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Is there a basis for the argument that the detainees at Guantanamo bay are entitled to constitutional protections?

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CASE WESTERN RESERVE UNIVERSITY
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MEMORANDUM FOR THE
UNITED STATES DEPARTMENT OF DEFENSE

ISSUE: IS THERE A BASIS FOR THE ARGUMENT THAT
THE DETAINEES AT GUANTANAMO BAY ARE ENTITLED
TO CONSTITUTIONAL PROTECTIONS?

PREPARED BY MARK PUSTAY
FALL 2004

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Introduction and Summary of Conclusions¹

This memorandum addresses the validity of the argument that detainees currently being held at the Guantanamo Bay Naval Base in Cuba are afforded certain protections under the United States Constitution. Part I of this memorandum gives a brief summary of the protections provided to all persons standing before military commissions, regardless of status or nationality. Part II considers how domestic and international law deals with the detention and prosecution of American citizens before military commissions. Part III addresses the distinction between Taliban and Al Qaeda detainees captured in Afghanistan, and how the law treats the two groups differently. Finally, part IV assesses the special situation surrounding the detention of members of Al Qaeda who have been captured in areas other than Afghanistan. Each section consist of a brief evaluation of the status classifications given to each type of detainee, an examination of domestic and international law relevant to the classification, and an assessment of the relative validity of the various arguments surrounding the treatment of each type of detainee.

Summary of Conclusions

1. There is a legal basis throughout American legal history to justify the constitutionality of American use of military commissions.

The Supreme Court has consistently upheld the ability of the United States to conduct military commissions in times of national security. International law provides less approval for the use of American-style military commissions.

2. There is very clear difference in the domestic protections afforded American citizens and those protections afforded non-citizen aliens.

¹ Is there a basis for the argument that the detainees at Guantanamo Bay are entitled to constitutional protections?

3. American courts recognize a wide range of constitutional protections afforded American citizens.

American courts, as will be evidenced throughout this paper, have made clear distinctions between citizens and non-citizens when it comes to the constitutional protections explicitly provided for in domestic law mechanisms.

4. Domestic law affords non-citizen aliens much fewer constitutional protections, although non-citizen aliens are afforded some limited constitutional protection.

Since the tenets of treaties to which the United States is a party are incorporated in the Constitution as the law of the land, there are very real constitutional protections that must be afforded members of the international community. These protections are somewhat limited, however, in that they are not as expansive as those constitutional protections afforded citizens of the United States. Non-citizens are afforded the ability to bring suit in American courts under the Alien Tort Claims Act and, under certain circumstances, may petition for a writ of habeas corpus review in the federal court system. That said, there are definite protections afforded non-citizens that arise to the level of constitutional protections through incorporation. These can be found through an analysis of the Geneva Conventions, the International Covenant of Civil and Political Rights and the Convention Against Torture.

5. Certain provisions of international law are incorporated as constitutional protections.

Article VI, clause two of the Constitution clearly provides that the provisions of international treaties to which the United States is a party are incorporated as the highest laws of the land. The extent to which customary international law or non-binding treaties are binding as constitutional protections is somewhat less clear.

6. There is a clear distinction between the protections afforded detainees under domestic law and those protections that may be afforded detainees under international law.

Generally speaking, the domestic protections afforded individuals detained by the United States are not as expansive as those provided by provisions of international law. Such provisions of international law may bind the United States if they arise to the highest law of the land.

7. The United States has taken a number of positive actions to ensure that as many protections are afforded the individuals detained pursuant to the War on Terror.

The United States has taken some positive steps to ensure that detainees are given minimum protections of international human rights law, but there still may be a few legitimate concerns about the ultimate protections afforded those detainees

1) General Protections Provided to All

A. Domestic Law Through the Federal Court System

It is difficult to determine the scope of protections afforded detainees under military commissions, as the protections for the accused are subject to change at the President's will.² The American legal system makes distinctions between citizens and non-citizens for the purpose of determining what rights and privileges are afforded each member of society. While the Constitutional protections for citizens are much greater in scope than those protections afforded non-citizens, there are certain constitutional protections afforded all people in the United States.

