

The Status of Detainees from the Iraq and Afghanistan Conflicts

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I. INTRODUCTION

On April 29, 2004, CBS 60 Minutes II horrified its viewers by showing photographs of prisoners in humiliating poses taken at the United States' Abu Ghraib prison in Iraq.¹ CBS relayed that the United States Army discharged from duty seventeen American soldiers, on charges of mistreating prisoners held at Abu Ghraib.² The world watched one more postwar American action in Iraq, disastrous by even the most optimistic accounts. High-ranking United States government officials expressed concern, disgust, and disappointment over the behavior of "a few bad apples" amidst the American soldiers.³

The exact reason for the prison abuse was unknown. The chain of causation leading to the abuse was unclear.⁴ Defense Secretary Donald

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¹CBS News, *Abuse of Iraqi POWs by GIs Probed*, at <http://www.cbsnews.com/> (Apr. 28, 2004).

²*Id.*

³*Id.* (quoting Brigadier General Mark Kimmitt as stating "[F]rankly, I think all of us are disappointed by the actions of the few. . . . Every day, we love our soldiers, but frankly, some days we're not always proud of our soldiers.").

⁴There have been several investigations of the Abu Ghraib scandal. The chain of causation has been identified differently in each of the reports. See Bradley Graham & Josh White, *Top Pentagon Leaders Faulted in Prison Abuse*, WASH. POST, Aug. 25, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A28862-2004Aug24.html>; see also ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 22-24 (2004) [hereinafter TAGUBA REPORT] (identifying as causative factor lack of standardization and accountability in specific units), http://www.npr.org/iraq/2004/prison_abuse_report.pdf (last visited May 8, 2005); INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 17 (2004) (suggesting serious leadership problem as cause for the prison abuse), <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf> (last visited May 8, 2005). See generally EXECUTIVE SUMMARY: INVESTIGATION OF INTELLIGENCE ACTIVITY AT ABU GHRAIB (2004) ("The abuses at Abu Ghraib primarily fall into two categories: a) intentional violent or sexual abuse and, b) abusive actions taken based on misinterpretations or confusion regarding law or policy. LTG Jones found that while senior level officers did not commit the abuse at Abu Ghraib they did bear responsibility for lack of oversight of the facility, failing to respond in a timely manner to the reports from the International Committee of the Red Cross and for issuing policy memos that failed to provide clear, consistent guidance for execution at the tactical level.").

Rumsfeld insisted that the pictures portrayed *abuse*, not *torture*⁵—an argument designed to remove the issue from the purview of the Geneva Conventions, which prohibit torture of prisoners of war.⁶ The Bush Administration asserted that it was unconnected with the abuse.⁷ Officials merely acknowledged that the failure of internal management led to the misbehavior of a rogue few.⁸ The media, however, released photographs of abuse by members of different battalions of soldiers, thereby implying that the abuse was not limited to a few.⁹ Moreover, critics pointed out that the photographs showed that soldiers had adopted detention techniques previously used during the World Wars.¹⁰ Lawyers representing military personnel accused of the abuse argued that the poses depicted in the photographs were stage managed, or alternatively, that the soldiers were following orders, thus suggesting that the abuse was known to, or authorized by, higher-ranking United States officers or intelligence operatives.¹¹ Other allegations include an argument that the allegedly abusive methods were already used in Guantanamo Bay, Cuba and that the success of those methods at extracting intelligence prompted its use in Abu Ghraib.¹²

http://www.washingtonpost.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf (last visited May 8, 2005).

⁵See Donald H. Rumsfeld, Defense Department Operational Update Briefing (May 4, 2004), at <http://www.defenselink.mil/transcripts/2004/tr20040504-secdef1423.html> (last visited May 8, 2005).

⁶There are four Geneva Conventions relating either to the conduct of war or to standards of human rights. The Geneva Conventions were signed on August 12, 1949, and the two additional Protocols were signed on June 8, 1977. This paper concentrates particularly on the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Convention III]; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Convention IV]; and the Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter FAP].

⁷*First Court-Martial in Iraqi Prisoner Abuse Scandal Draws Maximum Penalty for Sivits*, (CNN television broadcast, May 19, 2004) (transcript available at <http://www.cnn.com/TRANSCRIPTS/040519/lt.03.html>). The Administration wanted the world—especially a numbed Arab world—to watch its justice and democracy in action.

⁸Bradley Graham, *Army Investigates Wider Iraq Offenses: Cases Include Deaths, Assaults Outside Prisons*, WASH. POST, June 1, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A4807-2004May31.html>.

⁹John Barry et al., *Abu Ghraib and Beyond*, NEWSWEEK, May 17, 2004, at 30, available at <http://msnbc.msn.com/id/4934436/site/newsweek>.

¹⁰See Julie Scelfo & Rod Nordland, *Beneath the Hoods*, NEWSWEEK, July 19, 2004, at 41, available at <http://msnbc.msn.com/id/5412316/site/newsweek>. This Newsweek article shows a picture that is widely known as the “Statue of Liberty” in Iraq. *Id.*

¹¹BBC News, *Iraq Abuse ‘Ordered From the Top,’* at <http://news.bbc.co.uk/2/hi/americas/3806713.stm> (last updated June 15, 2004).

¹²See John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004 (“Ultimately, what was developed at Gitmo was a ‘72-point matrix for stress and duress,’ which laid out types of coercion and the escalating levels at which they could be applied. These included the use of harsh heat or cold; withholding food; hooding for days at a time; naked isolation in cold, dark cells for more than 30 days, and threatening (but not biting) by dogs. It also permitted limited

Thus, the U.S. Army commenced an investigation of the treatment of prisoners.¹³

The questionable treatment of the prisoners at Abu Ghraib served as the impetus for renewed analysis of the applicability of the Geneva Conventions to determine the status of detainees held at Guantanamo Bay and in Iraq.¹⁴ The Geneva Conventions consist of international treaties and protocols outlining the rules governing the status and treatment of prisoners in a conflict.¹⁵ The Geneva Conventions, being codifications of principles of customary international law, enjoy near-universal adoption by nations. The United States military, which has followed customary international law for over one hundred years, has a tradition of adherence to the Geneva Conventions.¹⁶ The Bush Administration, however, expressed concern as to whether “prisoners of the war on terror” from both the Afghanistan and Iraq conflicts were eligible for protections under the Geneva Conventions.¹⁷ The Administration argued that

use of ‘stress positions’ designed to subject detainees to rising levels of pain.”) <http://www.msnbc.msn.com/id/4989438/site/newsweek>; Defense Secretary Donald Rumsfeld, *GTMO Interrogation Techniques*, Dec. 2003, reprinted in WASH. POST, June 23, 2004, at A14; Memorandum from Donald Rumsfeld, Secretary of Defense, to Commander, USSOUTHCOM (Jan. 15, 2003) (rescinding previous approval of one Category III technique for interrogating prisoners at Guantanamo Bay, Cuba), available at <http://news.findlaw.com/hdocs/docs/dod/rums11503mem.pdf> (last visited May 8, 2005).

¹³John Diamond & Tom Squitieri, *Furor over Abuse Expands at Home and Abroad*, USA TODAY, May 3, 2004, http://www.usatoday.com/news/world/iraq/2004-05-03-us-prisoners_x.htm (last updated May 6, 2004).

¹⁴*Military Officials Scrutinize Guantanamo Bay for Abuse*, COLUM. DAILY TRIB., May 24, 2004, <http://www.showmenews.com/2004/May/20040524News021.asp>; see also Graham & White, *supra* note 4 (citing some investigations).

¹⁵See François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT’L L. 191, 192–94 (2004). The International Committee of the Red Cross (“ICRC”) has been the main driving force behind the development of international humanitarian law for 140 years. *Id.* The ICRC’s initiatives led to the adoption of the original “Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864,” “an instrument that is the starting point of contemporary international humanitarian law and a landmark in the development of public international law; it was the ICRC that laid the groundwork for the subsequent developments of that law.” *Id.* Further, the Diplomatic Conferences held in 1949 revised the 1864 Convention and adopted the four Geneva Conventions. *Id.* The First Geneva Convention addresses the “Wounded and Sick in Armed Forces in the Field”; the Second Geneva Convention extends protection to the naval forces; the Third Geneva Convention details the rules relating to “Treatment of Prisoners of War”; and the Fourth Geneva Convention protects civilian population during war times. *Id.* In 1977, a diplomatic conference of adopted the Protocols additional to the 1949 Conventions. *Id.*; see also Soc’y of Prof. Journalists, *Reference Guide to the Geneva Conventions*, at <http://www.genevaconventions.org> (last visited May 8, 2005) (containing text and historic discussion of Conventions).

¹⁶See, e.g., Bryan Whitman, Briefing on Geneva Convention, EPW’s and War Crimes (Apr. 7, 2003), http://www.dod.mil/transcripts/2003/t04072003_t407genv.html (implying that United States has traditionally adhered to international law).

¹⁷For example, the United States categorized the captured al-Qaeda and Taliban prisoners as “unlawful combatants” falling outside the protections of the Third Geneva Convention, but nevertheless vowed to treat them humanely. See Memorandum from the White House on the

the nature of the enemy involved in the war justified categorizing al-Qaeda and the Taliban prisoners as ‘unlawful combatants not eligible for protection’ under the Geneva Conventions.¹⁸ Such interpretation provided the Administration with unrestricted means to obtain information from the detainees.

As for prisoners captured in the war in Iraq, the Administration indicated that they belonged to a class different from that of the al-Qaeda insurgents, but left the categorization ambiguous. Thus, when the Red Cross presented the U.S. military a detailed catalog of abuses at the Abu Ghraib prison, the military allegedly asserted “that many Iraqi prisoners were not entitled to the full protections of the Geneva Conventions.”¹⁹ The United States based its invasion of Iraq on, among other things, the presence of hidden weapons of mass destruction (“WMDs”) that posed a national security threat.²⁰ Hence, information on the presence of hidden WMDs from the prisoners was widely acknowledged as having a direct political relevance because it could justify—in an election year—President Bush’s decision to invade Iraq.²¹

Humane Treatment of al-Qaeda and Taliban Detainees, to the Vice President et al. (Feb. 7, 2002) [hereinafter Memorandum on Humane Treatment] (“I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party”), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>; see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L L. 461, 477 (2002) (explaining position of Bush Administration).

¹⁸See Barry et al., *supra* note 9; see also Memorandum from Secretary of Defense, to Joint Chief of Staff, on Status of Taliban and al-Qaeda (Jan. 19, 2002) [hereinafter Taliban and al-Qaeda Memo], available at <http://news.findlaw.com/hdocs/docs/dod/62204index.html> (last visited May 8, 2005). See generally Memorandum from Alberto R. Gonzales, to the President, on Decision on Application of the Geneva Convention on Prisoners of War from Taliban and al-Qaeda (Jan. 25, 2002) [hereinafter Gonzales Memorandum] (outlining implications of enemy combatant declaration), available at <http://msnbc.msn.com/id/4999148/site/newsweek/>.

¹⁹Douglas Jehl & Neil A. Lewis, *U.S. Disputed Protected Status of Iraq Inmates*, N.Y. TIMES, May 23, 2004, <http://www.nytimes.com/2004/05/23/international/middleeast/23IRAQ.html>.

²⁰See President George W. Bush, State of the Union Address (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>. In his speech, President Bush said:

Twelve years ago, Saddam Hussein faced the prospect of being the last casualty in a war he had started and lost. To spare himself, he agreed to disarm of all weapons of mass destruction. For the next 12 years, he systematically violated that agreement. He pursued chemical, biological, and nuclear weapons, even while inspectors were in his country. Nothing to date has restrained him from his pursuit of these weapons—not economic sanctions, not isolation from the civilized world, not even cruise missile strikes on his military facilities.

Id.

²¹Barry et al., *supra* note 12 (“[A]nd Rumsfeld was getting impatient about the poor quality of the intelligence coming out of there. He wanted to know: Where was Saddam? Where were the WMD? Most immediately: Why weren’t U.S. troops catching or forestalling the gangs

The advantage of easy access to information notwithstanding, this Article is premised on the idea that the exceptions created by the United States to the applicability of the Geneva Conventions may be detrimental to the interests of United States military personnel in future conflicts. Moreover, if the United States shirks from or misinterprets international legal principles, it leaves the forum open for other nations—like Israel or India, for example—to avoid their responsibilities under international law against Palestine or Pakistan respectively.²² The future course of international law will be impacted by the United States' ability to adhere to international treaties to which it is a signatory. Hence, the current administration bears a responsibility to avoid unwisely stretching, distorting, or avoiding the principles of international law for short-term gain in a manner that jeopardizes long-term sustainable policy. The United States should be wary of creating a dangerous precedent—not only for the world, but for itself. With this background, this Article focuses on the legal status of the detainees from Afghanistan and Iraq under the Geneva Conventions. Secondly, this Article reviews the applicability of the Convention on Torture.

Part II of this Article examines the Geneva Conventions and their applicability to the war on terror. Part III discusses the status, under the Geneva Conventions, of the detainees of the war on terror. Part IV discusses the restrictions against torture under the Geneva Convention and the Convention on Torture. Part V analyzes whether the United States' alleged treatment of detainees of the war on terror violates the Geneva Conventions, the Convention on Torture, and customary international law. While hindsight is 20/20, the Article concludes that the United States should have capitalized on the tremendous worldwide goodwill established after 9/11²³ to advocate exceptions to the Geneva Conventions' proscriptions on torture of alleged terrorists, such as those advocated by Professor Dershowitz.²⁴ Instead, the United States threatens not only to jeopardize respect for the international rule of law, but to reduce its standing in the international community and to endanger its own military personnel captured by an enemy in future conflicts.

planting improvised explosive devices by the roads? Rumsfeld pointed out that Gitmo was producing good intel.”).

²²See Joshua S. Clover, Comment, “Remember, We’re The Good Guys”: *The Classification and Trial of the Guantanamo Bay Detainees*, 45 S. TEX. L. REV. 351, 353 (2004); see also Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 176 (2004) (arguing that doctrine of preemptive self-defense may enable India to justify attack on Pakistan).

²³“9/11” refers to the events of September 11, 2001, when airplanes were hijacked and used to destroy the World Trade Center in New York and to damage the Pentagon in Washington, D.C. See Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead: Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A14035-2001Sep11.html>.

²⁴See generally ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 131–63 (2002) (discussing proposals for limited use of torture in “ticking bomb terrorist” scenarios). The authors do not believe that torture should be justified or excused in any circumstance.

II. THE GENEVA CONVENTIONS AND THEIR APPLICABILITY TO THE WAR ON TERROR

The laws of occupation are found principally in three sources. The Hague Regulations of 1907,²⁵ which have the status of international customary law; the Geneva Conventions of 1949;²⁶ and the Additional Protocols to the Convention,²⁷ adopted in 1977, which codify the principles of customary international law on the subject.²⁸ The term “Geneva Convention” refers to a set of four Conventions and two Protocols concerning various wartime protections.²⁹ The most relevant Conventions for this study are the Third Geneva Convention,³⁰ which focuses on the treatment of prisoners of war; the Fourth Geneva Convention,³¹ concerning protections for civilians during war; and the First Additional Protocol, which covers the protection of victims of international armed conflicts.³²

All concerned countries are signatories of Conventions III and IV. In 1956, Iraq acceded and Afghanistan ratified both Conventions.³³ The United Kingdom and the United States—the two occupying powers of Iraq, as defined in the Geneva Conventions³⁴—ratified the Conventions in the years 1957 and 1955, respectively.³⁵ Thus, Conventions III and IV apply to the issues arising from the American war on terror, which is primarily fought in Afghanistan and Iraq.³⁶ The United Kingdom is the only principal occupying country that has

²⁵Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371.

²⁶Convention IV, *supra* note 6.

²⁷FAP, *supra* note 6.

²⁸Robbie Sabel, *The Problematic Fourth Geneva Convention: Rethinking the International Law of Occupation*, at <http://jurist.law.pitt.edu/forum/forumnew120.php> (July 16, 2003).

²⁹The idea of an international treaty to protect medical personnel is attributed to Henry Dunant, a Swiss businessman who traveled to Lombardy to meet with Napoleon III to obtain an agricultural estate in Algeria. Upon arrival, Dunant encountered soldiers of different nationalities wounded in the battle of Solferino. Dunant, in a book called *A Memory of Solferino*, proposed that states establish relief societies to assist their armed forces’ medical services and that states fashion an international agreement recognizing a legal basis for the protection of medical personnel. Inspired by Dunant’s writing on the mitigation of suffering during war, the Swiss government formed a committee that later became known as the International Committee of the Red Cross (“ICRC”). See Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59, 66 (2003) (detailing history of Geneva Convention and birth of law of war in United States).

³⁰Convention III, *supra* note 6.

³¹Convention IV, *supra* note 6.

³²FAP, *supra* note 6.

³³See Int’l Comm. of the Red Cross, *States Party to the Geneva Conventions and Their Additional Protocols*, at 2, 4 <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList103/77EA1BDEE20B4CCDC1256B6600595596> (Apr. 12, 2005).

³⁴*Id.* at 7.

³⁵*Id.*

³⁶*Id.*

ratified the first Additional Protocol.³⁷ Considering, however, that the Geneva Conventions and its protocols are mere extractions of the customary rules of the international law of war, the provisions of the Protocols are applicable to all parties in a general manner.³⁸

A. Whether the Geneva Convention Applies to the War on Terror

The application of the Geneva Conventions determines the status and treatment meted out to detainees of war. The Geneva Convention:

shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.³⁹

Thus, the Conventions become applicable if: (a) there is a declared war (irrespective of High Contracting Parties); (b) armed conflicts arise between two or more High Contracting Parties; or (c) there is a partial or total occupation of the territory of a High Contracting Party.

On a general note, the United States clearly and specifically declared “war” on both Afghanistan and Iraq.⁴⁰ There have been few, if any, instances of the Administration referring to the conflict in both nations as anything other than “war.” Standing alone, the declaration of war per se justifies the application of the Geneva Convention to both conflicts.

