Order Code RL31367

Treatment of "Battlefield Detainees" in the War on Terrorism

Updated November 15, 2005

Jennifer Elsea
Legislative Attorney
American Law Division

Treatment of 'Battlefield Detainees' in the War on Terrorism

Summary

In June, 2004, the U.S. Supreme Court ruled in *Rasul v. Bush* that U.S. courts have jurisdiction to hear challenges on behalf of persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism. The Court overturned a ruling that no U.S. court has jurisdiction to hear petitions for *habeas corpus* on behalf of the detainees because they are aliens detained abroad, but left questions involving prisoners' rights and status unanswered. The 9/11 Commission recommended a common coalition approach to such detention. The Senate voted to deny detainees access to federal courts to file *habeas* petitions (S.Amdt. 2524 to S. 1042, "Graham Amendment"), but to allow limited appeals.

The Bush Administration earlier deemed all of the detainees to be "unlawful combatants," who may, according to Administration officials, be held indefinitely without trial or even if they are acquitted by a military tribunal. Fifteen of the detainees have been designated as subject to the President's Military Order of November 13, 2001, making them eligible for trial by military commission. In answer to the *Rasul* decision, the Pentagon instituted Combatant Status Review Tribunals to provide a forum for detainees to challenge their status as "enemy combatants." The Pentagon had earlier announced a plan for annual reviews to determine whether detainees may be released without endangering national security.

The President's decision to deny the detainees prisoner-of-war (POW) status remains a point of contention, especially overseas and among human rights organizations, with some arguing that it is based on an inaccurate interpretation of the Geneva Convention for the Treatment of Prisoners of War (GPW), which they assert requires that all combatants captured on the battlefield are entitled to be treated as POWs until an independent tribunal has determined otherwise. The publication of executive branch memoranda documenting the internal debate about the status of prisoners has evoked additional criticism of the Bush Administration's legal position.

The Geneva Conventions of 1949 create a comprehensive legal regime for the treatment of detainees in war. Members of a regular armed force and certain others are entitled to specific privileges as POWs. Members of volunteer corps, militias, and organized resistence forces that are not part of the armed services of a party to the conflict are entitled to POW status if they meet four criteria specified in the treaty. Groups that do not meet the standards are not entitled to POW status, and their members who commit belligerent acts may be treated as civilians under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC). These "unlawful combatants" are not accorded immunity for their hostile acts.

This report provides an overview of the law of war and the historical treatment of wartime detainees, in particular the U.S.' practice, and describes how the detainees' status might affect their rights and treatment. The report reviews the current status of detainees' court cases and summarizes activity of the 108th and 109th Congress related to detention in connection with the war against terrorism. (H.R. 3038, S. 12, H.R. 2863, S. 1042, H.R. 3003).

Contents

Treatment of "Battlefield Detainees" in the War on Terrorism

Background

The U.S. Supreme Court decided at the end of its 2003 - 2004 term that U.S. courts have jurisdiction to hear challenges on behalf the approximately 550 persons detained at the U.S. Naval Station in Guantanamo Bay, Cuba, in connection with the war against terrorism.[1] The decision overturned the holding of the Court of Appeals for the D.C. Circuit, which had accepted the Administration's argument that no U.S. court has jurisdiction to hear petitions for *habeas corpus* by or on behalf of the detainees because they are aliens and are detained outside the sovereign territory of the United States.[2] In response to the Court's ruling, the Department of Defense (DOD) instituted a new form of tribunal at Guantanamo Bay to allow detainees an opportunity to contest their designation as "enemy combatants," similar to the planned administrative review procedure DOD had announced that would review the necessity of individuals' continued detention.[3] More than a dozen petitions for *habeas corpus* are pending before the federal District Court for the District of Columbia. In one case, a federal judge ruled that a petitioner must be treated as a prisoner of war until a competent tribunal has decided otherwise, and that a military commission may not proceed with his trial,[4] leading the government to suspend temporarily the operation of military tribunals. However, the D.C. Circuit Court of Appeals overturned that decision, allowing DoD to restart the military commissions. The Supreme Court has granted *certiorari* to review that decision. Two other district judges issued contradicting opinions as to whether the detainees have any rights enforceable in federal court; these decisions have also been appealed.[5] The Senate approved an amendment introduced by Senator Graham to S. 1042, the National

---

[1] Rasul v. Bush, 124 S. Ct. 2686 (2004). For a summary of *Rasul* and related cases, see CRS Report RS21884, *The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis of Decisions*, by Jennifer K. Elsea.

[2] Al Odah v. United States, 321 F.3d 1134 (D.C.Cir 2003), *rev'd sub nom* Rasul v. Bush, 124 S.Ct. 2686 (2004).

[3] *See* Press Release, Department of Defense, DoD Announces Draft Detainee Review Policy (Mar. 3, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040303-0403.html](last visited July 27, 2005).

[4] Hamdan v. Rumsfeld, 344 F.Supp.2d 152 (D.D.C.,2004), *rev'd* 413 F.3d 33 (D.C. Cir. 2005), *cert. granted* 2005 U.S. LEXIS 8222 (Nov. 7, 2005).

[5] Khalid v. Bush, 355 F.Supp.2d 311 (D. D.C. 2005)(detainees have no enforceable rights); Al Odah v. United States, No. CIV.A. 02-828(CKK) (D. D.C. Oct. 20, 2004) (detainees may assert due process rights). *See* CRS Report RS22173, *Detainees at Guantánamo Bay*, by Jennifer K. Elsea.

Defense Authorization Act for FY2006, that would, if enacted, require the Secretary of Defense to submit a report to the congressional defense committees setting forth the procedural rules for determining whether individual detainees are properly detained as enemy combatants and give jurisdiction to the D.C. Circuit Court of Appeals to hear appeals of those determinations, but would foreclose the detainees' ability to petition for *habeas corpus* in any court,[6] effectively reversing the *Rasul* decision.

The detention and treatment of the suspected enemy combatants at Guantanamo Bay has been a consistent source of friction for the Bush Administration since it began transporting prisoners there in January, 2002. After criticism from human rights organizations and many foreign governments regarding the determination that the Geneva Conventions of 1949 do not apply to the detainees there,[7] President Bush shifted position with an announcement that Taliban fighters are covered by the 1949 Geneva Conventions, while Al Qaeda fighters are not.[8] Taliban fighters are not, however, treated as prisoners of war (POW) because they reportedly fail to meet international standards as lawful combatants.[9] The President has determined that Al Qaeda remains outside the Geneva Conventions because it is not a state and not a party to the treaty.[10] The President proclaimed, in a secret memorandum issued February 7, 2002, that "[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[11]

The Bush Administration deems all of the detainees to be "unlawful combatants," who may, according to Administration officials, be held indefinitely without trial or even despite their eventual acquittal by a military tribunal. The 9/11

---

[6] S.Amdt. 2515 to S. 1042, printed at 151 CONG. REC. S12655 (daily ed. Nov. 10, 2005)("Graham Amendment"), later amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. Nov. 14, 2005).

[7] *See* Brian Knowlton, *Powell and Bush Split On Detainees' Status Applicability of Geneva Conventions at Issue*, INT'L HERALD TRIB, Jan. 28, 2002, at 1, *available at* 2002 WL 2884164; Tom Shanker and Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, *available at* 2002 WL-NYT 0205300064 (quoting unnamed senior official that Britain and France had warned they might not turn over suspects captured by their troops unless the Conventions are observed).

[8] *See* Mike Allen and John Mintz, *Bush Makes Decision on Detainees*, WASH. POST, Feb. 8, 2002, at A1.

[9] *See* Press Conference, Department of Defense, Secretary Rumsfeld and General Myers, Feb. 8, 2002, *available at* [http://www.defenselink.mil/transcripts/2002/t02082002_t0208sd.html](last visited July 27, 2005).

[10] *See* Fact Sheet, White House Press Office, Feb. 7, 2002, *available at* [http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html](last visited July 27, 2005).

[11] *See* Memorandum from the President of the United States, to the Vice President, et al., Regarding the Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), *available at* [http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf] (last visited July 27, 2005).

Commission, apparently finding the international discord over the treatment and status of the detainees to be harmful to the U.S. effort to thwart terrorism, recommended the development of a common coalition approach toward the detention and humane treatment of captured terrorists.[12]

Current Status

Although some 250 detainees (including three children under the age of 16)[13] have been released from the detention facilities at the U.S. Naval Station in Guantánamo Bay, Cuba, and some detainees are being rewarded for cooperation with better living conditions, the status and treatment of detainees who remain in custody continue to be a source of contention with human rights groups. The release of government documents regarding the determination that the detainees are not entitled to protection under the Geneva Convention and outlining permissible interrogation techniques has evoked even more criticism.

The administrative proceedings implemented to review the status of detainees, called the Combatant Status Review Tribunal (CSRT), appear designed to satisfy the Supreme Court's *Hamdi* ruling, although the government has argued in court that the Guantánamo detainees, as aliens detained outside the territory of the United States, are not entitled to any process beyond the initial screening process used to determine whether detainees should be sent to Guantánamo. Critics view the CSRT proceedings as insufficient to satisfy *Hamdi*, which many believe applies to all detainees regardless of citizenship and place of detention.[14] CSRTs have been completed for all detainees, and have confirmed the status of 520 enemy combatants. Of the 38 detainees determined not to be enemy combatants, 23 have been transferred to their home States.

---

[12] Final Report of the National Commission on Terrorist Attacks upon the United States 379-80 (authorized ed. 2004)[hereinafter "9/11 Report"]It stated:

> The United States should work with friends to develop mutually agreed-on principles for the detention and humane treatment of captured international terrorists who are not being held under a particular country's criminal laws. Countries such as Britain, Australia, and Muslim friends, are committed to fighting terrorists. America should be able to reconcile its views on how to balance humanity and security with our nation's commitment to these same goals.

[13] *See* Department of Defense, Press Release, Transfer of Juvenile Detainees Completed, Jan. 29, 2004) *available at* [http://www.defenselink.mil/releases/2004 /nr20040129-0934.html](last visited July 27, 2005). These detainees had been housed in special facilities apart from the general prison population, known as Camp Iguana, where they received schooling and were allowed to watch videos and play soccer. *See* John Mintz, *U.S. Releases 3 Teens From Guantanamo*, WASH. POST, Jan 30, 2004, at A01. There are reportedly seven teenagers ages 16 and 17 who are housed within the general population. *See id.*

[14] *See, e.g.*, Human Rights First Analyzes DOD's Combatant Status Review Tribunals, *available at* [http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm]; Human Rights Watch, U.S.: Review Panels No Fix for Guantanamo, *available at* [http://www.hrw.org/english/docs/2004/07/27/usdom9135_txt.htm](last visited July 27, 2005).

Fifteen of the detainees have been determined by the President to be subject to his military order of November 13, 2001, making them eligible for trial by military commission.[15] Military lawyers have been appointed for four detainees who have been charged and whose military commissions have begun.[16] After engaging in negotiations with the U.K. and Australia in an effort to satisfy those governments that military commissions will be fair, the Administration reportedly gave its assurances that the death penalty would not be sought and that any who were convicted may serve their sentences in their home countries.[17] Later, however, it was announced that all of the British detainees and one Australian detainee will be returned to their home countries.[18]

Critics' Views

Some allied countries and human rights organizations are criticizing the President's decision as contrary to international law, arguing it relies on an inaccurate interpretation of the Geneva Convention for the Treatment of Prisoners of War (GPW).[19] The U.N. High Commissioner on Human Rights (UNHCR) and some human rights organizations argue that all combatants captured on the battlefield are entitled to be treated as POWs until an independent tribunal has determined

---

[15] *See* Press Release, Department of Defense, Presidential Military Order Applied to Nine more Combatants (July 7, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040707-0987.html](last visited July 27, 2005); Press Release, Department of Defense, Military Commission Charges Approved (Nov. 7, 2005), *available at* [http://www.defenselink.mil/releases/2005/nr20051107-5078.html](last visited Nov. 12, 2005).

[16] Press Release, Department of Defense, Two Guantanamo Detainees Charged (Feb. 24, 2004), available at [http://www.defenselink.mil/releases/2004/nr20040224-0363.html](last visited July 27, 2005). The military commissions were suspended pending the government's appeal in Hamdan v. Rumsfeld, 344 F.Supp.2d 152 (D.D.C.,2004). The two defendants are charged with "willfully and knowingly joining an enterprise of persons who shared a common criminal purpose and conspired with Osama bin Laden and others to commit the following offenses: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." Australian detainee David Hicks was charged in June with "conspiracy to commit war crimes; attempted murder by an unprivileged belligerent and aiding the enemy." *See* Press Release, Department of Defense, Guantanamo Detainee Charged (June 10, 2004) *available at* [http://www.defenselink.mil/releases/2004/nr20040610-0893.html](last visited July 27, 2005). Charges against a fourth detainee were announced in July. For more information about military commission jurisdiction and procedures, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*,by Jennifer K. Elsea.

[17] *See id.*

[18] *See* Ed Johnson, *British Guantanamo Detainees to Be Freed,* AP, Jan. 11, 2005.

[19] The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter "GPW").

otherwise.[20] The U.N. Commission on Human Rights Working Group on Arbitrary Detention deemed that the U.S. detention of "enemy combatants," without determining their status in accordance with international law, may be arbitrary.[21] The UNHCR request to send independent experts to Guantánamo Bay to investigate allegations of ill-treatment of detainees has not been granted. The European Parliament asked the United Nations to pass a resolution requesting the establishment of a tribunal to clarify the detainees' legal status.[22] No action has been taken on it, but European Union countries voted as a bloc against a Cuban resolution calling on the UNHCR to investigate U.S. detention operations at Guantanamo Bay.[23] The Parliamentary Assembly of the European Council adopted a resolution in June, 2003 calling the detention of persons detained in Guantánamo Bay, Afghanistan, and elsewhere "unlawful," noting in particular its concern that children are among the detainees.[24] The Organization of American States' Inter-American Commission adopted precautionary measures with respect to the United States, urging it to take "urgent measures" to establish hearings to determine the legal status of the

---

[20] *See Red Cross Differs on POWs*, DETROIT FREE PRESS, Feb. 9, 2002, at 6A (reporting International Committee of the Red Cross (ICRC) statement criticizing Bush decision); *Afghan Human Rights is Cause for concern, Warns Top UN Official*, AGENCE FRANCE-PRESSE, Feb. 12, 2002, *available at* 2002 WL 2338501 (reporting (former) UNHCR Chief Mary Robinson agreed with legal position of ICRC regarding Geneva Conventions' applicability to detainees); Letter from Kenneth Roth, Executive Director Human Rights Watch, to Condoleezza Rice, National Security Advisor (Jan. 28, 2002), *available at* [http://hrw.org/press/2002/01/us012802-ltr.htm](last visited July 27, 2005).

[21] *See Civil and Political Rights, Including the Question of Torture and Detention*, Report of the Working Group on Arbitrary Detention, U.N. Commission on Human Rights, 59th Sess., Agenda Item 11(a), at 19 *et seq.*, E/CN.4/2003/8 (2002), *available at* [http://www.unhchr.ch.english/issues/detention/annual.htm] (last visited July 27, 2005).

> The Working Group concludes from the above that, so long as a "competent tribunal" in the meaning of [article 5, paragraph 2, of the third Geneva Convention], has not issued a ruling on the contested issue, detainees enjoy "the protection of the … Convention", as provided in paragraph 2, whence it may be argued that they enjoy firstly the protection afforded by its article 13 ("Prisoners of war must at all times be humanely treated"), and secondly the right to have the lawfulness of their detention reviewed and the right to a fair trial provided under articles 105 and 106 of that Convention (notification of charges, assistance of counsel, interpretation, etc.), so that the absence of such rights may render the detention of the prisoners arbitrary.

Id. at 20-21.

Arbitrary detention may be considered a violation of customary international law. *See* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J.503, 506 n.6 (2003)(citing numerous international treaties and decisions).

[22] *See* European Parliament Resolution on the Detainees in Guantanamo Bay, Doc. P5_TAPROV(2002)0066 (Feb. 7, 2002), *available at* [http://www.europarl.eu.int/meetdocs/delegations/usam/20020219/004EN.pdf](last visited July 27, 2005).

[23] Alexander G. Higgins, *Guantanamo Bay: Bid to review U.S. base fails*, MIAMI HERALD, April 22, 2005, at A19.