First, the Supreme Court has repeatedly held, and recently affirmed, that the ability to petition for a writ of habeas corpus review is a protection for all people within the "territorial jurisdiction" of the United States.³ Recent decisions by the Court indicate that the writ of habeas corpus may be extended to foreign nationals captured abroad, not just to those foreign nationals within the territorial jurisdiction of United States.⁴ This ability to petition for habeas corpus review is subject to prohibition by congressional action.⁵

² James Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 349 (2003). [Reproduced in the accompanying textbook at Tab 27].

⁴ *Rasul v. Bush*, 124 S.Ct. 2686, 2698. [Reproduced in the accompanying textbook at Tab 22]. The Court invokes Section 2241 of the US Code to determine that non-citizen detainees are entitled to a writ of habeas corpus in challenging their detentions. [Reproduced in the accompanying textbook at Tab 1]. This is the same section of the US Code relied upon by the *Hamdi v. Rumsfeld*, in which the Court determined that citizen detainees were not entitled to a writ of habeas corpus. See also *Braden v. 30th Judicial Court of Kentucky*, 410 U.S. 484 (1973) (holding that a prisoner need not necessarily be in the territorial jurisdiction of a district court in order for that district court to exercise federal habeas corpus jurisdiction.) [Reproduced in the accompanying textbook at Tab 12].

⁵ 28 U.S.C. §2241. See also *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (holding that habeas corpus jurisdiction of a citizen detainee was limited to the district in which the detainee was confined, not the Southern District of New York), [Reproduced in the accompanying textbook at Tab 23] and *Ahrens v.*

Second, non-resident aliens are entitled to bring civil action in United States District Court through the Alien Tort Claims Act (the “ATCA”).⁶ The ATCA provides original jurisdiction for district courts in cases where an alien brings a “civil action for a tort committed in violation of the law of nations or a treaty of the United States.”⁷ The ATCA’s authority was recently reaffirmed by the Supreme Court in the *Rasul v. Bush* decision of 2004.⁸ In coming to the conclusion that non-citizen detainees are entitled to bring civil action in district court, the *Rasul* Court explicitly stated that the fact that the persons bringing suit are held in military custody is “immaterial” to issue of whether or not district courts have jurisdiction over such tort claims.⁹

B. International Law

Any examination of the protections afforded the Guantanamo detainees that does not address provisions of international law would be improper. This is because the judicial branch has clearly indicated that terms of international law can be legally binding authority for American courts. The United States Constitution has explicitly designated international treaties made “under the authority of the United States “as the “supreme Law of the Land.”¹⁰ Provisions of international law beyond treaties to which the United States is a party may also apply to American judicial proceedings. The Supreme Court

Clark, 335 U.S. 188 (1948) (holding that a detainee’s presence in a particular territory places the detainee in that territory’s jurisdiction) [Reproduced in the accompanying textbook at Tab 11].

⁶ Alien Tort Claims Act, 28 U.S.C. §1350 (2004). [Reproduced in the accompanying textbook at Tab 4]

⁷ *Id.*

⁸ *Rasul*, *supra* note 3

⁹ *Rasul*, *supra* note 3, at 2699.

¹⁰ U.S. CONST., art. VI, cl. 2. [Reproduced in the accompanying textbook at Tab 6]

declared in the *Paquete Habana* case that “(i)nternational law is part of American law,” in holding that international law exempted fishing vessels from being captured as prizes of war.¹¹ Significantly, the *Paquete Habana* court declared that in cases “where there is no treaty, and no controlling executive or legislative act or juricial decision, resort must be had to the customs and usages of civilized nations.”¹² Frederic Kirgis argues that the United States sees international law and United States foreign relations law are “overlapping, side-by-side legal systems.”¹³ In one sense, the two systems overlap because international law can become domestic law through incorporation pursuant to article VI of the Constitution. In another sense, since international law and domestic law also exist side-by-side, official action that is lawful under U.S. federal law...could be unlawful under international law.”¹⁴

¹¹ The *Paquete Habana*, 175 U.S. 677, 700 (1900). [Reproduced in the accompanying textbook at Tab 21]. For a contemporary interpretation of the *Paquete Habana* case, see *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980) (holding that intentional torture was a violation of “universally accepted norms of international law”) [Reproduced in the accompanying textbook at Tab 17]. and *Fernandez-Roque v. Smith*, 622 F.Supp.887 (1985) (holding that detained aliens invited to the United States by the President were entitled to hearings because there was no “controlling legislative act” that precluded the court from applying norms of customary international law) [Reproduced in the accompanying textbook at Tab 16].