1. Iraq

The Geneva Conventions should apply to the situation in Iraq because the United States is an “occupying power” in Iraq, and Iraq is another High

³⁷See *id.* Iraq, Afghanistan, and the United States have not endorsed this protocol.

³⁸Robert Kogod Goldman, *The Legal Status of Iraqi and Foreign Combatants Captured by Coalition Armed Forces*, at <http://www.crimesofwar.org/special/Iraq/news-iraq4.html> (Apr. 7, 2003); see also Sabel, *supra* note 28.

³⁹See Convention III, *supra* note 6, art. 2, at 3318.

⁴⁰See Mofidi & Eckert, *supra* note 29, at 84 (arguing that President Bush adopted Restatement position that is based on “the Estrada doctrine, which obviates recognition of new governments, even those that come to power through extra-constitutional means as the Taliban did”); CNN, *Afghanistan Wakes After Night of Intense Bombing*, at <http://archives.cnn.com/2001/US/10/07/gen.america.under.attack/> (Oct. 7, 2001); CNN, *Bush Declares War*, at <http://www.cnn.com/2003/US/03/19/sprj.irq.int.bush.transcript/index.html> (Mar. 19, 2003). *But see* Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1340 n.20 (2004) (arguing that conflict with Afghanistan is not war despite Bush Administration’s categorization).

Contracting Party. United Nations Security Council Resolution 1483, issued in May of 2003, noted that the United States and the United Kingdom shared “responsibilities[] and obligations . . . as occupying powers” in Iraq.⁴¹ The Security Council specifically called upon all concerned states “to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”⁴² Neither the United States nor the United Kingdom objected to such compliance, thus lending credence to arguments that the Geneva Convention applies to the conflict and subsequent occupation of Iraq.

The United States, however, must clarify its position concerning the applicability of the Geneva Conventions to the conflict and subsequent occupation of Iraq.⁴³ For example, the occupation of Iraq began without a clear mandate from the U.N. Security Council,⁴⁴ and the United States did not establish clearly the reasons for its actions in Iraq. The Bush Administration invaded Iraq based on the “doctrine of preemptive force,” which can be interpreted as a clear rejection of customary international laws, including the Geneva Conventions.⁴⁵ Accordingly, the international community may question the legitimacy of the United States’ actions in Iraq.⁴⁶ The international community may view the United States’ invasion and occupation of Iraq as being prompted by a desire for oil, aggression against Muslims, or even as President Bush’s personal vendetta against Saddam Hussein.⁴⁷ Arguments by the United States that the Geneva Convention does not apply to suspected insurgents may lend more credence to some or more of these arguments. Nonetheless, the progress of the war in Iraq has established the benefits of broad international support,⁴⁸ and as time goes on, the United States will find it harder to dismiss the applicability of the Geneva Convention to the war in Iraq.

⁴¹S.C. Res. 1483, U.N. SCOR, 4761st mtg., at 2, U.N. Doc. S/Res/1483 (2003), *available at* http://www.un.org/Docs/sc/unsc_resolutions03.html (last visited May 8, 2005); *see also* Convention III, *supra* note 6, art 3, at 3318–19 (discussing application of Geneva Convention in cases of occupation of territory of contracting party).

⁴²S.C. Res. 1483, *supra* note 41, at 2.

⁴³*But see* Sabel, *supra* note 28 (discussing application of Convention IV to conflict in Iraq).

⁴⁴*See* Murphy, *supra* note 22, at 175–76.

⁴⁵*See* Mary Ellen O’Connell, *The Occupation of Iraq: What International Law Requires Now*, at <http://jurist.law.pitt.edu/forum/forumnew107.php> (Apr. 17, 2003).

⁴⁶*See The Weapons that Weren’t: How the Americans and British Got It So Wrong*, *ECONOMIST*, July 15, 2004, at 23; *see also The More Deceived?*, *ECONOMIST*, Oct. 4, 2003, at 24.

⁴⁷*See generally* Mary Ellen O’Connell, OCCUPATION FAILURES AND LEGALITY OF ARMED CONFLICT: THE CASE OF IRAQI CULTURAL PROPERTY (Ohio State Univ. Moritz College of Law, Working Paper No. 6, 2004) (analyzing whether means other than force could have been used to achieve American agenda in Iraq), *available at* <http://law.bepress.com/osulwps/moritzlaw/art6/> (Dec. 27, 2004).

⁴⁸*See, e.g.*, Associated Press, *Bush Calls for International Support for Iraq*, *BOSTON HERALD*, June 26, 2004 (explaining that President Bush asked international community to help control Iraq) <http://news.bostonherald.com/national/view.bg?articleid=33433&format=>; *see also*

2. Afghanistan

Both inside and outside the United States, people perceived the conflict initiated by the United States in Afghanistan as a counterattack to the events of 9/11, but in the nature of war. The Bush Administration portrayed the conflict as a single mission consisting of two objectives: to replace Afghanistan's Taliban regime and to capture Osama Bin Laden, a militant harbored by the Taliban.⁴⁹ The Administration questioned the applicability of the Geneva Convention to the war in Afghanistan on the basis that the war was not waged between two High Contracting Parties.⁵⁰ A White House Memo signed by Alberto Gonzales, reflecting the opinion of the Office of the Legal Counsel of the Department of Justice, argues that the war in Afghanistan is not between two High Contracting Parties because the Taliban (a) "did not exercise full control over the territory and people" of Afghanistan;⁵¹ (b) "was not recognized by the international community";⁵² (c) was incapable "of fulfilling its international obligations";⁵³ and (d) was "not a government but a militant, terrorist-like group."⁵⁴ Similarly, a memo written by former Secretary of State Colin Powell refers to the "failed state" theory⁵⁵ to argue that the war in Afghanistan does not fall within the Geneva Convention.⁵⁶

CNN, *Bush Asks EU Leaders to Support New Iraqi Government*, at <http://www.cnn.com/2004/WORLD/europe/06/26/ireland.bush/> (June 26, 2004).

⁴⁹See Mofidi & Eckert, *supra* note 29, at 83 ("The Bush Administration has distinguished between the Taliban and al-Qaeda prisoners. The Bush Administration has justified this distinction based on the Taliban's status as the de facto government of Afghanistan.").

⁵⁰See Memorandum on Humane Treatment, *supra* note 17, at 1; *see also* Gonzales Memorandum, *supra* note 18, at 1 (justifying previous decisions regarding prisoners of war). *See generally* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales and William J. Haynes II, on Application of Treaties and Laws to al-Qaeda and Taliban Detainees (Jan. 22, 2002) [hereinafter Bybee January Memorandum] (discussing application of treaties and laws to detainees), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

⁵¹See Gonzales Memorandum, *supra* note 18, at 1.

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* The United States has also argued that since the Taliban and al-Qaeda are not High Contracting Parties, they are not subject to Common Article 2 of the Geneva Conventions. Hence, article 4 of Convention III, which defines prisoners of war, does not apply to those captured in Afghanistan. *See generally* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, on the Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949, at 2 (Feb. 7, 2002) [hereinafter Bybee February Memorandum] (arguing that tribunal need be established only in event that status of combatants becomes "doubtful"), *available at* <http://news.findlaw.com/hdocs/docs/torture/bybee20702mem.html>.

⁵⁵See Memorandum from Colin L. Powell, Secretary of State, to Counsel to the President, on the Applicability of the Geneva Conventions to the Conflict in Afghanistan 1 (Jan. 25, 2002) [hereinafter Powell Memorandum], *available at* http://www.adamhodes.com/WORLD/docs/powell_memo.pdf; *see also* Bybee January Memorandum, *supra* note 50, at 11 (explaining reasons for categorizing Afghanistan as failed

The Administration's arguments emphasize the Taliban's lack of international recognition as a High Contracting Party even though close allies of the United States, such as Pakistan, the Kingdom of Saudi Arabia, and the United Arab Emirates, have accorded such recognition.⁵⁷ Further, the presence of an alternate regime in Afghanistan, even if deposed, may have given more credibility to the Administration's argument that the Taliban is a militant organization and not a High Contracting Party. From 1996 to 2001, Afghanistan was not ruled by any sovereign authority.⁵⁸ If the Taliban was categorized as a militant regime and not a government, the United Nations and the rest of the members of the Security Council would need to explain why adequate action was not taken to establish a proper form of governance during this period. It is, after all, the duty of the Security Council to "maint[ain] international peace" under Article 24 of the U.N. Charter.⁵⁹ The United Nations recognized and acted upon its Article 24 duty when Saddam Hussein invaded Kuwait.⁶⁰ Then, the United States, as a responsible member of the Security Council, assisted the United Nations' efforts to restore Kuwait's sovereignty.⁶¹ Similarly, in 1992, the United Nations protected Afghanistan's deposed ruler Najeebullaah when the Mujahideen took over Afghanistan.⁶² Logically, the United Nations should have taken similar steps when the Taliban took over Afghanistan by replacing the then-elected government of Burhannudin Rabbani.⁶³ Instead, the Taliban came into power and remained in power with huge support from Pakistan—a government recognized by the United States as a *close* ally.⁶⁴ The minimal interference by the United Nations when the Taliban took over from Rabbani leads to the conclusion that the

state). The memorandum examines the traditional indicia of statehood and argues, among other things, that the Taliban lacked an organized form of government, did not control clearly defined territory or population, never intended to carry out their international obligations, and merely exhibited characteristics of a criminal gang. *Id.* The memorandum further argues that the material breach of international treaties justifies the categorization of the Taliban as a "failed state" under international law. *Id.*

⁵⁶See Powell Memorandum, *supra* note 55, at 2.

⁵⁷Clover, *supra* note 22, at 359. *But see* Bybee January Memorandum, *supra* note 50, at 21. The memorandum advances the failed state theory on the basis that the government of the Taliban lacked international recognition. *Id.* The memorandum emphasizes the withdrawal of such recognition by Pakistan, just days before the launch of the counter attack, to substantiate the lack of recognition. *Id.*

⁵⁸Afghanistan Online, *Chronological History of Afghanistan*, at <http://www.afghan-web.com/history/chron/index4.html> (last updated Apr. 10, 2005).

⁵⁹See U.N. CHARTER art. 24, available at <http://www.un.org/aboutun/charter/> (last visited May 8, 2005).

⁶⁰See CNN, *Strike on Iraq: The Persian Gulf War*, at <http://www.cnn.com/SPECIALS/1998/iraq/9802/gulf.war.recap/prelude/> (last visited May 8, 2005).

⁶¹*Id.*

⁶²See Afghanistan Online, *supra* note 58.

⁶³Lawrence Azubuike, *Status of the Taliban and al-Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127, 133 (2003) (discussing history of Afghanistan).

⁶⁴*Id.*

international community may not have considered the Taliban as an ally, but nevertheless treated it as a High Contracting party.

The invasion of Afghanistan was approved by the United Nations by treating the Taliban as Afghanistan's ruling government.⁶⁵ That the United Nations approved the use of force by treating the invasion as a conflict between two nations suggests that the conflict is a "war" under the Geneva Conventions.⁶⁶ Moreover, despite discussing "international terrorism," the relevant Security Council Resolution does not indicate that the Taliban regime was, itself, considered to be an international terrorist organization.⁶⁷ Also, the Preamble of another Security Council Resolution, dated November 14, 2001, states the following:

Condemning the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the al-Qaeda network and other terrorist groups and for providing safe haven to Usama Bin Laden, al-Qaeda and others associated with them, and in this context supporting the efforts of the Afghan people to replace the Taliban regime⁶⁸

The Preamble notes that the ruling Taliban allowed Afghanistan to be used as a base for the al-Qaeda terrorist network; it identifies al-Qaeda alone as the terrorist network. Elsewhere, the paragraph outlines the United Nations' commitment to "the efforts of the Afghan people to replace the Taliban regime"⁶⁹ Thus, the wording establishes the construct of war by treating the Taliban as the ruling government.⁷⁰

The United States, however, may prefer to construe its role as supporting a national movement among Afghans to overthrow the Taliban. The Administration may choose to interpret its role as "help[ing] the people of Afghanistan" to replace the Taliban in order to establish democracy, "lasting peace, stability, and respect for human rights."⁷¹ Even this argument, however, may be inadequate to argue that the conflict between the United States and Afghanistan falls outside the purview of the Geneva Convention since conflicts

⁶⁵See S.C. Res. 1378, U.N. SCOR, 4415th mtg., at 1-2, U.N. Doc S/RES/1378 (2001) [hereinafter Resolution 1378], available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited May 8, 2005).

⁶⁶See Azubuike, *supra* note 63, at 134 (discussing relevant U.N. Resolutions).

⁶⁷See S.C. Res. 1373, U.N. SCOR, 4385th mtg., at 1, U.N. Doc S/RES/1373 (2001), available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited May 8, 2005); see also Resolution 1378, *supra* note 65, at 1-2.

⁶⁸See Resolution.1378, *supra* note 65, at 1-2.

⁶⁹*Id.*

⁷⁰Clover, *supra* note 22, at 366 (stating that "while perhaps not formally recognized, the Taliban governed Afghanistan at the time of the Guantanamo detainees' capture" as reason for granting Taliban prisoners status of POWs).

⁷¹See S.C. Res. 1383, U.N. SCOR, 4434th mtg., at 1, U.N. Doc S/RES/1383 (2001), available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited May 8, 2005).

“not of an international character” is governed by article 3 of Convention III. Then, Article 3, not Article 2, of Convention III may become applicable.⁷² Article 3 of Convention III includes conflicts “not of an international character” within the Geneva Convention protections.⁷³ The United States, however, may seek to limit Article 3’s application to internal conflicts that lack international involvement, like civil wars. Thus, the United States may argue that no provision of the Geneva Convention directly addresses the situation in Afghanistan.⁷⁴ Instead, the United States may want to characterize the situation as a conflict as between itself and al-Qaeda. Such a characterization, however, does not account for the United States’ stated intention to take action against then leader of the Taliban, Mulla Omar.⁷⁵

When in response to the attacks on 9/11, President Bush decided to place the United States in a state of armed conflict against Afghanistan, he decided to wage “war.”⁷⁶ The Administration’s Deputy Assistant Attorney General has defended the categorization of the conflict as war by arguing that as a matter of domestic law, the President’s finding settles the question whether the United States is at war.⁷⁷ In *The Prize Cases*,⁷⁸ the Supreme Court explained that the President had the authority to determine when a state of war existed.⁷⁹ In the case of Afghanistan, the Administration has repeatedly emphasized the nature of the conflict as “war.” Moreover, critics have argued that not conferring the status of “war” to the Afghan conflict may be detrimental to the United States because it would exempt terrorists from established international rules and conventions.⁸⁰ Thus, in the context of international practices and the

⁷²See Convention III, *supra* note 6, art. 3, at 3318–20.

⁷³*Id.* at 3318; see also John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207, 214 (2003) (explaining when Geneva Conventions do not apply to conflicts).

⁷⁴Bybee February Memorandum, *supra* note 54, at 4 (arguing that war in Afghanistan does not fit within any categories described in Common Article 3).

⁷⁵See *Marines Comb the Taliban Complex: Mullah Omar Is Believed to Be Hiding Nearby*, S.F. CHRON., Jan. 2, 2002, at A6, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2002/01/02/MN71595.DTL>. But see Bybee February Memorandum, *supra* note 54, at 4 (arguing that Taliban lacks proper command and that members functioned more as militia). Although militia members fall within the ambit of the Geneva Convention, the Bybee memo argues that the lack of a proper commander results in the Taliban falling outside the definition of “prisoner of war.” *Id.*

⁷⁶See Mofidi & Eckert, *supra* note 29, at 73–74 (highlighting that President Bush categorized conflict in Afghanistan as war).

⁷⁷See Letter from John C. Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Yoo Letter], available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html> (last visited May 8, 2005).

⁷⁸The Prize Cases, 67 U.S. 635, 665–66 (1862). But see Nicholas A. Kacprowski, *Stacking the Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government’s Power to Indefinitely Detain United States Citizens as Enemy Combatants*, 26 SEATTLE U. L. REV. 651, 658–59 (2003) (arguing that *The Prize Cases* do not apply).

⁷⁹*The Prize Cases*, 67 U.S. at 670; see also Yoo & Ho, *supra* note 73, at 211. Although Yoo and Ho’s article states that it is their personal opinion, the government finally adopted the opinion. *Id.*

⁸⁰Yoo & Ho, *supra* note 73, at 215.

declaration of war by the United States against Afghanistan, arguments that the conflict in Afghanistan falls outside the purview of the Geneva Convention remain unpersuasive. Even within the Bush Administration, different entities have offered conflicting views. The Secretary of State in a memorandum offers an alternate argument that the Convention applies to the Taliban and the war in Afghanistan.⁸¹ A Working Group Report classified by the Pentagon, however, argues that the Convention may be inapplicable to the Taliban.⁸²

Notwithstanding the applicability of Convention III, the war in Afghanistan may still fall within the Geneva Conventions under the First Additional Protocol (“FAP”). Under the FAP, the Conventions apply in situations of “armed conflicts which peoples are fighting against . . . alien occupation.”⁸³ The FAP is a codified version of the customary rules of international law and cannot be dismissed from the conflict in Afghanistan.

B. Who Are “Prisoners of War”

Participants of war fall into several categories. Both participants of war and nonparticipating civilians may become prisoners of the other warring faction. “Prisoners of war”—a status conferred by Article 4A of Convention III on some of these detainees—are eligible for the minimum standards of treatment detailed in the Convention.⁸⁴ Convention IV further protects civilian detainees captured by the “occupying power.”⁸⁵ The Conventions’ protection begins at capture and extends until either the prisoner is released or trial ends.⁸⁶ All combatants captured in an international armed conflict are deemed “prisoners of war” until their status is appropriately determined.⁸⁷ Detainees ineligible for “prisoner of war” status do not benefit from the protections of the Convention. For instance, such detainees may be tried for taking part in hostilities, although they may be eligible for humane treatment by virtue of

⁸¹Powell Memorandum, *supra* note 55, at 1–4.

⁸²See WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 4 (2003) [hereinafter WORKING GROUP REPORT], available at <http://www.npr.org/documents/2004/dodmemo030306.pdf>.

⁸³FAP, *supra* note 6, at 7.