[24] Parliamentary Assembly of the Council of Europe, Rights of Persons Held in the Custody of the United States in Afghanistan or Guantánamo Bay, Resolution 1340 (June 27, 2003), *available at* [http://assembly.coe.int/documents/adoptedText/ta03/ERES1340.htm] (last visited July 27, 2005)[hereinafter "Council of Europe"].

detainees.[25] The United States has declined to comply, answering that the Commission has no jurisdiction to enforce the Geneva Conventions, and reiterating the Administration's position that, there being no doubt as to the status of the detainees, individual legal procedures to determine the status of the detainees are unnecessary.[26] The decision to transfer the prisoners to Guantanamo Bay has also been criticized as an effort to keep them "beyond the rule of law."[27]

Applicable Law

The Geneva Conventions of 1949 create a comprehensive legal regime for the treatment of detainees in an armed conflict.[28] Members of a regular armed force and certain others, including militias and volunteer corps serving as part of the armed forces, are entitled to specific privileges as POWs. Members of volunteer corps, militias, and organized resistence forces that are not part of the armed services of a party to the conflict are entitled to POW status if the organization (a) is commanded by a person responsible for his subordinates, (b) uses a fixed distinctive sign recognizable at a distance, (c) carries arms openly, and (d) conducts its operations in accordance with the laws of war.[29] Groups that do not meet the standards are not entitled to POW status, and their members who commit belligerent acts may be treated as civilians under the Geneva Convention Relative to the Protection of

---

[25] *See* IACHR, Precautionary Measures Requested in Respect of the Detainees in Guantanamo Bay, Cuba (United States), March 12, 2002, 41 I.L.M. 532 (2002); Jesse Bravin, *Panel Says U.S. Policy on Detainees in Cuba Breaks International Law*, WALL ST. J., Mar. 14, 2002, at B2.

[26] *See* Response of the United States to Request for Precautionary Measures — Detainees in Guantanamo Bay, Cuba, 41 I.L.M. 1015 (2002); Frank Davies, *U.S. Stands Firm on Status of Detainees at Cuba Base*, PHILA. INQUIRER, Apr. 14, 2002, *available at* 2002 WL 19583567.

[27] *See, e.g.*, Lord Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, Twenty-Seventh FA Mann Lecture, British Institute of International and Comparative Law, 25 November 2003, at 10-11, *available at* [http://www.nimj.org/documents/guantanamo.pdf](last visited July 27, 2005) (noting that the practice of sending prisoners to remote places to avoid the application of the writ of *habeas corpus* had been practiced in England but was outlawed in 1679).

[28] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter referred to collectively as the "1949 Geneva Conventions" or "Conventions"].

[29] GPW art. 4A(2).

Civilian Persons in Time of War (GC).[30] These "unprivileged" or "unlawful combatants" may be punished for acts of violence for which legitimate combatants could not be punished.[31] Some have argued that there is implied in the Geneva Conventions a third category comprised of combatants from militias that do not qualify for POW status but also fall outside of the protection for civilians, who may be lawful in the sense that they would not necessarily incur criminal liability for engaging in otherwise lawful combat.[32] The Bush Administration takes the position that the Geneva Conventions do not provide any protection to "unlawful combatants," although the United States treats all such detainees in a manner consistent with the Geneva Conventions protections for prisoners of war, and that such persons may be tried by military commission for any act in furtherance of an unlawful belligerency.

The status of the detainees may affect their treatment in several ways. The Administration has argued that granting the detainees POW status would interfere with efforts to interrogate them, which would in turn hamper its efforts to thwart further attacks. Denying POW status may allow the Army to retain more stringent security measures, possibly including close confinement of detainees in prison-like cells. The Administration also argued that the detainees, if granted POW status, would have to be repatriated when hostilities in Afghanistan cease, freeing them to commit more terrorist acts. Finally, POWs accused of crimes are entitled to trial by court-martial or regular civil court. Denying POW status would appear to leave open the possibility that the detainees may be tried by military commissions for violations of the law of war.[33]

---

[30] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (hereinafter "GC"). *See also* Department of the Army, FM 27-10, The Law of Land Warfare (hereinafter "FM 27-10") para. 78 (1956) states:

> If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW, not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a "protected person" within the meaning of Article 4, GC. (*internal citations omitted*).

The Bush Administration does not appear to consider the detainees to be protected as civilians under the GC, however. *See* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 892 (2002)(noting the lack of mention on the behalf of the Administration of the applicability of the GC).

[31] *See* Maj. Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*,28 BRIT. Y.B. INT'L L. 323, 343 (1951) (explaining that belligerency is not violative of international law, but is merely unprotected by it).

[32] *See* W. Thomas Mallison and Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 43 (1977) (suggesting a category of "other combatants, such as spies, saboteurs, and the irregulars who do not meet the applicable criteria of the law of armed conflict [who are] lawful combatants in particular contexts, but ... not entitled to privileged treatment of POWs upon capture").

[33] Military Order, November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001). The M.O. also appears to permit the detention without trial of persons determined to be subject

(continued...)

The White House's legal position has been somewhat clarified by a series of internal documents released by the White House and DOD in response to allegations of detainee abuse at the Abu Ghraib prison in Iraq.[34] The memoranda document the internal debate about the applicability of the GPW to Al Qaeda and the Taliban. They do not expressly explain the application of the GPW to the Taliban, whose members would arguably seem to be eligible for POW status as members of the armed forces of Afghanistan under a plain reading of GPW art. 4A(1),[35] but suggest the view that the four criteria in GPW art. 4A(2) apply to regular armed forces as a matter of customary international law.[36] The documents also suggest that Afghanistan, as a "failed state," did not have a functional government with sufficient control over the territory and citizenry to enable it to field a regular army.[37] It is unclear why, under this view, the conflict with the Taliban continues to qualify as an international war under GPW art. 2[38] such that art. 4 would remain relevant.

State practice does not appear to support the conclusion that the armed forces of states or organized rebel forces have been categorically denied eligibility for POW

---

[33] (...continued)
to it, but this authority has not been invoked with respect to any of the detainees. *See* CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions*, by Jennifer K. Elsea.

[34] These documents can be found at [http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127](last visited July 27, 2005).

[35] *See* Memorandum from Office of Legal Counsel to Alberto Gonzales Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002) [hereinafter "OLC Memo Re: Taliban"], at 2 (dismissing discussion of Taliban under GPW art. 4(A)(1) by noting that "the Taliban have described themselves as a militia, rather than the armed forces of Afghanistan...").

[36] *See id*. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper confirmed this view

> In reviewing [the] new challenge [of the war against terrorism], we have concluded that the Geneva Conventions do apply ... to the Taliban leaders who sponsored terrorism. But, a careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely.

See Status and Treatment of Taliban and al-Qaida Detainees, remarks of Ambassador Prosper, Remarks at Chatham House, London, United Kingdom, Feb. 20, 2002, *available at* [http://www.state.gov/s/wci/rm/2002/8491.htm](last visited July 27, 2005).

[37] *See* Memorandum from Assistant Attorney General Jay S. Bybee to Alberto Gonzales and DOD General Counsel William J Haynes II Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002)[hereinafter "Bybee Memo"].

[38] *See infra* section on "Characterizing the Conflict."

status on the basis that the army did not comply completely with the law of war.[39] Indeed, U.S. practice has been to accord POW status generously to irregulars,[40] to support such status for irregular forces at times,[41] and to raise objections whenever an adversary has sought to deny U.S. personnel POW status based on a general accusation that the U.S. forces were not in compliance with some aspect of the law of war.[42] The Administration has also asserted that the Geneva Conventions are obsolete when it comes to dealing with terrorists,[43] but that it will continue to follow the treaties' principles.[44]

With respect to Al Qaeda fighters, the Administration has stated it is not applying the Geneva Conventions because Al Qaeda is a criminal organization and not a state party to the Geneva Conventions.[45] Opponents of that position argue that the Geneva Conventions do not apply solely to the armed forces of state parties to the Conventions; that the treaties also cover non-state belligerents, who have not been allowed to become parties to the Conventions. Partisan and other irregular groups can qualify for POW status if they otherwise meet the criteria in GPW art. 4. Non-states as well as states that are not parties to the Conventions remain bound by the provisions that have attained *opinio juris* status,[46] and may also accept the obligations of the Conventions in return for more favorable treatment. Common article 3 of the Geneva Conventions provides minimum protection during non-international conflicts for all captives.[47]

---

[39] *See* W. Hays Parks, *Special Force's Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 510-11 (2003)(noting disagreement among experts, but finding more support in historical context and treaty language for the view that members of regular armed forces are entitled to protection without regard to Geneva criteria unless captured as spies).

[40] *See, e.g.*, discussion about procedures adopted during Vietnam conflict, *infra* note 185 *et seq.*

[41] *See* HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 40-41 (1979) (noting that during WWII, the United States claimed the Philippine resistance movement as an adjunct of its own armed forces).

[42] *See* D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICT 563-92 (1981) (reporting U.S. and allies' objections to Communist countries' reservations to GPW, which resulted in the failure of U.S. airmen to qualify for POW status in Korea and Vietnam conflicts on the basis they were "war criminals").

[43] *See* Rumsfeld Press Conference, *supra* note 9.

[44] *See* Press Release, DOD Joint Task Force Briefing on Detainee Operations at Guantanamo Bay (Feb. 13, 2004), *available at* [http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html](last visited July 27, 2005).

[45] *See* Press Release, White House, Status of Detainees at Guantánamo (Feb. 7, 2002), *available at* [http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html](last visited July 27, 2005).

[46] *See* Theodore Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT'L L 348, 350 (1987).

[47] The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical. Common Article 3, note 63, *infra*, has been (continued...)

Another consideration may be that Al Qaeda members would retain their status as citizens of their states of nationality. The status and treatment of prisoners of war generally does not depend on their nationality.[48] However, civilians would not ordinarily derive their status under the Conventions from membership in a private organization. Under this view, the relevant issue would be whether they are citizens of states that are parties to the Conventions and whether those states have normal diplomatic relations with the United States.[49] The President's decision regarding Al Qaeda's status suggests that he may consider Al Qaeda to have sufficient "international personality" to be a valid party to the conflict and subject to the law of war, such that its members' status may be determined by their association with it rather than their nationality. On the other hand, that would seem to imply some recognition of Al Qaeda as a legitimate entity with belligerent rights.[50]

The Law of War

The law of war, also known as the law of armed conflict or humanitarian law, is a subset of international law that has evolved through centuries of efforts to mitigate the harmful effects of war. Recognizing the impossibility of eliminating warfare all together, nations in essence have agreed to abide by rules limiting their conduct in war, in return for the enemy's agreement to abide by the same rules.[51] There are two branches of the law of war: The older of the two branches, known as "Hague law" after the Hague Conventions of 1899 and 1907, prescribes the rules of engagement during combat and is based on the key principles of military necessity

---

[47] (...continued)
described as "a convention within a convention" to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it. *See* JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 32 (1975). Originally a compromise between those who wanted to extend the Convention's protection to all insurgents and rebels and those who wanted to limit it to wars between states, Common Article 3 is now considered to have attained the status of customary international law. *See* KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 188 (2001).

[48] *See In re* Territo, 156 F.2d 142 (9th Cir. 1946).

[49] *See* GC art. 4, which states, in part:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

[50] *See, e.g.,* Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004)(arguing that treating terrorists as "combatants" would seem to entail a recognition of their belligerent rights).

[51] *See* Mallison and Mallison, *supra* note 32, at 41(noting the law of war is dependent for its observance on the common interests of participants).

and proportionality.[52] The humanitarian side of the law, known as "Geneva law," emphasizes human rights and responsibilities, including the humane and just treatment of prisoners.

The legality and proper justification for resorting to war in the first place are a separate legal regime. A principal distinction exists between the law of conduct during war — *jus in bello* — and international law regulating when going to war is justified — *jus ad bellum*.[53] Parties to an armed conflict retain the same rights and obligations without regard to which party initiated hostilities and whether that conduct is justifiable under international law.[54] Otherwise, each party would routinely regard its enemy as unlawfully engaging in war and would thus feel justified in taking whatever measures might be seen as necessary to accomplish its defeat.[55]

If the law of war is to have any effect in restraining the conduct of belligerents, there must be both inducements for adherence to it and punishment for failure to adhere.[56] One incentive for parties to adhere to the rules is the promise that their members will receive humane treatment and some legal privileges at the hands of the enemy if they are captured. Reciprocity serves as a primary motivator, but is not an absolute requirement for adherence;[57] a derogation from the rules by one party does not excuse breaches by another,[58] although reprisal in proportion may be permissible.[59] Were this not the case, any deviation from the letter of the law could

---

[52] *See* PICTET, *supra* note 45, at 31 (describing the principle that "belligerents shall not inflict on their adversaries harm out of proportion to the object of warfare, which is to destroy or weaken the military strength of the enemy").

[53] *See* DOCUMENTS ON THE LAWS OF WAR 1 (Adam Roberts and Richard Guelff, eds. 2000)(hereinafter "DOCUMENTS").

[54] *See* CIVILIANS IN WAR 16-17 (Simon Chesterman, ed. 2001) (explaining that theories of "just war" were to be kept separate from *jus in bello* in part to make it easier to maintain legal parity between parties, holding both sides to same rules of conduct).

[55] *See* HILAIRE MCCOUBREY, 2 INTERNATIONAL HUMANITARIAN LAW 2 (1998) (predicting that the mixing of *jus in bello* and *jus ad bellum* "...would represent a renaissance of the very worst features of medieval 'just war' theory.").

[56] *See* Mallison and Mallison, *supra* note 32, at 41 (noting that the central technique for enforcing the law of war has been a system of interrelated rights and duties).

[57] *See* PICTET, *supra* note 47, at 21 (1975):

> It is generally admitted that the non-execution of a treaty by one party may ultimately release the other party from its obligations, or justify the annulment of the treaty, like a contract under municipal laws. This, however, would not apply to the Geneva Conventions: whatever the circumstances, they remain valid and are not subject to reciprocity. Indeed, the mind absolutely rejects the idea that a belligerent should, for instance, deliberately ill-treat or kill prisoners because the adversary has been guilty of such crimes.

[58] *But see* LEVIE, *supra* note 41, at 31(stating that commentators appear to agree that "few states can actually be expected to continue to apply the provisions of the [GPW] in the absence of reciprocity despite the provision to that effect...").

[59] *See* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 204 (Dieter Fleck, (continued...)

be invoked to justify wholesale abandonment of the law of war, causing the conflict to degenerate into the kind of barbarity the law of war aims to mitigate. Reprisals may not be taken against POWs or other protected persons.[60]

Some experts argue that in keeping with the purpose of humanitarian law, that is, to protect civilians and reduce the needless suffering of combatants, humanitarian law should be interpreted as broadly as possible in favor of individual rights and protections, to include rights of irregular combatants who comply to the extent possible with the law of war. Under this view, no one falls completely outside the protection of the Geneva Conventions during an armed conflict. Others would adhere rigidly to their interpretation of the letter of the law, denying rights to irregular combatants in order to deter the formation of resistance movements and to avoid legitimizing their belligerent acts. Proponents of this view argue the treatment of detainees not clearly covered by the Conventions is entirely at the discretion of the detaining power. However, states dealing with insurgents and armed resistance groups have typically denied that a state of war exists, treating rebels as common criminals and trying them in civil court for any belligerent acts.

Characterizing the Conflict

In order to determine the legal status of the detainees, it is first necessary to determine whether an armed conflict exists, and if so, whether that conflict is "international" or "non-international." The type of armed conflict depends upon the status of the parties to the conflict and the nature of the hostilities. The status and rights of individuals depend, in turn, on the relationship of those individuals to the parties to the conflict. It may also become important to determine the temporal and geographical boundaries of the armed conflict — for the most part, the Geneva Conventions would not apply to conduct that occurred prior to the onset or after the end of the armed conflict, nor would it apply to conduct occurring on the territory of a non-party to the conflict. Whether the territory on which the punishable conduct occurred is considered "occupied" or "partially occupied" may also be relevant to determining the status of detainees and the law applicable to them.[61]

The Geneva Conventions apply in full to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting

---

[59] (...continued)
ed. 1995)(hereinafter "HANDBOOK")(defining *reprisals* as "coercive measures which would normally be contrary to international law but which are taken in retaliation by one party to a conflict in order to stop the adversary from violating international law.").

[60] *See id*. at 206.

[61] *See* GC sec. III; *but see* W.T. Mallison & R.A. Jabri, *The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity*, 42 GEO. WASH. L. REV. 185, 189 (1974) (arguing that the 1949 Geneva Conventions removed the traditional distinction between "invasion" and "belligerent occupation" as far as the treatment of civilians is concerned).

