the Executive in military and national security affairs' and *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 587 (1952) acknowledging 'broad powers in military commanders engaged in day-to-day fighting in a theater of war'. The Core Majority Opinion was also anxious to avoid creating burdens on military officers that might intrude on sensitive secrets of national defence or result in futile searches for evidence buried 'under the rubble of war': *Hamdi*, 124 S Ct 2633, 2648 (2004).

56 *Hamdi*, 124 S Ct 2633, 2648 (2004). See also *Cleveland Bd of Ed v Loudermill*, 470 US 532, 542 (1985). In *Hamdi*, 124 S Ct 2633, 2649 (2004), the Core Majority Opinion made a number of comments regarding the permissibility of a shift in the evidential burden: 'Hearsay ... may need to be accepted as the most reliable available evidence' and '[T]he Constitution would not be offended by presumption in favour of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.' These comments were expressly disapproved of by the Outer Majority Opinion: at 2660. When coupled with the Dissenting Opinion, this aspect of the Core Majority Opinion does not command a majority of the Court.

57 *Hamdi*, 124 S Ct 2633, 2649 (2004). See Part C for a discussion of the role of customary international law and international agreements in United States law.

principles of international law and the *Convention*.[58] Further, their Honours said that 'indefinite detention for the purpose of interrogation was not authorised under the [Force Resolution]'.[59]

The Outer Majority Opinion held that the Force Resolution did not authorise Executive detention. Their Honours noted the absence of clear and unmistakable language in the Force Resolution providing for detention and concluded that the *Non-Detention Act* provided for Hamdi's immediate release. The Outer Majority Opinion highlighted the Executive's inconsistent approach in relation to international law and the *Convention*. Their Honours noted that the:

> [Executive]... repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly recognized by the Force Resolution, Hamdi's detention is authorized for the purposes of the [Non-Detention Act].[60]

Their Honours then said:

> [The Executive's] stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law [sic] of war and hence to be within the terms of the Force Resolution in its detention of Hamdi.[61]

The Outer Majority Opinion appears to indicate, although refrains from concluding, that the Executive has failed to comply with the *Convention*.[62] The main consequence of this 'tentative finding' is that their Honours reject the Executive's argument that detention is, as a usage of war, authorised by the Force Resolution. No doubt one can see the advantage of this interpretation to the Executive. Equally, one can sympathise with the view taken by the Court that the Executive should 'have clean hands' before it 'unsheathes its sword' and invokes a body of law it has, arguably, not complied with. However, in some ways, this part of the judgment is curious. Their Honours seem to be saying that because the Executive has failed to comply with the *Convention*, it should be deprived of the benefit of relying on the *Convention* as an aid for interpreting the Force

58 *Hamdi*, 124 S Ct 2633, 2641 (2004): 'It is a clearly established principle of the law of war that detention may last no longer than active hostilities'. The Core Majority Opinion expressly referred to art 118 of the *Convention*, art 20 of the *Hague Convention (II) on Laws and Customs of War on Land*, 29 July 1899, 32 Stat 1817, art 20 of the *Hague Convention (IV) on Laws and Customs of War on Land*, 18 October 1907, 36 Stat 2301 and Paust, above n 28, 510 in which the following was said: '[prisoners of war] can be detained during an armed conflict, but the detaining country must release and repatriate them "without delay after the cessation of active hostilities", unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences'.

59 *Hamdi*, 124 S Ct 2633, 2641 (2004). Implicit in this statement is that detention authorised by the Force Resolution is protective (in accordance with the *Convention*) and not a means by which interrogation can occur (contrary to international law, the *Convention* and the Force Resolution).

60 *Hamdi*, 124 S Ct 2633, 2657, 2658 (2004).

61 Ibid.

62 *Hamdi*, 124 S Ct 2633, 2658 (2004): '[T]here is reason to question whether the United States is acting in accordance with the laws of war it claims as authority'.

Resolution. One might say that the two are unrelated and should not be confused. The task of statutory interpretation is an objective exercise and should not be affected, in any way, by the Court's view of the conduct of either of the parties.[63] In any event, this is another example of the Court's willingness to consider and apply, where appropriate, the *Convention*.

The Dissenting Opinion is telling by its alacrity. Their Honours said:

> Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause ... allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the [Force Resolution], on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, [we] would reverse the decision below.[64]

In other words, the Dissenting Opinion would have ordered Hamdi's release because he had not been charged with a crime or alternatively the writ of habeas corpus had not been suspended.[65] These were the only alternatives available to the Executive should it wish to detain a United States citizen on United States territory.[66]

The Court therefore divided equally with four justices ruling that detention was permitted but only after due process protection was afforded to the detainee and four other justices ruling that detention was not permitted, and release should occur immediately.[67] The deadlock was broken when the Outer Majority Opinion comprising Souter and Ginsburg JJ joined the Core Majority Opinion on the basis

63 For different reasons, see Bradley and Goldsmith, above n 32, 2095-6, who contend that this finding is erroneous: '[The Outer Majority Opinion] appears to confuse [the] distinction between international law rules that are conditions precedent for the exercise of authorized powers, and those that are not ... [Their honour's] argument was ... that the [Executive] may have been violating international law by not treating Hamdi as a prisoner of war. However, both lawful combatants who qualify for prisoner of war status and unlawful combatants who do not can, under the laws of war, be detained until the end of hostilities. As a result, [the Legislature] should be understood as authorizing Hamdi's detention as long as he fell into either one of those categories. If the [Executive] incorrectly classified Hamdi as an unlawful combatant rather than as a prisoner of war, that would simply mean that Hamdi's treatment was not statutorily authorized, not that Hamdi's detention was unauthorized.' The difficulty with this position is that it is far from certain that the Force Resolution authorised, in the manner taken by the Executive, the detention of 'unlawful combatants'. See Part D – Classifying persons as enemy or unlawful combatants. Further, the position taken by Bradley and Goldsmith does not address the observation made above that the task of statutory interpretation is one that should not be affected by the conduct of the parties.

64 *Hamdi*, 124 S Ct 2633, 2660 (2004).

65 There are constitutional constraints on the Legislature's capacity to suspend the writ of habeas corpus: see *Hamdi*, 124 S Ct 2633, 2674 (2004).

66 The ruling was confined to US citizens detained on US territory: see *Hamdi*, 124 S Ct 2633, 2673 (2004).

67 Putting to one side, for the moment, the remaining judgment of Thomas J who found detention was authorised but without a right of judicial review (unlike the Core Majority Opinion).

that that opinion was closest to their own.[68] Justice Thomas was the only judge of the Court who accepted the Executive position that detention was permitted without judicial review.

V *RASUL v BUSH*

Unlike *Hamdi* and *Padilla*, *Rasul* concerned the detention of non-United States citizens. Indeed, the applicants in *Rasul* were two Australian and twelve Kuwaiti citizens who were captured outside the United States[69] during the hostilities in Afghanistan.[70] After capture they were eventually sent to, and detained, in military custody at Guantanamo Bay.[71]

In 2002, relatives of the detainees filed various applications, acting as next friends, challenging the legality of the detentions at Guantanamo Bay. They claimed that none of the detainees had ever been a combatant against the United States, or had ever been engaged in terrorist acts. They also claimed that none had been charged with any wrongdoing, permitted to consult with counsel, or provided with access to the courts or any other tribunal.