⁸⁴See Convention III, *supra* note 6, art. 4, at 3320.

⁸⁵See Convention IV, *supra* note 6, art. 4, at 3518.

⁸⁶See Goldman, *supra* note 38. Notably, the protections afforded prisoners of war—detailed below—do not preclude fair trial for war crimes (and, in some cases, other punishable crimes). *Id.* The combatants will be tried and punished, if proven guilty. *Id.*

⁸⁷See Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* [hereinafter *Background Paper*], at <http://hrw.org/backgrounder/usa/pow-bck.htm> (Jan. 29, 2002); see also Convention III, *supra* note 6, art. 4, at 3324 (“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 . . . [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.”).

international humanitarian and human rights law.⁸⁸ The burden on the Bush Administration to refuse the prisoner of war status to detainees is higher because, traditionally, the United States has applied the standards of treatment in the Geneva Convention to detainees of war.⁸⁹

Convention III places participants of war into two distinct categories: members entitled to bear arms and members without such entitlement. Under customary international law, members entitled to bear arms are *privileged* combatants, privileged “by a party to such an armed conflict to engage in hostilities.”⁹⁰ Privileged combatants include “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces,” and “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”⁹¹ The privilege to participate in hostilities also guarantees “prisoner of war” status upon capture, as well as immunity from prosecution for lawful acts of war.⁹² Convention III also extends “prisoner of war” status to persons who would otherwise remain unprotected if captured, like those who accompany the armed forces, such as civilian members of military aircrafts, pilots, or war correspondents.⁹³ Any captured member of the armed forces, if wounded or sick in captivity, is also entitled to protections equivalent to that of a “prisoner of war” under Convention III.⁹⁴

Article 4A(2) of the Convention deems two classes of combatants as privileged subject to certain conditions. The first class of combatants deemed privileged include “[i]nhabitants of a non-occupied territory” who spontaneously become combatants to resist an invading enemy.⁹⁵ “Spontaneity means that there is no time to organize into regular forces,”⁹⁶ although they must openly carry arms and follow the rules of war. The second class of combatants deemed privileged include members of a party to the conflict, but belonging to militias, volunteer corps, or resistance movements, and not forming a part of the regular army under article 4A(2). In order to benefit from the Convention’s protections, “such militias or volunteer corps, including such organized resistance movements,” including insurgents, members of militia not

⁸⁸Human Rights Watch, *Legal Issues Arising from the War in Afghanistan and Related Anti-Terrorism Efforts* [hereinafter *Legal Issues from Afghanistan*], at <http://www.hrw.org/campaigns/september11/ihlqna.htm> (last visited May 8, 2005).

⁸⁹See Letter from John Ashcroft, Attorney General, to the President (Feb. 1, 2002), at 1–2, available at <http://news.findlaw.com/hdocs/docs/torture/jash20102ltr.html> (last visited May 8, 2005); see also Bybee January Memorandum, *supra* note 50, at 25–27 (discussing in detail intervention by United States in Korea, Vietnam, Panama, Bosnia, and other regions).

⁹⁰Goldman, *supra* note 38.

⁹¹See Convention III, *supra* note 6, art. 4A(1), (3), at 3320.

⁹²*Id.*

⁹³*Id.* art. 4A(5), at 3320.

⁹⁴See FAP, *supra* note 6, arts. 43, 44, at 23–24.

⁹⁵See Convention III, *supra* note 6, art. 4A(2), at 3320.

⁹⁶See Goldman, *supra* note 38.

recognized by occupying power, and guerilla fighters, are subject to certain conditions. They should:

- (a) “belong to a party to the conflict”;⁹⁷
- (b) be “commanded by a person responsible for his subordinates”;⁹⁸
- (c) “hav[e] a fixed distinctive sign recognizable at a distance”;⁹⁹
- (d) “carry their arms openly”;¹⁰⁰ and
- (e) “conduct their operations in accordance with the laws and customs of war.”¹⁰¹

Members of resistance movements fulfilling the above conditions are to be treated as prisoners of war on capture. The Convention implies that the entire organization—militias or volunteer corps as a group—is entitled to protection, assuming the stated conditions are fulfilled. The Convention does not clarify the extent of protection in circumstances where the organization as a whole qualifies for the protections of prisoners of war, but individual members violate the Convention conditions. That is, it is unclear whether abrogation of the stated conditions by individual members, or even a group, results in exemption of the entire organization from protected status. For example, if one or a few members of an organization decide not to carry arms openly, it is an open question as to whether all members of the organization lose prisoners of war status if they are captured.

Some suggest that only the first three criteria—belonging to a party to the conflict, as organized groups, under responsible command—are meant for only the organization as a whole.¹⁰² The other conditions—having a distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war—apply to both the organization as well as the individual members.¹⁰³ Such a thesis, however, means that if one or a few members of the organization do not follow the conditions, all members of the organization would be disqualified from the Convention’s protections.¹⁰⁴ However, excluding an entire organization, irrespective of its size, because one or a few members did not follow the specified conditions, is inconsistent with the stated purpose of Convention III, which is to reduce abuse of prisoners. Moreover, the practical difficulties of impartially determining whether a particular combatant adhered to the

⁹⁷*Id.*

⁹⁸Convention III, *supra* note 6, art. 4(A)(2), at 3320.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*See id.*

¹⁰³*Id.*

¹⁰⁴*Id.* (“[I]f a majority of the members of the group fail to meet, for whatever reason, all or any of the last three conditions at any time, then all members of the group will not qualify for privileged combatant and POW status upon capture.”).

conditions could lead to misuse and ultimately, the abuse of detainees by occupying powers.

The interpretation favoring protection for the organization as a whole, even when individual members violate the conditions, is indirectly supported by article 5, which 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 enumerated in Article 4, *such persons* shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.¹⁰⁵

The use of the term “such persons” implies that the question of whether a detainee will be disqualified from the Convention’s protections will be handled on an individual, rather than on an organizational, basis. In other words, loss of Convention’s protection will be confined to individual detainees rather than the entire organization.

Persons not entitled to be treated as prisoners of war under Convention III may nonetheless qualify for similar protections under the FAP or under article 4, Convention IV.¹⁰⁶ The FAP specifies that “[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”¹⁰⁷ With the objective of supplementing the provisions of the Geneva Conventions, article 3 of the FAP helps clarify the language in Convention III that states, “[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations.”¹⁰⁸ For example, even though the United States is not a signatory to the FAP, it cannot refuse to treat humanely detainees who fall outside the ambit of Article 4A(2) of Convention III.¹⁰⁹ The FAP prevents the endangerment, either by willful commission or negligent omissions, of qualifying persons.¹¹⁰ Similarly, any militia member or insurgent ineligible for protection under Convention III for not following one or more of the conditions may fall within the definition of a “protected person” under Convention IV, provided the individual is not from a neutral country.¹¹¹ A protected person is a detainee captured by armed forces of a party to the conflict to which he is not a national.

¹⁰⁵Convention III, *supra* note 6, art. 5, at 3324 (emphasis added).

¹⁰⁶*See* Convention IV, *supra* note 6, art. 4(2), at 3320.

¹⁰⁷FAP, *supra* note 6, art. 1, at 7.

¹⁰⁸Convention III, *supra* note 6, art. 2, at 3318.

¹⁰⁹*See* Legal Issues from Afghanistan, *supra* note 88.

¹¹⁰*See* FAP, *supra* note 6, art. 11, at 8.

¹¹¹*Id.*

Article 5 of Convention IV, however, creates a major exception to prisoner of war protection for those who fall within two risk categories. Individuals in the first risk category (“Risk I members”) are those suspected of engaging in or engaged in actions hostile to the security of the state.¹¹² Presumably, the reference is to the security of the occupied territory. Risk I members are denied the specific rights and privileges under Convention IV.¹¹³ Individuals in the second risk category (“Risk II members”) are those suspected of posing a definite threat to the security of the occupying powers. Such individuals can be denied the right to communication, but are entitled to every other privilege under Convention IV. Importantly, both Risk I and II individuals are entitled to fair trial, since denial of their rights and privileges is based solely on “definite suspicion.” Since the terms “definite suspicion” and “suspicion” are not defined, as a matter of caution, such individuals are entitled to fair and quick trials at the earliest possible time after their capture. Moreover, the denial of rights and privileges under Article 5 of the Convention is not a denial of the general right to humane treatment during captivity under international law and the FAP.

C. *Determination of Prisoner of War Status*

Article 5 of Convention III provides that detainees whose status is unclear “shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”¹¹⁴ The treatment meted out to these individuals during detention and until determination of status should be equivalent to that which is provided to “prisoners of war.” The status of a detainee should be determined by a competent Tribunal established pursuant to the Geneva Conventions. President George Washington authorized the earliest of such military tribunals in 1780, to try a British detainee allegedly captured with the defense plans of West Point.¹¹⁵

With respect to the war on terror, President Bush issued an Executive Order¹¹⁶ authorizing the Secretary of Defense to set up a military

¹¹²See Convention IV, *supra* note 6, art. 5, at 3520–22.

¹¹³*Id.*

¹¹⁴See Convention III, *supra* note 6, art. 5, at 3320.

¹¹⁵See ABA TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS 3 (2004) [hereinafter ABA RECOMMENDATIONS], available at <http://www.abanet.org/leadership/military.pdf>; see also Jonathan Mahler, *Commander Swift Objects*, N.Y. TIMES MAG., June 13, 2004, at 42 (discussing Guantanamo Bay detainees). Military commissions derive their authority from Articles I and II of the United States Constitution. See U.S. CONST. art. I, § 8, cls. 1, 10–14 (granting Congress power to provide for common defense including offenses against Law of Nations, to support Armies and to provide for Navy, and to make regulations thereof); U.S. CONST. art. II, § 2, cl. 1 (conferring on President executive Power and making him Commander in Chief of Army and Navy); see also 10 U.S.C. § 821 (2000) (providing for military commissions).

¹¹⁶See President’s Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, at § 1(a) (Nov. 13,

commission¹¹⁷ to provide for detention, treatment, and trial by tribunal of noncitizens captured in the war on terror.¹¹⁸ Some critics have argued that the lack of prior congressional approval makes the tribunal unconstitutional.¹¹⁹ The United States Supreme Court affirmed the constitutionality of similar tribunals in *Ex parte Quirin*¹²⁰ and *Application of Yamashita*.¹²¹ *Quirin*, however, left open the issue of whether prior congressional approval was necessary to supplement the President's authority as Commander-in-Chief to establish a military commission.¹²² Thus, the constitutionality of military tribunals set up by a Presidential Order without congressional approval remains unclear.¹²³

2001) [hereinafter President's Military Order], available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. By a Joint Resolution, President Bush was authorized to use military force and to do all that is necessary for the operation. See Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter Military Force Joint Resolution].

¹¹⁷President's Military Order, *supra* note 116, at § 1(a).

¹¹⁸*Id.*

¹¹⁹Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 21 (2001); see also Bryan Robinson, *Due Process or Star Chamber?*, at <http://www.michaelkeller.com/news/news360.htm> (Nov. 15, 2001).

¹²⁰317 U.S. 1, 33, 35 (1942). The Supreme Court authorized the jurisdiction of the military tribunals to try U.S. citizens as well as foreign belligerents. After the surrender and occupation of Germany and Japan in 1945, military tribunals tried U.S. citizens for ordinary criminal activity in the occupied territories. See Amanda Schaffer, Comment, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465, 1466-70 (2003).

¹²¹327 U.S. 1, 25 (1946); see also *Madsen v. Kinsella*, 343 U.S. 341, 362 (1952) (upholding jurisdiction of military commission to try U.S. citizen for murdering her U.S. serviceman husband); ABA RECOMMENDATIONS, *supra* note 115, at 3; *Background Paper*, *supra* note 87 ("Under the 1997 U.S. military regulations, persons whose status is to be determined shall: be advised of their rights at the beginning of their hearings; be allowed to attend all open sessions and will be provided with an interpreter if necessary; be allowed to call witnesses if reasonably available, and to question those witnesses called by the tribunal; have a right to testify or otherwise address the Tribunal; and not be compelled to testify before the Tribunal.").

¹²²*Quirin*, 317 U.S. at 29 ("It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions."); ABA RECOMMENDATIONS, *supra* note 115, at 4; see also Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1281 (2002) (questioning applicability of *Quirin* as precedent for military tribunal established by President George Bush). But see *Yamashita*, 327 U.S. 1 at 11 ("The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war."); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 900 (2003) (criticizing Katyal and Tribe).

¹²³The ABA in its Report and Recommendations on Military Commissions argues that a "Joint Resolution authorizing the President to use all necessary and appropriate force against any entity to prevent international terrorism, provides the necessary authority to set up a military Tribunal." ABA RECOMMENDATIONS, *supra* note 115, at 6 (internal quotation marks and citation

Notwithstanding the constitutionality of setting up the tribunal, the terms of establishment have been a subject of severe criticism. For example, the President's Order authorizes detention of individuals invoking the "reason to believe" standard.¹²⁴ That is, individuals can be detained because there is a *reason to believe* that they committed the prohibited activities.¹²⁵ By definition, "individuals" excludes citizens, but includes legal residents of the United States; thus, every noncitizen, including legal residents (Green Card Holders) for several years, would fall within the Order's purview.¹²⁶ The Order provides a scope for indefinite detention by providing that detainees, "when tried," will be "tried for violations of the laws of war and other applicable laws by military tribunals;"¹²⁷ and individuals, "when tried" will be tried for offenses allegedly committed.¹²⁸ The Order denies the detainees "the privilege[] to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."¹²⁹ The evidentiary standard for the Tribunal is mere satisfaction, in the opinion of the presiding officer of the military commission, of "probative value to a reasonable person."¹³⁰ Thus, the trial contemplated by the tribunal denies established standards and procedures to the detainees and lacks adequate procedural safeguards.¹³¹ Thus, the Order violates article 14 of

omitted). Others, like Professor Bickers, have criticized those who question the constitutionality of the tribunals as being ideologically driven. Bickers, *supra* note 122, at 900.

¹²⁴Katyal & Tribe, *supra* note 122, at 1263 ("The Order is so written that virtually any act by an alien, anywhere, could, in theory, give the President 'reason to believe' the alien either has or once had some form of tribunal-triggering involvement with some international terrorist organization.").

¹²⁵*Id.*

¹²⁶President's Military Order, *supra* note 116, at § 2(a) ("The term 'individual subject to this order' shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writings."); *see also* ABA RECOMMENDATIONS, *supra* note 115, at 15 ("The President's order applies to all non-citizens, including aliens lawfully present in the United States. The breadth of the President's order raises serious constitutional questions under existing precedent."). *But see* Oral Argument at 23–25 (Ted Olsen, Apr. 20, 2004), *Rasul v. Bush*, 540 U.S. 1003 (2003) [hereinafter Oral Argument] ("Citizenship is a foundation for a relationship between the nation and the individual. . . . [The] Court goes on to say that we have pointed out that the privilege of litigation has been extended to aliens whether friendly or enemy, that specifically addresses one of the points you mentioned, only because permitting their presence in the country implied protection.").

¹²⁷President's Military Order, *supra* note 116, at § 1(e).

¹²⁸*See id.* at § 4.

¹²⁹*See id.* at § 7(b)(2); *see also* ABA RECOMMENDATIONS, *supra* note 115, at 15 ("Military commissions are subject to habeas corpus proceedings in federal court, at least as to persons present in the United States and to U.S. citizens.").

¹³⁰ABA RECOMMENDATIONS, *supra* note 115, at 11.

¹³¹*See* Military Force Joint Resolution, *supra* note 116; ABA RECOMMENDATIONS, *supra* note 115, at 13.

the International Convention on Civil and Political Rights to which the United States is a party.¹³²

The tribunal itself has not been established. Instead, detainees have been held indefinitely without proper charges or trial dates.¹³³ In defense of the inordinate delay in convening the tribunal, Professor Bickers argues that “the fact that military commissions have not yet been convened to try anyone in the current struggle does not mean that they have had no effect upon the nation.”¹³⁴ Unfortunately, the “effect upon the nation” is not a measure of justice under any sophisticated legal system—national or international. Instead, Professor Bickers justifies his opinion on the basis that “[e]nemy belligerents who attack the United States should not benefit from any of these rights.”¹³⁵ Unfortunately, the argument undermines the importance of a proper basis for defining “enemy belligerents” of the United States. Obviously neither a soldier in the middle of a war nor a prison guard can become roaming tribunals who determine whether an individual or a detainee is an enemy belligerent.¹³⁶ Moreover, during the interim period when the United States continues to detain without trial, several Iraqi detainees merely suspected of knowing information have been subject to treatment that qualifies to moderate and reasonable minds as “torture” rather than mere “abuse.” It is unclear how the objective of the war—establishing democracy in the Middle East—can be achieved by conceiving of a tribunal without provisions for basic principles of law, rules of evidence, or minimal judicial mechanisms. The military tribunals could have been an important means to display the benefits of American democracy to the Middle East.¹³⁷ Instead, the United States has yet to provide even a semblance of justice.¹³⁸

D. Status of Prisoners from Afghanistan

Prisoners from the conflict between Afghanistan and the United States can be categorized as the Taliban fighters, general Afghan fighters, al-Qaeda fighters, or international fighters (who either supported al-Qaeda or opposed the United States). The following section discusses the status of each category

¹³²International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR], available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (last visited May 8, 2005); see also ABA RECOMMENDATIONS, *supra* note 115, at 12 n.29 (“Since the United States joined the Covenant, it has not departed from its provisions.”).

¹³³*Insight: Prisoners Still Held at Guantanamo Bay* (CNN television broadcast, Jan. 13, 2004) (transcript available at http://www.cnn.com/TRANSCRIPTS/040113/i_ins.00.html).

¹³⁴Bickers, *supra* note 122, at 900.

¹³⁵*Id.* at 925.

¹³⁶*But see* Bybee February Memorandum, *supra* note 54, at 8 (arguing that tribunal has to be established only in event that status of combatants becomes “doubtful”).

¹³⁷Barry et al., *supra* note 12.

