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Rosa Brooks:

## Rosa Brooks: Did Bush commit war crimes?

### Supreme Court's decision in Hamdan vs. Rumsfeld could expose officials to prosecution.

June 30, 2006

THE SUPREME Court on Thursday dealt the Bush administration a stinging rebuke, declaring in Hamdan vs. Rumsfeld that military commissions for trying terrorist suspects violate both U.S. military law and the Geneva Convention.

But the real blockbuster in the Hamdan decision is the court's holding that Common Article 3 of the Geneva Convention applies to the conflict with Al Qaeda — a holding that makes high-ranking Bush administration officials potentially subject to prosecution under the federal War Crimes Act.

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The provisions of the Geneva Convention were intended to protect noncombatants — including prisoners — in times of armed conflict. But as the administration has repeatedly noted, most of these protections apply only to conflicts between states. Because Al Qaeda is not a state, the administration argued that the Geneva Convention didn't apply to the war on terror. These assertions gave the administration's arguments about the legal framework for fighting terrorism a through-the-looking-glass quality. On the one hand, the administration argued that the struggle against terrorism was a war, subject only to the law of war, not U.S. criminal or constitutional law. On the other hand, the administration said the

Geneva Convention didn't apply to the war with Al Qaeda, which put the war on terror in an anything-goes legal limbo.

This novel theory served as the administration's legal cover for a wide range of questionable tactics, ranging from the Guantanamo military tribunals to administration efforts to hold even

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U.S. citizens indefinitely without counsel, charge or trial.

Perhaps most troubling, it allowed the administration to claim that detained terrorism suspects could be subjected to interrogation techniques that constitute torture or cruel, inhuman and degrading treatment under international law, such as "waterboarding," placing prisoners in painful physical positions, sexual humiliation and extreme sleep deprivation.

Under Bush administration logic, these tactics were not illegal under U.S. law because U.S. law was trumped by the law of war, and they weren't illegal under the law of war either, because Geneva Convention prohibitions on torture and cruel treatment were not applicable to the conflict with Al Qaeda.

In 2005, Congress angered the administration by passing Sen. John McCain's amendment explicitly prohibiting the use of cruel, inhuman or degrading treatment of detainees. But Congress did not attach criminal penalties to violations of the amendment, and the administration has repeatedly indicated its intent to ignore it.

The Hamdan decision may change a few minds within the administration. Although the decision's practical effect on the military tribunals is unclear — the administration may be able to gain explicit congressional authorization for the tribunals, or it may be able to modify them to comply with the laws of war — the court's declaration that Common Article 3 applies to the war on terror is of enormous significance. Ultimately, it could pave the way for war crimes prosecutions of those responsible for abusing detainees.

Common Article 3 forbids "cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment." The provision's language is sweeping enough to prohibit many of the interrogation techniques approved by the Bush administration. That's why the administration had argued that Common Article 3 did not apply to the war on terror, even though legal experts have long concluded that it was intended to provide minimum rights guarantees for all conflicts not otherwise covered by the Geneva Convention.

But here's where the rubber really hits the road. Under federal criminal law, anyone who "commits a war crime ... shall be fined ... or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death." And a war crime is defined as "any conduct ... which constitutes a violation of Common Article 3 of the international conventions signed at Geneva." In other words, with the Hamdan decision, U.S. officials found to be responsible for subjecting war on terror detainees to torture, cruel treatment or other "outrages upon personal dignity" could face prison or even the death penalty.

Don't expect that to happen anytime soon, of course. For prosecutions to occur, some federal prosecutor would have to issue an indictment. And in the Justice Department of Atty. Gen. Alberto Gonzales — who famously called the Geneva Convention "quaint" — a genuine investigation into administration violations of the War Crimes Act just ain't gonna happen.

But as Yale law professor Jack Balkin concludes, it's starting to look as if the Geneva Convention "is not so quaint after all."

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