¹² *Id.* While it is clear that this passage establishes an application of international law to domestic cases where no specific law controls, the authority of international law in regards to the jurisdiction of military commissions is unclear. Anne English French argues that since Congress has not passed a statute explicitly defining the official jurisdiction of military commissions, international law, and particularly the “law of war” controls the jurisdiction of military commissions. The President’s Military order of November 13, however, declares that the military commissions conducted pursuant to his order shall have jurisdiction over non-US citizens where there is reason to believe the accused persons were members of Al-Qaeda, “engaged in, aided or abetted, or conspired to commit” acts of international terrorism, or has harbored someone who engaged in such activity. A detainee may also be subject to a military commission where “it is in the interest of the United States.” The exact boundaries of these jurisdictional provisions, however, cannot be determined, as the President may determine new jurisdictional boundaries for the commissions “from time to time.”

¹³ Frederic L. Kirgis, *Distinctions Between International and U.S. Foreign Relations Law Issues Regarding Treatment of Suspected Terrorists*, ASIL, June 2004. [Reproduced in the accompanying textbook at Tab 45].

¹⁴ *Id.*

There are two ways that the United States may be held bound to provisions of international law. The first way the United States can be bound to international law is through treaties to which the United States is a party. These treaties include the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights. Not only is the United States bound to the provisions of those treaties, but also the substantive law of those treaties is incorporated in the United States Constitution as the “supreme law of the land.”¹⁵ The second way the United States is bound to tenets of international law is if those tenets are so widely practiced that those tenets rise to the level of customary international law. For the purposes of the Guantanamo proceedings, the United States could potentially be bound to provisions of international law through either of these concepts. It has been argued that regardless of the designation given to the accused Taliban and Al-Qaeda members captured in Afghanistan, tenets of both international humanitarian law and international human rights law affords the detainees at least a minimum of protections.¹⁶

To put it succinctly, international law “recognizes that all human beings are entitled to a bottom line of human dignity.”¹⁷ The minimum protections that must be given to “unprivileged combatants” can be divided into three distinct areas of protection: “lawful

¹⁵ U.S. CONST. , *supra* note 10.

¹⁶ BARRY E. CARTER, ET AL. *International Law* 1119 (2003). [Reproduced in the accompanying textbook at Tab 39]. This book attributes this argument to Robert K. Goldman and Brian D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law* (2002). Excerpts from this book will be analyzed in the form that they are reprinted in the Carter text.

¹⁷ Barbara Stark, *US Ratification of the Other Half of the International Bill of Rights*, in David P. Forsyth, *The United States and Human Rights: Looking Inward and Outward*, 84 (2000). [Reproduced in the accompanying textbook at Tab 42]

detention, humane treatment, and fair trial guarantees.”¹⁸ These protections arise out of not only those treaties to which the United States is a party, but also out of certain tenets of international humanitarian and human rights law that have become so fundamental as to constitute binding customary international law.¹⁹ Beyond the potential legal obligations arising out of international law, following international law has inherent benefits in that it is good policy to build international alliances through collective respect of international rule of law.²⁰

Under the Geneva Conventions, every detainee must be given some sort of legal status.²¹ It is the detainee’s legal status that determines the protections afforded the detainee under international law.

International Covenant on Civil and Political Rights (ICCPR)

The United States is a party to the International Covenant on Civil and Political Rights, and as a party, the United States must comply with the provisions of the Covenant. The United States must comply with Article 14 of the ICCPR in determining

¹⁸ Robert K. Goldman and Brian D. Tittmore, cited in Carter, *supra* note 16, at 1117.

¹⁹ See generally Goldman and Tittmore, cited in Carter, *supra* note 16, at 1116-19. Again, it should be emphasized that article VI, clause two of the United States Constitution incorporates such international obligations into domestic law. Goldman and Tittmore summarize the United States’ obligations arising out of international law very well: “That the United States must afford certain minimum human rights protections to unprivileged enemy combatants who fall into its hands in the course of an international armed conflict is dictated by treaty and customary norms to which it is bound under international human rights and humanitarian law...” (Cited in Carter *supra* note 16, at 1116).