¹³⁸Mofidi & Eckert, *supra* note 29, at 66 (discussing rationale of classification of detainees under Bush administration and arguing that classification of detainees as group may be flawed).

of detainee and whether the location of detention affects the status or the rights of the detainee under the Geneva Convention.

The Bush Administration has not clarified the status of the prisoners from the war in Afghanistan. On occasion, the Administration asserted that Taliban and al-Qaeda detainees were not entitled to “prisoner of war” status under Convention III.¹³⁹ A memorandum, authored by then-White House Counsel Alberto R. Gonzales, suggested that the Geneva Convention does not apply to Taliban and al-Qaeda detainees because the Taliban was not a High Contracting Party, and because the Taliban and al-Qaeda were militant organizations.¹⁴⁰ Not conferring “prisoner of war” status on the captured individuals allows the United States to avoid its obligations to the prisoners under the Geneva Conventions.

Alternately, a memorandum signed by then-Secretary of State Colin Powell suggested that the Geneva Convention applies to all members of the Taliban and al-Qaeda.¹⁴¹ The Secretary, however, was not averse to refusing “prisoner of war” status to the detainees, provided they were treated in a manner consistent with the Geneva Convention.¹⁴² Subjecting the conflict to the Geneva Convention obligates the terrorists to adhere to the laws of war while denying “prisoner of war” status relieves the United States of its obligations to the detainees. Thus, the Secretary’s position retains the substance of the Geneva Conventions while disengaging its spirit.

Interestingly, a Working Group Report classified by the Pentagon reflects the Gonzales position that Convention III applies to neither al-Qaeda nor Taliban members, since neither are High Contracting Parties.¹⁴³ But the memorandum argues that the fact that the Taliban is not a High Contracting Party does not affect the application of the Geneva Convention to the conflict itself.¹⁴⁴ Under this view, Taliban and al-Qaeda militants are required to follow the laws of war under principles of customary international law, but the United States’ treatment of the detainees need not be consistent with principles of customary international law.

1. *The Taliban Detainees*

The Administration’s case that the Taliban is not a High Contracting Party

¹³⁹On February 7, 2002, President Bush announced that Convention III applied to members of the Taliban, since there was an armed conflict between two parties to the Convention—the United States and Afghanistan. Murphy, *supra* note 17, at 478. The president also maintained, however, that the Taliban’s actions in violating the laws of war and closely associating itself with al-Qaeda effectively stripped Taliban members of their rights as prisoners of war. *Id.*

¹⁴⁰*See* Gonzales Memorandum, *supra* note 18, at 2.

¹⁴¹Powell Memorandum, *supra* note 55, at 1–4.

¹⁴²*Id.* at 1.

¹⁴³*See* WORKING GROUP REPORT, *supra* note 82, at 3.

¹⁴⁴*Id.*

is unconvincing. The several reasons outlined in Part III—including recognition by allies of United States, governing status, and the position of the United Nations—compels the conclusion that Taliban members should be treated as the military of Afghanistan. If detained by the United States, they should be granted prisoner of war status.¹⁴⁵ Because the Taliban governed Afghanistan at the beginning of hostilities, the Afghanistan army, however dismantled, fell under the command of the Taliban. Accordingly, Taliban members fought either as the Afghan military or along with the military as militia.

2. *The Taliban as Afghan Military*

In assuming that Taliban members fought as part of Afghanistan's regular army, a memorandum from Gonzales to President Bush argues that the Taliban detainees are ineligible for "prisoner of war" status because they violated article 4A(2) conditions.¹⁴⁶ The memorandum argues that the article 4A(2) conditions are part and parcel of the definition of "regular armed forces."¹⁴⁷ Because militia members are expected to follow the article 4A(2) conditions, the memorandum argues that armed forces representing a nation could not have been excluded from that definition. Article 4A(2) conditions, however, are specifically limited with respect to militia members. Hence, the memorandum's construction may be inadequate to remove Taliban detainees from protections meant for "prisoners of war."

3. *The Taliban with Afghan Military*

If the Taliban is considered to be a mere militia, the Taliban fighters—as militia members forming a part of Afghanistan's armed forces—qualify for "prisoners of war" status under article 4A(1) of the Convention.¹⁴⁸ Considering, however, that the Taliban governed Afghanistan at the beginning of hostilities, the Afghanistan army fell within the command of the Taliban.

¹⁴⁵See *Background Paper*, *supra* note 87.

¹⁴⁶Bybee February Memorandum, *supra* note 54, at 1; *see also* Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 184 n.140 (2000) (arguing that terrorists do not qualify as "prisoners of war"). *But see* Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1077–78 (1998) (implying that Taliban and al-Qaeda could probably fall within definition of prisoners of war by arguing that 1949 Geneva Convention changed protections for combatants by including militia members).

¹⁴⁷Bybee February Memorandum, *supra* note 54, at 1.

¹⁴⁸See Clover, *supra* note 22, at 354; *see also* George H. Aldrich, Comment, *The Taliban, al-Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893–94 (2002) (supporting argument that Taliban falls within ambit of article 4A(1) of Geneva Convention); Bybee January Memorandum, *supra* note 50, at 9 (arguing that close nexus between Taliban and al-Qaeda causes Taliban to fall within definition of militia and thus, disqualifies those captured in war from prisoner of war status).

Accordingly, Taliban fighters have to be construed to be a part of the Afghanistan army. Alternatively, if the Taliban is viewed as militia not forming a part of the Afghan forces, detainees will continue to qualify for “prisoner of war” status under article 4A(2), but will be subject to the restrictions detailed in the article. The Taliban fulfills the first requirement of the article because it belongs to Afghanistan, a party to the dispute. The Taliban also had a clear commander—Mulla Omar himself—who was presumably responsible for subordinates.¹⁴⁹

Determining the second criterion—whether the Taliban conducted its operations within the laws of war—is more difficult. Determination of this condition may become dependant on the resolution of the nature of the 9/11 attacks. If the 9/11 attacks are construed as the beginning of hostilities, then the Taliban likely violated the rules of war because of its presumed involvement with al-Qaeda’s actions on that day. The Bush Administration has argued that the Taliban “knowingly adopted and provided support to the unlawful terrorist objectives of the al-Qaeda.”¹⁵⁰ The Administration construes the role of the Taliban in harboring al-Qaeda as a violation of the rules of war, which results in the disqualification of detainees for “prisoners of war” status under the Convention.¹⁵¹

The 9/11 attacks, however, are also classified as an attack by al-Qaeda.¹⁵² However, al-Qaeda has attacked the United States prior to September 2001. These attacks include the bombing of the U.S.S. Cole in 2000,¹⁵³ the bombing of American embassies in Kenya and Tanzania in 1998,¹⁵⁴ and the bombing of the World Trade Center in 1993.¹⁵⁵ Arguably, it may become difficult to

¹⁴⁹Clover, *supra* note 22, at 353 (reiterating same argument). *But see* Diana K. Hook, *Detainees or Prisoners of War?: The Applicability of the Geneva Convention to the Law on Terror*, 58 J. MO. BAR 6 (Nov.–Dec. 2002), available at <http://www.mobar.org/journal/2002/novdec/hook.htm> (The “Taliban’s military forces have been run by an ever-changing cast of commanders whose authority is unclear, especially since the Taliban regime has toppled.”). However, the only requirement under the Convention is some authority; there are no conditions on how often the authority is replaced, or whether there was clarity of authority. As long as there was some recognition of authority, which there was, the Taliban will fall within in this condition.

¹⁵⁰Ari Fleischer, White House Press Secretary, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/>; The White House, *Fact Sheet: Status of Detainees at Guantanamo*, at <http://www.whitehouse.gov/news/releases/2002/02/> (Feb. 7, 2002).

¹⁵¹See Bybee January Memorandum, *supra* note 50, at 31.

¹⁵²See, e.g., Mofidi & Eckert, *supra* note 29, at 59 n.5.

¹⁵³See generally Raphael Perl & Ronald O’Rourke, *Terrorist Attack on USS Cole: Background and Issues for Congress*, <http://news.findlaw.com/cnn/docs/crs/coleterrattck13001.pdf> (Jan. 30, 2001).

¹⁵⁴See generally CNN, *Four Embassy Bombers Get Life*, at <http://archives.cnn.com/2001/LAW/10/19/embassy.bombings/index.html> (Oct. 21, 2001).

¹⁵⁵See generally BBC, 1993: *World Trade Center Bombing Terrorizes New York*, at http://news.bbc.co.uk/onthisday/hi/dates/stories/february/26/newsid_2516000/2516469.stm (Feb. 26, 1993).

construe the attacks of September 11, 2001, as the beginning of hostilities, especially since the Taliban has given sanctuary to al-Qaeda since 1996.¹⁵⁶

Alternatively, the 9/11 attacks may be construed as a crime, such as mass murder.¹⁵⁷ If so construed, applying the laws of armed conflict against al-Qaeda and the Taliban militia may be questionable.¹⁵⁸ The rights of government authorities may be limited to arresting members of terrorist organizations when they have sufficient evidence of probable cause to believe those members have violated a criminal law.¹⁵⁹

If, on the other hand, hostilities are construed to have begun when the United States invaded Afghanistan, then it can be argued that most members of the Taliban observed the laws of war for the purposes of the second condition outlined in article 4A(2). Many critiques, however, expressed doubts as to whether the nature of the conflict initiated by the United States in Afghanistan is a war. It has been argued that the “war on terror” is akin to the “war on drugs,” fought on many territories outside of the United States.¹⁶⁰

Others have argued that the Taliban does not follow the laws of war because of “[v]iolations includ[ing] preventing Afghan women from being employed or educated, forcing Afghan women to be covered completely by burqas, prohibiting medical services for women, and allowing women to be raped as spoils of war. Members of the Taliban have also massacred thousands of innocent civilians”¹⁶¹ Interestingly, a memorandum addressed to the President and signed by Gonzales, addressing the “Status of the Taliban Forces under Article 4” of Convention III, points to the Taliban’s alleged atrocities in Afghanistan—including raping women and killing civilians—as violations of the laws of war justifying denial of the prisoner of war status.¹⁶² However, under the Geneva Convention, neither the Taliban’s support of al-Qaeda nor violations against women and other civilians of Afghanistan can be determinative of whether the Taliban detainees followed the rules of war in the conflict with the United States for the purposes of article 4A(2). The question under the Geneva Convention is limited to whether a party falling within the ambit of article 4A(2) of the Geneva Convention has followed the rules of war such that he qualifies for “prisoner of war” status.¹⁶³ A predetermined

¹⁵⁶BBC, *Who Is Osama Bin Laden?*, at http://news.bbc.co.uk/1/hi/world/south_asia/155236.stm (Sept. 18, 2001); see also David Johnson, *Who Is Osama bin Laden? Wealthy Saudi Exile Is a Suspected Terrorist Mastermind*, at <http://www.infoplease.com/spot/osamabinladen.html> (last visited May 8, 2005).

¹⁵⁷Yoo & Ho, *supra* note 73, at 208.

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*Id.* at 208.

¹⁶¹Hook, *supra* note 149.

¹⁶²Bybee February Memorandum, *supra* note 54, at 1.

¹⁶³See Aldrich, *supra* note 148, at 895. (“Providing sanctuary to al-Qaeda and sympathizing with it are wrongs, but they are not the same as failing to conduct their own military operations in accordance with the laws of war. A nation that assists an aggressor thereby

argument that the Taliban—as an entire regime—failed to follow the laws of war is unpersuasive. At the minimum, the question of whether the Taliban observed the laws of war is a question requiring the reasoned opinion of a duly constituted tribunal; the Bush Administration’s predetermined, generalized, predilections are insufficient.

The third condition under article 4A(2) of the Geneva Convention requires combatants to openly carry arms and wear fixed insignia or other distinctive signs for identification.¹⁶⁴ The requirement will be fulfilled if the Taliban had even a remote means of identification. Here, the Northern Alliance helped U.S. soldiers distinguish civilians from combatants.¹⁶⁵ The Department of Defense, however, has indicated that Taliban members cannot be identified except by the tribal flag that they carry.¹⁶⁶ The Bush Administration has argued that flags cannot qualify as insignia under the Convention.¹⁶⁷ The Convention’s objective is to differentiate combatants from criminals. Regardless of whether tribal flags qualify as insignia, it cannot be disputed that the flags served as a means of identification. Moreover, in Afghanistan, unlike in Iraq, civilians did not bear arms and fight against the United States.¹⁶⁸ Hence, article 4A(2)’s requirement is fulfilled.

Even assuming that the Taliban lacked any identifying means, the combatants may fall within the ambit of the FAP. Under the FAP, combatants are protected provided they are “under a command responsible to that Party.”¹⁶⁹ Under article 44(3) of the FAP, such combatants are required to carry arms openly, “during each military engagement, and during such time as he is visible to the adversary while he is engaged in a military deployment

commits a wrong, but its armed forces should not, as a consequence, lose their entitlement, if captured, to POW status.”).

¹⁶⁴See Convention III, *supra* note 6, art. 4A(2), at 3320.

¹⁶⁵The distinguishing feature prevents civilians from taking unlawful advantage of uniformed soldiers. *See* Hook, *supra* note 149.

¹⁶⁶See Bybee February Memorandum, *supra* note 54, at 3 (stating that Taliban lacked fixed insignia but that they carried tribal flag). The memo suggests that barring the tribal flag, Taliban members cannot be distinguished. *Id.* The memo also argues that the Taliban as an entire organization lacked a proper leader and therefore did not satisfy the condition requiring them to wear fixed insignia. *Id.*

¹⁶⁷*Id.*

¹⁶⁸Hook, *supra* note 149 (“Afghanis habitually and customarily carry weapons about their persons.”). Hence the author argues that although the Taliban met the requirement of carrying arms openly, it is merely a societal norm with little intended consequence in terms of the international laws of war. *Id.* Unfortunately, “intention to carry arms openly” is not a requirement under the Geneva Convention. *Id.* Nor does carrying arms as a part of societal norms create an exception to fulfillment of the condition. *Id.*

¹⁶⁹FAP, *supra* note 6, art. 43(1), at 23. Under this section, the commander is responsible for enforcing international law within the units. *Id.* Whether such enforcement was made is subject to the determination of the tribunal. *Id.* If a tribunal determines that no such enforcement was made, combatants may become ineligible for protection. *Id.*

preceding the launching of an attack” in which he is to participate.¹⁷⁰ Combatants who fail to wear the identifying symbols or carry arms openly may fall outside of the protection of both article 4A(2) of Convention III and article 44(3) of the FAP. Under article 44(4), however, combatants failing to meet the requirements “shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.”¹⁷¹

In any case, the status of Taliban detainees who violated article 4A(2) cannot be determined by their captors.¹⁷² Instead, the detainees shall be granted the same protection as a “prisoner of war” until a tribunal, as required under article 5 of Convention III, is established.¹⁷³ Until such a tribunal is operational, all detainees should be treated humanely.¹⁷⁴ A general denial of protection for all members of the Taliban is a violation of the principles of international law.

4. *Al-Qaeda Detainees*

Al-Qaeda fighters can be divided into three classes: citizens of Afghanistan, international fighters, and members of al-Qaeda captured outside the United States as a part of the war on terror. The Bush Administration’s refusal to provide Convention protections to al-Qaeda detainees and instead to categorize the detainees as “illegal combatants” is based on several factors, the foremost being that al-Qaeda is not a High Contracting Party.¹⁷⁵

Considering the relationship between the Taliban and al-Qaeda, Afghan citizens subscribing to al-Qaeda would most likely have fought alongside the Afghan army (the Taliban). Such combatants will fall within the ambit of article 4A(1) as “members of militias or volunteer corps forming part of” the Taliban forces.¹⁷⁶ As militia members, al-Qaeda fighters forming a part of

¹⁷⁰Clover, *supra* note 22, at 363 (quoting Convention III) (basing argument on precedent created with Viet Cong during Vietnam war).

¹⁷¹FAP, *supra* note 6, art. 44(4), at 23.

¹⁷²*But see* Bybee February Memorandum, *supra* note 54, at 2 (arguing that Taliban as entire organization lacked proper leader and therefore did not satisfy fixed insignia condition).

¹⁷³Convention III, *supra* note 6, art. 5, at 3322–24.

¹⁷⁴*Id.*

¹⁷⁵*See* Gonzales Memorandum, *supra* note 18, at 6; *see also* Letter from United States Department of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (on file with author). *See generally* Bybee January Memorandum, *supra* note 50, at 4 (arguing that al-Qaeda is nonstate actor and that conflict is in itself not subject to article 2 of Geneva Convention).

¹⁷⁶Azubuikie, *supra* note 63, at 143 (quoting Convention III, *supra* note 6, art. 4) (arguing that Taliban and al-Qaeda are not distinguishable and hence are entitled to same status and that members of al-Qaeda do not qualify under any subsections of Geneva Conventions).

Afghanistan's armed forces will qualify for the status of "prisoners of war" under article 4A(1) of the Convention.¹⁷⁷

The status of those who fought independently for al-Qaeda should be based on the tribunal's determination of whether the combatants followed the conditions in article 4A(2). Under this subsection, the Bush Administration has argued that al-Qaeda fighters failed to distinguish themselves from civilians.¹⁷⁸ In an independent article, Professor Yoo, the Assistant Attorney General of the Bush administration, argued that al-Qaeda members "cannot claim the benefits of a treaty to which their organization is not a party."¹⁷⁹ In the same article, however, Professor Yoo reiterates that, despite being nonstate actors, all terrorists, including al-Qaeda, should follow the international conventions of war (to which they are not parties).¹⁸⁰ A "Working Group Report" by the Pentagon used Professor Yoo's argument with respect to the Taliban detainees.¹⁸¹ As previously noted, to argue that nonstate actors must adhere to rules of war, but to refuse protections that follow from such adherence is unpersuasive. Such reasoning merely deprives al-Qaeda of incentive to observe the rules of war, and places the lives of American soldiers in greater danger.¹⁸²

Alternatively, Professor Yoo argues that Convention III's application to "international conflicts" is limited to situations involving two High Contracting Parties or to "armed conflict not of an international character," such as an internal insurgency.¹⁸³ Hence, Professor Yoo argues that the conflict with al-Qaeda is excluded from the purview of the protections of the Geneva Conventions.¹⁸⁴ However, it seems unlikely the Conventions' drafters meant to protect detainees from civil insurgencies, but excluded—for no specific reasons—international insurgents fighting an international army.