Construing the applications as writs for habeas corpus, the District Court[72] dismissed them for want of jurisdiction. The District Court relied on the authority of *Johnson v Eisentrager*,[73] which had held that 'aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for writ of habeas corpus'. The Court of Appeal affirmed the decision of the District Court finding that 'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign'.[74]

On appeal, the Court reversed the judgment of the Court of Appeal. The Court split six to three.[75] The Majority Opinion commenced their reasons for judgment by noting that the Legislature had granted federal courts 'within their respective jurisdictions', the authority to hear applications for habeas corpus by any person who claims to be held 'in custody in violation of the *Constitution* or laws or

68 The Outer Majority Opinion joined with the Core Majority Opinion on the basis that, on remand to the lower courts, Hamdi was entitled to a meaningful opportunity to offer evidence that he was not an 'enemy combatant'.

69 It appears all were captured in Afghanistan except one who was captured in Pakistan, deported to Egypt and then transferred to US custody. See *Rasul*, 124 S Ct 2686, 2691 (2004).

70 When the Court granted certiorari, the applicants included two British citizens, Shafiq Rasul and Asif Iqbul. However, before judgment was delivered, they were released from custody.

71 *Rasul*, 124 S Ct 2686, 2690, 2691 (2004). See n 35 for a more detailed discussion of Guantanamo Bay, Cuba.

72 *Rasul v Bush*, 215 F Supp 2d 55 (2002).

73 *Johnson v Eisentrager*, 339 US 763 (1950) ('*Eisentrager*').

74 *Al Odah v Bush*, 321 F 3d 1134, 1144 (2003), citing *Eisentrager*, 339 US 763, 777 , 778 (1950).

75 Justice Stevens delivered the opinion of the Court, with whom O'Connor, Souter, Ginsburg and Breyer JJ joined (the 'Majority Opinion'). Kennedy J delivered a separate but concurring opinion. Justice Scalia delivered a dissenting opinion, with whom Rehnquist CJ and Thomas J joined (the 'Dissenting Opinion'). This article will review the Majority Opinion of the Court and note, where applicable, points of difference with the Dissenting Opinion.

treaties of the United States'.[76] After tracing the statutory ancestry of the *Habeas Corpus Act* to 1789,[77] and noting the ancient common law derivation of the statute,[78] the Majority Opinion identified the issue before the Court in the following terms: 'The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty"'.[79] The Majority Opinion distinguished the precedential value of *Eisentrager*[80] on the basis that the detainees in this case were not nationals of countries at war with the United States, denied that they have engaged in or plotted acts of aggression against the United States, had never been afforded access to any tribunal, and had been 'imprisoned' in a territory over which the United States exercises exclusive jurisdiction and control. Lastly, and perhaps most importantly, the Majority Opinion noted that *Eisentrager* concerned the Constitutional entitlement to habeas corpus and said little about the statutory entitlement reflected by the *Habeas Corpus Act*.

The Majority Opinion concluded that the District Court has jurisdiction to hear the habeas corpus applications filed on behalf of the appellants.[81] The Majority Opinion ruled that such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, 'but not ultimate sovereignty'.[82]

76 *Habeas Corpus Act*, 28 USC §2241(a), (c)(3).

77 See *Rasul*, 124 S Ct 2686, 2692 (2004). The *Judiciary Act* of 24 September 1789, Ch 20, §14, 1 Stat 82: which authorised federal courts to issue the writ of habeas corpus to prisoners 'in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same'. In 1867, the Legislature extended the protections of the writ to 'all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States': Act of 5 February 1867, Ch 28, 14 Stat 385. See also *Felker v Turpin*, 518 US 651, 659-660 (1996).

78 See *Rasul*, 124 S Ct 2686, 2692 (2004). Habeas corpus is 'a writ antecedent to statute ... throwing its root deep into the genius of our common law': *Williams v Kaiser*, 323 US 471, 484 (1945). The writ appeared in English law several centuries ago, became 'an integral part of our common-law heritage' by the time the Colonies achieved independence (*Preiser v Rodriguez*, 411 US 475, 485 (1973)) and received explicit recognition in the Constitution, which forbids suspension of '[t]he Privilege of the Writ of *Habeas Corpus* ... unless when in Cases of Rebellion or Invasion the public Safety may require it' art I, § 9, cl 2.

79 *Rasul*, 124 S Ct 2686, 2693 (2004).

80 Ibid. The Court held in *Eisentrager* that a District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by US forces in China, tried and convicted of war crimes by an American military commission, headquartered in Nanking and incarcerated in the Landsberg Prison in occupied Germany.

81 *Rasul*, 124 S Ct 2686, 2692-8 (2004). Justice Kennedy delivered a separate but concurring opinion. His Honour found that Guantanamo Bay 'is in every practical respect a United States territory'. His Honour, however, was less willing to distinguish the authority of *Eisentrager* in relation to the *Habeas Corpus Act*, in the manner of the Majority Opinion. His Honour resolved the case on the basis that Eisentrager was good authority but simply Guantanamo Bay fell within the territory of the United States and the detainees in this case had not been afforded the benefit of any legal proceeding to determine their status (unlike *Eisentrager*).

82 It is unnecessary for the purposes of this article to set out the Dissenting Opinion of the Court but suffice it to say that their Honours disagreed, using rather strong language, with the Majority Opinion's treatment of *Eisentrager* and the status of Guantanamo Bay in US law: see *Rasul* 124 S Ct 2686, 2701-11 (2004).

VI SUBSEQUENT JUDICIAL CONSIDERATION OF *HAMDI* AND *RASUL*

The judgments of the Court in *Hamdi* and *Rasul* have, so far, been considered in three District Court cases. In *Hamdan*,[83] Judge Robertson of the District Court declared invalid military commission proceedings convened to try a detainee at Guantanamo Bay. The District Court found that the Executive had breached the *Convention* on the basis that Hamdan had a basic right to be treated as a prisoner of war unless or until his status was found to be otherwise by a tribunal compliant with Article 5 of the *Convention*.[84] The District Court rejected the Executive's argument that it was itself capable and entitled to determine Hamdan's status under the *Convention*.[85] Predicated on the finding that the *Convention* applies (unless or until a neutral decisionmaker finds otherwise), the District Court found that the military commission set up to try Hamdan was not compliant with the *Convention*.[86] The District Court ruled that the Executive had 'both overstepped [its] constitutional bounds and improperly brushed aside the [*Convention*] in establishing military commissions to try detainees ... as war criminals'. At the time of writing, the Executive has appealed this judgment in the United States Court of Appeals.[87] Regardless of the outcome of this appeal, there will be continual debate until the United States Supreme Court rules on this matter.

In *re Guantanamo Detainee Cases*,[88] the Executive sought an order dismissing several applications brought by Guantanamo detainees. The applications raised a number of allegations, including claims that the *United States Constitution*,

83 *Hamdan v Rumsfeld*, 344 F Supp 2d 152 (2004).

84 Article 5 of the *Convention* provides: 'Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in art 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.' The Article has been implemented by *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8 §1-6 (1997).