Parties, even if the state of war is not recognized by one of them,"[62] or in "any cases of partial or total occupation of the territory of a High Contracting Party." Common Article 3 of the Geneva Conventions applies to internal hostilities serious enough to amount to an armed conflict,[63] although the parties are encouraged to adopt voluntarily the remaining provisions with respect to each other. In the case of sporadic violence involving unorganized groups and uprisings, the law of war is not implicated, although the law of basic human rights continues to apply.

The classification of an armed conflict presents few difficulties in the case of a declared war between two states. Such a conflict would clearly qualify as an international armed conflict to which the Geneva Conventions would apply in their entirety. Such conflicts have also become rare. The term "internal armed conflict" generally describes a civil war taking place within the borders of a state, featuring an organized rebel force capable of controlling at least some territory. Internal conflicts may be more difficult to classify as such because states frequently deny that a series of violent acts amounts to an armed conflict.[64] Classifying a conflict in which a foreign state intervenes in an internal armed conflict creates an even more complex puzzle. Some theorists consider an armed conflict to remain internal where a foreign state intervenes on behalf of a legitimate government to put down an insurgency, whereas foreign intervention on behalf of a rebel movement would "internationalize"

---

[62] GPW art. 2; GC art. 2.

[63] Common Article 3 of the Geneva Conventions of 1949 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 2. The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[64] *See* HANDBOOK, *supra* note 59, at 23.

the armed conflict.[65] Under this view, the war in Afghanistan was an internal conflict between the Taliban and Northern Alliance troops until U.S. forces intervened, at which point the conflict became international.[66] When the Taliban ceded control of the government, the conflict may have reverted to an internal conflict, because U.S. forces then became aligned with the government of the state. Others view virtually any hostilities causing international repercussions to be international for the purposes of the Geneva Conventions.[67]

According to the official commentary of the International Committee of the Red Cross (ICRC),[68] the conditions for an international war are satisfied whenever any difference arises leading to the use of armed force between the militaries of two states.[69] Both the United States and Afghanistan are signatories to the four Geneva Conventions of 1949. If the Taliban was, at the onset of the conflict, the government of Afghanistan and its soldiers were the regular armed forces, it would appear that the present conflict meets the Geneva Conventions' definition of an international armed conflict. However, only three states ever recognized the Taliban as the legitimate government of Afghanistan. While it is not necessary for the governments of states engaging in hostilities to recognize each other,[70] the rules are less clear where virtually no country recognizes a government.

Because the use of force by private persons rather than organs of a state has not traditionally constituted an "act of war,"[71] it is arguable that refusing to recognize the Taliban as a *de facto* government of a state would preclude the United States from prosecuting the September 11 terrorist attacks as "war crimes." After all, it has been suggested that international terrorism might be considered to amount to armed conflict for the purposes of the law of war only if a foreign government is involved.[72]

---

[65] *See* John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 41-42 (1991) (applying analysis to determine whether U.S. invasion of Panama on behalf of Endara government made conflict "international" for the purposes of GPW).

[66] *See* Do the Laws of War Apply to the War on Terror?, Public Meeting of the American Society of International Law, Feb. 13, 2002 (hereinafter ASIL Meeting) (comments of Prof. Robert Goldman).

[67] *See* Maj. Geoffrey S. Corn and Maj. Michael Smidt, "*To Be or Not to Be, That is the Question": Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW. June 1999 (citing interview with DOD law of war expert Hayes Parks, who advocates a purely *de facto* standard, without regard to political factors).

[68] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS (J. Pictet, ed., 1960) (hereinafter "ICRC COMMENTARY"). The ICRC was instrumental in drafting the Geneva Conventions and continues to act as a "custodian" of international humanitarian law.

[69] *See id.* at 23.

[70] GPW art. 4A(3).

[71] HANDBOOK, *supra* note 59, at 42.

[72] *See* LT. COL. RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST
(continued...)

The level of state support of terrorism required to incur state responsibility under international law is a matter of debate.[73] Denying that *any* state is involved in the terrorist acts that precipitated the armed conflict could call into question the United States' treatment of those attacks as violations of the law of war and for treating the global war on terrorism as an international armed conflict.

Some observers cite additional policy grounds for treating the armed conflict as international. To treat it as an internal conflict could have implications for U.S. and allied troops. *No one* would be entitled to POW status or "protected person" status under the third and fourth Geneva Conventions, although Common Article 3 would remain in force for all parties. U.S. and coalition soldiers may be placed at risk of capture in Afghanistan or elsewhere depending on how the conflict proceeds. The President's decision to apply the Geneva Conventions to the Taliban but deny their application to Al Qaeda as a non-party may be an implicit recognition that the armed conflict is an international one, at least with respect to the Taliban.

It is also possible to view the conflict with the Taliban as separate from the conflict with Al Qaeda.[74] Al Qaeda would have to qualify as a belligerent in its own right, however, which most observers argue it does not. Because an armed conflict can only exist where (at least) two belligerents are in opposition, the present hostilities between the United States and Al Qaeda would not seem to qualify as an armed conflict under international law.[75] The difficulty under this view is that it may either lend an air of legitimacy to Al Qaeda or cast doubt on the legality of the United States' military actions against Al Qaeda.[76]

Another possibility is that the war on terrorism is forging new international law by recognizing or creating a new form of armed conflict, in which a state is

---

[72] (...continued)
STATE-SPONSORED INTERNATIONAL TERRORISM 66-67 (1989)(arguing that state sponsored or state supported terrorist organizations may have status under international law, while terrorist organizations not recognized as international entities might best be dealt with as criminal matters).

[73] *See* Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force,* 18 WIS. INT'L L.J. 145, 148 (2000) (citing General Assembly Resolutions 2131 that states have a "duty to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory....").

[74] *See* Aldrich, *supra* note 30, at 893 (viewing the decision to treat the conflict with Al Qaeda as a separate conflict to be correct).

[75] *See* Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 8 n.16 (2001)(arguing that Al Qaeda does not fit the criteria for an insurgency); Aldrich, *supra* note 30, at 894 (arguing that Al Qaeda is not capable of being party to a conflict to which the Geneva Conventions or Protocols apply).

[76] *See* Jordan Paust, *There is No Need to Revise the Laws of War in Light of September 11th*, American Society of International Law Task Force Paper, Nov. 2002, *available at* [http://www.asil.org/taskforce/paust.pdf] (arguing that "[c]ontrary to the assertion of President Bush, the United States simply could not be at war with bin Laden and Al Qaeda as such, nor would it be in the overall interest of the United States for the status of war to apply merely to conflicts between the United States and Al Qaeda").

authorized to use armed force against members of a para-military group in self-defense outside its own territory,[77] not only to deflect immediate attacks but also to initiate attacks against members of the group and their leaders in order to weaken or eradicate it, at least so long as force is used on the territory of a consenting government or territory not under the firm control of any national government. Under this view, the traditional nexus between the rights and the obligations of belligerents appear to be severed, so that a state may wage a full-fledged war against persons not entitled to participate.

Authority to Detain during War

The treatment of all persons who fall into the hands of the enemy during an armed conflict depends upon the status of the person as determined under the four Geneva Conventions of 1949. Parties to an armed conflict have the right to intern enemy prisoners of war,[78] as well as civilians who pose a danger to the security of the state,[79] at least for the duration of hostilities.[80] The right to detain enemy combatants is not based on the supposition that the prisoner is "guilty" as an enemy for any crimes against the Detaining Power, either as an individual or as an agent of the opposing state. POWs are detained for security purposes only, to remove those soldiers from further participation in combat. The detention is not a form of punishment.[81] The Detaining Power may punish enemy soldiers and civilians for crimes committed prior to their capture as well as during captivity, but only after a fair trial in accordance with the relevant convention and other applicable international law. Failure to accord prisoners a fair trial is a grave breach under article 130 of GPW[82] and article 146 of GC.[83]

---

[77] *See* Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MIL. L. REV. 364, 387 (2003) ("International reaction to the attacks of 9/11 and the military response they engendered complete the trend towards acceptance of the use of force against terrorists as a form of self-defense.").

[78] *See* GPW art. 21:

> The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

[79] GC art. 42 states:

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

[80] *See* GPW art. 21; PICTET, *supra* note 47, at 47 ("Prisoners will be released and repatriated as soon as there are no longer any reasons for captivity, that is to say, at the end of active hostilities.").

[81] *See* PICTET, *supra* note 47, at 46.

[82] GPW art. 130 states:

> Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the

(continued...)

Neutral and non-belligerent signatory countries also have an obligation to intern members of belligerent armed forces under the Geneva Conventions of 1949.[84] The neutral country must treat these prisoners as POWs, except that certain provisions do not apply, including arts. 8, 10 and 126 (relating to visits by representatives of the Protecting Power[85] or international organization acting in that role), 15 and 30 (maintenance and medical care; in this case costs are to be borne by the belligerent nations), 58-67 (financial resources) and 92 (penal provisions for unsuccessful escape).[86] There is no express obligation to arrest and detain persons who are not lawful combatants and are suspected of having participated in hostilities before crossing a border into neutral territory.

Prisoners of War. The privileged status of prisoners of war grew from the concept of military necessity. Declarations of "no quarter" were forbidden because an enemy soldier who had become *hors de combat* — incapacitated due to injury, illness, surrender or capture — no longer posed a danger to combatants. Killing such persons or causing their needless suffering was considered to serve no valid military purpose, the objective being the incapacitation rather than the annihilation of enemy.[87] The privilege of being held as a prisoner of war was not extended to brigands, pirates, looters and pillagers not associated with the uniformed army of any state. Such persons were considered common criminals acting for personal gain

---

[82] (...continued)
forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

[83] GC Article 147 states:
Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

[84] GPW art. 4B(2) requires neutral countries to intern persons falling within the provisions of overall art. 4, that is, who would be entitled to POW status. *See* LEVIE, *supra* note 41, at 69 (noting that predecessor rule during WWII resulted in the internment of more than 100,000 POWs in neutral countries).

[85] The Protecting Power (PP) is a classic international-law device by which States engaging in armed conflict select mutually acceptable neutral nations to serve as their representatives in communicating with the other belligerent power. *See* GEOFFREY BEST, WAR AND LAW SINCE 1945 371 (reprinted 2001). Since 1950, however, PPs have been appointed in only four instances. *See id.* at 372. The ICRC generally carries out the responsibilities of the PP under the Conventions.

[86] *See* LEVIE, *supra* note 41, at 69.

[87] *See* DONALD A. WELLS, THE LAWS OF LAND WARFARE 127 (1992).

rather than agents of a state, and they could be summarily shot.[88] (Modern rules require a fair criminal trial).[89]

The first codified set of rules for the protection of prisoners of war was General Orders 100 (known as the Lieber Code), adopted by the Union Army during the Civil War. It covered "[a]ll soldiers of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency, and promote directly the object of war..." as well as "citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured ...."[90] It was forbidden to declare that every member of a legitimate levy *en masse* — a spontaneous uprising of citizens in opposition to an armed invasion — would be treated as a bandit, but once the invading army had established itself as occupying force, citizens could not lawfully rise up against it.[91]

Later conventions adopted the Lieber Code for international application and clarified the rules, generally expanding their coverage and increasing their protections.[92] The United States Army Field Manual (FM) 27-10, The Law of Land Warfare is the main source for the Army's modern interpretation of the law of war, incorporating reference to relevant international conventions and rules of the customary law of war, as well as relevant statutes.[93] Army Regulation (AR) 190-8 prescribes the treatment to be accorded to prisoners based on their status.[94] The U.S. military also incorporates the law of war into rules of engagement (ROE) prepared for specific combat operations,[95] providing instructions to soldiers on the lawful handling of prisoners.

The authority to detain enemy combatants continues to rest on a theory of agency or allegiance to the state. Enemy soldiers are presumed to follow the orders of commanders, therefore, if hostilities cease, soldiers can be expected to cease their fighting and will no longer pose a threat. There is thus no longer any military need to keep them in captivity under article 21 of GPW.

---

[88] *See id.*

[89] *See* Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 30, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

[90] *See id.* at 127-28.

[91] General Orders No. 100 para. 52.

[92] *See* PICTET, *supra* note 45, at 25 (noting Third Geneva Convention of 1949 has 143 articles plus annexes; compared with 97 in the Geneva Convention of 1929, and the chapter of the Hague Regulations on prisoners had only 17 articles). GPW art. 4 was intended to expand the coverage of the protection. *See id.* at 100.

[93] *See* FM 27-10, *supra* note 30, para. 1 (listing treaties pertinent to land warfare to which the United States is a party).

[94] Department of the Army, AR 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997).

[95] *See* Lt. Col. Marc L. Warren, *Operational Law — A Concept Matures*, 152 MIL. L. REV. 33, 51-57 (1996) (explaining function of ROE).

Civilian Detainees. Civilians in occupied territory or the territory of a belligerent may be interned during war if necessary for reasons of security.[96] The Fourth Geneva Convention (GC) protects civilians who fall into the hands of the enemy, providing protections similar to those afforded POWs under the GPW. Enemy civilians, that is, those civilians with the nationality of the opposing belligerent state, have the status of "protected person" under the GC, as long as that state is a party to the GC.[97] Nationals of a neutral or co-belligerent states within the territory of a belligerent state are not entitled to the status of "protected persons" as long as the state of which they are nationals has normal diplomatic representation with the state in whose hands they are.[98] Presumably, these civilians would be protected through the diplomatic efforts of their home country and would not be exposed to the same vulnerabilities as are the citizens of the belligerent states themselves. However, Common Article 3 provides a set of minimum standards for all persons, whether or not they are "protected persons."[99] Furthermore, part II of the GC applies universally without regard to the nationality of the civilians affected.[100]

Civilians who participate in combat, unlike combatants, are not acting on behalf of a higher authority with whom peace can be negotiated; therefore, they are not immune from punishment for belligerent acts. Their conduct is dealt with according to the law of the criminal jurisdiction in which it occurred, which could mean a civil trial or trial by a military tribunal convened by an occupying power. The GC does not state that civilians who engage in combat thereby lose their protection under the Convention. They lose their protection as civilians in the sense that they may become lawful targets for the duration of their participation in combat, but their status as civilians does not change according to the Convention. Traditionally, such a person might be regarded as an "unlawful combatant,"at least if caught while committing a hostile act, and may be tried and punished in accordance with criminal law.

Unlawful Belligerents. There is no definition or separate status under the Geneva Conventions for "unlawful belligerents." However, the law of war has denied the status of privileged combatant to warriors who conduct violence for private rather than public purposes or who carry out specific unprivileged acts.[101] There are traditionally two types of unlawful belligerents: combatants who may be authorized

---

[96] GC art. 42 ("The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.").

[97] GC art. 4. Some interpret this to act as an exception to protected person status for aliens within a belligerent state's home territory, but not to apply in occupied territory, where all persons are protected regardless of nationality, so long as they are not nationals of the occupying power or of a state not a party to the Conventions.

[98] GC art. 4.

[99] *See supra* note 45; George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 60-61 (2000) (citing international court cases for the proposition that Common Article 3 states customary international law with regard to international armed conflicts).

[100] *See* GC art. 4 (stating "[t]he provisions of Part II are, however, wider in application, as defined in Article 13").

[101] *See* Mallison and Mallison, *supra* note 32, at 42.

to fight by a legitimate party to a conflict but whose perfidious conduct disqualifies them from the privileges of a POW, and civilians who are not authorized as combatants but nevertheless participate in hostilities, but who do not thereby gain combatant status.

Spies, Saboteurs, and Mercenaries. The first type of unlawful belligerents includes spies, saboteurs and mercenaries. These are persons who act on behalf of a party to the conflict and probably under its orders, but are nonetheless denied the status of lawful belligerents. They forfeit their entitlement to combat immunity, and may be tried and punished according to the law then prevailing for civilians. It has also been suggested that such persons may be detained without trial in a status other than that of prisoners of war (or civilian internee), but it appears that such detention was considered punitive rather than preventive in nature.[102]

Spies and Saboteurs. A spy is one who, in disguise or under false pretenses, penetrates behind enemy lines of a belligerent to obtain information with the intent of communicating that information to the hostile party.[103] If captured in the act, a spy may be denied POW treatment, tried and possibly executed.[104] However, if a spy rejoins the army of the hostile party as a lawful combatant, he is no longer subject to punishment for those acts should he later fall into the hands of the enemy.[105] Saboteurs, or enemy agents who penetrate into the territory of an adversary without openly bearing arms in order to perpetrate hostile acts are subject to similar treatment.[106] If the acts are directed against civilian targets, they will likely be termed acts of terrorism.[107] Saboteurs retain the protection of the GC,[108] and are entitled to a fair and regular trial before punishment may be administered.[109] If spies and saboteurs were to retain their entitlement to POW status, belligerents could immunize those they send behind enemy lines by making them members of the armed forces, thus eliminating the inherent risk in such conduct.[110]

---

[102] *See, e.g.,* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 783 (2d. ed. 2000)(1886)("Irregular armed bodies or persons not forming part of the organized forces of a belligerent . . . are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, *but may upon capture be summarily punished even with death*.")(emphasis added).