¹⁷⁷Convention III, *supra* note 6, art. 4, at 3320–22. *See generally* Bybee January Memorandum, *supra* note 50, at 9 (arguing that al-Qaeda cannot fall within protections of Convention because conflict is not subject to article 2 of Geneva Convention and that article 4 applies only to conflicts subject to article 2 of Convention).

¹⁷⁸Yoo & Ho, *supra* note 73, at 216.

¹⁷⁹*Id.*

¹⁸⁰*Id.* at 216–18.

¹⁸¹WORKING GROUP REPORT, *supra* note 82, at 4.

¹⁸²Yoo & Ho, *supra* note 73, at 216–18.

¹⁸³*Id.* at 214 (quoting Convention III, *supra* note 6, art. 3, at 3518–20); *see also* Hook, *supra* note 149 ("There is another reason that members of the al Qaeda (sic) network are not entitled to prisoner of war status. Distinctions 'between *bellum*, war against *legitimus hostis*, a legitimate enemy, and *guerra*, war against *latrunculi*—pirates . . . and outlaws [that are] 'the common enemies of mankind,' have been made as early as Roman times and have been incorporated into the international laws of war. It is alleged by Sir Michael Howard, an eminent military historian, that the Geneva Conventions were drafted to address *bellum/legitimus hostis* conflicts, and that states in conflicts with *guerra/latrunculi* could summarily execute those types of enemies because they have no right to participate in hostilities.").

¹⁸⁴Yoo & Ho, *supra* note 73, at 216–18.

5. *International Fighters*

Persons detained or captured in a conflict by nationals of countries other than their own are protected persons under Article 4 of Convention IV. Generally, the application of Convention IV is limited to civilians.¹⁸⁵ However, the definition of “protected persons” includes civilians and nationals of countries that are not a party to the conflict irrespective of whether they were combatants in the conflict.¹⁸⁶ Some of the international fighters in the war on terror will fall within the definition of protected persons. Importantly, article 4 does not require a person to have been captured at the conflict zone in order for that person to qualify for protected person status.¹⁸⁷ Protected person status, however, does not apply if the detainee:

- (a) is not a national of a signatory of the Geneva Convention,¹⁸⁸
- (b) belongs to a neutral nation having normal diplomatic representation with the captor nation, or
- (c) is an individual qualifying for the protected persons status but suspected of or having engaged in activities hostile to the security of the captor nation.¹⁸⁹

Once detained, a tribunal must determine whether the detainee is a national of a state that is not a party to the Convention or a national of a neutral state. Until such determination is made, the detainee shall be entitled to humane treatment under article 5 of Convention III.¹⁹⁰

Interestingly, the Geneva Conventions do not specifically envisage a class of detainees belonging to neutral countries taking up arms on behalf of one of the parties to the conflict outside the regular army.¹⁹¹ Thus, combatants from neutral countries—like Saudi Arabia or Pakistan—who fight for al-Qaeda in Afghanistan may not fall within any of the provisions of the Convention. International fighters who are neither citizens of the United States nor Afghanistan who are captured in the conflict zone cannot qualify for protection under article 4A(1) of Convention IV, even if they fight alongside the Afghanistan army. Such fighters, if detained, will also fall outside the definition of prisoner of war under 4A(2) of Convention III, since they do not

¹⁸⁵See Convention IV, *supra* note 6, art. 6, at 3518.

¹⁸⁶*Id.* art. 4, at 3518.

¹⁸⁷*Id.*

¹⁸⁸*Id.*

¹⁸⁹*Id.*

¹⁹⁰Convention III, *supra* note 6, art. 5, at 3324.

¹⁹¹*But see* Paust, *supra* note 40, at 1351 (“Under the Geneva Conventions, there is no gap in the reach of at least some forms of protection and rights of persons. Any person detained, whether a prisoner of war, unprivileged belligerent, terrorist, or noncombatant, has at least minimum guarantees in all circumstances, at any time and in any place whatsoever under common Article 3.” (internal quotation marks and citation omitted)).

fulfill the condition of belonging to either of the parties to the conflict. Even assuming that al-Qaeda or the Taliban pays them for their role in the conflict, such fighters still may not qualify for protection as mercenaries under article 47 of Convention IV.¹⁹² To that extent, if detained, such fighters cannot claim the benefits of prisoner of war status, or of protected person status under Convention IV; nor can they claim protection as civilians taking up arms spontaneously. Their status as protected persons will be dependent on the nature of the diplomatic relationship their country has with the United States. Thus, the exact categorization of these combatants within the Convention remains unclear.

Nonetheless, lack of proper status does not leave international fighters open to inhuman treatment. Article 1 of the FAP entitles everyone not covered under the Conventions and Protocols to humane treatment at the hands of the captors during detention.¹⁹³ Article 75 of the FAP adds that “persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances.”¹⁹⁴ Despite reservations concerning the Protocol, the United States regards the provisions of Article 75 of the FAP as an “articulation of safeguards to which all persons in the hands of an enemy are entitled.”¹⁹⁵ International bilateral treaties may also govern the status of such fighters and require captors to repatriate captured fighters to countries that will not torture them.¹⁹⁶

International fighters having connections with the 9/11 attacks who are captured, not as part of the war, but within Afghanistan, can be tried by the United States for the domestic crimes of murder and hijacking. Al-Qaeda members captured *outside* of the conflict zone as a part of the war on terror fall within the jurisdiction of the country where they are captured. For example, two suspected terrorists, Bin-Al-Sheed and Khaleed Sheik Muhammed, were captured in Pakistan. Khaleed Sheik Muhammed, a Kuwaiti national, was placed under the United States’ custody with permission from the respective nations.¹⁹⁷ Generally, repatriation to either the prisoner’s home country or to the United States will be based on bilateral treaties and political agreements between the respective nations. Detainees from a neutral country, like Bin-Al-

¹⁹²Convention IV, *supra* note 6, art. 45, at 3548.

¹⁹³See FAP, *supra* note 6, art. 1, at 7.

¹⁹⁴*Id.* art. 75, at 37.

¹⁹⁵William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003); see also Jordan Paust, *The Common Plan to Violate the Geneva Convention*, at <http://jurist.law.pitt.edu/forum/paust2.php> (May 25, 2004).

¹⁹⁶Mofidi and Eckert argue that giving prisoner of war status to detainees does not compel the United States to repatriate the detainees at the end of the conflict before prosecuting the detainees for their alleged involvement in terrorist crimes against Americans. See Mofidi & Eckert, *supra* note 29, at 89.

¹⁹⁷Richard Boucher, Spokesman, United States Department of State, Daily Press Briefing (Mar. 3, 2003), available at <http://www.state.gov/r/pa/prs/dpb/2003/18144.htm> (last visited May 8, 2005).

Sheed and Khaleed Sheik Muhammed, may be exempt from protected person status. Such individuals, if not from a neutral country (or if not from a nonsignatory country) will become protected persons under article 4 of Convention IV.

Interestingly, since nationals of neutral states are exempt from protected person status, detainees like Bin-Al-Sheed and Khaleed Sheik Muhammed cannot be subject to treatment authorized under article 5 of Convention III—treatment meant for those suspected of activities hostile to the security of the state. The status of such detainees remains akin to international criminals, although as soon as they are placed in the custody of a party to the conflict, such as the United States, such persons will fall within the ambit of article 75 of the FAP.¹⁹⁸

Referring particularly to foreign fighters, Larry Di Rita, chief spokesman for Defense Secretary Donald H. Rumsfeld, said, “there is a body of law which suggests that there could be individual cases in which, while the general provisions apply, an individual case could be exempted.”¹⁹⁹ This statement was in reference to the exemption under article 5 of Convention IV, which disqualifies suspected spies from the protections. Article 5, however, exempts protected persons suspected of “or engaged in activities hostile to the security of the State” from rights and privileges under the Convention IV, including rights of communication.²⁰⁰ As mentioned above, the article 5 cannot be applied to all international fighters as a class, nor can it be applied to all detainees suspected of activities hostile to the security of the United States. The exemption in article 5 applies to those falling within the definition of protected persons under article 4 of Convention IV. With respect to the conflict in Afghanistan, all countries except Afghanistan itself have remained neutral. Therefore most, if not all, of the international fighters detained from the Afghan war will not fall within the ambit of article 5, even if such individuals are known to have engaged in activities hostile to the security of the United States. The status of such detainees may be governed by other conventions and customary international law as discussed above.

American citizens arrested in the field of battle as enemy belligerents can be tried for treason in addition to the above-mentioned sanctions.²⁰¹ Moreover, international fighters holding American citizenship may be tried for “crimes

¹⁹⁸FAP, *supra* note 6, art. 75, at 37.

¹⁹⁹Larry Di Rita, Deputy Assistant Secretary of Defense, Defense Department Operational Update Briefing (May 26, 2004), *available at* <http://www.dod.gov/transcripts/2004/tr20040526-0797.html> (last visited May 8, 2005). Elsewhere in the same press conference, Di Rita mentioned that, “I understand that there . . . [may be] legal precedent that would provide for . . . a determination [as to whether] they were not in fact subject to the Geneva protections.” *Id.*

²⁰⁰Convention IV, *supra* note 6, art. 5, at 3520.

²⁰¹Legal Issues from Afghanistan, *supra* note 88; *see also* Michael Greenberger, *Is Criminal Justice a Causality of the Bush Administration's "War on Terror?"*, 31 HUMAN RIGHTS NO. 1, at 19 (2004) (explaining other classes of prisoners include citizens captured outside battlefield, say, within United States itself).

against humanity” as set forth in the statute of the International Criminal Court.²⁰² Human Rights Watch articulates that, although most adjudicated cases address crimes against humanity committed in an ongoing war organized under state authority, “recent jurisprudence provides for the commission of such crimes in peacetime and by non-state actors.”²⁰³ The Bush Administration, however, has invoked the doctrine of enemy combatant against U.S. citizens captured fighting for al-Qaeda.²⁰⁴ *Ex Parte Quirin* established the enemy combatant doctrine for those who violate international law and the laws of war, including U.S. citizens.²⁰⁵

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.²⁰⁶

Commentators have criticized the treatment meted out by the Administration to such enemy combatants.²⁰⁷ Most criticisms center on the denial, among other things, of the right to counsel and judicial review.²⁰⁸ Importantly, most enemy combatants probably would qualify for prisoner of war status but for their American citizenship. Considering that prisoners of war are entitled to a fair trial, including components of due process and a right to representation with procedural safeguards under the Geneva Conventions, enemy combatants should not be denied these rights because they are

²⁰²Legal Issues from Afghanistan, *supra* note 88 (“[O]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health qualify as crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack are generally considered as crimes against humanity.” (internal quotation marks and citations omitted)).

²⁰³*Id.*

²⁰⁴For general background on enemy combatant law, see Nickolas A. Kacprowski, Note, *Stacking the Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government’s Power to Indefinitely Detain United States Citizens as Enemy Combatants*, 26 SEATTLE U. L. REV. 651, 654–75 (2003). The Administration derived the right to classify American citizens as “enemy combatants” from *Ex parte Quirin*, 317 U.S. 1 (1942), which discussed the circumstances under which American citizens may be charged as enemy combatants. *Id.* at 35.

²⁰⁵See Greenberger, *supra* note 201, at 20.

²⁰⁶See *Quirin*, 317 U.S. at 31.

²⁰⁷See, e.g., Clover, *supra* note 22, at 388 (arguing that Guantanamo detainees should have been classified as prisoners of war under Geneva Conventions).

²⁰⁸See Greenberger, *supra* note 201, at 19.

American citizens.²⁰⁹ In addressing the issue of detaining American citizens falling within the definition of enemy combatants, the United States Supreme Court held in *Hamdi v. Rumsfeld*²¹⁰ that while there is no bar to a nation holding its own citizen as an enemy combatant in times of war, *indefinite* detention is not authorized by an act of Congress providing the power of detention.²¹¹ The Court held that due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for his detention before a neutral decision maker.²¹²

The question of whether the Guantanamo Bay prisoners—including international fighters—are entitled to rights under the United States Constitution because of the location of their detention depends on whether Guantanamo Bay is, in fact, a territory under the control of the United States. In an agreement signed by Cuban President Estrada Palma and President Theodore Roosevelt, the United States leased the territory in 1903.²¹³ Thus, although Cuba remains the de jure sovereign, the United States has been the de facto sovereign for a century.²¹⁴ However, the United States has argued before the Supreme Court that Guantanamo Bay falls outside its jurisdiction since the territory remains under the sovereign control of Cuba.²¹⁵ Such arguments are meant to deny detainees in Guantanamo constitutional rights otherwise available to American citizens.²¹⁶ A Working Group Report on the interrogation of terrorists, however, takes the position that Guantanamo Bay is a special maritime and territorial jurisdiction of the United States.²¹⁷ Without discussing the detainees' rights, the Working Group Report argued that 18 U.S.C. § 2340A,²¹⁸ the statute prohibiting torture, did not apply to protect the

²⁰⁹See Craig M. Bradley, *The Rights of Enemy Combatants*, 40-APR TRIAL 72, 72-75 (2004) (discussing Hamdi case). See generally Schaffer, *supra* note 120, at 1467-74 (discussing rights of foreign combatants).

²¹⁰124 S. Ct. 2633 (2004).

²¹¹*Id.* at 2635.

²¹²*Id.*

²¹³1 M.E. MURPHY, *THE HISTORY OF GUANTANAMO BAY*, ch. III (1953), http://www.nsgtmo.navy.mil/gazette/History_98-64/hischp3.htm (last visited May 8, 2005).

²¹⁴Joanne Marnier, *A Guantanamo-Size Hole in the Constitution*, at http://www.veteransforpeace.org/A_Guantanamo_size_120103.htm (Dec. 1, 2003).

²¹⁵See generally Oral Argument, *supra* note 126, at 21-45. For the Supreme Court decision in the matter, see *Al Odah v. United States*, 124 S. Ct. 2686 (2004); see also Hicks, *Habib Lawyers Appear Before the US Supreme Court* (Australian Broadcasting Co. radio broadcast, Apr. 21, 2004), available at <http://www.abc.net.au/am/content/2004/s1091669.htm> (providing synopsis of Ted Olsen's argument in *Rasul v. Bush*).

²¹⁶See Paust, *supra* note 191, at 1358 (“[T]he United States and its nationals cannot avoid responsibility under international law by merely transferring persons to other states for torture or cruel and inhumane interrogation.”).

²¹⁷See WORKING GROUP REPORT, *supra* note 82, at 7 (“That GTMO is within [Special Maritime and Territorial Jurisdiction (“SMTJ”)] of the United States is manifested by the prosecution of civilian dependents and employees living in GTMO in Federal District Courts based on SMTJ and the Department of Justice opinion.”); see also 18 U.S.C. § 2340(3) (2000) (defining “United States” in U.S. criminal code).

²¹⁸18 U.S.C. § 2340A (2000).

detainees in Guantanamo Bay because it requires the offense to occur outside the United States.²¹⁹

E. Status of Prisoners from Iraq

In the conflict between the United States and Iraq, combatants fighting for Iraq can be categorized as soldiers under the command of the General Headquarters, Special Forces of Iraq, or Fedayeen Saddam. Outside of this structure, the detainees include those following, for example, Mukhtar-al-Sadar, other insurgents, and civilians taking up arms.

1. The Iraqi Army

At the end of the First Persian Gulf War, fought between Iran and Iraq from 1980 to 1988, Iraq supported the largest military in the Middle East, with approximately seventy army divisions and over 700 aircraft within its air force.²²⁰ The war affected the economy and left Iraq with serious debts, including an estimated \$14 billion debt to Kuwait.²²¹ By some accounts, the pressures of the debt in 1990 caused Saddam Hussein, the now-deposed leader of Iraq, to invade Kuwait.²²² The invasion of Kuwait resulted in a battle between Iraqi forces and a coalition of thirty-four countries authorized by the United Nations and led by the United States.²²³ The coalition's victory resulted in Kuwait establishing its sovereignty and Iraq losing its military supremacy in the region.²²⁴ The Iraqi ground forces shrank to twenty-three divisions and the Iraqi Air Force had less than 300 aircraft after the Second Gulf War with Kuwait.²²⁵ Iraqi forces were under the command and control of the General Headquarters.²²⁶ Controlled by the Army, the General Headquarters was the highest military echelon of Iraq and integrated the army, air force, navy, and popular army operations.²²⁷ The General Headquarters consisted of three categories of personnel: the regular army corps, the strategic corps reserve designated the "Republican Guard Forces Command,"²²⁸ and a separate

²¹⁹*Id.*; see also Michael Fromkin, *OLC's Aug. 1, 2002 Torture Memo ("the Bybee Memo")*, at <http://www.discourse.net/archives/2004/06/> (June 14, 2004).

²²⁰TheFreeDictionary.com, *Military of Iraq*, at <http://encyclopedia.thefreedictionary.com/> (last visited May 8, 2005).

²²¹*Id.*

²²²TheFreeDictionary.com, *Iran-Iraq War*, at <http://encyclopedia.thefreedictionary.com/> (last visited May 8, 2005).

²²³TheFreeDictionary.com, *Gulf War*, at <http://encyclopedia.thefreedictionary.com/> (last visited May 8, 2005).

²²⁴*Id.*

²²⁵*Id.*

²²⁶GlobalSecurity.org, *Iraqi Army* [hereinafter *Iraqi Army*], at <http://www.globalsecurity.org/military/world/iraq/army.htm> (last visited May 8, 2005).