85 *Hamdan*, 344 F Supp 2d 152 (2004). The judge ruled that 'Combatant Status Review Tribunals', comprising a panel of military officers, were not 'established to address detainees' status under the [*Convention*]'. The judge found that '[t]he President is not a "tribunal" ... The government must convene a competent tribunal ... and seek a specific determination as to Hamdan's status under the [*Conventions*]. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war': at 162.

86 The military commission was not compliant with art 102 of the *Convention*: 'A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.' The Executive did not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position was that Hamdan was not entitled to the protections of the *Convention* at all.

87 Oral argument in the appeal was heard on 8 March 2005. See also Neil A Lewis, 'US Judge Halts War-Crime Trial at Guantanamo', *The New York Times* (New York), 9 November 2004, A1; New York Times, 'National Briefing Washington: U.S. To Appeal Ruling on Detainees' P.O.W. Status'. *The New York Times* (New York), 13 November 2004, A13.

88 355 F Supp 2d 443 (2005). In the wake of the Court's judgment in *Rasul*, several habeas corpus applications were filed with the District Court in addition to the ones remanded by the Court in *Rasul*. As at the end of July 2004, thirteen cases involving more than sixty detainees were pending before eight judges in the District Court. While an application by the Executive seeking consolidation was denied, on 17 August 2004, Kessler J, on behalf of the Calender and Case Management Committee of the District Court, designated Green J to coordinate and manage all

treaties, statutes, regulations, the common law and customary international law had been violated. The Executive contended that the applications were misconceived and had no basis in law and therefore should be summarily dismissed. Judge Green of the District Court granted, in part, the Executive's motion and, in part, dismissed it. Her Honour held that the detainees had brought 'valid' claims under the Fifth Amendment of the *United States Constitution* and that the procedures put in place to determine their status as 'enemy combatants' violated their 'due process' rights. Her Honour also held that at least some of the detainees (mainly 'Taliban' detainees) had brought 'valid' claims under the *Convention* and that they had a right to challenge their status as 'enemy combatants' before a competent tribunal (discussed later under Part D). The remainder of the claims made by the detainees were dismissed.

In *Khalid*,[89] the Executive sought an order, like in *Re Guantanamo Detainee Cases*, dismissing two habeas corpus applications made by detainees on the basis that their applications did not disclose a sustainable cause of action. It was conceded in oral argument before Judge Leon that the *Convention* did not apply to the applicants because they were not 'captured in the zone of hostilities ... in and around Afghanistan'.[90] His Honour did not, therefore, consider the role of the *Convention* in United States law. However, his Honour did make the following comment in relation to the invocation of international law:

> ... having concluded that Congress, through the [Force Resolution], has conferred authority on the [Executive] to detain the petitioners ... it would be impermissible ... under our constitutional system of separation of powers for the judiciary to engage in a substantive evaluation of the conditions of their detention. Simply stated, it is the province of the Executive branch and Congress, should it choose to enact legislation relating thereto, to define the conditions of detention and ensure that United States laws and treaties are being complied therewith.[91]

The above cases will be considered further by the United States Court of Appeals in the pending appeal of the judgment in *Hamdan*. Further, it is likely that, whatever the judgment of the Court of Appeals, the issues raised in these cases will be considered by the Court.

(cont'd) proceedings that were pending and, to the extent necessary, rule on procedural and substantive issues common to the cases. Although issues and motions were transferred (on the order of each judge assigned to the case) to Judge Green, the cases themselves remained before each assigned judge. It is important to note that if a judge does not agree with a ruling made by her Honour, that judge is free to find otherwise. In *Re Guantanamo Detainee Cases*, eleven of the thirteen cases were transferred in this way. However, two cases before Judge Leon were not: see *Khalid v Bush*, 355 F Supp 2d 311 (2005) ('*Khalid*'). As at the date of the writing of this article, eight more habeas corpus applications have been filed with the District Court.

89 355 F Supp 2d 311 (2005).

90 *Khalid*, 355 F Supp 2d 311, 326 (2005).

91 Ibid 328.

VII PART C: APPLICATION OF INTERNATIONAL LAW IN UNITED STATES LAW

At the turn of the last century, the Court recognised international law was part of United States law both as a matter of customary international law and United States' treaty obligations.[92] Further, international law and international agreements that are binding on the United States may be interpreted and enforced by United States courts. According to the *Third Restatement of the Foreign Relations Law of the United States*:

> (2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to the Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of federal courts.
>
> (3) Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non self-executing' agreement will not be given effect as law in the absence of necessary implementation.[93]

This part of the article will first consider the role of international law in United States law and then consider the role of international agreements, and specifically the *Convention*, in the jurisprudence of the Court.

For over two centuries, the common law of the United States has incorporated customary international law.[94] In *Paquete Habana*, the leading case on the reception of customary international law, the United States Navy seized fishing vessels, during the Spanish American War, belonging to private Spanish citizens and condemned them as prizes of war. The owners of those vessels challenged the seizure and sought recovery of the ships, asserting that under international law private fishing vessels, even if belonging to enemy aliens, were not subject to seizure as war prize. The Court examined the state of international law, found that it indeed exempted such fishing vessels from seizure, and ordered that the proceeds of the sale of these vessels be paid to the original owners. In supporting its conclusion, the Court made the following oft-quoted statement:

92 *The Paquete Habana*, 175 US 677, 700 (1900) ('*Paquete Habana*'). See generally, for a detailed account of the reception of treaty and customary international law in United States law, Lori F Damrosch (ed), *International Law – Cases and Materials*, (4th ed, 2001), ch 3; Louis Henkin, 'International Law As Law In the United States' (1984) 82 *Michigan Law Review* 1555; John F Murphy, *The United States and the Rule of Law In International Affairs* (2004); Jordan J Paust, 'Customary International Law: Its Nature, Sources and Status As Law In the United States' (1990) 12 *Michigan Journal of International Law* 59; and Jordan J Paust, 'Customary International Law and Human Rights Treaties Are Law of the United States' (1999) 20 *Michigan Journal of International Law* 301.

93 *Restatement (Third) of the Foreign Relations Law of the United States* § 111.

94 See *Ware v Hylyon*, 3 US 199 (1796), 'When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.': at 281; and *Talbot v Janson*, 3 US 133 (1795), 'This is so palpable a violation of our own law ... of which the law of nations is a part, as it subsisted either before the act of Congress on the subject ...': at 159-61. See also brief for international law professors in support of petitioners as amici curiae in *Hamdi*, filed 23 February 2004.

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations ...[95]

In the United States, customary international law is subject to the *Constitution*[96] and to repeal by Acts of Congress.[97] There is, however, a presumption in United States law that legislation is not intended to conflict with customary international law.[98] As to the paramountcy of legislation over customary international law, the Court of Appeals in *Committee of United States Citizens Living in Nicaragua v Reagan*[99] said that 'no enactment of Congress can be challenged on the ground that it violates customary international law'. Similarly, it was held in *United States v Yunis (No 3)*[100] that '[s]tatutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.' The District Court in *Schroeder v Bissell*[101] described the paramountcy of legislation in the following terms:

> International practice is law only in so far as we adopt it, and like our common law or statute law it bends to the will of Congress ... There is one ground only upon which a federal court may refuse to enforce an Act of Congress and that is when the Act is held to be unconstitutional. The act may contravene recognised principles of international law, but that affords no more basis for judicial disregard of it than it does for the executive disregard of it.[102]

95 *Paquete Habana*, 175 US 677, 700 (1900). See also *Banco National de Cuba v Sabbatino*, 376 US 398, 423 (1964): 'International law is part of our law, and must be ascertained and administered by courts of justice ...' Clear evidence of the existence of customary international law is necessary before such law will be incorporated into United States law: see *Filartiga v Pena-Irala*, 630 F 2d 876 (1980); *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774 (1984); and *Trajano v Marcos*, 978 F 2d 493 (1992).