[103] *See* Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 29, Oct. 18, 1907, 36 Stat. 2277. The U.S. codification of this rule is article 106 of the UCMJ, codified at 10 U.S.C. § 904. *See* FM 27-10, *supra* note 29, at paras. 75-78.

[104] *See id.* art. 30.

[105] *See id.* art. 31.

[106] *See* FM 27-10, *supra* note 30, at para. 81 (citing GC III art. 4).

[107] *See* Hans Peter Gasser, *Prohibition of Terrorist Acts in International Humanitarian Law*, 253 INT'L REV. RED CROSS 200 (1986), *available at* [http://www.icrc.org].

[108] *See* FM 27-10, *supra* note 30, at para. 73.

[109] *See* GC IV art. 5; FM 27-10, *supra* note 30, at para. 248.

[110] *See* LEVIE, *supra* note 41, at 37 (noting that a person suspected of being a spy or saboteur who claims POW status is entitled to a determination by a competent tribunal under GPW

(continued...)

GC art. 5 addresses the treatment of spies and saboteurs, applying different standards depending upon whether the suspect is an alien in the territory of a belligerent state or a person in occupied territory:

> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.
>
> In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

Mercenaries. Mercenaries are persons who are not members of the armed forces of a party to the conflict but participate in combat for personal gain.[111] They may be authorized, or at least encouraged to fight by a party to the conflict, but their allegiance to the authorizing party is conditioned on payment rather than obedience

---

[110] (...continued)
art. 5).

[111] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, *reprinted in* 16 I.L.M. 1391.

Art. 47 defines mercenary as follows:

> 2. A mercenary is any person who:
>
> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) Does, in fact, take a direct part in the hostilities;
>
> (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
>
> (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
>
> (e) Is not a member of the armed forces of a Party to the conflict; and
>
> (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

and loyalty.[112] It is seen as questionable whether mercenaries can serve as valid agents of a party to the conflict, or are, rather, mere "contract killers," especially considering they could just as easily switch sides to accept a better offer; may be operating in pursuit of different objectives from those of the party to the conflict; and may have an incentive for keeping the conflict live. In that sense, they are theoretically similar to brigands, looters, and bounty hunters,[113] who may take advantage of hostilities to conduct unlawful looting for their own enrichment without regard for military necessity or the law of war.[114] However, merely having a nationality other than that of the party on whose side a soldier fights does not automatically make that soldier a mercenary.[115]

It has been suggested that non-Afghan members of the Taliban and Al Qaeda might be mercenaries and disqualified from POW privileges on that basis.[116] Based on press reports and Pentagon statements about the detainees, there is little to suggest that their motives stem from personal material gain rather than a belief that they are serving a higher power. It appears to be generally recognized that the fighters do not believe themselves to be serving Afghanistan as a country but are serving either the Taliban or Al Qaeda, perhaps both, for ideological reasons. The United States has made it clear that it is not fighting against the Afghan people, but instead considers the Taliban and Al Qaeda to be the enemies. Since both groups are considered to be parties to the conflict and their conduct serves as justification for the United States' combat operations in Afghanistan, the label of mercenary does not appear appropriate for the groups as a whole, although some of the individual fighters may prove to be mercenaries.

---

[112] *See* Lieutenant Commander Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War* II, 47 NAVAL L. REV. 176, 187 (2000) (recounting origin of prohibition on mercenaries after the Middle Ages).

[113] The United States has traditionally regarded the use of bounty hunters and private assassins as uncivilized. The 1914 Rules of Land Warfare stated:

> Civilized nations look with horror upon rewards for the assassination of enemies, the perpetrator of such an act has no claim to be treated as a combatant, but should be treated as a criminal. So, too, the proclaiming of an individual belonging to the hostile army, or a citizen or subject of the hostile government, an out-law, who may be slain without trial by a captor. The article includes not only assaults upon individuals, but as well any offer for an individual "dead or alive."

See RULES OF LAND WARFARE para. 179 (U.S. War Department 1917).

[114] *See* MCCOUBREY, *supra* note 55, at 145 (noting the "disturbing" role of mercenaries in the conflict in Angola as "contract killers").

[115] *See id.*(noting that not all foreigners in service of armed forces of other countries should be treated as "mercenaries," as some may serve with the approval of their home governments or for moral or ideological reasons); LEVIE, *supra* note 41, at 75 (describing entitlement to POW status of nationals of neutral states or states allied with enemy state as well-settled, while status of individual who is a national of capturing state or its allies is subject to dispute).

[116] *See* Joseph Samuels, *Unconventional Prisoners*, GLOBE & MAIL (Toronto), Jan. 24, 2002, at A21 (opining that U.S. treatment of detainees is consistent with Geneva Protocols).

Civilians Who Engage in Combat. The second category of unlawful belligerents consists of civilians who carry out belligerent acts that might well be conducted lawfully by combatants with proper authorization of the state. They act on their own, albeit perhaps for patriotic or ideological reasons. Because they do not answer to any higher command, they are not valid agents of a party to the conflict and cannot always be expected to lay down their arms when hostilities between parties cease. Civilians who engage in combat lose their protected status and may become lawful targets for so long as they continue to fight. They do not enjoy immunity under the law of war for their violent conduct and can be tried and punished under civil law for their belligerent acts. They may also be interned without trial under GC art. 5, but they do not lose their protected status as civilians under the GC.[117] Civilians who owe loyalty to the detaining power might also find themselves charged with treason or aiding the enemy.

It would seem that the Taliban and Al Qaeda do not exactly fit the second definition of unlawful combatants, either. Again, it appears they are considered to be parties to the conflict who may lawfully be treated as military targets whether or not they are directly participating in the immediate hostilities. If every Taliban or Al Qaeda fighter is considered a civilian participating in an armed conflict without authorization who can be tried for ordinary acts of combat, then the question might be asked whether an armed conflict exists at all, there being no apparent legitimate force opposing the United States.[118]

Guerrillas and "Non-POWs"? Some argue there is a third category of unlawful belligerents, comprised of all members of organized groups of irregular fighters that do not, as a whole, meet the criteria to be treated as prisoners of war.[119] These groups typically employ unorthodox guerrilla tactics emphasizing stealth and surprise,[120] and have received somewhat uneven treatment at the hands of states.[121] In some conflicts, irregulars who could not prove their affiliation to an official military were summarily shot as *franc-tireurs*.[122] The lack of international consensus

---

[117] *See* FM 27-10, *supra* note 30, at para 247 (those protected by GC also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war). Certain civilians who are suspected of engaging in hostile conduct are "not entitled to claim such rights and privileges under GC as would, if exercised in favor of such individual person, be prejudicial to the security of such State." *Id.* at para. 248.

[118] *See* discussion on "Characterizing the Conflict," *supra*.

[119] *See* A TREATISE ON THE JURIDICAL BASIS OF THE DISTINCTION BETWEEN LAWFUL COMBATANT AND UNPRIVILEGED BELLIGERENT 7 (U.S. Army Judge Advocate General's School 1959) (hereinafter "TREATISE") (noting the Geneva Conventions do not state that fighters who do not pass the four part test of article 4 are illegal combatants, and that therefore, if they are to be so considered, it is only because of customary international law).

[120] *See* Mallison and Mallison, *supra* note 32, at 42.

[121] *See generally* TREATISE, *supra* note 119, at 11-42 (describing varying treatment given irregulars at the hands of different states, and even by the same state during different phases of a conflict).

[122] *See id.* at 44 (citing the example of the Franco-Prussian War as impetus for advancements (continued...)

with regard to the treatment of insurgents and partisans contributed to the international impetus to codify the law of war, but has not been resolved and remains a source of contention among states parties to the resulting treaties.[123] Guerrilla tactics do not appear to be in and of themselves violative of international law.[124] It could be argued that conventional style warfare conducted by irregular soldiers is no worse. Under this view, members of irregular armies who carry out ordinarily lawful belligerent acts, or who have not personally carried out any hostile acts, while not necessarily entitled to POW privileges, would not be punishable as unlawful combatants. Like POWs, they would be subject to internment at the hands of the state without necessarily being charged with a crime. Their detention would be based on membership in the irregular army rather than citizenship and suspicion of criminal activity.

The issue remains: what set of rules applies to them? Some argue that, in the very least, Common Article 3 applies as well as other international human rights law. Others argue that neither peacetime civil law nor the law of war applies, essentially leaving them outside the law altogether.

Interpretation of GPW Article 4

Assuming the conflict is international, both the United States and Afghanistan, as signatories to the four Geneva Conventions of 1949, are bound to grant POW status to enemy combatants who qualify under GPW article 4. Members of the armed forces, including militias and volunteer corps serving as part of the armed forces, who are captured are entitled to be treated as POWs. Members of other volunteer corps, militias, and organized resistence forces belonging to a party to the conflict are entitled to POW status only if the organization meets the four criteria in GPW article 4A(2). The regular armed forces of a state,[125] even if it is a government or "authority" not recognized by the opposing party,[126] need not necessarily satisfy the four criteria in order for their members to be entitled to POW status under the GPW art. 4A(2). However, members of regular armed forces may be denied POW rights if they are caught as spies or saboteurs behind enemy lines.[127] Under this view, Taliban soldiers captured on the battlefield in Afghanistan are at least presumptively lawful combatants entitled to POW status.

---

[122] (...continued)
in the law of war allowing irregular fighters to qualify as belligerents).

[123] *See* Baxter, *supra* note 31, at 327 (arguing the 1949 Geneva Conventions destroyed what little certainty had existed in the law regarding status of irregulars).

[124] *See id*. at 337 (noting distinction between those fighting for private gain and those fighting because of genuine allegiance to a cause).

[125] GPW art. 4A(1).

[126] GPW art. 4A(3).

[127] See LEVIE, *supra* note 41, at 36-37 (explaining that a soldier wearing civilian clothes captured in enemy territory engaged in sabotage or espionage is no more entitled to POW treatment than a civilian in the same situation, lest states incorporate saboteurs and spies into their armed forces to immunize them for violations of the law of war).

Al Qaeda is not claimed as the armed forces of Afghanistan; therefore, its members are entitled to POW status only if it "forms part of" the armed forces of Afghanistan, it "belongs to" the Taliban and meets the four criteria in GPW art. 4A(2), or it can be considered "an authority" not recognized by the United States but nevertheless a party to the conflict. If the Taliban is not the armed forces of Afghanistan, it would seem that such a determination would render the conflict non-international, in which case GPW art. 4 is entirely irrelevant. However, if the conflict is considered to remain international notwithstanding the status of the Taliban, then presumably the following analysis would apply to the Taliban as well.

GPW Art. 4A(1): Does Al Qaeda Form "Part of" the Armed Forces of a Party to the Conflict? The GPW provides little guidance for making the determination whether an armed militia or volunteer group "forms part of" the regular army of a party to a conflict for the purposes of article 4A(1). The determination may be made in accordance with the national laws of the state party to the conflict.[128] The language may have been included in order to ensure that members of the United States National Guard, for example, are protected.[129] However, in the case of states with less developed military organizations, including newly emerging states or new governments, the determination may not be as clear. If some Al Qaeda combat units are officially incorporated into the Taliban army, members of those units could argue that they are entitled to POW status.[130]

GPW Art. 4A(2): Does Al Qaeda "Belong to" a Party to the Conflict? Even if Al Qaeda is not part of the armed forces of Afghanistan, its members could qualify as POWs if Al Qaeda "belongs to" a party to the conflict and it meets the criteria under GPW art. 4A(2). Presumably, "belonging to" a party would be a less exacting standard than "forming part of" its armed forces. It may be that informal and even temporary cooperation between the militia or volunteer group and regular troops suffices to bring militia members under the protection of combatant status.[131] The inclusion of the phrase "organized resistance groups" complicates the interpretation. The phrase was apparently included to address resistance movements of the type that sprang up in many occupied territories during World War II.[132] If a militia is fighting on behalf of a government-in-exile, the question arises as to whether that government is still a party to the conflict to which a resistance group might validly belong.[133]

---

[128] *See id.* at 36 (noting, however, that states may not use domestic legislation to bring otherwise unlawful combatants under the protection of the GPW).

[129] *See* LEVIE, *supra* note 41, at 38.

[130] *See* Douglas Cassel, *Case by Case: What Defines a POW?*, CHI. TRIB., Feb. 3, 2002 (noting that at least one Al Qaeda battalion is reportedly incorporated into the Taliban armed forces, possibly entitling those soldiers to POW status upon capture).

[131] *See* Mallison and Mallison, *supra* note 32, at 52 (suggesting "belonging" element could be satisfied by mere *de facto* relationship between the irregular unit and a state).

[132] *See* Cassel, *supra* note 130, at 40 n.151 (distinguishing resistance movement in international conflict from rebel groups in civil wars for the purpose of article 4).

[133] *See id.* at 41 (concluding that indigenous groups resisting invading forces are likely meant to be covered, but recognizing ambiguity with respect to groups supporting the (continued...)

If no party to the conflict claims a partisan group or authorizes it to engage in combat, there may be insufficient proof that the group is covered. An Israeli court confronted the question when members of the Popular Front for the Liberation of Palestine (PLFP) sought to overturn criminal convictions for acts they committed in the West Bank by claiming POW status.[134] The court upheld the civil convictions, holding that since no government with which Israel was then at war claimed responsibility for the actions of the PLFP, its members were not entitled to be treated as POWs. Because the occupied territory of the West Bank previously belonged to Jordan, a signatory of the GPW, the PLFP could only belong to "a party" if it belonged to Jordan. Since the group was illegal in Jordan, the court reasoned its members were not protected as POWs.[135]

On the other hand, governments are not always willing to acknowledge their support of irregular armed groups, meaning a partisan group may have to establish a *de facto* relationship through other means.[136] United States officials have argued that the Taliban and Al Qaeda are intimately connected.[137] That connection is arguably what makes the Taliban responsible for the terrorist acts of Al Qaeda, and thus subject to military action. For that reason, it may be counterproductive for United States Officials to take the position that Al Qaeda does not belong to the Taliban for the purposes of applying GPW art. 4.

The Four Criteria. The four criteria in GPW art. 4A(2) appear to be at the center of the debate about the POW status of detainees. The main issue is whether the four criteria apply only to irregulars, as the text and structure of the treaty suggests, or whether they form a part of customary international law and apply to *all*

---

[133] (...continued)
invading army).

[134] Military Prosecutor v. Kassem, 47 I.L.R. 470 (1971) (excerpts reprinted in DOCUMENTS ON PRISONERS OF WAR, document no. 160 (U.S. Naval War College 1979) (hereinafter "POW DOCUMENTS").

[135] *But see* Mallison and Mallison, *supra* note 32, at 71-72 (arguing status of PFLP under Jordanian law was not relevant to the question of whether it "belonged to" a party).

[136] *See* LEVIE, *supra* note 41, at 42 (citing GPW commentary suggesting that supply of arms might be evidence of relationship).

[137] *See* Press Conference, Department of Defense, Secretary Rumsfeld Media Availability en route to Camp X-Ray, Jan. 27, 2002, *available at* [http://www.defenselink.mil/transcripts/2002/t01282002_t0127sd2.html](last visited July 27, 2005).

> With respect to the Taliban, the Taliban also did not wear uniforms, they did not have insignia, they did not carry their weapons openly, and they were tied tightly at the waist to Al Qaeda. They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition, and there isn't any question in my mind — I'm not a lawyer, but there isn't any question in my mind but that they are not, they would not rise to the standard of a prisoner of war.

combatants.[138] Unfortunately, there is not much legal precedent that can aid in interpreting and applying the criteria.[139]

The four criteria have their roots in the earliest expressions of the laws of war, beginning with the Brussels Declaration[140] and continuing nearly unchanged in the Hague Convention Respecting the Laws and Customs of War on Land of 1907,[141] and are repeated in the GPW. However, this may be more a reflection of nations' inability to agree on a better formula than an indication of the solidity of their foundation.[142] The criteria may reflect the customs of war as they existed among the European countries who signed the original treaties, but were not viewed at the time as universal.[143] The criteria originated as a compromise between states with strong standing armies and weaker states whose defense might depend on armed citizens.[144] The only real effect of the enumeration of the criteria at the Hague was to prohibit ill treatment of those who do not meet them.[145]

---

[138] *See* LEVIE, *supra* note 41, at 36 -37 (commenting that the lack of criteria under article 4A(1) "does not mean that mere membership in the regular armed forces will automatically entitle an individual who is captured to [POW] status if his conduct prior to and at the time of capture have not met these requirements."). However, the examples he lists have to do with individual spies and saboteurs, that is, individual soldiers who pose as civilians to conduct hostile activities behind enemy lines. It is arguably a different matter to apply the standards to regular armies as a whole.