²²⁷*Id.*

²²⁸*Id.*

aviation command supporting the corps and the Republican Guards.²²⁹ Personnel falling within the General Headquarters formed the regular, uniformed troops of Iraq.²³⁰

The corps and the Republican Guards formed the ground forces and conducted operations wherever directed.²³¹ The Republican Guard was separated from the regular army guards and received the best training and equipment.²³² By 2003, there were between 65,000 and 100,000 troops in the Republican Guard.²³³ The Special Republican Guard consisted of 15,000 to 20,000 troops and formed one division of the Republican Guard.²³⁴ Founded in the early 1990s, the Special Republican Guard was charged with protecting Saddam Hussein and responding to threats to his power, such as rebellion or a coup.²³⁵ The regular army corps, in 2003, consisted of 300,000 troops, organized into five corps.²³⁶ Within the regular army, the highly trained Special Forces conducted special operations.²³⁷ Members of the Iraqi Corps, Republican Guard, and Special Republican Guard are eligible, if detained, for prisoner of war status under Convention III, article 4A(1) as “members of the armed forces of a Party to the conflict.”²³⁸

2. *Fedayeen*

Another class of fighters, *Fedayeen*, consisted of paramilitary forces loyal to Saddam Hussein.²³⁹ The *Fedayeen* consisted of approximately 18,000 to

²²⁹*Id.*

²³⁰*Id.*

²³¹*Id.*

²³²GlobalSecurity.org, *Republican Guard*, at <http://www.globalsecurity.org/military/world/iraq/rg.htm> (last visited May 8, 2005) (stating that Republican Guards protected government tanks, mechanized infantry, and Special Forces). By the end of the Iran-Iraq war in 1987, the Republican Guard had grown to three armored divisions, one infantry division, and one commando division. John Pike, *Republican Guard*, at <http://www.fas.org/irp/world/iraq/rg/> (last updated Nov. 26, 1997). The Republican Guard Forces Command was divided into two subcorps groups, an independent division, twenty special forces (commando) brigades, and one naval infantry brigade. *Id.*

²³³Jonathan Curiel, *GIs' 'Unfinished Business' with Republican Guard*, S.F. CHRON., Mar. 26, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/03/26/MN138223.DTL>.

²³⁴TheFreeDictionary.com, *Iraqi Republican Guard*, at <http://encyclopedia.thefreedictionary.com/> (last visited May 8, 2005).

²³⁵*Id.*

²³⁶*Id.*

²³⁷See SpecialOperations.com, *Iraqi Special Forces*, at <http://www.specialoperations.com/Foreign/Iraq/Default.htm> (last visited May 8, 2005) (explaining that Iraqi regular army had three basic types of divisions: armored, mechanized infantry, and infantry); *Iraqi Army*, *supra* note 224.

²³⁸Convention III, *supra* note 6, art. 4A(1), at 3320; *see also* Goldman, *supra* note 38 (expressing same view).

²³⁹TheFreeDictionary.com, *Fedayeen Saddam*, at <http://encyclopedia.thefreedictionary.com/> (last visited May 8, 2005) (explaining that “name means ‘Sacrificers of Saddam’ and was chosen to imply a conceptual relationship with

40,000 young soldiers.²⁴⁰ The unit reported directly to the Presidential Palace, and was responsible for patrol, antismuggling duties, and protection against domestic opponents.²⁴¹ Most paramilitary organizations, including that of Saddam Hussein, have a uniform.²⁴² The Fedayeen is an irregular troop, akin to militia, reporting, however, to the President of Iraq.²⁴³ Article 4A(1) of Convention III specifies that members of armed forces “as well as members of militias or volunteer corps forming part of such armed forces” are entitled to prisoner of war status.²⁴⁴ The Fedayeen is both a militia and a volunteer corp. Despite its irregular character, it falls within the armed forces because the Fedayeen members directly reported to the highest commander-in-chief, Saddam Hussein. Critics may argue that the Fedayeen was not a part of Iraq’s regular armed forces and lacked elite military training. The standard, however, in the Geneva Conventions is merely whether such militia members formed a part of the “armed forces” of a party to the conflict.²⁴⁵

The term “armed forces” should be contrasted with the term “regular armed forces” used in article 4A(3) of Convention III. To be entitled to the Convention protections, militia—like Fedayeen—need not fall within the regular military force of a country as long as they are part of the armed forces resisting another party to the conflict.²⁴⁶ With respect to the 2003 invasion of

Palestinian guerillas termed Fedayeen who operated primarily from Israel’s founding into the 1950s”); see also GlobalSecurity.org, *Saddam’s Martyrs [“Men of Sacrifice”]* [hereinafter *Fedayeen*], at <http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm> (last visited May 8, 2005) (explaining that “paramilitary *Fedayeen Saddam* (Saddam’s ‘Men of Sacrifice’) was founded by Saddam’s son Uday in 1995). “In September 1996 Uday was removed from command of the *Fedayeen*. Uday’s removal may have stemmed from an incident in March 1996 when Uday transferred sophisticated weapons from Republican Guards to the *Saddam Fedayeen* without Saddam’s knowledge. Control passed to Saddam’s other son, Qusay, further consolidating his responsibility for the Iraqi security apparatus.” *Id.*

²⁴⁰*Fedayeen*, *supra* note 239.

²⁴¹*Id.*

²⁴²TheFreeDictionary.com, *Paramilitary*, at <http://encyclopedia.thefreedictionary.com/> (last visited May 8, 2005); see also Sharon Otterman, *What Is the Fedayeen Saddam?*, at http://www.cfr.org/background/background_iraq_fedayeen.php (last updated Mar. 31, 2003) (giving background on Fedayeen Saddam).

²⁴³Otterman, *supra* note 242.

²⁴⁴Convention III, *supra* note 6, art. 4A(1), at 3320.

²⁴⁵See Convention III, *supra* note 6, art. 4(1), at 3320.

²⁴⁶See Goldman, *supra* note 38 (“The legal situation of the Saddam Hussein’s Fedayeen fighters is quite different. They are apparently irregular combatants and, as explained above, in order to qualify for POW status, the group collectively and its individual members must comply with the strict conditions specified in Article 4(A)(2) of the Third Geneva Convention. Since these irregulars must continuously comply with these requirements, it is difficult to imagine how any members of this group could qualify for that status if, as has been widely reported, some of their members commit war crimes or disguise themselves as civilians in the course of the hostilities.”). In my opinion, the mere use of civilian disguise by a combatant is not a war crime, but, as previously noted, could deprive irregular combatants of POW status. See Convention III, *supra* note 6, art. 5, at 3324 (requiring all members to be treated as prisoners of war until violations are determined).

Iraq by the United States, when the “Iraqi regular forces, as well as the Republican Guard, melted away before the coalition, Fedayeen forces put up stiff and often fanatical resistance to the coalition invasion.”²⁴⁷ The Fedayeen members were trained to act as the last front of resistance and, to that extent, formed a part of the armed forces. Within the army, the Fedayeen acted as enforcers, threatening to kill soldiers who tried to surrender.²⁴⁸ Had the Fedayeen been a militia unconnected to the armed forces, they could not have wielded such power within the armed forces. The CIA allegedly distributed to policymakers a classified report in early February, 2003, warning that the Fedayeen could be expected to employ guerrilla tactics.²⁴⁹ The awareness and the categorization of Fedayeen as a part of the resisting armed forces obligates the United States to provide detained Fedayeen members prisoner of war privilege.

Critics argue that Fedayeen members often wore civilian clothes to confuse coalition forces during the war. Unlike Convention III, article 4A(2), which requires combatants to have identifying marks or wear a uniform, “prisoner of war” status for militia members and voluntary corps forming a part of the armed force is not conditioned on the requirement to wear uniforms.²⁵⁰ Hence, denying prisoner of war status to the Fedayeen could be a violation of Convention III, article 4A(1).²⁵¹ The captured members of Fedayeen, may however, be tried for violations of the laws of war and for war crimes, especially relating to guerilla warfare.

3. *International Fighters*

Arms-bearing fighters in Iraq from other nations—like Syria or Saudi Arabia—will be entitled to the same treatment as their counterparts in the conflict between the United States and Afghanistan.²⁵² Such fighters, therefore, will generally not be eligible for protection as “prisoners of war” under the Geneva Convention.²⁵³ They may, however, be eligible for protected person status, especially if they are from countries like Syria, which presumably does not have normal diplomatic relations with the United States. Individual detainees who do not qualify for protected person status may be held under Convention III, article 5.²⁵⁴

²⁴⁷*Fedayeen*, *supra* note 239.

²⁴⁸Otterman, *supra* note 242.

²⁴⁹*Id.*

²⁵⁰Convention III, *supra* note 6, art. 4, at 3364.

²⁵¹*Id.*

²⁵²*See supra* Part II.D.5 (describing treatment of international fighters in Iraq).

²⁵³*See* Goldman, *supra* note 38 (“[F]oreigners who, for whatever reason, join the fight against Coalition forces without being members of Iraqi regular or irregular forces can be considered as waging “private” hostilities and treated as unprivileged combatants and prosecuted as such.”).

²⁵⁴Convention III, *supra* note 6, art. 5, at 3322–24.

4. Popular Army

The Iraqi Popular Army consisted of civilian volunteers to protect the Ba'ath regime against internal opposition. It served as a power base counterbalancing the regular army.²⁵⁵ Captured members of the popular army fall within Convention III, article 4A(2) and are subject to the conditions of the article. Hence, until determination of the status of such detainees by a competent tribunal,²⁵⁶ they are entitled to the treatment akin to that given a prisoner of war.²⁵⁷

Suspected insurgents captured by the American forces in Iraq have belonged to various militia organizations, the most well-known being led by

²⁵⁵GlobalSecurity.org, *People's Army/Popular Army/People's Militia (Al Jaysh ash Shaabi)*, at <http://www.globalsecurity.org/military/world/iraq/militia.htm> (last modified Apr. 27, 2005). Sharon Otterman writes:

Experts say this is intended to be a mass volunteer force, with female as well as male units. The Iraqi regime showcases the brigades at public marches and other propaganda events and claims it has up to 7 million members. U.S. experts say its strength is greatly exaggerated by the Iraqis. But they also believe that at least some al Quds members—who hail largely from Sunni areas in the middle of the country—have been given rifles, mortars, and light automatic weapons There are reports that a so-called youth army, made up of 12 to 17 year-olds, was formed in 1999 to defend the cities. It is unclear that such a force exists, but some Iraqi media coverage does show youths and adults being trained and possibly armed for such a role. Ashbal Saddam, or Saddam's Cubs. This is a military organization for children aged 10 to 16 that holds annual war training camps. However, like other popular forces, the extent to which it is involved in the war is unknown.

Otterman, *supra* note 242.

²⁵⁶See Convention III, *supra* note 6, art. 5, at 3322–24 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”).

²⁵⁷Convention IV provides:

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.

Convention IV, *supra* note 6, art. 5, at 3520–22.

Muktadar-al-Sadar and the Jordanian Abu Musab al-Zarqawi.²⁵⁸ Such members will fall within the ambit of Convention III, article 4A(2). The status of captured insurgents depends on whether they satisfied the conditions under the article. Here, insurgents belong to one party to the conflict, Iraq, and are clearly directed by a leader, whether it is Al-Sadar or Al-Zarqawi. Whether they carried arms openly and conducted their operations according to the laws of war is less clear, considering several reports that insurgents attacked the Coalition forces by either disguising themselves as civilians or through the use of guerilla warfare. Again, as argued in the previous section, the loss of status of one or more individual insurgents does not disqualify all members of that militia or voluntary corps from prisoner of war status unless it can be proved that the militia never had an identifying mark or that they never carried weapons openly. The status of the Jordanian Abu Musab al-Zarqawi, when captured, may be classified similar to that of Khaleed Mohammed in Afghanistan.²⁵⁹

5. *Saddam Hussein*

As the commander-in-chief of the Iraqi military, Saddam Hussein is a member of the armed forces.²⁶⁰ Under article 4 of Convention III, Saddam Hussein is eligible for prisoner of war status. Hence, the United States should treat him humanely during captivity. Prisoner of war status, however, does not preclude the United States or other nations from trying Saddam for war crimes and past violations of the law, including war crimes allegedly committed during the Iran-Iraq war and first Gulf War.²⁶¹

The United States captured Saddam Hussein on December 13, 2003.²⁶² His status as a prisoner of war was declared on January 9, 2004.²⁶³ During the interim period from capture to declaration of status, article 5 of Convention III obligates the United States to accord Saddam Hussein the status of a prisoner of war.²⁶⁴ The United States fulfilled that requirement by declaring that

²⁵⁸BBC, *Profile: Abu Musab al-Zarqawi*, at http://news.bbc.co.uk/2/hi/middle_east/3483089.stm (last updated Sept. 22, 2004).

²⁵⁹See *supra* note 197 and accompanying text.

²⁶⁰Convention III, *supra* note 6, art. 4, at 3320–22; see also Human Rights Watch, *Saddam Hussein as a P.O.W.*, at <http://hrw.org/english/docs/2004/01/27/iraq7076.htm> (Jan. 22, 2004).

²⁶¹Human Rights Watch, *supra* note 260 (“He could also be prosecuted for crimes against humanity and genocide such as for the 1988 Anfal campaign against Iraqi Kurds, the large-scale killings that followed the failed 1991 uprisings in the north and south of Iraq, and the brutal repression of the Marsh Arabs. While Saddam Hussein could also be tried for common crimes under Iraqi law, he could not be prosecuted under criminal laws enacted *ex post facto* (after the fact) by the Iraqi Governing Council or a foreign state.”).

²⁶²CNN, *Saddam Hussein Captured*, at <http://www.cnn.com/SPECIALS/2003/saddam/> (last visited May 8, 2005).

²⁶³Guy Taylor, *Pentagon Deems Saddam a Prisoner of War*, WASH. TIMES, Jan. 10, 2004, <http://www.washingtontimes.com/functions/print.php?StoryID=20040109-085155-6079r>.

²⁶⁴See Convention III, *supra* note 6, art. 5, at 3322–24.

Saddam Hussein would be treated like a prisoner of war until the final declaration of his status under the Convention.²⁶⁵

The United States, however, telecast pictures of Saddam Hussein's medical examination during capture. The pictures were released before the determination of the status of Saddam Hussein on January 9, 2004.²⁶⁶ Article 13 of Convention III specifies that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."²⁶⁷ The last phrase prohibits broadcast of photographs of prisoners.²⁶⁸ Thus, the telecast of the medical examination of Saddam Hussein may be viewed as a violation of the article by the United States.²⁶⁹

As for trial for war crimes, article 129 of Convention III obligates parties to try suspected war criminals in domestic courts or to hand over such detainees to another High Contracting Party—in this case, Iraq.²⁷⁰ Hence, Saddam Hussein could have been tried under the laws of United States. Article 84 of Convention III, however, specifies that a "prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power," here the United States, permit trial by local civil courts.²⁷¹ Article 84's use of the term "military courts" is different from Article 53's use of the term "military tribunal."²⁷²

The United States helped the Iraqi Governing Council establish an independent Iraqi Special Tribunal to facilitate the trial of Saddam Hussein and other Iraqi nationals or residents falling within the Tribunal's jurisdiction.²⁷³ It is unclear whether a Provisional authority of an occupied territory can establish such tribunals. Article 84 of Convention III implies that prisoners of war will be tried by the detaining power.²⁷⁴ On the other hand, article 129 obligates the High Contracting Parties to enact necessary legislation to provide effective

²⁶⁵Paul Reynolds, *Analysis: Putting Saddam on Trial*, http://news.bbc.co.uk/1/hi/world/middle_east/3318531.stm (last updated Dec. 17, 2003) ("In the meantime, the US Defence Secretary Donald Rumsfeld has said that the former Iraqi leader will be 'accorded the protections of a prisoner of war and his treatment will be governed by the Geneva Convention.'").

²⁶⁶Peter Wilkinson, *Amnesty: Saddam Photo Humiliating*, at <http://edition.cnn.com/2003/WORLD/meast/12/18/sprj.irq.saddam.photo/> (Dec. 18, 2003).

²⁶⁷See Convention III, *supra* note 6, art. 13, at 3328.

²⁶⁸*Id.*

²⁶⁹*Id.*

²⁷⁰*Id.* art. 129, at 3418.

²⁷¹*Id.* art. 84, at 3382.

²⁷²*Compare id.* ("A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war."), *with id.* art. 5, at 3322–24.

²⁷³Human & Constitutional Rights, *Iraqi Special Tribunal to Try Crimes Against Humanity*, at <http://www.hrcr.org/hottopics/iraqitribunal.html> (last updated Apr. 13, 2005).

²⁷⁴Convention III, *supra* note 6, art. 84, at 3382.

penal sanctions for violations of the Convention.²⁷⁵ It is, therefore, unclear whether the Provisional authority can be construed as a High Contracting Party when it is still under occupation.

Human rights organizations have been concerned that the Special Tribunal “lacks key provisions to ensure that the trials are conducted in accordance with basic international human rights standards.”²⁷⁶ It has been pointed out that the Tribunal fails to fulfill two requirements of article 14 of the International Covenant on Civil and Political Rights (“ICCPR”).²⁷⁷ First, the Iraqi statute establishing the Tribunal does not require judges and prosecutors to have experience working on complex criminal cases or cases involving serious human rights crimes. The statute prohibits appointment of experienced non-Iraqi prosecutors or investigative judges.²⁷⁸ Second, the statute does not require that guilt be proven beyond a reasonable doubt.²⁷⁹ The violations of the ICCPR also violate Convention III, article 84, which states that the prisoner of war shall not be “tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized.”²⁸⁰

III. THE TREATMENT OF DETAINEES UNDER INTERNATIONAL LAW

The treatment of detainees is governed by multiple treaties and international customary law.²⁸¹ The Geneva Conventions contain restrictions

²⁷⁵*Id.* art. 129, at 3418.

²⁷⁶Human Rights Watch, *supra* note 260.

²⁷⁷*Id.*; *see also* ICCPR, *supra* note 132.

²⁷⁸Human Rights Watch, *supra* note 260.

²⁷⁹*Id.*; Office of the High Commissioner for Human Rights, *General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)*, at <http://www.unhchr.ch/tbs/doc.nsf/0/bb722416a295f264c12563ed0049dfbd?Opendocument> (Apr. 13, 1984) (“By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.”).

²⁸⁰Convention IV, *supra* note 6, art. 84, at 3384 (“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 does not afford the accused the rights and means of defence provided for in Article 105.”).