96 Louis Henkin, 'The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny' (1987) *Harvard Law Review* 853, 869-70. The learned author contends that the Court has 'yet to declare that the Constitution is ... supreme over the law of nations and principles of customary law'. However, he ultimately concedes that 'we can assume that, like treaties, customary international law is inferior to the United States Constitution in the hierarchy of our domestic law'.

97 As to the paramountcy of Acts of Congress over customary international law in United States law, see Henkin, above n 96, 872-8. See also Nadine Strossen, 'Recent US and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis' (1990) 41 *Hastings Law Journal* 805, 815 for a detailed account of the 'cyclical' patterns of United States court enforcement of customary international law. See generally Ryan Goodman and Derek P Jinks, 'Filartiga's Firm Footing: International Human Rights and Federal Common Law' (1997) 66 *Fordham Law Review* 463, 467; and Malcolm Evans (ed), *International Law* (2003) 425-6.

98 *Schroeder v Bissell*, 5 F 2d 838 (1925), 842: 'unless it unmistakably appears that a congressional Act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it.' See also *Macleod v United States*, 229 US 416 (1913) and *Littlejohn & Co v United States*, 260 US 215 (1926).

99 859 F 2d 929, 939 (1988). See also *Tag v Rogers*, 267 F 2d 664, 666 (1959).

100 724 F 2d 1086, 1091 (1991).

101 5 F 2d 838 (1925).

102 *Schroeder v Bissell*, 5 F 2d 838, 842 (1925).

Further, the reference to 'controlling executive act' in *Paquete Habana* limits the applicability of customary international law in relation to Executive action. In *Garcia - Mir v Meese*,[103] it was held that although the lengthy detention of 'illegal' Cuban immigrants was contrary to customary international law, their detention was not contrary to United States law because the Attorney-General's decision to detain them was, in the terms of the *Paquete Habana* judgment, a 'controlling executive act'.[104]

VIII APPLICATION OF THE *CONVENTION* IN THE COURT'S JURISPRUDENCE

Under the *United States Constitution*, treaties are the 'supreme law of the land'.[105] The learned scholar Professor Henkin described the reception of 'international agreements', and by implication the *Convention*, into United States law in the following terms:

> By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other ... [i]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self executing.[106]

It should be noted that there are complex rules in United States constitutional law and practice that determine whether an international agreement is 'self-executing'.[107] In *Foster v Neilson*, Marshall CJ said that:

> [A Treaty is] to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[108]

103 788 F 2d 1446 (1986). See also *Rodriguez-Fernandez v Wilkinson*, 654 F 2d 1382 (1981); *United States v Palestinian Liberation Organization*, 695 F Supp 1456 (1988) and *Klinghoffer v SNC Achille Lauro*, 739 F Supp 854 (1990). This position is not accepted by a number of eminent scholars, see Louis Henkin, 'The President and International Law' (1986) 80 *American Journal of International Law* 930, 936-7; and Jordan J Paust, 'May the President Violate Customary International Law?: The President Is Bound by International Law' (1987) 81 *American Journal of International Law* 377.

104 David Harris, *Cases and Materials on International Law* (6th ed 2004), 95.

105 *United States Constitution* art VI, § 2: 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land'. Note, however, whichever of legislation and treaty is last in time will have paramountcy in US law in the event of their inconsistency: see Henkin, above n 96, 870-2.

106 Henkin, above n 96, 871 citing *Whitney v Robertson*, 124 US 190, 194 (1888).

107 A treaty is 'non-self-executing' if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation; or if the Senate in consenting to the treaty requires implementing legislation; or if the implementing legislation is constitutionally required. See *Diggs v Richardson*, 555 F 2d 848 (1976) and *Head Money Cases*, 112 US 580, 598-9 (1884), which established the proposition that a 'treaty is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined'.

108 27 US 253, 314 (1829). See also Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (4th ed, 2003) 129.

Further, later Acts of Congress will take precedence over earlier treaty obligations. For example, in *Diggs v Schultz*,[109] the court considered the effect of the Byrd Amendment, which legalised the importation into the United States of strategic materials, such as chrome from Rhodesia. The activity was expressly forbidden by a United Nations Security Council resolution, which in the circumstances was binding. The court noted that the Byrd Amendment was 'in blatant disregard of our treaty undertakings' but concluded that 'under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it'. It should be noted that while the law was free from challenge in United States law, the United States was still liable for the breach in international law.[110]

The frequency of potential conflict between legislation and treaty is reduced by the well-known canon of statutory interpretation that the Legislature is presumed not to enact laws contrary to the international obligations of the United States,[111] and that legislation should be construed as conforming to international obligations. When considering legislation and a treaty dealing with the same subject, courts seek to construe them so as to give effect to both of them without acting contrary to the wording of either (discussed below, in more detail, under the heading 'Indirect application of the *Convention*').[112] Where, however, the two are inconsistent, the general rule is that the latter in time will prevail, provided the treaty is self-executing.[113]

Perhaps the clearest statement of the role of the *Convention* (and implicitly international agreements) in United States law was made by the District Court in *Hamdan* following the Court's findings in *Hamdi*, *Rasul* and *Padilla*. The court in *Hamdan* made it clear that the *Convention* as a treaty made under the authority of the United States was part of the law of the United States.[114] It held that the Judiciary

109 470 F 2d 461, 466-7 (1972).

110 See *Restatement (Third) of the Foreign Relations Law of the United States* § 115(1)(b).

111 See *Murray v Schooner Charming Betsy*, 6 US 64 (1804); *Weinberger v Rossi*, 456 US 25 (1982) and *Cook v United States*, 288 US 102 (1933). See also Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) vol 1, 75-7; Ralph Steinhardt, 'The Role of International Law As a Canon of Domestic Statutory Construction' (1990) 43 *Vanderbilt Law Review* 1103, and Rebecca Wallace, *International Law* (4th ed, 2002), 44-8. Likewise, a later treaty provision will not be treated as having repealed by implication an earlier statute unless 'the two are absolutely incompatible and the statute cannot be enforced without antagonising the treaty': see *Johnson v Browne*, 205 US 309, 321 (1907).

112 See generally Malcolm Shaw, *International Law* (5th ed, 2003). In *United States v Palestine Liberation Organisation*, 695 F Supp 1456 (1988), the District Court held that an Act of Congress that provided for the closure of all PLO offices in the United States did not extend to the PLO mission to the United Nations (an action which would have breached the obligations of the Untied States under the United Nations Headquarters Agreement). The District Court held that it could not be established that the legislation clearly and unequivocally intended that an obligation arising out of the Headquarters Agreement, a valid treaty, was to be violated.