[139] *See* TREATISE, *supra* note 119, at 86-87 (predicting nations would be unlikely to adopt definitions that might foreclose future options, and noting that prior practice was relatively useless as precedent, consisting of a "collection of varying and conflicting policy decisions made on an ad hoc basis").

[140] *See* LEVIE, *supra* note 41, at 44 (noting that Declaration of Brussels, based largely on the Lieber Code, never entered into force but served as a source for later conventions).

[141] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277. Article 1 states:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:
>
> To be commanded by a person responsible for his subordinates;
>
> To have a fixed distinctive emblem recognizable at a distance;
>
> To carry arms openly; and
>
> To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

[142] *See* TREATISE, *supra* note 119, at 48 (attributing the reluctance to adopt any change in the criteria to the sensitivity of the subject).

[143] *See id*. at 95 (pointing out that the reasons for defining irregulars as such are the product of "western minds," and that the "gulf between the occidental and oriental concept of war is vast").

[144] *See id*. at 7 (noting that the "four criteria, being the product of a compromise of violently conflicting interests, are vague and open to varying interpretations").

[145] *See id.* at 52 (noting that the Hague Convention did not enact any new positive law, but

(continued...)

Historically, the most important consideration given to POW status has been whether there is evidence that they serve a government or political entity that exercises authority over them.[146] For example, the United States practice as early as 1900, during the Philippine Insurrection following the Spanish-American War, was to accord prisoner of war status to members of the insurgent army recognized by the Philippine government who complied "in general" with the four conditions.[147] Members of guerrilla bands not part of the regular forces were punished severely for acts of violence. A similar policy was adopted by the British during the South African War, although the first inclination was to declare that, inasmuch as the newly annexed Orange River Colony was British territory, inhabitants who took up arms were to be treated as rebels.[148] Foreign jurists and some prominent British statesman objected to the policy as a "monstrous proclamation ... absolutely opposed to the first principles of international law and history."[149] A new proclamation was issued to declare that only those inhabitants who had not been a continuous part of the fighting would be treated as rebels. British forces punished as "marauders" those who carried out acts of hostility who did not belong to "an organized body authorized by a recognized Government."[150]

On the other hand, toward the end of the Mexican War, in 1847, United States forces changed from a more tolerant policy toward irregulars to one of utmost severity. By that time, warfare by bands of guerrillas sanctioned by the late Mexican government had become the primary means of resistance. Once the war degenerated to the point where the guerrillas more resembled murderers and highway robbers than soldiers, the U.S. Secretary of War directed General Winfield Scott to adopt a policy of less forbearance than had hitherto been observed.[151] In 1870, during the Franco-Prussian War, the German commanders refused to treat any irregular fighters as lawful combatants, even those who possessed papers proving their affiliation with the government.[152] In 1914, when the German army invaded Belgium, it refused to recognize the citizen defense of yet unoccupied territories as a valid "people's war" qualifying for belligerent status because the Belgian government did not adequately

---

[145] (...continued)
only attempted to codify the existing rules and prohibit certain acts).

[146] *See generally,* Lester Nurich and Roger W. Barret, *Legality of Guerrilla Forces under the Laws of War,* 40 AM. J. INT'L L 563 (1946) (surveying history of armed conflict from 1847 through the Second World War).

[147] *See id.* at 576 (describing official statements as well as practice with regard to different types of guerrillas).

[148] *See id.* at 578.

[149] *See id.* (citing statement by James Bryce in the House of Commons).

[150] *See id.* at 579.

[151] *See id.* at 570-71.

[152] *See id.* at 573.

organize the forces and failed to supply the civilian fighters with proper distinguishing emblems.[153]

It was a fundamental part of the law of war that only combatants authorized to fight on behalf of a state party to a conflict were allowed to participate in the hostilities. It has never been permitted to wage war against civilians.[154] Civilians could become lawful military objectives only if and for so long as they took up arms against a belligerent. The four criteria are meant to ensure that only persons authorized to fight on behalf of a higher authority who is responsible for their conduct will participate, excluding civilians as both combatants and targets.

Supporters of granting POW status to Taliban soldiers argue that the text of the Conventions should be read literally. That the four criteria are listed only under the sub-paragraph for volunteer groups and militias not forming part of the regular army of a state indicates that there is no similar test for those whose status as members of a state military force is not in doubt. Others, however, argue that regular soldiers must already meet those criteria under customary international law, and the drafters of the GPW felt it would be superfluous to list the criteria with regard to regular armies. Article 1 of the 1907 Hague Convention could be read to apply the four criteria to all military forces. However, inasmuch as that article states that not only the rights, but the laws and duties of war as well, apply only to the parties it lists, such an interpretation could lead to the conclusion that regular armies could evade their obligations under the law of war simply by not fulfilling the four conditions.

(a) Commanded by a Person Responsible for his Subordinates. According to U.S. military doctrine, the responsible command element is fulfilled if:

> the commander of the corps is a commissioned officer of the armed forces or is a person of position and authority or if the members of the militia or volunteer corps are provided with documents, badges, or other means of identification to show that they are officers, noncommissioned officers, or soldiers so that there may be no doubt that they are not persons acting on their own responsibility. State recognition, however, is not essential, and an organization may be formed spontaneously and elect its own officers.[155]

The key to the first element is that the subject is acting on behalf of and on the command of a higher authority. The Secretary of Defense has suggested that the Taliban do not fulfill this requirement because "they were not organized in military units, as such, with identifiable chains of command; indeed, Al Qaeda forces made

---

[153] *See* ELLERY C. STOWALL AND HENRY F. MUNRO, 2 INTERNATIONAL CASES 122-23 (1916)(citing memorial published by German Foreign Office on May 10, 1915). There were reports of German soldiers indiscriminately killing Belgian civilians after claiming the soldiers were fired upon. *Id* at 119. Reportedly, by the German account, all Belgian citizens had been "called out," even those in territories occupied by German forces, and were murdering German soldiers after pretending to be friendly. *Id.* at 120.

[154] *See* WINTHROP, *supra* note 103, at 778.

[155] FM 27-10, *supra* note 30, para. 64a.

up portions of their forces."[156] However, in response to a reporter who asked whether it was not clear that the Taliban were operating as a cohesive unit, pointing to previous reports that the U.S. military had successfully attacked "command and control" elements, Secretary Rumsfeld responded that while such a case could be made for the first (command) element, it would be difficult to argue the Taliban meet all four criteria, suggesting that that element may not be critical to the Administration's position.

A possible drawback to setting a high standard of conventional military organization to determine whether the Taliban or Al Qaeda meet the "responsible command" element is that it could contradict the justification for targeting them at all. If there is insufficient command and control of the forces to distinguish the Taliban from a lawless mob, it would be unlikely that those forces would pose a significant threat, especially outside of Afghanistan. If there is no central authority directing the conduct of the fighters, they would be considered mere civilians whose targeting would accomplish little toward the objective of conquering the foe. It also raises a question as to the possible value of any intelligence to be gained through interrogating them.

(b) Uses a Fixed Distinctive Sign Recognizable at a Distance. According to FM 27-10, the requirement for a "fixed distinctive sign" is satisfied:

> by the wearing of military uniform, but less than the complete uniform will suffice. A helmet or headdress which would make the silhouette of the individual readily distinguishable from that of an ordinary civilian would satisfy this requirement. It is also desirable that the individual member of the militia or volunteer corps wear a badge or brassard permanently affixed to his clothing. It is not necessary to inform the enemy of the distinctive sign, although it may be desirable to do so in order to avoid misunderstanding.[157]

The GPW does not clarify what is meant by "fixed" or by "distinctive," despite the fact that the same language gave rise to disputes as it was interpreted in earlier treaties.[158] Presumably, the requirement for a sign to be "fixed" was meant to prevent fighters from removing them easily, but it is unlikely the requirement was meant to remain in force even when no military operations were ongoing.[159] Similarly, there is nothing to explain how great a distance must be before the distinction need no longer be discernible. Methods of locating and of camouflaging military targets, including soldiers, make it questionable whether the standards are the same today as they were when the original Conventions were drafted, if such standards ever existed.

The purpose for requiring combatants to distinguish themselves from civilians is to protect civilians from being targeted. Combatants who are unable to distinguish enemy combatants from civilians might resort to firing upon all human beings in the

---

[156] *See* Rumsfeld Press Conference, *supra* note 8.

[157] FM 27-10, *supra* note 30, at para. 64b.

[158] *See* LEVIE, *supra* note 41, at 47.

[159] *See* Mallison and Mallison, *supra* note 32, at 56-57 (noting that armbands, insignia, or distinctive headgear are acceptable according to some military manuals).

area of operations. There may be other reasons for enforcing the obligation to identify oneself as a combatant that serve tactical purposes rather than purely humanitarian ends. Requiring irregulars to display a mark aids the opposing army in targeting them and also impedes the irregulars' ability to effect a surprise attack.[160] The use of different uniforms to distinguish the forces also helps leaders identify their own troops during combat, and to distinguish friendly from enemy soldiers.[161] It has also been suggested that the requirement to wear a uniform is a remnant of long outdated forms of warfare, in which closely ranked armies opposed each other across open fields.[162] Modern army uniforms are designed to make the wearer difficult to distinguish from the surrounding foliage from any distance. It has been pointed out that the requirement for irregulars is not more stringent than the standard set by regular armies.[163]

Although the lack of uniform can be detrimental to a soldier who falls into the hands of the enemy,[164] it has not been the case historically that all fighters lacking a uniform or some other identifying mark have been denied prisoner status.[165] According to FM 27-10, the lack of uniform brings the following result:

> Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war *whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property.* Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.[166]

For a combatant to engage in hostilities while disguising his identity in order to deceive the enemy thus could amount to perfidious conduct in violation of the law of war.[167] Guerrillas and terrorists therefore lose any claim they might have to

---

[160] *See* TREATISE, *supra* note 119, at 31.

[161] *See id.* at 76 (noting that uniforms performed a purely utilitarian function prior to the Franco-Prussian War).

[162] *See* Baxter, *supra* note 31, at 343.

[163] *See* Mallison and Mallison, *supra* note 32, at 57.

[164] *See* Baxter, *supra* note 31, at 343. ("[T]he character of the clothing worn by the accused has assumed major importance.").

[165] *See generally* TREATISE, *supra* note 119. For example, during the French and Indian War, both sides employed some irregulars, who did not wear uniforms, and these were apparently regarded as lawful combatants. *Id.* at 18-19. During the American Revolution, the British army treated colonial irregulars belonging to militias as lawful combatants despite their lack of uniforms, although individual snipers unattached to any American forces were sometimes executed. *Id.* at 20-21. In the Spanish Peninsular War (1807-1814), the French treated all irregulars as illegal combatants, even those that met the four conditions embodied in later treaties. *See id.* at 23-23.

[166] FM 27-10, *supra* note 30, at para. 74 (emphasis added.)

[167] Perfidious conduct refers to an act that "invite[s] the confidence of an adversary to lead

(continued...)

protected status if they place the civilian populace at risk. However, a soldier not engaging in hostilities probably has not committed a violation by using civilian disguise merely to evade detection by the enemy.[168] Soldiers who belong to armies that do not wear full uniforms are not necessarily engaging in perfidious conduct as long as they bear arms openly and do not hide their belligerent status.[169]

Secretary of Defense Rumsfeld has suggested that the Taliban do not fulfill the requirement because they "did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas."[170] Critics of the Defense Department's position point out that neither the Taliban nor the Northern Alliance had ever worn uniforms or any distinctive sign, other than the black turban reportedly worn by members of the Taliban and distinctive headscarves worn by members of the Northern Alliance.[171] The failure to wear what Western commanders might regard as proper military dress may be more a matter of custom than perfidy. Since most of the hand-to-hand combat was conducted by the Northern Alliance, with U.S. forces supplying intelligence and fire support from the air or at a great distance, the critics argue, the Pentagon's position that the lack of uniforms makes "unlawful combatants" of the Taliban force is less persuasive.[172] The very success of the armed forces in quickly routing the enemy with virtually no U.S. casualties may also make the argument somewhat more difficult to sustain. Finally, critics have pointed out that U.S. Special Forces troops have been known to operate occasionally in civilian

---

[167] (...continued)
him to believe that he is entitled to receive, or is obliged to accord protection under the rules of international law applicable in armed conflict, with intent to betray that confidence...." *See* BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 24 (ICRC ed. 1983).

[168] *See* Baxter, *supra* note 31, at 340-41 (noting probable distinction between hostile intent and seeking to escape).

[169] *See, e.g.* TREATISE, *supra* note 119, at 55-59 (describing the very unconventional commandos of the Boer Republic, which Britain treated as lawful combatants despite the fact that they wore civilian clothing and employed guerrilla tactics in the latter phase of the Boer War).

[170] *See* Rumsfeld Press Conference, *supra* note 8.

[171] *See* Robert K. Goldman and Brian D. Tittemore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, American Society of International Law, Task Force on Terrorism Paper 23 (Dec. 2002), *available at* [http://www.asil.org/taskforce/goldman.pdf] (last visited July 27, 2005)(commenting that "both modes of dress, while perhaps not ideal, are, nonetheless, sufficient to satisfy the principle of distinction under current law.").

[172] *Id*. ("It is also somewhat disingenuous for the Administration to press this particular point because if the Northern Alliance clearly knew how to identify the enemy, then so too did their U.S. allies in the field.").

dress, or even to use the uniform of the enemy for the purpose of infiltrating enemy territory.[173]

(c) Carries Arms Openly. The requirement of carrying arms openly serves a similar purpose to that of the fixed distinctive sign, to prevent perfidious conduct in violation of the law of war. FM 27-10 describes this requirement in the negative. It is:

> not satisfied by the carrying of weapons concealed about the person or if the individuals hide their weapons on the approach of the enemy.

The ICRC notes the distinction between "carrying arms 'openly' and carrying them 'visibly' or 'ostensibly,'" stating the provision "is intended to guarantee the loyalty of the fighting (sic), it is not an attempt to prescribe that a hand-grenade or a revolver must be carried at belt or shoulder rather than in a pocket or under a coat."[174] The paramount concern "is that the enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons."[175]

It is unclear whether arms must be carried in the open at all times or only during the conduct of actual hostilities. Since surprise attacks are not *per se* unlawful, it seems that ordinary ruses of war that involve camouflage or the concealing of arms to hide preparation for battle would be permissible, while perfidious attacks carried out with weapons disguised as harmless equipment might not be allowed.

It may also be valid to question whether the requirement is the same during offensive operations for both the attacker and the attacked. To impose the same requirements on those who suddenly find themselves in battle, denying POW status on the basis that a particular combatant had a weapon concealed somewhere or was not at the time in uniform would seem to give the attacker a clear advantage and even greater incentive to launch surprise attacks against an unprepared enemy.

(d) Conducts its Operations in Accordance with the Laws of War. According to FM 27-10:

> This condition is fulfilled if most of the members of the body observe the laws and customs of war, notwithstanding the fact that the individual member concerned may have committed a war crime. Members of militias and volunteer corps should be especially warned against employment of treachery, denial of quarters, maltreatment of prisoners of war, wounded, and dead, improper conduct toward flags of truce, pillage, and unnecessary violence and destruction.

The ICRC interprets the condition similarly:

---

[173] *See* Gary L. Walsh, *Role of the Judge Advocate in Special Operations*, 1989-AUG ARMY LAW. 4, 6-7 (noting that while use of the enemy uniform during battle is forbidden by the law of war, U.S. policy allows use of the enemy uniform for infiltration of enemy lines).

[174] *See* ICRC COMMENTARY, *supra* note 68, at 61.

