Senate Armed Services Committee
Questions for the Record
Hearing on 7/19/06, #06-59
"To continue to receive testimony on military commissions in light if the Supreme Court decision in Hamdan v. Rumsfeld"

Witnesses: Massimino, Newell Bierman, Fidell, Mernin, Carafano, Katyal, Schleuter, and Silliman

Response of Michael Mernin, Chair, Committee on Military Affairs and Justice, New York City Bar Association

Questions and Responses

Chairman John Warner

1. – 6. No response requested.

Common Article 3

7. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in your opinion, does the statutory prohibition on cruel, inhuman, and degrading treatment or punishment enacted last year constitute sufficient legal guidance to ensure compliance with Common Article 3?

D. Mr. Mernin?

Response: No. The statutory prohibition on cruel, inhuman, and degrading treatment or punishment enacted last year, in its definitional section, articulates a more restricted definition of what treatment is prohibited than does Common Article 3. The base-line treatment standards of Common Article 3 have been incorporated in the training of U.S. Armed Forces armed forces for decades as a requirement of international law and the law of armed conflict, as a useful tool to inhibit sliding down a slippery slope of maltreatment, and as consistent with core military concepts of honor and reciprocity. While the New York City Bar Association (the "Association") praised, and continues to applaud, last year's statutory prohibitions set forth in the Detainee Treatment Act, the Act did not purport to incorporate or subsume the standards of Common Article 3. Moreover, the Act's lack of an enforcement mechanism weakens its ability to contribute to or ensure compliance with Common Article 3. Finally, the Presidential signing statement which accompanied the Act's becoming law, and reserved the right not to comply with the Act in certain circumstances, also may undercut its effectiveness as "sufficient legal guidance."

8. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, would compliance with that statute constitute

compliance with Common Article 3?

D. Mr. Mernin?

Response: No. As set forth above, the statute is by its terms not referable to Common Article 3. A number of commentators have offered examples of the potential different treatment standards reflected in the two sources. Before a statutory departure from Common Article 3 is undertaken, it should first take into account the opinion of the Judge Advocate General testimony concerning the U.S. Armed Forces' teaching, training and application of the Geneva Conventions, including Article 3.

Senator John McCain

Common Article 3

9. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, the Supreme Court found that Geneva Common Article 3, which bars cruel and humiliating treatment, including outrages upon personal dignity, applies to al-Qaeda. In response, some have argued that the terms included in Common Article 3 are vague and undefined in law of war doctrine. In Tuesday's Senate Judiciary Committee hearing, for example, the head of the Department of Justice's Office of Legal Counsel said that some of the terms are "inherently vague." Is this your understanding?

D. Mr. Mernin?

Response: No. Common Article 3 has provided a useful framework for decades, and should not be discarded based upon a facile claim of vagueness. The cited testimony focused on the ban of "outrages upon personal dignity, in particular humiliating and degrading treatment" as inherently vague. The Association respectfully disagrees. Common Article 3 has been interpreted and followed by our Armed Forces for decades and to discard this well-regarded, clear legal standard -- for the sake of expediency in establishing rules which will only apply to a handful of detainees – would be a grave mistake.

By its terms, the subject provision accommodates the notion that there might be instances of "humiliating and degrading treatment" which do not rise to the level of "outrages upon personal dignity." As an example, one can posit an instance of verbal ridicule that would constitute an instance of "humiliating and degrading treatment." However, such an isolated event would not rise to the level of "outrages upon personal dignity." Requiring a modicum of interpretation does not make a standard inherently vague.

10. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, is there a body of opinion that defines Common Article 3?

D. Mr. Mernin?

Response: Yes. The authoritative International Committee of the Red Cross Commentary, edited by Jean S. Pictet, was published in 1958. In addition, a number of U.S. courts (see, *e.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), courts of other nations, and international criminal tribunals have rendered decisions concerning or applying Common Article 3. An accessible standard of what constitutes a violation of the Article has developed in this body of case law.

11. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, does the vagueness of these terms require a change in America's relationship to the Geneva Conventions?

D. Mr. Mernin?

Response: No. As set forth above, the Association disagrees with the premise that the referenced terms are vague. The treatment standards of Common Article 3 have formed an integral part of our nation's Armed Forces' overall training and application with respect to detention and interrogation for decades. To whittle away at these respected and tested norms, for the sake of expediency, would send the wrong message to our troops, our enemies, our allies and to the world.

12. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, some have suggested that we put in statute that the prohibitions contained in Common Article 3 are identical to the prohibition against cruel, inhumane, and degrading treatment contained in last year's Detainee Treatment Act. In that bill, we defined cruel, inhumane, and degrading treatment with reference to the 5th, 8th, and 14th amendments to the U.S. Constitution. Is this a good idea?