113 See *Whitney v Robertson*, 124 US 190 (1888) and *Edye v Robertson*, 112 US 580, 599 (1884). See also *Restatement (Third) of the Foreign Relations Law of the United States*, above n 93, 63, which suggests that an Act of Congress will supersede an earlier provision in an international agreement 'if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled'. In similar terms, see *Cooke v The United States*, 288 US 102, 119-20 (1933): 'A treaty is not repealed or modified by a subsequent federal statute unless that is the clearly expressed intention of Congress.'

114 *Hamdan*, 344 F Supp 2d 152, 164 (2004). The District Court so held after referring to the *Constitution*, art VI § 2, *Paquete Habana*, 175 US 677 (1900) and *Restatement (Third) of the Foreign Relations Law of the United States* § 111.

is bound to give effect to international agreements of the United States unless such agreements are 'not self-executing'.[115] The court gave short shrift to an Executive argument that no federal court has authority to determine whether the *Convention* has been violated, or, if it has, to grant relief for the violation. The court said:

> Because the [*Convention*] was written to protect individuals, because the Executive Branch of our government has implemented the [*Convention*] for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the [*Convention*] did not require implementing legislation except in a few specific areas, and because nothing in the [*Convention*] itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the [*Convention*] is a self-executing treaty [and thus part of the law of the United States].[116]

The Court has applied the *Convention* in a number of comparable cases concerning 'wartime detainees'. For example, in *Ex parte Quirin*,[117] in considering the constitutionality of an American detainee's trial by a military commission, the Court acknowledged that '[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as of enemy individuals'. Similarly, in *Eisentrager*,[118] in determining whether a German national convicted by a United States military commission could pursue habeas corpus relief, the Court extensively reviewed the then relevant rules of international law to ensure that they would not be violated by its decision.

A *Direct Application of the* Convention

At the outset, it must be noted that the Court does not, in an orthodox sense, enforce and apply the *Convention* as would a trial court or military

115 *Hamdan*, 344 F Supp 2d 152, 164 (2004). See also *Diggs v Richardson*, 555 F 2d 848 (1976); Akbar, above n 8, 207-10 and Strossen, above n 97, 812: 'Unless a court deems a treaty to be "self-executing", the treaty will bind domestic courts only if Congress has passed legislation for the specific purpose of implementing the treaty provisions domestically.'

116 *Hamdan*, 344 F Supp 2d 152, 165 (2004). This passage of the judgment was expressly adopted in *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 478-9 (2005). See also Jinks and Sloss, above n 8, 129, 191: '...unanimous judicial precedent supports the proposition that the Geneva Conventions, at least in substantial part, have the status of supreme federal law under the Constitution.' Cf *Tel-Oren v Libyan Arab Republic*, 726 F 2d 774, 808-9 (1984) (Bork J); *Linder v Calero Portocarrero*, 747 F Supp 1452, 1463 (1990); and *United States v Fort*, 921 F Supp 523, 526 (1996). The finding is controversial and the Court of Appeals is currently reviewing this issue in the appeal of *Hamdan*: oral argument in the appeal was heard on 8 March 2005. The finding is also inconsistent with the Fourth Circuit finding in *Hamdi*, 316 F 3d 450, 468 (2003), which found that the *Convention* is not self-executing because there was no private cause of action in the treaty. The Court did not consider this issue in *Hamdi* and left undisturbed this aspect of the finding of the Fourth Circuit. See Paust, above n 28, 515 for a persuasive argument that the *Convention* is self-executing.

117 317 US 1, 27-8 (1942).

118 See *Eisentrager*, 339 US 763 (1950), noting '[t]he practice of every modern government': at 785; citing 'treaty law': at 786; and citing 'Hague Regulations and secondary sources of international law': at 787-8.

tribunal/commission.[119] The power of the Court is found in its binding appellate power at the fulcrum of the United States judicial hierarchy. As we have seen in *Hamdi* and *Rasul*, the Court is the ultimate arbiter of justiciable disputes. Putting to one side issues regarding jurisdiction, the Court has significant power to shape United States law in a manner that is compliant with the *Convention*.

The writ of habeas corpus and due process protections under United States law, as formulated by the Court in *Hamdi* and *Rasul*, operate to effectively protect the procedural right of persons detained under Article 5 of the *Convention* to have their status as a prisoner of war determined by a 'competent tribunal'.[120] Likewise, there does not appear to be any impediment to further enforcement of other procedural rights under the *Convention*, such as Article 103 (the right to have 'judicial investigations' be conducted as rapidly as possible so that the trial take place as soon as possible) and Article 105 (the right to a qualified counsel for one's defence). However, the Executive will likely contest any further elaboration of procedural rights under the *Convention* and it is far from certain that *Rasul*, in particular, will be followed by the Court once its composition has changed.[121]

In addition, the content of the Article 5 procedural right is uncertain. That is because the Core Majority Opinion in *Hamdi* suggested that there might be a lower balance of proof and a shift in the evidential burden. As noted earlier,[122] this aspect of the Core Majority Opinion did not command the support of the Outer Majority Opinion, and as a consequence only the four judges that comprised the Core Majority Opinion found in its favour. It might also be said that this aspect of the judgment was *obiter dicta* as it was not dispositive of the case. In any event, it remains to be seen whether the Executive will avail itself of the evidentiary suggestions made by the Core Majority Opinion in setting up 'competent tribunals'.

The separate issue as to whether the evidentiary suggestions made by the Core Majority Opinion are compliant with the *Convention* is problematic. The *Convention* is silent on this issue. Article 102, which says: 'prisoners of war can

119 Ralph Steinhardt, 'International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911' (2004) 36 *George Washington International Law Review* 1, 13 discusses the paramountcy of military courts in the US, emanating from the *Uniform Code of Military Justice* (art 17), for the enforcement of war crimes. See also David Glazier, 'Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission' (2003) 89 *Virginia Law Review* 2005.

120 There was a tantalising reference in *Hamdi*, 124 S Ct 2633, 2649 (2004) to treaties and whether they might guarantee a detainee access to a tribunal for a determination of his status. However, the Core Majority Opinion did not resolve this issue as their Honours found that the detainee had a due process right under the *Constitution*.

121 That is because the size of the majority in *Rasul* was narrower than in *Hamdi*. Although the judgments of the Court in both cases were split six to three, the Dissenting Opinion in *Rasul* accepted the Executive's arguments, whereas the Dissenting Opinion in *Hamdi* went much further than the Majority Opinion (both Core and Outer) in rejecting the Executive's arguments. Therefore, the opinion in *Rasul* is more exposed to rejection as the composition of the Court changes in the future. This is particularly the case, given press speculation that a number of judges of the Court will likely resign and be replaced in the coming years during the term of the incumbent Executive.