[175] *See id.*

> Partisans are ... required to respect the Geneva Conventions to the fullest extent possible. In particular, they must conform to international agreements such as those which prohibit the use of certain weapons (gas). In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man; in launching attacks, they must not cause violence and suffering disproportionate to the military result which they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty as they expect their enemies to do.[176]

The condition is said to be vital to the recognition of irregular fighters, because states cannot be expected to adhere to the law of war to fight an enemy that is not likewise bound. However, the somewhat lenient stance just quoted reflects the fact that the "concept of the laws and customs of war is rather vague and subject to variation as the forms of war evolve."[177] The imprecision of the condition could lead to its abuse; a relatively minor violation of the law of war could be used as a pretext to deny POW status to an entire army, which would arguably give the members of an irregular army little incentive to follow *any* of the rules if adherence to a particular rule is outside their capability.[178]

One of the unresolved issues, then, is whether the criteria apply to each soldier as an individual or to the army as a whole. In other words, does the violation of a rule by one soldier result in the failure to qualify for POW status for the rest of the group, even though some members might scrupulously follow all of the rules? Can individual soldiers still qualify for POW status even though their leaders do not strictly enforce the rules over all subordinates? A member of a regular force does not lose his right to be treated as a POW by violating the law of war, so it might seem inconsistent to give members of irregular groups who might otherwise qualify harsher treatment. However, a capturing power is probably inclined to insist that each individual detainee meet all four conditions before receiving treatment as a POW.[179]

With regard to whether a regular army forfeits the right to have its members treated as POWs by failing to follow the laws of war, U.S. practice has been to comply with the Conventions even when the opposing side of a conflict does not. The United States treated North Korean and Chinese prisoners as POWs during the armed conflict in Korea, despite the near total disregard of its provisions on the part

---

[176] *See id.*

[177] *See id.*

[178] *See* Mallison and Mallison, *supra* note 32, at 60 (suggesting that "it is better to have irregulars adhere as much as possible rather than not at all").

[179] *See* LEVIE, *supra* note 41, at 44-45, emphasizing that:

> [M]ost Capturing Powers will deny the benefits and safeguards of the Convention to any such individual who is in any manner delinquent in compliance. It must also be emphasized that if an individual is found to have failed to meet the four conditions, this may make him an unprivileged combatant but it does not place him at the complete mercy of his captor, to do with as the captor arbitrarily determines. He is still entitled to the general protection of the law of war, which means that he may not be subjected to inhuman treatment, such as torture, and he is entitled to be tried before penal sanctions are imposed.

of the Communists.[180] The United States also treated North Vietnamese and some Vietcong prisoners as POWs, despite North Vietnam's denial that the GPW applied at all,[181] along with its threatened policy of treating downed U.S. airmen as not eligible for POW status and trying them as war criminals.

Determining Status under GPW Art. 5

Article 5 of GPW states: "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 in article 4 for POWs, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." President Bush has declared with respect to the detainees that there is no ambiguity: they are "unlawful combatants" and are not entitled to POW status. Some critics argue, and one federal court has agreed, that even if most of the detainees fail to meet the criteria for POW status, a declaration by the executive to that effect does not equate to a decision by a "competent tribunal."[182]

The GPW does not indicate how an article 5 tribunal should be constituted or in whose mind the doubt must arise in order to compel the institution of such a tribunal. The provision is new to the 1949 GPW and was inserted at the request of the ICRC.[183] Prior to the inclusion of this language, summary decisions were often made by soldiers of relatively low rank on the battlefield, leading to instances where a captive could be presumed unlawful and executed on the spot, with any investigation to follow.[184] Under the 1949 GPW, combatants are presumed to be entitled to POW status unless formally declared otherwise.[185] The United States has in the past interpreted this language as requiring an individual assessment of status before privileges can be denied.[186] Any individual who claims POW status is entitled to an adjudication of that status. An individual who has not committed a belligerent act and thus claims to be an innocent civilian arguably has the right to have that claim adjudicated.

---

[180] *See id.* at 30 (noting that none of the parties had yet acceded to the treaties but all had agreed to be bound by their humanitarian principles).

[181] *See id.*

[182] Hamdan v. Rumsfeld, 344 F.Supp.2d 152, 162 (D.D.C. 2004).

[183] *See* ICRC COMMENTARY, *supra* note 68, at 77.

[184] *See* LEVIE, *supra* note 41, at 56.

[185] *See* Baxter, *supra* note 31, at 343-44 ("The judicial determination which is necessary before a person may be treated as an unprivileged belligerent is in consequence not a determination of guilt but of status only and, for the purposes of international law, it is sufficient to ascertain whether the conduct of individual has been such as to deny him the status of the prisoner or of the peaceful civilian.").

[186] *See id;* FM 27-10, *supra* note 30, at para. 71 ("[Article 5] applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.").

The conflict in Vietnam, with its high frequency of irregular warfare, brought about the first implementation of written procedures for art. 5 tribunals.[187] The United States Military Assistance Command (MACV) first issued a directive pertaining to the determination of POW status in 1966.[188] Under the MACV directive, the captured North Vietnamese Army and Vietcong fighters were accorded POW status upon capture.[189] For prisoners who were not obviously entitled to POW status, a tribunal of three or more officers was convened to determine their status.[190] "Irregulars" were divided into three groups: guerrillas, self-defense force, and secret self-defense force. Members of these groups could qualify for POW status if captured in regular combat, but were denied such status if caught in an act of "terrorism, sabotage or spying."[191] Those not treated as POWs were treated as civil defendants, and were accorded the substantive and procedural protections of the GC.[192] This approach met with the approval of the ICRC.[193]

In Grenada, where U.S. forces were opposed by Cuban military personnel and the Grenadian People's Revolutionary Army, the conflict was treated as international in nature and all captives were treated as prisoners of war until a more accurate determination could be made.[194] Detained persons were later classified as POWs, retained persons, or civilian internees, and were allowed to communicate with their next of kin within seven days of capture.[195] Seventeen former members of the government who were accused of taking part in the coup attempt, however, were initially detained incommunicado and interrogated on board U.S. vessels.[196] After hostilities ceased they were transferred to revolutionary courts that were financed by the United States and staffed by judges and lawyers from various Caribbean nations. All were found guilty. Amnesty International alleged that the trials were unfair and the verdicts relied on coerced statements.[197] The Inter-American Commission on Human Rights (IACHR) later determined that the Government of the United States had violated Articles I (right to life, liberty and security of person), XVII (the right to recognition of juridical personality and civil rights) and XXV (right to be protected from arbitrary arrest and the right to humane treatment in custody) of the American

---

[187] *See* POW DOCUMENTS, *supra* note 134, at 722.

[188] *See* MACV Directive 20-5, 17 May 1966.

[189] *See* MACV Directive 381-46, Dec. 27, 1967 annex A, *reprinted in* 62 AM. J. INT'L L 765 (1968).

[190] *See* FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT 21 (2001).

[191] *See* MACV Directive 381-46.

[192] *See* Mallison and Mallison, *supra* note 32, at 73.

[193] *See id.* at 74 (quoting commendation by ICRC representative in Saigon).

[194] *See* BORCH, *supra* note 190, at 65-66 (noting that the brief nature of the hostility phase in that conflict made it difficult to classify the captives until afterward).

[195] *See id.*

[196] *See* The Grenada 17: The Last of the Cold War Prisoners?, Amnesty International Report 32/001/2003 (23 October 2003), *available at* [http://web.amnesty.org/library/index/ENGAMR320012003](last visited July 27, 2005).

[197] *See id.*

Declaration on the Rights and Duties of Man.[198] The IACHR did not examine the fairness of the trials because the United States no longer had custody of the accused by the time they were tried.

The current procedures for determining the status of detainees is prescribed in United States Army Regulation (AR) 190-8. The regulation divides persons captured on the battlefield into four groups: enemy prisoners of war (EPW), retained personnel (RP - medical personnel, chaplains, and Red Cross representatives), civilian internees (CI), and other detainees (OD - whose status has not yet been determined but who are to be treated as EPW in the meantime). Ordinarily, a preliminary determination of each captive's status would be made by military police with the assistance of military intelligence personnel and interpreters during the processing procedure at the battlefield division collection point.[199] Where a captive's status cannot be adequately determined, the captive will be temporarily assigned the designation of "OD" until a tribunal can be convened to make a final determination. In the meantime, the OD is kept with the EPWs and accorded the same treatment.

AR 190-8 sec.1-6 prescribes the procedures for determining whether persons who have committed belligerent acts or engaged in hostile activities in aid of enemy armed forces are entitled to POW status, when such status is in doubt, in accordance with GPW art. 5. A tribunal composed of three commissioned officers established by a general courts-martial convening authority holds an open (to the extent allowed by security concerns) proceeding to decide by majority vote on the preponderance of evidence whether the detainee is an EPW, RP, innocent civilian, or civilian who "for reasons of operational security, or probable cause incident to criminal investigation, should be detained." It is unclear whether there are any specific time limits for a final determination. The regulation states that

> [p]ersons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.[200]

These procedures do not appear to apply in what the Army calls Military Operations Other than War (MOOTW).[201] In U.S. operations in Somalia and Haiti, for example, captured persons were termed "detainees" and were treated "in accordance with the humanitarian, but not administrative or technical standards of

---

[198] *See* Inter-American Commission on Human Rights, Report No. 109/99, Case 10.951, Coard et al v. United States (29 September 1999).

[199] *See* FM 3-19.40 Military Police Internment/Resettlement (I/R) Operations.

[200] AR 190-8 ch. 1-6(g).

[201] *See* Warren, *supra* note 95, at 58 (noting that during MOOTW in Panama, Somalia, and Haiti, captured belligerents were not entitled to POW status because none was involved in an international armed conflict or captured in occupied territory). A court later ruled that the engagement in Panama amounted to an international armed conflict. *See* United States v. Noriega, 808 F.Supp.791 (S.D.Fla. 1992).

the GPW."[202] Human rights advocates reportedly found the living conditions acceptable, but criticized the uncertain nature of the detention. None of the detainees was ever tried by military commission as unlawful combatants.[203]

During Operation Just Cause in Panama, members of the Panamanian armed forces were termed "detainees" but were reportedly treated as POWs.[204] U.S. forces also detained a large number of common criminals and patients from a mental hospital, as well as some members of the Noriega government.[205] After hostilities had ceased, a three-officer tribunal was set up to classify the prisoners. Four thousand of the prisoners were turned over to the new Endara government, while 100 prisoners of special interest were retained by U.S. forces.[206] Some of the latter group were transferred to the United States for civilian trials, but most were turned over to the Panamanian government. General Manuel Noriega, taken prisoner during the operation and removed to the United States for trial on drug charges, eventually succeeded in having a court accord him recognition as a POW.[207] The court did not agree with the Administration that since Gen. Noriega was being treated as a POW, there was no need to decide whether he was entitled to that status under international law.[208] The court stated:

> The government's position provides no assurances that the government will not at some point in the future decide that Noriega is not a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. Because of the issues presented in connection with the General's further confinement and treatment, it seems appropriate — even necessary — to address the issue of Defendant's status. Articles 2, 4, and 5 of Geneva III establish the standard for determining who is a POW. Must this determination await some kind of formal complaint by Defendant or a lawsuit presented on his behalf? In view of the issues presently raised by Defendant, the Court thinks not.

During the first Gulf War in 1991, the U.S. military did not set up camps for prisoners of war; instead, prisoners were processed by the Army and turned over to Saudi Arabia for detention.[209] The Army conducted 1,191 art. 5 tribunals.[210]

---

[202] *See* Warren, *supra* note 95, at 58-59.

[203] *See id.*

[204] *See id* .

[205] *See* BORCH, *supra* note 190, at 104-05.

[206] *Id.*

[207] *See* United States v. Noriega, 808 F.Supp. 791 (S.D.Fla. 1992). The change in official status did not have any effect on his prison sentence.

[208] *Id.* at 794.

[209] *See* BORCH, *supra* note 190, at 171.

[210] *See* Law of War Workshop Deskbook, The Center for Law and Military Operations, Judge Advocate General's School, U.S. Army (2000).

Treatment of Detainees at Guantánamo

The Department of Defense defends its treatment of the detainees at the Guantánamo Naval Station as fully complying with the principles of the Geneva Convention, causing some to question whether a change in the Administration's position as to whether and how the United States is bound to apply the Geneva Conventions would in any way change the treatment the detainees are receiving. DOD reports that the detainees are receiving some of the benefits accorded under the Conventions to protected persons, and are not suffering inhumane treatment. DOD also points to the relatively recently instituted Combatant Status Review Tribunals as evidence that the detainees have received a determination of their status that roughly corresponds to what they would receive from a "competent tribunal" under GPW art. 5. Critics of the policy respond that the U.S.' position regarding the inapplicability of the Geneva Conventions could be invoked as precedent to defend the poor human rights practices of other regimes, and it could lead to harsh treatment of U.S. service members who fall into enemy hands during this or any future conflict. Under the critics' view, if the Administration can accomplish its goals by applying the GPW to determine by means of a competent tribunal which of the detainees is entitled to POW status, the foreign policy and humanitarian benefits would be worth the cost.

The perceived implications of granting POW status appear to have played a role in the decision-making process, with Administration officials emphasizing the detrimental impact of treating the detainees as POWs on the U.S.' ability to fight the war against terror. There is some controversy over whether the predicted problems would necessarily result from a change in policy. Some of the issues are discussed below.

Interrogation

One argument cited frequently in the press for denying POW status to the detainees is that the U.S. military would no longer be able to interrogate them in an effort to gain intelligence.[211] The GPW requires prisoners to give only a few personal facts, including name, rank, and serial number. Most armies undoubtedly forbid their soldiers from divulging any more information than what is required; however, there is no prohibition against the detaining power asking for more information.[212] It is forbidden to use mental or physical coercion to extract information from prisoners,[213] but tactics such as trickery or promises of improved living conditions are not foreclosed.[214] Article 17 of GPW provides that "[p]risoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or

---

[211] For more on military interrogation, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer Elsea.

[212] *See* ICRC COMMENTARY, *supra* note 68, at 164.

[213] GPW art. 17.

[214] *See* LEVIE, *supra* note 41, at 108.

disadvantageous treatment of any kind." Torture is not permitted in the case of any detainee, regardless of that person's status.[215]

Similar language was contained in the 1929 Geneva Convention.[216] Despite the reports of widespread abuse of prisoners of war at the hands of enemy interrogators, there is very little case precedent defining the boundaries of acceptable conduct. [217] A British military court convicted several German Luftwaffe officers of improperly interrogating British POWs[218] at a special interrogation camp, where it was charged the officers used excessive heating of cells in order to induce prisoners to give war information of a kind they were not bound by the Convention to disclose. The charges also alleged the officers had threatened prisoners that their failure to provide sufficient answers could be seen by the Gestapo as evidence that the prisoners were saboteurs.[219] The military court expressed its agreement with the defense's position that interrogation was not unlawful under the Geneva Convention then in force, that obtaining information by trick was likewise not unlawful, and that interrogation of a wounded prisoner was not itself unlawful without evidence that methods used amounted to physical or mental ill-treatment.[220]

It appears to be a common practice for militaries to interrogate prisoners as soon as possible after capture to exploit their knowledge concerning tactical positions and plans.[221] There is no express right to counsel during such interrogation; however, the case may be different where the information sought is of the type that could incriminate the prisoner personally for any crime.[222] The GPW forbids the use of coercion to induce a POW to admit guilt, and POWs who are accused of crimes have the right to counsel.[223] It may thus be argued that POWs are entitled to some form

---

[215] GC art. 31 prohibits the use of physical or mental coercion to obtain information. *See also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Jun. 26, 1987, 1465 U.N.T.S. 85.

[216] Geneva Prisoners of War Convention of 1929 art. 5 stated in part:

> No pressure shall be exerted on prisoners to obtain information regarding the situation of their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.

[217] *See* POW DOCUMENTS, *supra* note 134, at 708.

[218] *See* Trial of Erich Killinger and Four Others, 3 LRTWC 67, *excerpts reprinted in* POW DOCUMENTS, *supra* note 134, doc. no. 70, at 291.

[219] *See id.*

[220] *See id.* at 292.

[221] *See* ICRC COMMENTARY, *supra* note 68, at 163.

[222] *See* LEVIE, *supra* note 41, at 109, n42 (arguing the "interrogation of a prisoner of war in a search for tactical information of immediate urgency cannot be equated to the interrogation of an individual arrested for questioning in connection with the possible commission of a crime...").

[223] GPW art. 99 states in part:

> No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

(continued...)

of exclusionary rule to keep a forced confession from introduction into evidence at trial.

Trial and Punishment

Trial and punishment of detainees may call for different procedural guidelines depending on the status of the detainee and whether the offense was committed prior to capture or during captivity.[224] Further, there is a distinction between crimes and mere disciplinary violations with respect to the nature and severity of punishment permitted. The Geneva Conventions do not permit collective punishment without an individual determination of guilt, nor confinement without a hearing. [225]

The military has jurisdiction to try enemy POWs and civilians, including "unlawful belligerents," for violations of the law of war.[226] However, the military does not appear to have jurisdiction to try detainees for pre-capture acts not committed within occupied territory or in connection with the armed conflict, as described below.[227]

POWs. According to GPW article 102:

> 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.