D. Mr. Mernin?

Response: No. The prohibitions are not identical, and the United States should not by such legislation water down or turn its back on its treaty obligations, nor by doing so encourage or credit another nation's unilateral effort to rewrite the meaning of Common Article 3's baseline safeguards. Nations need to be able to depend upon the uniform application of treaty provisions, or the provisions will over time lose their force.

13. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, what are the implications of our redefining Common Article 3 in this way?

D. Mr. Mernin?

Response: As alluded to in response to question 12, such a redefinition would open the door for our enemies to mistreat American captives yet still claim, behind a curtain of deceptive logic, that their actions were consistent with their interpretation of Common Article 3. Moreover, JAG testimony to this Committee and the Judiciary Committee has made clear that there is neither a need, nor desire within the armed services, to depart from the Common Article 3 standards which have been taught, trained to, and applied for decades.

<u>How Congress Should Proceed</u>

14. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schleuter, in Mr. Silliman's prepared testimony, he stated his view that, as a matter of domestic law, Congress could restrict the application of Common Article 3, but that doing so might not pass judicial muster and would invite additional litigation and more years of legal uncertainty. Could you explain to us why the Supreme Court might

not uphold such legislation as Professor Silliman suggests?

D. Mr. Mernin?

Response: With respect to whether the Supreme Court would sustain such a legislative maneuver, the court could well find that any material departure from the Common Article 3 treatment standards impermissibly violated the law of armed conflict. The Court stated: "Common Article 3 then, is applicable here and, as indicated above, requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples'." Although legislation which attempted to restrict the application of Common Article 3 would be possible, any step which sought to roll back the explicit guarantees of Geneva, on the heels of the *Hamdan* decision and in the context of the message the Detainee Treatment Act sought to convey, would constitute an ill-advised effort to circumvent the U.S. military's experience-driven policy and practice. In this and future conflicts, our troops are the ones most at risk of capture, and our detainee policies have always been premised, in significant part, on the encouragement of reciprocity in the treatment of our captured troops. We should never take steps which heighten the risk of maltreatment of our troops without any demonstrable benefit.

15. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, and Mr. Schleuter, could you also give the Committee a more detailed explanation of how such legislation would create more litigation and legal uncertainty?

D. Mr. Mernin?

Response: After *Hamdan*, any legislative response which restricts the application of Common Article 3 will invite further detainee litigation by detainees. First, whether Congress even has the ability to change the substantive law of war as to current detainees would be placed in issue. Second, the substantive arguments as to whether the newly legislated procedures satisfied our treaty obligations and constitutional standards, as set forth by the *Hamdan* court, would be at issue. Departing from the Common Article 3 standards would place an enormous burden on those we call upon to implement these policies, who would be compelled to maneuver in the grey area between the known Common Article 3 standards and the new legislative standards. Damage to the well-earned respect for the U.S. military legal system would be the worst result.

16. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman in his prepared testimony, Professor Schleuter states that "it is appropriate for Congress to map out only broad policy guidelines for implementing military commissions, and leave to the President and the Department of Defense (DOD) the task of more specifically setting out the procedures and rules to be used." Mr. Fidell from the National Institute of Military Justice (NIMJ) seems to agree with that approach. Could the panel address why Congress should set specifically the procedures and rules to be used for military commissions?

D. Mr. Mernin?

Response: The Association believes the suggestion that broad deference to the Executive would now result in a satisfactory system is not supported by the public record. We applaud NIMJ's efforts and continue to study its revised proposal which uses as its starting point the Uniform Code of Military Justice. The Administration reportedly received and disregarded, or failed to credit, significant input as to methods to better structure the commissions. Accounts suggest that the experience and input of senior JAG officers was largely ignored in the commission rulemaking process. One would hope that the Executive would now seek to establish commissions which satisfied the goals of security, credibility and fairness. However, the evidence suggests that circumventing, rather than addressing, the substantive issues raised by the *Hamdan* decision may underlie the Administration's efforts to respond.

Attorney General Gonzales's Testimony on Hamdan

18. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that the existing military commissions that were struck down by Hamdan take into account the "situational difficulties" of the war on terrorism and "thus provide a useful basis for Congress's consideration of modified procedures." Do you agree with the suggestion that the commissions should be the starting point for legislation?

D. Mr. Mernin?

Response: No. The existing commission procedures were drafted in a rush, modified without sufficient review, and never actually implemented. No trials resulted from the existing commissions. If there are trials to be conducted – rather than detentions dressed up under the guise of due process -- then security, fairness and our national values demand that a just, clear, and consistent trial system be implemented, without hiding behind facile and conclusory assertions of "situational difficulties."

19. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, why would someone suggest that the commissions and not the Uniformed Court of Military Justice (UCMJ) should be the starting point for legislation?