122 See above n 56.

be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of the armed forces of the Detaining Power', provides some assistance. Although strictly not applicable to Article 5, as it deals with the sentencing of prisoners of war, Article 102 effectively says that the rules of evidence afforded to enemy combatants must be the same as those afforded to members of the Detaining Power's armed forces. Assuming this rule has application to Article 5, it would seem that any inconsistency between the rules of evidence afforded citizens and non-citizens[123] under the procedure set out in Article 5 will result in a contravention of the *Convention*. Interestingly, the Court has made no such distinction as the suggested principles apply equally to citizens, as in the case of *Hamdi*, and non-citizens, as in the case of *Rasul*.[124]

Unlike procedural rights, the Court has not yet been invited to consider the application of substantive rights under the *Convention*, such as those found in Part III. The District Court in *Hamdan* has, however, made it clear that the *Convention* is part of United States law and implicitly, *detainees* must be accorded all the substantive rights of the *Convention* until their status is determined by a competent tribunal. As the Executive has appealed the judgment in *Hamdan*, it is likely that the Court will be asked to consider this issue in the future.

B *Indirect Application of the* Convention

It is plain that the 'interpretive role' of international law (including customary law and international agreements, such as the *Convention*) is more common than its 'controlling role'. That is because 'outright repudiation of international law by legislation or by executive act is the exceptional case, both because the political branches are generally unwilling to be perceived as violating international law and because the courts are reluctant to find a conflict that triggers the supremacy axioms'.[125]

It is, therefore, a well-established principle of law that wherever possible, United States law should be construed in a manner that does not conflict with customary international law and United States' treaty obligations.[126] The 'Charming Betsy'[127] rule provides that 'an Act of Congress ought never to be construed to violate the

123 The reference to 'armed forces' in art 102 must be changed to 'citizen' if the rule is applicable to art 5.

124 For criticism of the evidentiary suggestions, see Moeckli, above n 8, 99: '... there is a danger that the procedural rules suggested by the [Court] could make the judicial review of 'enemy combatant' detentions so deferential to the [Executive] as to render it all but meaningless.'

125 Steinhardt, above n 111, 1109.

126 See *Restatement (Third) of the Foreign Relations Law of the United States*, above n 93, §114. On the application of the rule in common law countries, see Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1991) 10(2) *European Journal of International Law* 237, 254. See also Strossen, above n 97, 824: 'In contrast to US courts' current reluctance to view themselves as bound directly by international human rights principles on substantive issues, they are much more willing to invoke such principles – whether embodied in treaties or other manifestations of customary international law – to guide the interpretation of domestic legal norms.'

127 *Murray v Schooner Charming Betsy*, 6 US 64, 118 (1804). See also *Talbot v Seeman*, 5 US 1, 43 (1801): 'the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law'.

laws of nations if any other possible construction remains'. This principle of law is a form of indirect adherence to the *Convention* by way of statutory interpretation.[128] There were three examples of this type of adherence in *Hamdi* and *Rasul*.

First, the *Convention* was used to determine whether the Force Resolution authorised detention. Although the resolution did not expressly provide for detention, the Core Majority Opinion in *Hamdi* found that detention was implicitly authorised after extensive reference to the usages of war and the *Convention*. The Outer Majority Opinion also considered the *Convention* but declined to permit the Executive's use of the *Convention* as an interpretive aid in relation to the Force Resolution. Their Honours refused to give the Executive the benefit of this interpretive aid as it was arguable that the Executive was in violation of the *Convention* by failing to afford detainees prisoners of war status pending the resolution of their status by a competent tribunal.

Secondly, the *Convention* was used to access the nature of detention authorised by the Force Resolution. In *Hamdi*, the Core Majority Opinion applied the *Convention* in concluding that the Force Resolution did not permit indefinite detention for the purposes of interrogation.[129] Similarly, their Honours found that detention authorised by the Force Resolution was delimited by its 'preventative' character. These aspects of the Court's findings suggest that detention authorised by the Force Resolution must have a certain 'purposive' flavour. Their Honours did so after considering the nature of detention envisaged by the *Convention*.

Thirdly the *Convention* was used to determine the length of detention authorised by the Force Resolution. In *Hamdi*, the Core Majority Opinion applied the *Convention* in concluding that detention authorised by the Force Resolution was limited to the duration of hostilities in Afghanistan. This would suggest that Article 118 of the *Convention*, which provides that detainees 'shall be released and repatriated without delay after the cessation of active hostilities', has life in the jurisprudence of the Court.[130] Of course, the Executive is free to charge and try detainees for crimes, which would negate the obligation to free detainees at the end of the conflict.

128 See Bradley and Goldsmith, above n 32, 2088-2100: '[The Core Majority Opinion] in *Hamdi* relied extensively on the international laws of war in interpreting... the powers that the [Force Resolution] confers on the [Executive] and provide boundaries on the scope of [the Legislature's] authorisation.'

129 Article 17 of the *Convention* provides: 'Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information'.

130 McDonald and Sullivan, above n 8, 312-4: 'The tenor of the debate over the adoption of article 118 makes it clear that this provision was designed to minimise unnecessary detention. A broad interpretation of "active hostilities" where US detainees could conceivably spend the rest of their entire lives as POWs during an elusive and sporadic War on Terror, contravenes this aim.'

IX PART D: CLASSIFYING PERSONS AS 'ENEMY OR UNLAWFUL COMBATANTS'

The Executive contends that it is entitled to detain, indefinitely, those it deems as 'enemy combatants'[131] without charge or trial until the end of the 'war on terrorism' or until it is determined that the detainee no longer poses a threat to the United States or its allies. The usefulness and legitimacy of the Executive's classification of detainees held at Guantanamo Bay as 'enemy combatants' is questionable.[132] The phrase is not recognised in the *Convention* and until recently had not been defined by the Executive.[133]

In international law the term 'combatant' denotes the right to participate directly in hostilities. 'Lawful combatants' may not be prosecuted for taking part in a conflict, unless they have committed a violation of international law.[134] The classification of 'enemy combatant', by contrast, is not one recognised in international humanitarian law.[135]

Within the general class of 'enemy combatants' is a subset whom the Executive has decided to prosecute for war crimes before a military commission.[136] Curiously, detainees subject to criminal prosecution may have more rights than those whom the Executive does not intend to prosecute formally for war crimes.[137] Although detainees not subject to prosecution could suffer the same fate as those

131 Initially, the Executive declared that the detainees held at Guantanamo Bay were 'unlawful combatants'. However, before the Court in *Hamdi* and *Rasul*, and since then, the Executive has asserted the detainees are 'enemy combatants'. It is unclear whether there is any difference between the two forms of classification, although it appears the Executive uses the terms interchangeably. In relation to 'unlawful combatants', the Court in *Ex parte Quirin*, 317 US 1, 31 (1942) said '[l]awful combatants are subject to capture and detention as prisoners of war' whereas unlawful combatants, in addition to being subject to capture and detention 'are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful'.

132 All persons detained at Guantanamo Bay are characterised by the Executive as 'enemy combatants': see *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 447 (2005). There are essentially two classes of persons held in detention at Guantanamo Bay. The first are those captured on Afghan soil pursuant to the military conflict in Afghanistan and the second are those detained some distance from the 'battle zone' in Afghanistan. In *Re Guantanamo Detainee Cases*, it was observed that 'men were taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia and Thailand': at 445.

133 See Moeckli, above n 8, 77: 'What seems to be common to these "enemy combatant" classifications is the government's endeavour to thereby prevent having to make a choice between either granting the detainees prisoner of war status under the [Convention] or charging them with a criminal offence.'