²⁸¹While not discussed in this paper, the United States also prohibits torture in 18 U.S.C. § 2340A. Section 2340, paragraph 1 defines “torture” as “an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340 (2000). Section 2340, paragraph 2 further defines “severe mental pain or suffering” as

the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; (C) the threat of imminent death; or (D) the threat that another person

governing the treatment of prisoners of war.²⁸² Moreover, torture or other cruel, inhuman, or degrading treatment is a violation of international human rights standards under international customary law and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”).²⁸³ The discussion in this section is limited to an analysis of the specific restrictions set forth in both of these conventions, the alleged treatment of detainees by the United States, and whether that treatment may violate those restrictions.

First, both conventions absolutely prohibit torture.²⁸⁴ The question of what conduct is categorized as torture is open to debate, although the Convention Against Torture contains a definition of torture.²⁸⁵ For example, the United States argues that conduct prescribed as torture must be inflicted with specific intent and that torture only includes the most egregious conduct.²⁸⁶ Additionally, while the question of whether torture may ever be justified or excused is subject to current academic debate,²⁸⁷ the United States takes the position that defenses, such as self-defense and necessity, may excuse torture.²⁸⁸ Second, under both conventions, treatment that does not rise to the level of torture is also prohibited, though perhaps not absolutely. The question of what constitutes torture and “cruel, inhuman or degrading treatment” is also

will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Id. The United States’ definition of torture is considered narrower than the definition used in international law. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 112 Stat. 2681, 2681–821, 1465 U.N.T.S. I-24841, 112 [hereinafter Convention Against Torture], http://www.unhcr.ch/html/menu3/b/h_cat39.htm.

²⁸²See *infra* Part IV (detailing restrictions of Geneva Conventions).

²⁸³Acts of torture also likely violate the provisions of the International Covenant on Civil and Political Rights and customary international law. See African Charter on Human and Peoples’ Rights, June 27, 1981, art. 5, 21 I.L.M. 50; ICCPR, *supra* note 132; American Convention of Human Rights “Pact of San Jose, Costa Rica,” Nov. 22, 1969, art. 5, 1144 U.N.T.S. 123, 125; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224; Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 5, U.N. Doc. A/810 (1948).

²⁸⁴See Convention Against Torture, *supra* note 281, art. 2; Convention III, *supra* note 6, art. 3, at 3318–20.

²⁸⁵Convention Against Torture, *supra* note 281, art. 1.

²⁸⁶See Memorandum from the Office of Legal Counsel of the Department of Justice, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter Bybee August Memorandum], available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf> (last visited May 8, 2005).

²⁸⁷See, e.g., DERSHOWITZ, *supra* note 24; Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2004); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2004); Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28 (reviewing DERSHOWITZ, *supra* note 24).

²⁸⁸See Bybee August Memorandum, *supra* note 286, at 39–46.

debated. The lines between both types of conduct are not well defined by the conventions or case law.

Third, the Geneva Conventions demand a higher standard of conduct from parties controlling detainees and prisoners of war by prohibiting “intimidation” instead of restricting the prohibition to “torture” and “cruel, inhuman and degrading treatment.” Moreover, the limited definition of torture in the Convention Against Torture and the United States’ narrow interpretation of the term may not limit the definition of torture prohibited under the Geneva Conventions. In other words, the Geneva Conventions may prohibit a broader scope of conduct than does the Convention Against Torture.

The Convention Against Torture protects detainees excluded by the Geneva Conventions, such as the foreign fighters in Iraq and Afghanistan. The Convention Against Torture may not provide as much protection to detainees as the Geneva Conventions, but it still prohibits intentional acts defined as torture and requires that parties prevent cruel and inhuman treatment or punishment.

IV. THE TREATMENT OF PRISONERS OF WAR UNDER GENEVA CONVENTION III

The United States and Iraq are signatories to the Geneva Convention III, which sets forth restrictions on torture relative to the treatment of prisoners of war.²⁸⁹ Moreover, even if the United States were not bound by the Geneva Convention III, some provisions concerning torture restrictions in the Geneva Convention III are considered international customary law. Accordingly, the torture restrictions described in the Geneva Convention III bind the United States. The following is a description of the articles in the Geneva Convention III concerning and relating to torture restrictions.

The distinguishing feature of the Geneva Convention is that intention is not a requirement to breach the restrictions concerning the treatment of detainees. Notably, the convention creates two classes of breaches: “serious breach”²⁹⁰ and “grave breach.”²⁹¹ Although none of the Geneva Conventions discuss the differences between the two types of breach, “willful conduct” is required to commit a grave breach.²⁹² Violation of article 13 results in a serious breach, which does not expressly require intent.²⁹³ On the other hand, article 130 characterizes a grave breach as willfully engaging in prohibited conduct, such as torture.²⁹⁴ From this, it is apparent that the definition of torture in the

²⁸⁹For an extensive discussion of the rights of unlawful combatants under the Geneva Convention IV, see generally Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L.J. 367 (2004).

²⁹⁰Convention III, *supra* note 6, art. 13, at 3328.

²⁹¹*Id.* arts. 129–30, at 3418–20.

²⁹²*Id.* art. 130, at 3420.

²⁹³*Id.* art. 13, at 3328.

²⁹⁴*Id.* art. 130, at 3420.

Geneva Conventions does not include a requirement of intent; if it did, the language in article 130 would be superfluous.

Articles 13 and 17 are the primary articles in the Geneva Convention III concerning torture restrictions and the treatment of detainees.²⁹⁵ A violation of any of the restrictions described in Articles 13 and 17 results in a breach of the Geneva Convention III. Notwithstanding the calls of commentators to create exceptions for the torture of prisoners of war in cases wherein information is needed to avoid a catastrophic event,²⁹⁶ there are no exceptions to the restrictions stated in Convention III.²⁹⁷

Article 13 generally requires that prisoners of war be humanely treated at all times.²⁹⁸ The article also prohibits any act or omission which “cause[s] death” or “seriously endanger[s]” the health of a prisoner of war.²⁹⁹ Article 13 further prohibits physical mutilation of prisoners of war and medical or scientific experiments conducted on prisoners of war.³⁰⁰ The meaning of “seriously endangers the health” is unclear. That phrase is not defined in the Convention. “[C]ause death” and “seriously endangers the health” appear to focus on the result of a particular action. Thus, an action which may not cause death or seriously endanger the health of a prisoner of war, but may threaten death or serious endangerment of the health of a prisoner of war, may not violate this provision. The article does not expressly prohibit only those acts which are intentional. The article appears to include not only a prohibition of intentional acts, but also reckless and negligent acts that cause death or seriously endanger the health. Moreover, use of the word “any” before “acts” indicates an intent that the article broadly cover all actions that may “cause death” or “seriously endanger the health,” whether intentional or not.

Article 13 also requires that the detaining power affirmatively protect prisoners of war, specifically from acts of violence or intimidation.³⁰¹ The detaining power’s duty to protect prisoners of war from acts of violence or

²⁹⁵Convention III, *supra* note 6, art. 13, 17, at 3328–32. The Convention continues: Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.

Id. art. 13, at 3328.

²⁹⁶*See supra* note 287 and accompanying text (citing to several commentators’ views on whether torture is ever justified).

²⁹⁷Convention III, *supra* note 6, art. 13, at 3328.

²⁹⁸*Id.*

²⁹⁹*Id.*

³⁰⁰*Id.*

³⁰¹*Id.* The second paragraph of Convention III, article 13 provides: “Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.” *Id.*

intimidation implies that the detaining power will not inflict acts of violence or intimidation on prisoners of war. Unfortunately, “acts of violence or intimidation” are not defined by the Convention. Moreover, the terms “violence” and “intimidation” are not defined. Webster’s New International Dictionary defines “intimidation” as the “act of making timid or fearful or of deterring by threats; state of being intimidated.”³⁰² The second paragraph of article 13 appears to be the broadest prohibition in the Convention. Obviously, an act may be an act of intimidation or violence and at the same time not cause death or seriously [endanger] the health of a prisoner of war. However, a violation of Convention III, article 13, paragraph two may be a lesser offense than a violation of article 13, paragraph one, the violation of which is a “serious breach” of the Convention. There is no such language applicable to the prohibitions stated in the second paragraph. Article 13 also requires that detaining powers must protect prisoners of war against insults and public curiosity.³⁰³ Finally, any measure of reprisal against prisoners of war is prohibited.³⁰⁴ Again, the terms “measure” and “reprisal” are not defined.

Article 17 of the Geneva Convention III prohibits the infliction of physical or mental torture for the purpose of obtaining information.³⁰⁵ Article 17 not only prohibits torture, but further “any other form of coercion” to secure information.³⁰⁶ Moreover, if a POW refuses to provide information, he or she may not be “threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”³⁰⁷ The term “torture” is undefined by the Geneva Convention. However, the term is defined in the Convention Against Torture to include a prohibition on the intentional infliction of severe pain or suffering, physical or mental, to obtain information or a confession, to inflict punishment, or to intimidate.³⁰⁸ The definition in the Convention on Torture may be borrowed to define torture under the Geneva Conventions. As used in article 17, “torture” appears to mean some form of treatment that is more egregious

³⁰²WEBSTER’S NEW INT’L DICTIONARY 1301 (2d ed. 1934) (1998).

³⁰³Convention III, *supra* note 6, art. 13, at 3328.

³⁰⁴*Id.*

³⁰⁵*Id.* art. 17, at 3330–32 (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”).

³⁰⁶*Id.* art. 13, at 1328.

³⁰⁷*Id.*

³⁰⁸The Convention Against Torture defines “torture” as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture, *supra* note 281, art. 1.

than “any other form of coercion.”³⁰⁹ Thus, committing some act of coercion that does not amount to torture may violate Convention III. As such, an act of coercion may include unintentional, reckless, or negligent acts or omissions that may cause pain or suffering. Moreover, a prohibited act of coercion need not be *intentional* or cause *severe* pain or suffering. However, the standard set forth in the Convention Against Torture may not apply to the meaning of “torture” in Convention III because article 1, paragraph two of the Convention Against Torture states: “[t]his article is without prejudice to any international instrument or national legislation which does not or may contain provisions of wider application.”³¹⁰ As a result, the definition of torture in Convention III could be defined as being broader than the definition set forth in the Convention Against Torture. Thus, the Geneva Conventions may not require that torture include a requirement of intent.

Article 17 further states that prisoners of war who refuse to answer questions may not be “threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”³¹¹ Accordingly, threats and insults are prohibited. The use of the word “any” indicates that “unpleasant or disadvantageous treatment” is to be broadly construed.³¹²

Moreover, Article 130 states that act such as “willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health” are considered “grave breaches” of the Geneva Convention III.³¹³ Arguably, article 130 addresses a higher level of torture as willful torture. As such, an argument can be made that willful torture may be a grave breach, but torture that is not willful is still a breach. Possibly, torture that is not willful falls within the ambit of article 17; when torture is committed willfully, it rises to the level of article 130. Moreover, defining torture so as to require an intent would render the term “willful” in Article 130 superfluous.³¹⁴ Accordingly, torture may not be a grave breach unless it is willful.

Several other articles of Convention III contain restrictions concerning the humane treatment of prisoners of war. Article 22 states in pertinent part that: “[p]risoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness.”³¹⁵ Article 25 provides in pertinent part that:

Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the

³⁰⁹Convention III, *supra* note 6, art. 17, at 3330–32.

³¹⁰Convention Against Torture, *supra* note 281, art. 1, ¶ 2.

³¹¹Convention III, *supra* note 6, art. 17, at 3332.

³¹²*Id.*

³¹³*Id.* art. 130, at 3420.

³¹⁴*Id.*

³¹⁵*Id.* art. 22, at 3336.

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 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.³¹⁶

Article 26 states in relevant part that: “The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. . . . Collective disciplinary measures affecting food are prohibited.”³¹⁷ Article 27 provides in relevant part that: “[c]lothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained.”³¹⁸ Article 29 and article 30 require adequate sanitary facilities and medical attention, respectively.³¹⁹ Article 87 in Chapter III, which is entitled “Penal and Disciplinary Sanctions,” provides in relevant part that, “[c]ollective punishment for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.”³²⁰

V. RESTRICTIONS UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The United States is a party to the Convention Against Torture. In addition to the prohibition of torture, the convention also requires participating parties to prevent “cruel, inhuman or degrading treatment or punishment.”³²¹ The Convention explicitly states that, “[n]o exceptional circumstances whatsoever, whether a state of war or threat of war . . . or any public emergency, may be invoked as a justification for torture.”³²² The Convention, however, does not contain a similar statement absolutely barring cruel, inhuman or degrading treatment or punishment in all circumstances. Accordingly, a participating party may not have to prevent “cruel, inhuman or degrading treatment or punishment” if exceptional circumstances exist which justify or excuse that treatment.³²³ Moreover, the Convention prohibits

³¹⁶*Id.* art. 25, at 3338.

³¹⁷*Id.* art. 26, at 3340.

³¹⁸*Id.* art. 27, at 3340.

³¹⁹*Id.* art. 29–30, at 3342.

³²⁰*Id.* art. 87, at 3384.

³²¹Convention Against Torture, *supra* note 281, art. 16.

³²²*Id.* art. 2, ¶ 2.

³²³*See* NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS OF WAR UNDER INTERNATIONAL LAW* 78–84 (2d ed. 1999) (discussing justifiability of infliction of cruel, inhuman, or degrading treatment).

extradit[ion] to another country “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”³²⁴

The Convention Against Torture specifically defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³²⁵

Accordingly, for conduct to be defined as torture, that conduct must include: (1) severe pain and suffering; (2) intent; (3) some government involvement; and (4) a prohibited purpose.³²⁶ The convention fails to define “severe” or “intent.”

The United States Congress enacted 18 U.S.C. §§ 2340-2340A to implement the Convention Against Torture.³²⁷ Section 2340A of 18 U.S.C. prohibits torture, and § 2340, paragraph one, defines torture as requiring a specific intent to inflict severe physical or mental pain or suffering.³²⁸ In a memorandum dated August 1, 2002, the Office of Legal Counsel of the Department of Justice interpreted § 2340A to require a prohibition of inflicting acts specifically intended to inflict severe pain or suffering.³²⁹ The memorandum noted that the Convention Against Torture does not specify whether general or specific intent is necessary, only that torture is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”³³⁰ The memorandum, however, took the position that

to be sure, the text of the treaty requires that an individual act intentionally. This language might be read to require only general intent for violations of the Torture Convention. We believe, however, that the better interpretation is that the use of the phrase “intentionally” also created a specific intent-type standard. In that event, the Bush administration’s understanding represents only an explanation of how the United States intended to implement the

³²⁴Convention Against Torture, *supra* note 281, art. 3, ¶ 1.

³²⁵*Id.* art. 1.

³²⁶*Id.*

³²⁷*See* 18 U.S.C. § 2340 (2000).

³²⁸*Id.*

³²⁹Bybee August Memorandum, *supra* note 286, at 3.

³³⁰*Id.* at 14–15.

vague language of the Torture Convention. If, however, the Convention Against Torture established a general intent standard, then the Bush understanding represents a modification of the obligation undertaken by the United States.³³¹

As recognized by the Bush Administration, the Convention, by its text, does not include a requirement of specific intent or exclude a demonstration of general intent to satisfy the requirement of “intent.”³³²

In addition to a prohibition of torture, Article 16 of the convention also states that

[e]ach State Party shall undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³³³

The Senate ratified the Convention³³⁴ and included reservations that state the United States only considers itself bound to prevent cruel and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.³³⁵ It is clear that cruel, inhumane, or degrading treatment or punishment is something less than what constitutes torture under the Convention. However, the Convention itself does not define “cruel, inhuman or degrading treatment or punishment.” According to the reasoning of the European Commission on Human Rights, interpreting the same language in another treaty, “degrading treatment” tends to humiliate or drive a victim against his or her will or conscience, and “inhuman treatment” is a deliberate infliction of severe mental or physical suffering.³³⁶

³³¹*Id.* at 15 n.7.

³³²*Id.*

³³³Convention Against Torture, *supra* note 281, art. 16, ¶ 1.

³³⁴The memorandum also took the position that § 2340A is unconstitutional if it interferes with the president’s constitutional power to conduct a military campaign. Bybee August Memorandum, *supra* note 286, at 31. Finally, the memorandum asserted that torture may be justified by defenses such as self-defense and necessity. *Id.* at 39.

³³⁵See Office of the U.N. High Comm’r for Human Rights, *United Nations Treaty Collection, Declarations and Reservations*, at http://www.unhchr.ch/html/menu3/b/treaty12_asp.htm (Feb. 5, 2001).

³³⁶RODLEY, *supra* note 323, at 90–92. According to commentators, the use of the terms torture and inhuman treatment by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment do not refer to two different categories of conduct on a continuum. See Rod Morgan & Malcom D. Evans, *CPT Standards: An Overview*, in *PROTECTING PRISONERS* 39–40 (Rod Morgan & Malcom D. Evans eds., 1999). Morgan and Evans write:

Torture is almost exclusively used to refer to physical ill-treatment employed instrumentally by the police. . . . The terms *inhuman* and *degrading*, used either separately or together, have been reserved for forms of environmental ill-treatment,

The United Nation's Code of Conduct for Law Enforcement Officials posits that the section "should be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental."³³⁷ Moreover, categorizing specific conduct is a poor way to define torture because torturers would avoid that conduct and create new ways to terrorize their victims.³³⁸

The U.N. Committee on Human Rights, the European Commission on Human Rights, and the European Court of Human Rights have clarified the meaning of the terms "torture" and "cruel, inhuman, or degrading treatment or punishment."³³⁹ Torture has been defined by the European Commission on Human Rights to include "[s]evere beatings (often of the feet) with wooden or metal sticks or bars without breaking the bones or causing lesions, yet causing intense pain and swelling."³⁴⁰

chiefly concerning the conditions in which groups of prisoners are housed, where the purposive element, at least in terms of a particular individual, is lacking or obscure. . . . Physical ill-treatment falling short of torture is not called *inhuman* or *degrading* but is described as *ill-treatment*. Environmental *ill-treatment* falling short of the *inhuman* or the *degrading*, and well below that which is deemed *inhuman* and *degrading*, is said to be *unacceptable* or *inadmissible*, or it is said that it *could* be considered to be *inhuman and degrading*, but is not actually said to be so.