Further, Article 84 provides:

> In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which

---

[223] (...continued)

> No prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

[224] *See* CRS Report RL31600, The *Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

[225] *See* GPW art. 87; GC III art. 33.

[226] *See* 10 U.S.C. § 821 (recognizing concurrent jurisdiction of military courts over offenders or offenses designated by statute or the law of war); 10 U.S.C. § 818 (recognizing courts-martial jurisdiction over violations of the law of war committed by any person). For a brief overview comparing jurisdiction and procedure among various courts, see CRS Report RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts*,by Jennifer K. Elsea.

[227] For example, some of the detainees allegedly were arrested outside the zone of operations, in Bosnia, for suspicion of involvement in Al Qaeda terrorist plots. Some observers believe that these prisoners can only be charged as common criminals and not as unlawful belligerents.

> does not afford the accused the rights and means of defence provided for in Article 105.

Other procedural guarantees under the GPW include a prohibition on punishment for *ex post facto* crimes,[228] prompt notification of the charges and a speedy trial,[229] notification to the Protecting Power of the impending trial at least three weeks in advance,[230] right to counsel of the POW's own choosing or appointed counsel,[231] trial in the presence of a representative of the Protecting Power,[232] the

---

[228] GPW art. 99.

[229] GPW art. 103 states:

> Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

[230] GPW art. 104 requires the following information to be reported to the Protecting Power (*see supra* note 83) and POW's representative before a trial can commence:

> 1. Surname and first names of the prisoner of war, his rank, his army, regimental, personal or serial number, his date of birth, and his profession or trade, if any;
>
> 2. Place of internment or confinement;
>
> 3. Specification of the charge or charges on which the prisoner of war is to be arraigned, giving the legal provisions applicable;
>
> 4 . Designation of the court which will try the case; likewise the date and place fixed for the opening of the trial.
>
> The same communication shall be made by the Detaining Power to the prisoner's representative.

[231] GPW art. 105 provides:

> The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.
>
> Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.
>
> The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.
>
> Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language which he understands, and in good time before the opening of the trial. The same communication in the same circumstances shall be made to the advocate or counsel conducting the defence on behalf of the prisoner of war.

(continued...)

right to appeal a decision,[233] and if convicted, the right to serve the sentence under humane conditions.[234] Special Provisions apply in case the offense is punishable by death. A POW sentenced to death may not be executed until six months after the Protecting Power has received the required notification under art. 107.[235] The court must be informed that the POW owes no allegiance to the Detaining Power, encouraging the court to exercise leniency in sentencing on that basis.[236]

Civilians. A belligerent state may exercise jurisdiction over civilians in occupied territory subject to section III of the GC. However, the penal laws of the occupied territory remain in force unless the Occupying Power repeals or suspends them "in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."[237] The Occupying Power may also institute such laws that are essential to maintaining order and security, and to carrying out its obligations under the GC,[238] but these may not be enforced retroactively.[239] In addition, "[n]o sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial."[240] All accused persons have the right to be "promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them, and shall be brought to trial as rapidly as possible."[241] The accused has the right to counsel of choice and an interpreter, the right to present evidence necessary to his defense,[242] and the right to

---

[231] (...continued)
> The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security. In such a case the Detaining Power shall advise the Protecting Power accordingly.

[232] *Id.* ("The representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security.").

[233] GPW art. 106:
> Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.

[234] GPW art. 108:
> Sentences pronounced on prisoners of war after a conviction has become duly enforceable, shall be served in the same establishments and under the same conditions as in the case of members of the armed forces of the Detaining Power. These conditions shall in all cases conform to the requirements of health and humanity.

[235] GPW art. 101.

[236] GPW art. 100.

[237] GC art. 64

[238] *Id.*

[239] *See id.* art. 65-66

[240] *Id.* art 71.

[241] *Id.*

[242] GC. art. 72.

appeal a sentence.[243] These provisions apply not only in occupied territory but also, by analogy, to persons interned on the territory of the Detaining Power.[244]

Protected persons have the additional right to have the Protecting Power notified of the charges[245] and may have a representative of that power attend the trial.[246] If a protected person is sentenced to death, the sentence may not be carried out prior to six months after the Protecting Power is notified of the sentence.[247]

Chapter IX applies to civilian internees, and provides protection against duplicate punishment.[248] Violations of camp disciplinary rules may also be punished, but they are not to be treated as crimes. Internees may not be punished for a simple disciplinary breach, including attempted escape,[249] by confinement in a penitentiary.[250]

Unlawful Belligerents. The term "unlawful belligerents" is not found in the Geneva Conventions. Therefore, rules applicable to the trials of unlawful belligerents depend on whether the person charged is considered to be a civilian or whether a separate standard, found outside of the Geneva Conventions, applies. If the minimum standards outlined in Common Article 3 apply, the following are forbidden:

> The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Security Measures

Many nations impose upon their soldiers the duty to make every effort to escape from captivity if they should fall into the hands of the enemy.[251] At the same time, the Detaining Power will undoubtedly seek to take all possible precautions to prevent escape.[252] The Geneva Conventions regulate the use of deadly force to prevent an

---

[243] *Id.* art. 73.

[244] *Id.* art. 126 (applying arts. 71-76 by analogy to internees in the national territory of the Detaining Power). It is arguable that this provision would also encompass detainees at Guantánamo Bay, although the base is not technically U.S. territory.

[245] *Id.* art 71.

[246] *Id.* art 74.

[247] *Id.* art 75.

[248] *Id.*art. 118.

[249] GC art. 122.

[250] *Id.* art. 124.

[251] *See* LEVIE, *supra* note 41, at 403.

[252] *See id.* (noting POWs will likely be placed in enclosures made "as escape-proof as humanly possible").

escape, requiring warning prior to the firing of any shots.[253] Attempted escape or aiding and abetting such an attempt is treated as a disciplinary matter only; once an escape is deemed to be "successful," in the case the prisoner is recaptured, no punishment is permitted.[254] A prisoner who has attempted escape may be subjected to extraordinary surveillance measures.[255]

It is unclear where the line between security measures and punitive measures lies. POWs are entitled to living quarters similar to those of their guards.[256] In contrast, press reports have described the facilities at Guantánamo Bay as similar to a "high security prison." The present living conditions may be subject to criticism as punitive measures. The Department of Defense has added a new medium-security facility, known as Camp 4, with cells that can hold up to 20 detainees, to house those deemed to pose less of a threat to the United States but cannot yet be repatriated.

The Conventions allow prisoners to be searched and weapons confiscated, but personal property must be returned to them once internment ends.[257] U.S. Army regulations require detainees to be searched for weapons and other contraband immediately after their capture, prior to a determination of the captive's status.

Repatriation

One argument advanced to support denying POW status to the detainees is that the United States would be required to return them to their countries of origin once hostilities cease. Some observers argue that this may not in practice be such an immediate requirement, and question whether hostilities will have ceased when U.S. troops have ceased combat operations in Afghanistan.

Under GPW art. 21, internment of POWs must cease when no longer necessary. According to GPW art. 118, repatriation must occur "without delay at the cessation

---

[253] GPW art. 42 provides:

> The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

[254] *Id*. art. 91-95.

[255] GPW art. 92; GC art. 120.

[256] GPW art. 25 provides:

> Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. The said conditions shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.
>
> The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.
>
> The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.

[257] *See* LEVIE, *supra* note 41, at 110.

of active hostilities." The language of the 1929 Geneva Convention was not as adamant, requiring only that parties should provide, in armistice agreements, for repatriation of prisoners to occur "with the least possible delay after cessation of hostilities."[258] However, there is an exception for prisoners who are charged with or have been convicted of an indictable crime.[259] There is also case law suggesting the obligation to repatriate is not automatic and immediate. The 9th Circuit declined to grant freedom to a POW captured in Italy during the Second World War, who sought release partly on the grounds that hostilities had ceased.[260] The court noted that no peace treaty had yet been negotiated between Italy and the United States, and was not swayed by the fact that Italy had by that time changed sides. It appears to have remained international state practice to provide for repatriation of prisoners of war by express agreement.[261]

Interned civilians must also be released "as soon as the reasons which necessitated [their] internment no longer exist,"[262] which will occur "as soon as possible after the close of hostilities."[263] There is an exception for internees against whom penal proceedings are pending or who have been convicted and sentenced for non-disciplinary offenses.[264] These internees may be detained "until the close of such proceedings and, if circumstances require, until the completion of the penalty."[265]

Right to Redress

The proper treatment of prisoners is the responsibility of the detaining power and the individuals directly responsible for their conditions. Mistreatment of prisoners of war may incur liability under both international norms and the UCMJ. It is possible that the refusal to hold tribunals to determine the legal status and rights of detainees may also contravene the law of war.[266] Detainees have the right to

---

[258] *See* 1929 Geneva Convention Relative to the Treatment of Prisoners of War art. 75, 47 Stat. 2021 (July 27, 1929).

[259] *See* GPW art. 119:

> Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence.

[260] *See In re* Territo, 156 F.2d 142 (9th Cir. 1946).

[261] *See, e.g.* POW DOCUMENTS, *supra* note 134, at 796, (noting that it took nearly two years after hostilities between Pakistan and India ended in 1971 before Pakistani prisoners of war were repatriated).

[262] GC art. 132.

[263] *Id.* art. 133.

[264] GC art. 133.

[265] *Id.*

[266] Failure to afford a prisoner a regular trial in accordance with the 1929 Geneva Convention resulted in some convictions by post-World War II tribunals. Japan, for example, adopted a policy proclaiming enemy airmen who participated in bombing raids

(continued...)

protest their treatment to the detaining power or to a neutral power or organization serving as the protecting power,[267] and may not be punished for having asserted a grievance, even where it is considered unfounded.[268] (In this case, the role of protector appears to be filled by the International Committee of the Red Cross.) Other signatory states are obligated to "ensure respect" for the Conventions "in all circumstances,"[269] meaning that other states may issue diplomatic challenges on behalf of the detainees, and may even find a cause of action in domestic courts to challenge the detention.[270]

While the detainees also have recourse to federal courts to challenge their detention,[271] the extent to which they may enforce their rights under the Geneva Conventions remains unclear. The Justice Department argues that *Rasul v. Bush* merely decided the issue of jurisdiction, but that the 1950 Supreme Court decision in *Johnson v. Eisentrager*[272] still limits the relief to which the detainees are entitled. The *Eisentrager* Court declined to consider whether the military commissions had lacked jurisdiction because they failed to accord rights guaranteed under the 1929 Geneva Convention on Prisoners of War, but this decision was based on its earlier interpretation that the relevant language in the 1929 Convention applied only to disciplinary offenses committed during captivity and not to pre-capture violations of

---

[266] (...continued)
against Japanese territory to be violators of the law of war and subject to execution. This "Enemy Airmen Act" resulted in the deaths of many captured American fliers after allegedly sham trials. *See* Trial of Lieutenant General Shigeru Sawada and Three Others, 5 LRTWC 1 (U.S. Military Commission, Shanghai 1946), *reprinted in* POW DOCUMENTS, *supra* note 134, doc. no. 78 (four Japanese officers convicted of denying fair trial to captured "Doolittle Raiders"); Trial of Lieutenant General Harukei Isayama and Seven Others, 5 LRTWC 60 (U.S. Military Commission, Shanghai 1946), *reprinted in* POW DOCUMENTS, *supra* note 134, doc. no. 82 (conviction for "permitting and participating in an illegal and false trial" of American POWs).

[267] GPW art. 78.

[268] *Id.*

[269] GPW art. 1.

[270] Such a suit was dismissed in Great Britain. *See* John Chapman, *'Taliban' Briton Loses His Court Bid*, DAILY EXPRESS (United Kingdom), Mar. 16, 2002, at 47. The mother of a British detainee brought a case claiming her son, one of the detainees held at Guantanamo Bay, has wrongly been denied POW status, was interrogated by British security services and has been denied legal representation. The High Court rejected the challenge as essentially a "political question," but criticized the United States' conduct with respect to the detainees. *See* Abbasi v. Sec'y of State, [2002] EWCA Civ 1598, *reprinted in* 42 I.L.M. 358 (2003).

[271] Rasul v. Bush, 124 S.Ct. 2686 (2004).

[272] 339 U.S. 763 (1950) (holding that the federal courts did not have jurisdiction to hear a petition on behalf of German citizens who had been convicted by U.S. military commissions in China because the writ of *habeas corpus* was not available to "enemy alien[s], who at no relevant time and in no stage of [their] captivity [have] been within [the court's] jurisdiction"). In two other cases, however, the Supreme Court agreed that federal courts have jurisdiction to hear *habeas* petitions by enemy combatants, although the petitioners eventually lost on the merits. *See Ex parte* Quirin, 317 U.S. 1 (1941); *In re* Yamashita, 327 U.S. 1 (1946).

the law of war.[273] The 1949 Geneva Convention, however, was drafted to clarify that it applies to trials for any offense, whether committed during or prior to internment.[274] The D.C. Circuit decision relies instead on a footnote from the *Eisentrager* opinion that expresses doubt that the Court could grant relief based directly on the 1929 Geneva Convention:

> We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929. 47 Stat. 2021, concluded . . . an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.[275]

Some district judges from the District Court for the District of Columbia reached contrasting conclusions with respect to the applicability of the Constitution and the enforceability of the Conventions, holding that detainees have the right to the assistance of an attorney[276] and that they have a right to be treated as POWs until a "competent tribunal" decides otherwise.[277] A panel of the D.C. Circuit Court of Appeals, however, agreed with the government, holding that the Geneva Conventions are not enforceable in U.S. court on behalf of detainees,[278] despite the Supreme Court's note in *Rasul* suggesting that the detainees had stated a claim under the *habeas* statute,[279] which statute had been interpreted by the *Eisentrager* Court to be inapplicable to the claims then at issue. The D.C. Circuit interpreted *Rasul* to apply to jurisdiction only, and not to imply that relief could necessarily be granted on such a claim.

The Supreme Court has granted *certiorari* in *Hamdan v. Rumsfeld* (05-184) to decide whether Congress authorized the President to try suspected terrorists by military commissions and whether detainees can assert rights under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch. However, if Congress passes the Graham

---

[273] 339 U.S. at 789-90 (citing *Ex parte* Quirin, 317 U.S. 1, 37 (1941); *In re* Yamashita, 327 U.S. 1 (1946)).

[274] *See* LEVIE, *supra* note 41, at 379-80.

[275] 339 U.S. at 789 n.14.

[276] Al Odah v. United States, No. CIV.A. 02-828(CKK) (D.D.C. Oct. 20, 2004).

[277] Hamdan v. Rumsfeld, 344 F.Supp.2d 152 (D.D.C. 2004); *rev'd* 413 F.3d 33 (D.C. Cir. 2005), *cert. granted* 2005 U.S. LEXIS 8222 (Nov. 7, 2005).

[278] 413 F.3d at 37 .

[279] *See Rasul* at 2698 (finding authority for federal court jurisdiction in 28 U.S.C. § 2241, which grants courts the authority to hear applications for habeas corpus "within their respective jurisdictions," by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States").

Amendment to the Senate Defense Appropriations bill (see *infra*), or any similar legislation to deny detainees the statutory right to petition for *habeas corpus*, the Court might lose jurisdiction to decide these issues.

Congress's Role

The Constitution provides Congress with ample authority to legislate the treatment of battlefield detainees in the custody of the U.S. military. The Constitution empowers Congress to make rules regarding capture on land or water,[280] to define and punish violations of international law,[281] and to make regulations to govern the armed forces.[282] Congress also has the constitutional prerogative to declare war,[283] a power it has not yet exercised with regard to the armed conflict in Afghanistan. By not declaring war, Congress has implicitly limited some presidential authorities.[284]

Despite the constitutional powers listed above, Congress has not generally taken an active rule in prescribing the treatment of prisoners of war. Existing statutes concerning enemy prisoners of war are limited to providing for the use of DOD funds to pay expenses incident to the maintenance, pay, and allowances of persons in custody of any military department,[285] to provide for the disposition of the remains of enemy prisoners of war and interned enemy aliens who die in the custody of a military department,[286] to penalize those who aid the escape of an enemy prisoner,[287] and to exempt prisoners of war from the entitlement to claim of compensation for injury or death resulting from war-risk hazard.[288] However, prisoners of war are covered under the jurisdiction of the Uniform Code of Military Justice (UCMJ).[289] The UCMJ does not indicate whether detainees who are determined not to be prisoners of war are covered.

The Administration has asserted that the war on terror is a new kind of conflict, requiring a new set of rules and definitions. It has been observed that the nature of the hostilities and U.S. objectives borrow some characteristics from the realm of law enforcement and others from a model based on conventional war. Consequently, the

---

[280] U.S. CONST. art. I, § 8, cl. 11

[281] *Id.* art. I, § 8, cl. 10.