134 See art 43(2) of the *Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts* (Protocol I). Further, upon capture a 'combatant' must be granted prisoner of war status and treated in accordance with the *Convention*.

135 Knut Dörmann, 'The Legal Situation of "Unlawful/unprivileged Combatants"' (2003) 85 *The International Review of the Red Cross* 45, 46; Mofidi and Eckert, above n 26, 68-69 and Moeckli, above n 8, 77: 'What has been used in legal literature and military manuals, though not in treaties of international humanitarian law, are the terms 'unlawful or unprivileged combatant. These are generally used to describe persons taking part in hostilities without being entitled to do so; they can be prosecuted simply for their participation in an armed conflict and are not entitled to [prisoner of war status] upon capture.'

136 See above n 33. The military commission was established pursuant to Executive Order issued on 13 November 2001.

137 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 447 (2005). See also *Procedures for Trials by Military Commissions of Certain Non-US citizens in the War against Terrorism* (2005) 32 CFR § 9.1, which provides that the prosecution of detainees requires a formal notice of charges, a presumption of innocence of any crime until proven guilty, a right to counsel, pre-trial

convicted of war crimes - potentially life in prison, depending on how long the 'war on terrorism' lasts - they were not given, until recently, any significant procedural rights to challenge their classification as 'enemy combatants'.[138]

The Court in *Hamdi* and *Rasul* held that federal courts had jurisdiction to review the legality of the detention of persons, citizens and non-citizens alike, classified by the Executive as 'enemy combatants'. The Majority Opinion in *Rasul* observed that:

> Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.[139]

The Core Majority Opinion in *Hamdi* noted that there was some uncertainty regarding the phrase 'enemy combatant', a classification that the Executive contended justified detention. The Core Majority Opinion said:

> The threshold question before us is whether the Executive has the authority to detain citizens who qualify as 'enemy combatants'. There is some debate as to the proper scope of this term, and the [Executive] has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for the purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States'.[140]

On 7 July 2004, nine days after the judgments in *Rasul* and *Hamdi* were delivered, Deputy Secretary Mr Wolfowitz (as he then was) issued an order creating a military tribunal called the 'Combatant Status Review Tribunal' (the 'Tribunal') to review the status of each detainee at Guantanamo Bay as 'enemy combatants'.[141] It is this Tribunal that the District Court in *Hamdan* ruled was not a 'neutral decision-maker' capable of depriving detainees of their presumptive

(cont'd) disclosure to the defence team of exculpatory evidence and of evidence the prosecution intends to use at trial, the right to call reasonably available witnesses, the right to have a defence counsel attend every portion of the trial proceedings, even where classified information is presented and the right to an open trial with press present, at least for those portions not involving classified information.

138 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 447 (2005).

139 *Rasul*, 124 S Ct 2686, 2699 (2004). From the beginning of 2002 through at least June 2004, the substantial majority of detainees not charged with war crimes were not informed of the basis upon which they were detained, were not permitted access to counsel, were not given a formal opportunity to challenge their 'enemy combatant' status, and were held virtually 'incommunicado' from the outside world: see, eg, *Hamdi*, 124 S Ct 2633, 2653 (2004).

140 *Hamdi*, 124 S Ct 2633, 2639 (2004).

141 *Memorandum for the Secretary of the Navy – Order Establishing Combatant Status Review Tribunal*, Issued by Deputy Secretary of Defence – Mr Wolfowitz, 7 July 2004. The order can be found viewed at <http//:www.defenselink.mil/news/Jul2004/d20040707review.pdf> at 20 May 2005. See generally, Moeckli, above n 8, 94-5.

prisoner of war status under Article 5 of the *Convention*.[142] In any event, it appears that this is the first document issued by the Executive that makes any attempt to define the phrase 'enemy combatant'. This is curious as some detainees had, by this date, been in custody for more than two years on the basis that they were 'enemy combatants'. The phrase was defined in the following terms:

> [T]he term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has supported hostilities in aid of enemy armed forces.[143]

The definition of 'enemy combatant' in the military order establishing the Tribunal appears broader than the definition considered in *Hamdi*.[144] The use of the word 'includes' in the Executive definition indicates that the Executive interprets the Force Resolution[145] to authorise indefinite detention of individuals who may never have committed a 'belligerent' act or directly supported hostilities against the United States or its allies.[146] Interestingly, in *Re Guantanamo Detainee Cases*,[147] counsel for the Executive contended in oral argument that the Executive has the authority to detain the following individuals until the conclusion of the 'war on terrorism': '[a] little old lady in Switzerland who writes checks [sic] to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al Qaeda activities, [or] a person who teaches English to the son of an al Qaeda member, [or] a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.'

Under the terms of the military order establishing the Tribunal, detainees for the first time have the right to hear the factual bases for their detention, at least to the extent that those facts do not involve information deemed classified by the Executive.[148] However, the District Court held that there were 'constitutional'

142 *Hamdan*, 344 F Supp 2d 152, 162 (2004).
143 See above n 141, paragraph (a).
144 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 475 (2005).
145 See above n 6 for details of the resolution.
146 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 475 (2005).
147 Ibid.
148 See above n 141 and a *Memorandum issued by Secretary of the Navy, Mr England, implementing the order. Memorandum – Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba*, Issued by Secretary of the Navy - Mr England, 29 July 2004. The memorandum can be viewed at: <http//:www.defenselink.mil/news/Jul2004/d20040730comb.pdf> at 20 May 2005. Detainees have the right to testify why they contend they should not be considered 'enemy combatants' and may present additional evidence they believe might exculpate them, at least to the extent the tribunal finds such evidence relevant and 'reasonably available' (see para (f) of the implementing order). However, detainees do not have a right to counsel in the proceedings, although each is assigned a military officer who serves as a 'personal representative' to assist the detainee in understanding the process and presenting his case. Formal rules of evidence do not apply (see para (g)(7)), and there is a presumption in favour of the Executive's conclusion that a detainee is in fact an 'enemy combatant' (see para (g)(11)). Although the tribunal may consider classified evidence supporting an allegation that a detainee is an 'enemy combatant', that person is not entitled to have access to or know the details of that classified evidence. The record of the Tribunal proceedings, including the decision classifying a detainee as an 'enemy combatant', is

defects in the procedures of the Tribunal.[149] The defects fell into two broad categories. The first category consisted of defects that applied to all detainees in the cases before the judge. Specifically, those deficiencies included the tribunal's failure to provide detainees with access to material evidence upon which the tribunal affirmed their 'enemy combatant' status and the failure to permit the assistance of counsel[150] to compensate for the Executive's refusal to disclose classified information directly to the detainees. The second category of defects involved those that were detainee specific and may not apply to every detainee party to the case. Those defects included the manner in which the Tribunal handled accusations of torture, and the vague and potentially overbroad definition of 'enemy combatant' in the military order establishing the Tribunal.[151]

Interestingly, the District Court in *Re Guantanamo Detainee Cases*[152] adopted the holding in *Hamdan* that the *Convention* is a self-executing treaty and therefore part of United States law. It held, however, that the *Convention* did not apply to al Qaeda detainees.[153] It observed that Article 2 of the *Convention* provides 'in addition to the provisions which shall be implemented in peacetime, the present *Convention* shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. The District Court observed that al Qaeda is not a 'High Contracting Party' to the *Convention* and thus individuals detained on the ground that they are members of that terrorist organisation are not entitled to the protection of the *Convention*.[154] The Executive conceded, however,

(cont'd) reviewed for legal sufficiency by the Staff Judge Advocate for the Convening Authority, the body designated by the Secretary of the Navy to appoint tribunal members and personal representatives. After that review, the Staff Judge Advocate makes a recommendation to the Convening Authority, which is then required either to approve the panel's decision or to send the decision back to the panel for further proceedings (see paras (I)(7-10)).