Id.

³³⁷G.A. Res. 169, U.N. GAOR, 34th Sess., Supp. No. 46, art. 5, cmt. C, at 187, U.N. Doc. A/RES/34/169 (1979), available at <http://www.un.org/documents/ga/res/34/a34res169.pdf>; see also John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 240 (2003).

³³⁸RODLEY, *supra* note 323, at 77.

³³⁹Parry, *supra* note 337, at 240. Morgan and Evans explain:

What, then, is the threshold which the [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT")] appears to consider it necessary for physical ill-treatment to have crossed in order for it to be described as torture? We conclude that the CPT has so far reserved the word 'torture' for what are perhaps best described as specialized, or exotic, forms of violence purposefully employed to gain a confession or information or generally intended to intimidate or humiliate. Other forms of violence of the sort frequently reported to, and not infrequently found by, the Committee, such as blows with fists or feet or batons or other weapons, have generally been deemed insufficient to justify use of the terms 'severe ill-treatment' or 'torture', even when such blows have apparently been inflicted either with the intention of causing pain or purposefully with a view of extracting information. Physical ill-treatment has been described as torture when, for example, evidence has been found of the use of specialized techniques (such as the suspension of the victim, beating of the soles of the feet, hosing with pressurized water, the placing of a metal bucket on the head and then striking it with metal or wooden instruments and so on), the use of specialized instruments (notably electric shock equipment), or special forms of preparation (such as blindfolding or covering the victim's head with a blanket, or officers' face being masked, to prevent the victim from seeing his or her tormenters.

Morgan & Evans, *supra* note 336, at 34–35.

³⁴⁰Parry, *supra* note 337, at 240. For a description of Israeli, British, and Chicago Police Department torture case studies, see generally JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE (2000).

Torture also includes the combination of being made to stand all day for days at a time, beatings and withholding food; beatings and being buried alive; electric shocks, beatings, being hung with arms behind one's back, having one's head forced under water until nearly asphyxiated, and being made to stand for hours.³⁴¹

The European Court of Human Rights found that rape is torture.³⁴² Additionally, the Human Rights Committee found threats of physical mutilation to be torture, including being "blindfolded, beaten, stripped, placed inside a tyre and sprayed with high pressure water."³⁴³ Moreover, rape alone has been classified as torture by the Inter-American Commission on Human Rights, the U.N. Special Rapporteur on Torture, and the International Criminal Tribunal for the Former Yugoslavia.³⁴⁴

Certain combinations of the following conduct fall within either or both of the categories of torture and cruel or inhuman treatment:

[B]eing beaten, given electric shocks and then forced to stand, hooded, for long hours, where the victim fell, broke his leg, and was denied medical treatment for a period of time; electric shocks, having one's hooded head put into foul water, having objects forced in one's anus, and being forced to remain standing, hooded and handcuffed for several days; and enduring a fractured jaw while being kept hanging for hours by the arms, subjected to electric shocks, thrown on the floor, covered in chains connected to electric current and kept naked and wet.³⁴⁵

The "European Commission of Human Rights also found that beatings and one or more of electric shock, mock execution, or refusal of food and

³⁴¹Parry, *supra* note 337, at 240.

³⁴²RODLEY, *supra* note 323, at 89.

³⁴³*Id.*

The *Estrella* case also affords an example of the sort of *mental* suffering that may amount to torture. Estrella complained of "psychological torture" which: consisted chiefly in threats of torture or violence to relatives of friends, or of dispatch to Argentina to be executed, in threats of making us witness the torture of friends, and in inducing in us a state of hallucination in which we thought we could see and hear things which are not real. In my own case, their point of concentration was my hands. For hours upon end, they put me through a mock amputation with an electric saw, telling me, "We are going to do the same to you as Victor Jara." Amongst the effects from which I suffered as a result were a loss of sensitivity in both arms and hands for eleven months, discomfort that still persists in the right thumb, and severe pain in the knees.

Id. at 90 (citation omitted).

³⁴⁴*Id.*

³⁴⁵Parry, *supra* note 337, at 240–41 (citations omitted).

water were either torture or inhuman treatment.”³⁴⁶

According to Professor Parry, “few cases address the distinction between torture and inhuman treatment, [and] the line between inhuman and permissible treatment is not clear.”³⁴⁷ On one side of the spectrum, “[p]erhaps beatings that are not severe and sustained, or an isolated practice—such as wall-standing (being forced to stand spread-eagled on one’s toes with fingers on the wall above one’s head, so that the body weight is on the toes and fingers)—would be inhuman treatment but not torture.”³⁴⁸ On the other side, “slaps and blows after arrest” may not amount to cruel or inhuman treatment.³⁴⁹ At least one court, the European Court of Human Rights, has stated that “[a] range of factors come into play in establishing whether a victim’s ‘pain or suffering’ is so ‘severe’ as to constitute ‘torture,’ as distinct from other prohibited ill-treatment under the [Convention Against Torture].”³⁵⁰ According to that court, determining whether treatment is torture depends on “‘all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.’”³⁵¹

The case of *Ireland v. United Kingdom*³⁵² provides some illumination as to the differences between torture and inhuman treatment, and inhuman treatment and permissible conduct. In that case, British soldiers subjected Irish Republican Army members “to wall-standing for hours, hooding, continuous loud and hissing noise, sleep deprivation, and restricted food and water.”³⁵³ The European Commission of Human Rights determined that that treatment was torture; however, its ruling was reversed by the European Court of Human Rights in a thirteen to four vote.³⁵⁴ While the court found by a sixteen to one vote that the practices were inhuman and degrading, those practices did not amount to torture.³⁵⁵ That court stated that “the difference between torture and inhuman treatment ‘derives principally from a difference in the intensity of the suffering inflicted.’”³⁵⁶ “Because torture is an ‘aggravated’ form of inhuman treatment that carries ‘a special stigma,’ it should be reserved for practices that exhibit a ‘particular intensity and cruelty.’”³⁵⁷ This decision has been criticized

³⁴⁶*Id.* at 241.

³⁴⁷*Id.*

³⁴⁸*Id.* (citation omitted).

³⁴⁹*Id.* (citation omitted).

³⁵⁰See HumanRightsFirst.org, *U.S. Law Prohibits Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, at http://humanrightsfirst.org/us_law/after_911/PDF/torture.pdf (last visited May 8, 2005).

³⁵¹*Id.* (quoting *Selmouni v. France*, 2 Eur. H.R. Rep. 75 (1999)).

³⁵²App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980).

³⁵³Parry, *supra* note 337, at 241.

³⁵⁴*Id.*; RODLEY, *supra* note 323, at 92.

³⁵⁵RODLEY, *supra* note 323, at 92; Parry, *supra* note 337, at 241–42.

³⁵⁶Parry, *supra* note 337, at 242 (citation omitted).

³⁵⁷*Id.*

by commentators and human rights groups that believe those practices were clearly torture.³⁵⁸

Notably, the United States State Department's 2003 Country Reports on Human Rights Practices has condemned other countries from participating in the following conduct: beatings, bindings, electric shock, stripping, solitary confinement, suffocation, suspension, sexual assaults, forced painful positions, sleep deprivation, threats (especially of sexual abuse), mock executions, dog attacks, burning, blindfolding, and branding.³⁵⁹ While this list is not exhaustive, it contains treatment that ranges from torture to inhuman treatment specifically condemned by the United States.³⁶⁰

VI. REPORTED TREATMENT OF PRISONERS OF WAR AND DETAINEES BY UNITED STATES

A. *Allegations of Mistreatment of Detainees at Guantanamo Bay*

According to a June 7, 2004, article in the Wall Street Journal, “[m]ethods now used at Guantanamo include limiting prisoners’ food, denying them clothing, subjecting them to body-cavity searches, depriving them of sleep for as much as 96 hours and shackling them in so-called stress positions.”³⁶¹ The article further states that “[a]lthough the interrogators consider the methods to be humiliating and unpleasant, they don’t view them as torture.”³⁶²

Human Rights Watch conducted several interviews with former detainees at Guantanamo Bay. According to those interviewees, they were subjected to, or witnessed other detainees being subjected to, threats of electric shock, cold temperature, shackling or chaining for weeks, threats with military dogs, isolation for long periods of time, and beatings.³⁶³ Notably, some interviewees reported that there was no abuse during interrogations.³⁶⁴ Some theorize that that interviewees considered to be “high value” or special risk may be subjected to harsh treatment, while interviewees unlikely to have information are not subjected to abusive treatment.³⁶⁵

The Secretary of Defense approved the following conduct for use in the military prison at Guantanamo Bay:

³⁵⁸*Id.*

³⁵⁹U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *2003 Country Reports*, <http://www.state.gov/g/drl/rls/hrrpt/2003/index.htm> (Feb. 25, 2004).

³⁶⁰*Id.*

³⁶¹Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL ST. J., June 7, 2004, at A17.

³⁶²*Id.*

³⁶³Human Rights Watch, *Guantánamo: America’s “Black Hole,”* at <http://hrw.org/reports/2004/usa0604/3.htm> (June 2004).

³⁶⁴*Id.*

³⁶⁵*Id.*

Category 1: Incentive, Yelling at detainee, Deception, Multiple interrogator techniques, Interrogator identity; Category 2: Stress positions for a maximum of four hours (e.g., standing), Use of falsified documents or reports; Isolation of up to 30 days (requires notice), Interrogation outside the standard interrogation booth, Deprivation of light and auditory stimuli, Hooding during transport and interrogation, Use of 20 hour interrogations, Removal of all comfort items, Switching detainees from hot meals to MRE, Removal of clothing; Forced grooming (e.g., shaving), Inducing stress by use of detainee's fears; and Category 3: Use of mild, non-injurious physical contact.³⁶⁶

The following conduct was reported to have been used by personnel at Guantanamo Bay:

Category I: Yelling (not directly in ear), Deception (introduction of confederate detainee), Role-playing interrogator in next cell; Category II: Removal from social support at Camp Delta, Segregation in Navy Brig, Isolation in Camp X-Ray, Interrogating detainee in an environment other than the standard interrogation room at Camp Delta (e.g., Camp X-Ray), Deprivation of Light (use of red light), Inducing stress (use of female interrogator), Up to 20 hour interrogations, Removal of all comfort items including religious items, Serving MRE instead of hot rations, Forced grooming (to include shaving facial hair and head—also served hygienic purposes), Use of false documents or reports.³⁶⁷

B. Allegations of Mistreatment and Treatment of Detainees in Afghanistan

Human Rights Watch alleged that “U.S. officials have told journalists and Human Rights Watch that U.S. military and intelligence personnel in Afghanistan employ an interrogation system that includes the use of sleep deprivation, sensory deprivation, and forcing detainees to sit or stand in painful positions for extended periods of time.”³⁶⁸ The organization has also documented abuse of detainees, including exposure to freezing temperatures and severe beatings.³⁶⁹ According to Human Rights Watch, “[d]etainees complained about being stripped of their clothing and photographed while

³⁶⁶Rumsfeld, *supra* note 12.

³⁶⁷*Id.*

³⁶⁸Human Rights Watch, *Afghanistan: Impunity for Systematic Abuse*, at <http://hrw.org/reports/2004/usa0604/4.htm> (June 2004).

³⁶⁹*Id.*

naked.”³⁷⁰ Additionally, the Washington Post reported in a December 2002 article that

[a]ccording to Americans with direct knowledge and others who have witnessed the treatment, captives are often “softened up” by MPs and U.S. Army Special Forces troops who beat them up and confine them in tiny rooms. And alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep.³⁷¹

Human Rights Watch also reports that

Afghans detained at Bagram airbase in 2002 have described being held in detention for weeks, continuously shackled, intentionally kept awake for extended periods of time, and forced to kneel or stand in painful positions for extended periods. Some say they were kicked and beaten when arrested, or later as part of efforts to keep them awake. Some say they were doused with freezing water in the winter.”³⁷²

Moreover, Human Rights Watch asserts that the “United States has still not provided any adequate explanation for four, and possibly five, suspicious deaths of detainees that took place in Afghanistan in 2002 and 2003.”³⁷³ One incident involved the death of an Afghan detainee “due to hypothermia after he was doused with cold water and left shackled in an unheated cell overnight.”³⁷⁴

C. Allegations of Mistreatment and Findings of Torture or Inhuman or Degrading Treatment in Iraq

The report, *Article 15-6 Investigation of the 800th Military Police Brigade*, also known as the “Taguba Report,” outlines findings and allegations of torture or inhuman or degrading treatment of detainees in Iraq.³⁷⁵ The Taguba Report was prepared by Major General Antonio M. Taguba at the request of his superior officers.³⁷⁶ The purpose of the report was to:

³⁷⁰*Id.*

³⁷¹Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

³⁷²Human Rights Watch, *supra* note 368.

³⁷³*Id.*

³⁷⁴*Id.* “According to the Los Angeles Times, this case was referred by the CIA to the Justice Department, but no investigation results have been made public.” *Id.* (citing Bob Drogin, *Abuse Brings Deaths of Captives into Focus*, L.A. TIMES, May 16, 2004, at A1).

³⁷⁵*See generally* TAGUBA REPORT, *supra* note 2.

³⁷⁶*Id.* at 6.

- a. Inquire into all the facts and circumstances surrounding recent allegations of detainee abuse, specifically allegations of maltreatment at the Abu Ghraib Prison (Baghdad Central Confinement Facility (BCCF));
- b. Inquire into detainee escapes and accountability lapses as reported by CJTF-7, specifically allegations concerning these events at the Abu Ghraib Prison;
- c. Investigate the training, standards, employment, command policies, internal procedures, and command climate in the 800th MP Brigade, as appropriate; and
- d. Make specific findings of fact concerning all aspects of the investigation, and make any recommendations for corrective action, as appropriate.³⁷⁷

The Taguba Report found that the following conduct was engaged in by United States contractors and/or military police:

- a. Punching, slapping, and kicking detainees; jumping on their naked feet;
- b. Videotaping and photographing naked male and female detainees;
- c. Forcibly arranging detainees in various sexually explicit positions for photographing;
- d. Forcing detainees to remove their clothing and keeping them naked for several days at a time;
- e. Forcing naked male detainees to wear women's underwear;
- f. Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;
- g. Arranging naked male detainees in a pile and then jumping on them;
- h. Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
- i. Writing "I am a Rapest" (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;
- j. Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;
- k. A male MP guard having sex with a female detainee;
- l. Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee; [and]
- m. Taking photographs of dead Iraqi detainees.³⁷⁸

³⁷⁷*Id.* at 6–7.

³⁷⁸*Id.* at 16–17.

The Taguba Report also found that detainees described the following acts of abuse:

- a. Breaking chemical lights and pouring the phosphoric liquid on detainees;
- b. Threatening detainees with a charged 9mm pistol;
- c. Pouring cold water on naked detainees;
- d. Beating detainees with a broom handle and a chair;
- e. Threatening male detainees with rape;
- f. Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;
- g. Sodomizing a detainee with a chemical light and perhaps a broom stick; [and]
- h. Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.³⁷⁹

General Taguba found those statements “credible based on the clarity of their statements and supporting evidence provided by other witnesses.”³⁸⁰

D. Treatment and Alleged Mistreatment of Detainees May Violate Standards in Geneva Convention III and Convention Against Torture

It is unclear whether the arguably lower standards of the Geneva Convention III or Convention Against Torture apply to the conduct described above. Considering that the military tribunal required under article 45 of Convention III has not become functional yet, the status of all detainees has not been determined. Thus, all detainees are covered under article 5 of Convention III, which requires the Detaining Power to treat the detainees like prisoners of war until their status is determined by a competent tribunal.³⁸¹ As discussed earlier, the prisoners of war are entitled to humane treatment. Thus, even detainees who are unlikely to receive permanent protection from the Geneva Convention—for example, foreign fighters—fall within the purview of the Geneva Convention III since their status remains undetermined. The alleged treatment of the prisoners, if true, may well violate the restrictions of Convention III. At the very minimum, almost all of the conduct described above would be impermissible under the standard of “intimidation” outlined in Convention III.³⁸² Moreover, sodomizing detainees with a chemical light or broom stick and raping a female soldier are clearly torture under the Geneva

³⁷⁹*Id.* at 17–18.

³⁸⁰*Id.* at 17.

³⁸¹Convention III, *supra* note 6, art. 5, at 3322–24.

³⁸²*Id.* art. 13, at 3328.

Convention III. If the definition of torture asserted by the Bush Administration is adopted, it is unclear whether the requisite specific intent is present for some of the acts described above to be considered torture. If that definition is not used, a finding of general intent would likely be supported and thus, those acts would be considered torture under the Convention Against Torture. However, acts, such as using military dogs to frighten prisoners, prolonged sleep deprivation, and beatings, would likely be categorized as cruel, inhuman, or degrading treatment or punishment.

VII. CONCLUSION

This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.³⁸³

The Bush administration has taken a position which attempts to dance around international law to achieve the objective of obtaining high quality information from detainees. There is no dispute that obtaining high quality information about future terrorist attacks is critical to preventing future attacks, but at what cost? A more prudent approach by the Bush administration would have been use of the worldwide support received after 9/11 to modify the international rules of law concerning the treatment of detainees of war on terror. At that point, the world would likely have been receptive to creating exceptions to international law to even allow the torture of detainees in order to prohibit a catastrophic terrorist attack.³⁸⁴ Instead, the Bush administration, by its actions, has jeopardized respect for the rule of law, reduced its standing in the international community, and placed its own soldiers and citizens captured in future conflicts at risk.

³⁸³H.C. 5100/94, Pub. Comm. Against Torture in Israel v. Israel, 53(4) P.D. 817, 845, 38 I.L.M. 1471, 1488, ¶ 39 (1999) (Aharon Barak, President, Israeli Supreme Court).

³⁸⁴The authors are not suggesting that torture may ever be excused or justified in any circumstance. We are only suggesting that had the Bush Administration either taken that position or explored other alternatives, it is likely that they would have received support without jeopardizing the rule of law and United States military personnel in future conflicts.