[282] *Id.* art. I, § 8, cl. 14.

[283] *Id.* art. I, § 8, cl. 11.

[284] *See* CRS Report RL31133, *Declarations of War and Authorizations for the Use of Military Force: Background and Legal Implications*, by David Ackerman and Richard Grimmet.

[285] 10 U.S.C. § 956(5).

[286] 10 U.S.C. § 1483.

[287] 18 U.S.C. § 757.

[288] 42 U.S.C. § 1701.

[289] *See* 10 U.S.C. § 802(a)(9).

role of Congress might be seen as particularly important in providing a definition and a set of boundaries to shape how such a war is to be fought. Courts have not been receptive to the argument that the President has the inherent authority to determine how to pursue the war against terrorism. As detainees exercise their right under *Rasul v. Bush* to challenge their detention, Congress's role is likely to receive greater attention. If Congress decides to suspend the writ of *habeas corpus* with respect to the Guantánamo detainees, the broadest avenue for testing whether executive actions comply with congressional authorization will likely be at least partially blocked.

108th Congress

Several measures were introduced during the 108th Congress to address the detention of persons detained in connection with the war on terrorism. Legislation to authorize the President to convene military tribunals under certain circumstances was not enacted. However, the National Defense Authorization Act for FY2005, PL 108-375 (October 28, 2004) ("NDA") contains measures to ensure the proper treatment of all prisoners held in connection with the war on terrorism, including the prisoners in military custody at Guantanamo Bay.[290]

The NDA emphasizes that the policy of the United States is to ensure that no detainee in its custody is subjected to torture or cruel, inhuman, or degrading treatment, and to promptly investigate and prosecute instances of abuse, to ensure that U.S. personnel understand the applicable standards, to accord detainees whose status is in doubt the protection for prisoners of war under the Geneva Conventions, and to "expeditiously process and, if appropriate, prosecute detainees in the custody of the United States, including those in the custody of the United States Armed Forces at Guantanamo Bay, Cuba." (Sec. 1091). It also requires the military to implement, within 150 days of the passage of the act, a policy to ensure detainees are treated in accordance with the obligations set forth in section 1091, (Sec. 1092), and to submit copies of regulations to Congress along with a report setting forth steps taken to implement section 1092. (Sec. 1093). The NDA also requires DOD to submit an annual report giving notice of any investigation into any violation of laws regarding the treatment of detainees, aggregate data relating to the detention operations of the Department of Defense, including how many persons are held and in what status, and how many have been transferred to the jurisdiction of other countries. The NDA does not address the treatment of persons in custody of the CIA.

109th Congress

Two bills have been introduced to authorize the detention of enemy combatants. The Detention of Enemy Combatants Act (H.R. 1076) deals with U.S. citizens and resident aliens, and will not be further elaborated below.[291] The Guantanamo Detainees Procedures Act of 2005, H.R. 3038, affirms the President's

---

[290] For more information, see CRS Report RL32395, *U.S. Treatment of Prisoners in Iraq: Selected Legal Issues*, by Jennifer K. Elsea.

[291] For a discussion of H.R. 1076, see CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea.

authority to detain certain foreign nationals and prescribes procedural rules with respect to their detention and possible trial by military commission, apparently irrespective of where covered persons are captured or detained. Two bills would create an independent commission to investigate detainee abuse (H.R. 3003, S. 12, § 224). The House of Representatives passed a provision as part of its Defense Appropriations bill, H.R. 2863, that would "reaffirm[] that torture of prisoners of war and detainees is illegal and does not reflect the policies of the United States Government or the values of the people of the United States." (Sec. 9009) The Senate substituted its own version of H.R. 2863, which includes an amendment introduced by Senator McCain to require uniform standards for interrogation of persons in the custody of the Department of Defense,[292] and would expressly ban cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency.[293] The prohibited treatment is defined as that which would violate the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as the Senate has interpreted "cruel, inhuman, or degrading" treatment banned by the U.N. Convention Against Torture.[294] The provision would not create a cause of action for detainees to ask a court for relief based on inconsistent treatment. The Administration has reportedly sought to have the Central Intelligence Agency excepted from this provision on the grounds that "the president needed maximum flexibility in dealing with the global war on terrorism."[295] Senator McCain has criticized the Administration's proposal, arguing that an express CIA exemption could be interpreted as tantamount to statutory authority for the CIA to subject detainees to the treatment his amendment seeks to ban.[296]

The Senate approved amendments to its Defense Authorization bill (S. 1042, passed by roll call vote November 15, 2005), to require the Defense Department to adhere to the Army's interrogation manual and prohibit cruel, inhumane and degrading treatment of prisoners in U.S. custody no matter where they are held

---

[292] Section 8154 of H.R. 2863, as passed by the Senate, would require DoD to follow the Army Field Manual for intelligence interrogation. *See* DEPARTMENT OF THE ARMY FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (1992), *available at* [http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf] (Sep. 1, 2004). For an analysis of the approved interrogation procedures, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer Elsea.

[293] S.Amdt. 1977 to H.R. 2863 (October 5, 2005)(passed with a roll call vote of 90 yeas and 9 nays). *See* CRS Report RS22312, *Overview and Analysis of Senate Amendment Concerning Interrogation of Detainees*, by Lee Wood.

[294] H.R. 2863 § 8155. For more information, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

[295] *See* Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, Oct. 25, 2005, at 16.

[296] *See* Charlie Savage, *McCain Fights Exception to Torture Ban*, BOSTON GLOBE, Oct. 26, 2005, at A2.

(S.Amdt. 2425),[297] but rejected an amendment to establish an independent commission to investigate detainee abuse (S.Amdt. 1494).[298]

The Senate also voted to require the Defense Department to submit to the Armed Services and Judiciary Committees the procedural rules for determining detainees' status,[299] which would be required to preclude evidence determined by the board or tribunal to have been obtained by undue coercion (S.Amdt. 2516 to S. 1042, "the Graham Amendment").[300] The amendment would neither authorize nor require a formal status determination, but it would require that certain congressional committees be notified 30 days prior to the implementation of any changes to the rules. The Graham Amendment would also eliminate the federal courts' statutory jurisdiction over *habeas* claims by aliens detained at Guantanamo Bay, including those pending at the bill's enactment, but would provide for limited appeals of status determinations made pursuant to the DoD procedures for Combatant Status Review Tribunals (CSRTs).[301] The D.C. Circuit Court of Appeals would have exclusive jurisdiction to hear appeals of any status determination made by a "Designated Civilian Official," but the review would be limited to a consideration of whether the determination was made consistently with applicable DoD procedures, including whether it is supported by the preponderance of the evidence, but allowing a rebuttable presumption in favor of the government. The restriction on the use of evidence obtained through undue coercion applies prospectively only, and would be unavailable to detainees who have already been determined by CSRTs to be enemy combatants. Detainees could also appeal status determinations on the basis that "subjecting an alien enemy combatant to such standards and procedures is [in]consistent with the Constitution and laws of the United States." Jurisdiction would cease if the detainee is transferred from DoD custody.

The Graham Amendment does not elaborate on the role of the "Designated Civilian Official" whose decision may be appealed. As the CSRTs were initially established,[302] the final approval of CSRT decisions was the responsibility of the

---

[297] 151 CONG. REC. S12380 (daily ed. Nov. 4, 2005)(introduced by Sen. McCain, passed by voice vote). The amendment is identical to the amendment that add sections 8154 and 8155 to the Senate version of H.R. 2863.

[298] 151 CONG. REC. S8833 *et seq.* (daily ed. July 25, 2005).

[299] The amendment refers to both the Combatant Status Review Tribunals ("CSRTs"), the initial administrative procedure to confirm the detainees' status as enemy combatants, and the Administrative Review Boards, which were established to provide annual review that the detainees' continued detention is warranted.

[300] 151 CONG. REC. S12667 (daily ed. Nov. 10, 2005)(introduced by Sen. Graham, passed by roll call vote, 49 - 42), as amended by S.Amdt. 2524, 151 CONG. REC. S12771 (daily ed. Nov. 14, 2005).

[301] S.Amdt. 2516 to S. 1042, subsection (d). Sen. Bingaman's second-degree amendment to alter section (d) of S.Amdt. 2516 did not pass.

[302] Memorandum, Assistant Secretary of Defense Paul Wolfowitz for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (June 7, 2004), *available at* [http://www.defenselink.mil/news/Jul2004/d20040707review.pdf](last visited Nov. 12, (continued...)

convening authority,[303] and there was no mention of a "designated civilian official," although this might be a reference to the role of the Secretary of the Navy, to whom the order establishing CSRTs was addressed.[304] The procedures established by Secretary England refer to the position of Director, CSRT, who appears to be the convening authority for the tribunals.[305] At any rate, it does not appear that the Graham Amendment would give the D.C. Circuit Court of Appeals jurisdiction to review CSRT determinations that have not been made or approved by a civilian official who had been appointed with the advice and consent of the Senate. The amendment would not foreclose or limit any legal avenue other than *habeas corpus* that might be available to the detainees to seek relief.

The Graham Amendment would also provide for an appeal to the Court of Appeals for the District of Columbia Circuit of final sentences rendered by a military commission. The court would be required to review capital cases or cases in which the alien was sentenced to a term of imprisonment for 10 years or more, but could hear other cases at its discretion. The scope of review would be limited to considering whether the decision applied the correct standards consistent with Military Commission Order No. 1 (implementing the President's Military Order) and whether "subjecting an alien enemy combatant to such order is consistent with the Constitution and laws of the United States." The amendment does not contain a provision for interlocutory appeals of military commission procedures.

The Defense Authorization Act for FY2006 passed by the House of Representatives, H.R. 1815, does not contain any provisions pertaining to the status or treatment of detainees.

The White House has reportedly threatened to veto the bill if it includes measures that would impede the President's ability to conduct the war on terrorism.[306]

---

[302] (...continued)
2005).

[303] Rear Adm. James M. McGarrah currently serves as convening authority for the CSRTs, which have made determinations for all current detainees.

[304] *See id.* The Department of Defense appointed the Secretary of the Navy, Gordon England, to be the designated civilian official to operate and oversee the annual administrative review boards set up to determine the continued detention of persons affirmed by CSRTs to be enemy combatants at Guantanamo Bay Naval Base, Cuba. *See* Press Release, Department of Defense, Navy Secretary to Oversee Enemy Combatant Admin Review (June 23, 2004), *available at* [http://www.defenselink.mil/releases/2004/nr20040623-0932.html](last visited Nov. 12, 2005).

[305] *See* Memorandum, Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Station, Cuba, July 29, 2004, *available at* [http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf](last visited Nov. 12, 2005).

[306] Liz Sidoti, S*enators Press Bill On Detainee Rights*, PHILADELPHIA INQUIRER, July 26, (continued...)

H.R. 3038. The Guantanamo Detainees Procedures Act of 2005, H.R. 3038, would affirm the President's authority to detain as "unlawful combatants" foreign nationals who are accused of "planning, authorizing, committing, aiding, or abetting one or more terrorist acts against the United States" or of "being part of or supporting forces engaged in armed conflict against the United States." Persons detained as unlawful combatants or on a similar basis, apparently regardless of whether in military custody or the custody of another agency, would be entitled to receive a hearing, conducted by an active officer of one of the Courts of Criminal Appeals of the Armed Forces, within six months to challenge the basis for that detention. The hearing officer would have the authority to review detainees' status *de novo* and would have the power to grant relief. The detainee would have the right to have access to all evidence supporting his detention (but apparently not to exculpatory evidence). The detainee would be entitled to the opportunity to address the hearing officer, and would be provided an interpreter for that purpose.

Those detained under the procedures above would have to have a final disposition within two years after the government's initial decision to detain them, unless the Secretary of Defense certifies that the person would continue to pose a threat if repatriated or under other extraordinary circumstances. Possible dispositions would include repatriation to the governing authority of the territory where the detainee was captured or his state of nationality, unless there is a substantial risk that the person would be subjected to torture, or prosecution in an appropriate court, which could include federal district court, an international criminal tribunal, or an extraordinary tribunal authorized pursuant to section 5. The certification necessary to extend the time period for a disposition for renewable one-year periods would be required to include a detailed account of the factual basis for that determination, an unclassified version of which would be made available to the detainee. The United States Court of Appeals for the Armed Forces would be authorized to provide judicial review of a certification.

Section 5 of the bill would authorize the President to conduct "extraordinary tribunals," consisting of at least five members and a military judge, to try persons held as unlawful combatants for "violations of the law of war, international laws of armed conflict, and crimes against humanity targeted against United States persons or residents." The Secretary of Defense, in consultation with the Secretary of State and the Attorney General, would prescribe regulations for the tribunals' rules and procedures, which would be published in the Federal Register and reported to Congress. Section 6 provides that the rules must be designed to "ensure a full and fair hearing of the charges against the accused," and sets forth the minimum safeguards.[307]

---

[306] (...continued)
2005, at 1.

[307] Bills prescribing procedural rules for military commissions are discussed in CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, by Jennifer K. Elsea.

Finally, H.R. 3038 would require the Secretary of Defense to submit to Congress an annual report (unclassified, but with possible classified annexes) on persons detained as unlawful combatants, including their names and nationalities, the length of their detention and the results of proceedings required above. For detainees no longer in custody, the report would also include any terms or conditions of release, as well as a statement of the basis for the determination that release was warranted.

S. 12. The Targeting Terrorists More Effectively Act of 2005, S. 12, contains a provision to define U.S. policy with respect to detainees in the war against terrorism. Section 223 would express the sense of the Congress that, at a minimum, Common Article 3 of the Geneva Conventions applies to the war. The bill would expressly mandate that "no detainee shall be subject to torture or cruel, inhumane, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States." It would further state that the policy of the United States is to "avoid the indefinite detention of any individual in a manner which is contrary to the legal principles and security interests of the United States," and to treat all foreign persons in the custody of the United States "humanely and in accordance with the legal obligations under United States law and international law, including the obligations in the Convention Against Torture and in the minimum standards set forth in the Geneva Conventions." The bill would further proclaim as U.S. policy that "all officials of the United States are bound both in wartime and in peacetime by the legal prohibitions against torture, cruel, inhumane, or degrading treatment set out in the Constitution, laws, and treaties of the United States," that detainees are to be treated as POWs until a competent tribunal determines otherwise. It would also state U.S. policy to either provide detainees individualized hearings for the purpose of expeditiously holding detainees accountable for violations of the law of war or other crimes, or to expeditiously conduct intelligence debriefings of such detainees. The bill would require the Secretary of Defense to establish appropriate regulations and training programs, and to report information about detainees and their treatment to Congress.

Independent Commission Proposals. H.R. 3003 and section 224 of S. 12 are proposals to create an independent commission to investigate detainee abuse. **S. 12** would establish the National Commission To Review Policy Regarding the Treatment of Detainees to "examine and report upon the role of policymakers in the development of intelligence related to the treatment of individuals detained during Operation Iraqi Freedom or Operation Enduring Freedom . . . the impact of the abuse of prisoners by the United States personnel on the security of the Armed Forces of the United States . . . [and] to build upon the reviews of the policies of the United States related to the treatment of individuals detained by the United States, including such reviews conducted by the executive branch, Congress, or other entities." The Commission's 15 members would be appointed by the minority and majority leaders of both houses of Congress (three commission members each) as well as the Judge Advocates General of each of the Armed Forces (one member each). The Commission would investigate the detainee policy and its impact, whether and to what extent U.S. military leaders were given the opportunity to comment on and influence that policy, and would identify how the policy differs from prior policies and practices of the U.S. Armed Forces.

H.R. 3003 would establish the Independent Commission on the Investigation of Detainee Abuses to "conduct a full, complete, independent, and impartial investigation of the abuses of detainees in connection with Operation Iraqi Freedom, Operation Enduring Freedom, or any operation within the Global War on Terrorism." The Commission would be charged with assessing the extent of the abuses, why they occurred, who is responsible, whether any particular government policies, procedures, or decisions facilitated or failed to prevent the detainee abuses, and what legislative or executive actions should be taken to prevent future recurrences. The Commission would also identify which Guantanamo Detention Center policies influenced policies at the Abu Ghraib prison and other detention centers. H.R. 3003 would cover not only DOD policies and procedures, but would extend to the Department of State, Department of Justice, Central Intelligence Agency, National Security Council, and the White House. The Commission's ten members would be appointed by the President (one commission member), the majority and minority leaders of both houses of Congress (two members each), and by the minority leaders of the House and Senate together (one member). The Commission's final report would be due within 18 months after the bill's enactment.