149 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 468 (2005).

150 Ibid 468-72.

151 Ibid 472-8.

152 Ibid 479.

153 There is some controversy whether combatants not classified as prisoners of war (such as those classified by the Executive as 'enemy combatants') have minimum rights under customary international law and/or Articles 4 and 5 of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 UST 3516, 75 UNTS 287. See Jason Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 *Virginia Journal of International Law* 1025, 1071: 'Delegates to the Geneva Conference voiced their belief that unlawful combatants outside of the Conventions were entitled under customary international law to humane treatment and general, fair trial rights. While such individuals are not given the specific rights detailed in the Conventions, they certainly are protected against torture and from being shot out of hand.' The countervailing view is stated in Erin Chlopak, 'Dealing With Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions' (2002) 9 *Human Rights Brief* 6, 7; and Jean Pictet et al (eds), *Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958): The general principle in all of the *Geneva Conventions* is that 'every person in enemy hands must have some status under international law' and that captured combatants are either protected as prisoners of war or, if failing to satisfy the criteria for protection under the *Convention*, as civilians protected by the *Civilian Convention*. The latter position is to be preferred.

154 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 479 (2005). See Mofidi and Eckert, above n 26, 87; and Luisa Vierucci, 'Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to Which Guantanamo Bay Detainees Are Entitled' (2003) 1(2) *Journal of International Criminal Justice* 284, 294-5. Cf Chlopak, above n 153, 7-8.

that the *Convention* applied to Taliban fighters[155] but that the *Convention* did not protect them because it had determined that no Taliban fighter was a 'prisoner of war' as defined by the *Convention*. This argument was rejected on the basis that the *Convention* does not permit the determination of prisoner of war status in such 'a conclusionary fashion'.[156] Army Regulation 190-8,[157] together with the military order creating the Tribunal, establishes the 'competent tribunal' referenced in Article 5 of the *Convention*.

The District Court in *Re Guantanamo Detainee Cases*[158] observed that 'nothing in the *Convention* itself or in Army Regulation 190-8 authorizes the [Executive] to rule by fiat that an entire group of fighters covered by the [*Convention*] falls outside of the Article 4 definitions of "prisoners of war"'. Critically, the court observed that the Executive's broad characterisation of how the Taliban generally fought the war in Afghanistan could not substitute for an Article 5 tribunal's determination, on an individualised basis, of whether a particular fighter complied with the laws of war or otherwise falls within an exception denying him prisoner of war status.[159] The District Court held that although numerous detainees were found by the Tribunal to be Taliban fighters, nowhere in the Tribunal's records were there specific findings that each detainee committed particular acts entitling the Executive to deprive them of prisoner of war status.

As can be seen from the above discussion, the Executive classification of detainees at Guantanamo Bay as 'enemy combatants' is unhelpful. The Executive asserts that persons it classifies as 'enemy combatants' can be detained indefinitely – for as long as the 'war on terrorism' lasts – and are denied prisoner of war status under the *Convention*. This denial has proven to be incorrect both as a matter of form and substance. In relation to form, the Executive asserts it is entitled itself to determine whether a person is a prisoner of war. This is plainly wrong. To do so is to violate Article 5, which requires that a 'competent tribunal' determine a person's status. Importantly, the Majority Opinion in *Rasul* has added further gloss to the notion of a 'competent tribunal' by insisting that the decision-maker must be neutral.[160] In relation to substance, blanket 'group' denials of *Convention* rights is a clear violation of a person's right to individual justice under the *Convention*. Thus, the Executive assertion that even if the

155 See also White House, *Status of Detainees at Guantanamo* (2002) <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> at 20 May 2005.

156 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 479 (2005). See generally Green, above n 29, ch 6 – 'Lawful Combatants'; Mofidi and Eckert, above n 26, 66-7 and Vierucci, above n 154, 291-2.

157 See above n 84. See also *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* US Army Regulation 190-8 (1997), §1-1b, available at: <http://www.army.mil/usapa/epubs/pdf/r190_8.pdf> at 20 May 2005.

158 *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 480 (2005).

159 *Hamdan*, 344 F Supp 2d 152, 161-2 (2004) and *Re Guantanamo Detainee Cases*, 355 F Supp 2d 443, 480 (2005)

160 Vierucci, above n 154, 302: '... the type of tribunal which should determine the status is left to each Contracting Party to decide, be it military, civil or administrative, as long as the internationally accepted judicial standards are respected.' See also *United States of America v Noriega*, 808 F Supp 791, 796 (1992): 'there was concern on the part of the drafters that whatever entity was to make determinations about POW status would be fair, competent, and impartial'.

Convention applies to the Taliban, their conduct in the armed conflict deprives them of prisoner of war status is misconceived. A neutral decision-maker properly reposed with the power to determine the status of a person under the *Convention* can only discharge his duty if he considers the facts of each case. He will fall into legal error if he denies a combatant prisoner of war status by making a 'blanket' holding in relation to a group of combatants. Ultimately, the Executive's characterisation of detainees as 'enemy combatants' is erroneous and likely to cause unnecessary confusion.

X CONCLUSION

It has often been said that a hallmark of the separation of powers doctrine is that the arms of government, namely the Legislature, the Executive and the Judiciary will inevitably be in a perpetual state of war with each other. Indeed, some would say that such tension is healthy, necessary and appropriate. The rationale of the doctrine is well known: each arm should act as a check on the other so that no arm accrues too much power.

In *Hamdi*, *Rasul* and *Padilla*, the latest episode of the perpetual conflict between the Executive and Judicial arms has been played out. Perhaps ironically, the conflict concerns the limits of the Executive's war-making power. Importantly, these cases highlight that that power is not without limits. As we have seen, the *Convention* has been an integral instrument in setting the limits of that power. While its application cannot be described as overtly binding, it has nevertheless played a meaningful role in the jurisprudence of the Court. The cases of *Hamdi* and *Rasul* demonstrate that reference to the *Convention*, in construing wartime detention legislation, is both legitimate and necessary.

It is perhaps appropriate to recall the purpose of the *Convention*: even in war those captured on the battlefield should be treated with dignity and respect. Those captured on the battlefield have a right to have their status as a prisoner of war under the *Convention* determined by a 'competent tribunal' and, failing which, must be afforded prisoner of war status. The Executive's arbitrary detention of citizens and non-citizens alike without such determination (due process) is conducive of abuse and contrary to the rule of law. It repays to heed the ominous words of the Court in *Rasul*: '[I]f this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny'.[161]

[161] *Rasul*, 124 S Ct 2686, 2690 (2004). See also Paust, above n 28, 503: 'When the United States was formed, Alexander Hamilton reiterated a trenchant warning that "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument of tyranny".'