D. Mr. Mernin?

Response: Someone acting on behalf of a prosecutor, given carte blanche, might follow an ill-advised tendency to create those procedures most likely to obtain convictions, in the belief that prosecutorial discretion would prevent abuse. That is not a recipe for due process, fairness or honor.

20. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee, Attorney General Gonzales stated that "no one can expect members of our military to read Miranda warnings to terrorists captured on the battlefield, or provide terrorists on the battlefield immediate access to counsel, or maintain a strict chain of custody for evidence. Nor should terrorist trials compromise sources and methods for gathering intelligence, or prohibit the admission of probative hearsay evidence." Mr. Gonzales suggests that each of these examples would happen if the UCMJ were used as the basis for detainee trials. Do you agree with Mr. Gonzales's assessment?

D. Mr. Mernin?

Response: No. The Association believes that the Attorney General's examples misrepresent the prosecutorial realities and the UCMJ, and we do not support the extreme departure from fundamental guarantees of fairness which the Administration endorses. With respect to the notion of Miranda warnings in the battlefield, there would be no such requirement. The military law version of Miranda warnings provided by Article 31(b) of the UCMJ are applicable only with respect to law enforcement interrogations. Similarly, we have no understanding that any right to counsel ever attaches on the battlefield. The UCMJ already provides for a variety of alternate methods of authentication of evidence, taking into account the same sorts of evidentiary issues to which the Attorney General alluded. In sum, the texts of the UCMJ and the Manual for Courts Martial dispel the Attorney General's assertions and contain necessary safeguards and exceptions to permit effective prosecution, providing necessary latitude to prosecutors while guaranteeing fundamental fairness.

<u>Specific Trial Procedures</u>

21. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony last week before the Senate Judiciary Committee, Steven Bradbury from the Department of Justice (DOJ) stated that "a good example to look to for an acceptable hearsay rule is the international criminal tribunals, for example, for the former Yugoslavia and for Rwanda, which regularly allow the use of hearsay evidence, as long as the evidence is probative and reliable in the determination of the fact-finder, and as long as it is not outweighed by undue prejudice." Do you believe that this is an acceptable hearsay rule?

D. Mr. Mernin?

Response: Mr. Bradbury's shorthand reference apparently seeks to raise the inference that hearsay was regularly used to prove a case against an accused in the cited international criminal tribunals. We understand him to refer, in particular, to the permitted use of written statements in lieu of live testimony. The suggestion is misleading. Rule 92 *bis* (*bis* is used for "(a)" or "A" in the text's numbering protocol) permits the introduction of written witness statements in certain circumstances, in lieu of live testimony. However, if such a statement concerns the acts or conduct of the accused, the witness is to be made available for live

testimony; thus, the written statement alone is never admitted as evidence in chief. Moreover, it is always dangerous and difficult to cherry-pick rules from one set of procedures and attempt to overlay them onto another system. The issues raised are complex. If the Committee desires, the Association would be able to make an expert on rules of evidence in the international criminal tribunals available for consultation.

22. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, is this how the hearsay rule used by the international criminal tribunals works?

D. Mr. Mernin?

Response: No. See response to question 21. In addition, while the rules for admission of hearsay evidence are broader under the international criminal tribunals, we understand that, for example, in the Milosevic trial, the defense was provided access to every adverse witness for cross-examination, whether that witness' initial testimony offered was written or oral.

23. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, does the UCMJ and specifically Military Rule of Evidence 501, adequately protect classified evidence? If not, what do we need to do to enhance the protection of classified information in detainee trials?

D. Mr. Mernin?

Response: The Military Rules of Evidence, in particular Rule 505, provide adequate procedural safeguards for both prosecution and defense with respect to classified evidence. We have not been persuaded that any other procedure is necessitated, certainly not by conclusory claims of "situational difficulties." The defense should have access to any evidence supporting the charges against the accused which is offered to the court, and civilian defense counsel with security clearances should have access to all evidence admitted against the accused and all potentially exculpatory evidence.

24. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in testimony before the Senate Judiciary Committee and the Senate Armed Services Committee last week, much was made of the potential problems posed by Article 31(b) of the UCMJ – which essentially sets up the military's Miranda rights – in the context of detainee trials. Is it the case that this Article ties our hands with respect to intelligence gathering?

D. Mr. Mernin?

Response: No. See response to question 20.

25. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, if the military's Miranda rule is truly problematic, how should we fix it?

D. Mr. Mernin?

Response: The Association does not have any understanding that UCMJ Article 31 is "problematic" and needs to be fixed. If it were, it would need to be fixed generally, and not merely with respect to detainees.

26. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, at the House Armed Services Committee hearing on Hamdan, Mr. Bradbury of the Justice Department's Office of Legal Counsel said the Administration wishes to maintain flexibility in introducing evidence coerced from detainees. Specifically, he said, "We do not use as evidence in military commissions evidence that is determined to have been obtained through torture. But when you talk about coercion and statements obtained through coercive questioning, there's obviously a spectrum, a gradation of what some might consider pressuring or coercion short of torture, and I don't think you can make an absolute rule." Is Mr. Bradbury correct in his analysis of coercion and the need to introduce coerced evidence in detainee trials?

D. Mr. Mernin?

Response: According to the U.S. Army's Field Manual on Intelligence Interrogation and its predecessors, coercion and threats of coercion are illegal, immoral and of little or no practical value in interrogations. Our Armed Forces have long understood that coerced evidence is unreliable. Even assuming that isolated coerced information were to prove worthwhile in the intelligence-gathering context, to conclude that such information was sufficiently reliable so as to be introduced as evidence would be a departure from well-established law and practice, contrary to what years of experience have taught our Armed Forces, and contrary to our nation's values. The Association believes that Sen. McCain and the testifying Judge Advocate Generals are inarguably correct on this fundamental issue.

<u>Specific Trial Procedures</u>

27. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, in a letter dated July 10, 2006, and addressed to Chairman John Warner of the Senate Armed Services Committee and Chairman Arlen Specter of the Senate Judiciary Committee, a group of retired Judge Advocates state that we should "bring accused terrorists to justice in military trials based on the UCMJ and Manual for Courts Martials (MCM)." The letter goes on to say that, in developing legislation to address the Hamdan ruling, "it should start from the premise that the United States already has the best system of military justice in the world" but that narrowly targeted amendments to the UCMJ to accommodate "specific difficulties in gathering

evidence during the time of war" would be acceptable. If the current rules are not adequate, what changes need to be made to those rules?

D. Mr. Mernin?

Response: Fundamentally, the Association believes the rules for commissions should not depart materially from the UCMJ and Manual for Courts Martial. We believe that convening a panel of experts would guarantee that a thorough job of determining necessary circumscribed departures from the UCMJ would occur in a transparent and nonpartisan manner. This process would serve the twin goals of establishing a workable system to prosecute and punish our enemies who have committed breaches of the law of war, and establishing a system which reaffirms the United States' role as the world's pre-eminent advocate of the rule of law and justice. Moreover, it is also essential that the system crafted is worthy of the American men and women in uniform who will make it work, whether as prosecutors, defense counsel or judges.

28. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, how, in your view, can Congress best fashion legislation that will stand up to Supreme Court scrutiny?

D. Mr. Mernin?

Response: Using the UCMJ as a starting point, and departing from it only to address *demonstrable* "situational difficulties," would likely be the best course to take in order to arrive at a workable system which would survive judicial review.

29. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, the Hamdan Court appeared to be concerned about an accused and his civilian counsel being excluded from, and precluded from ever learning what evidence was presented during, any part of the military commission trial. How should this concern be addressed?

D. Mr. Mernin?

Response: Such a situation should not be permitted. As I testified, the accused must ultimately have access to any evidence supporting the charges against him which is offered to the court, and civilian defense counsel with security clearances should have access to all evidence admitted against the accused and all potentially exculpatory evidence. UCMJ evidentiary rules accommodate these fundamental standards.

30. Ms. Massimino, Ms. Newell Bierman, Mr. Fidell, Mr. Mernin, Dr. Carafano, Mr. Katyal, Mr. Schleuter, and Mr. Silliman, Dr. Carafano suggested in his testimony that to win the war of ideas in the war on terrorism Congress should essentially ratify the military commissions that have been overturned by the Supreme Court. I would suggest that there

are some here who believe that the exact opposite is true: That to win the war of ideas we need to put in place a system that is based on the UCMJ and that respects Common Article 3, and that only that way will we show the world that we are truly different from our enemy in this war. Would the panel care to comment?

D. Mr. Mernin?

Response: The war of ideas will be won, in part, by demonstrating, without hedging, that American justice and values are not built on words without meaning. Putting in place a system which provides fundamental guarantees of due process and fairness will demonstrate to our enemies, to our allies, and to our friends, that the U.S. intends to lead the world and remain in the vanguard of respect for the rule of law and human dignity. The U.S. Military Academy, in preparing cadets for their role as the next commanders, requires instruction in Military and Constitutional Law. These young men and women are training to be leaders in this war – a "Long War on Terror," as it is now characterized – and we owe them, and all our troops, support and gratitude. If we take the position that we can whittle away, for the sake of the moment, bits and pieces of our treaty obligations – the "supreme Law of the Land" – honored in letter and spirit for fifty years, we send the wrong message to those cadets, our troops, our enemies, our allies and to the world. We send a message that the parsing of words for the sake of expediency trumps experience, honor and law. If we slide down this slippery slope, we will be judged at the bottom by those left standing at the top.