²⁰ See generally Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 Ohio St. L.J. 1225, 1278-1282 (2002/2003). [Reproduced in the accompanying textbook at Tab 26]

²¹ *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, Human Rights Watch, 3, (2002), available at <http://www.hrw.org/backgrounder/usa/pow-bck.pdf>. [Reproduced in the accompanying textbook at Tab 43].

the due process rights afforded the detainees at Guantanamo Bay.²² It is through incorporation of this article that the Guantanamo detainees may be afforded the most expansive protections under the United States Constitution.²³ Among these protections would include equality before the court,²⁴ a fair and public hearing before an impartial tribunal,²⁵ the presumption of innocence,²⁶ and the right to appeal a conviction to some higher authority.²⁷

Perhaps the most significant international law protections due the detainees are found in Section three of Article 14 of the ICCPR.²⁸ Section three provides that “everyone shall be entitled” to certain “minimum guarantees, in full equality.”²⁹ Incorporation of this section of the ICCPR would mean that the detainees at Guantanamo are entitled to the minimum guarantees of the right to be informed promptly in a language which the detainee understands,³⁰ the right to communicate with “counsel of his own choosing,”³¹ the right to be tried without undue delay,³² the right to defend oneself in

²² Jordan J. Paust, *Anti-Terrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l. L. 1, 12 (2001) [Reproduced in the accompanying textbook at Tab 32].

²³ U.S. CONSTITUTION, *supra* note 10. Again, the fact that the United States is a party to the treaty incorporates the provisions of the treaty as the “highest law of the land” under article VI, clause 2 of the Constitution.

²⁴ International Covenant on Civil and Political Rights (ICCPR), art. 14, §1. [Reproduced in the accompanying textbook at Tab 8].

²⁵ *Id.*, at art. 14, §1.

²⁶ *Id.*, at art. 14, §2.

²⁷ *Id.*, at art. 14, §5.

²⁸ *Id.*, at art. 14, §3.

²⁹ ICCPR, *supra* note 24, art. 14, §3.

³⁰ ICCPR, *supra* note 24, art. 14, §3(a).

³¹ ICCPR, *supra* note 24, art. 14, §3(b).

person,³³ the right to examine witnesses,³⁴ the right to an interpreter if needed,³⁵ and the right to be free from being compelled to testify against oneself.³⁶ These minimum protections of due process are afforded all people in all circumstances by customary international law.³⁷

While the ICCPR seeks to protect the rights provided through all of article fourteen, the language of section three of article fourteen would seem to indicate that a state could be in accordance article fourteen without providing for all the rights contained therein. While section three is meant to apply to all people in all sections, the designation of such privileges as “minimum guarantees” would seem to imply that compliance with section three would be sufficient to satisfy to article fourteen as a whole.

Beyond article fourteen, the detainees are afforded certain rights and privileges under article nine of the ICCPR. Article nine provides that persons shall be afforded the right not to be subjected to arbitrary detention and that if such person is detained, that person must be brought before a judicial body “within a reasonable time” or the person must be released.³⁸

³² ICCPR, *supra* note 24, art. 14, §3(c).

³³ ICCPR, *supra* note 24, art. 14, §3(d).

³⁴ ICCPR, *supra* note 24, art. 14, §3(e).

³⁵ ICCPR, *supra* note 24, art. 14, §3(f).

³⁶ ICCPR, *supra* note 24, art. 14, §3(g).

³⁷ Jordan J. Paust, *supra* note 22. See also Daryl A. Mundis, *Agora: Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 A.J.I.L. 320, 324 (“Article 14 of the International Covenant on Civil and Political Rights...is the most important human rights treaty provision governing due process rights.”) [Reproduced in the accompanying textbook at Tab 30].

³⁸ ICCPR *supra* note 24, art. 9

There may be other provisions of the ICCPR that may apply to the Guantanamo detainees as well. In particular, the United States may be held to the provisions of article seven of the ICCPR, which provides protections from “torture” or “cruel, inhuman or degrading treatment or punishment.”³⁹ In regards to the ICCPR as a whole, there are a number of provisions in the ICCPR that are more expansive than domestic law. To that end, there are legitimate reasons for not incorporating every provision of the ICCPR.⁴⁰ Article nine and article fourteen, section three are the exceptions to that rule. The protections of article nine and article fourteen, section three are necessary for the United States to fulfill its’ international obligations. As such, since the United States is a party to the ICCPR, the United States would at the very least have to apply the provisions of at least section three of article fourteen to the Guantanamo detainees.

Torture

The Convention Against Torture was adopted by member-states of the United Nations on December 10, 1984.⁴¹ The Convention Against Torture was adopted with the intent to “make more effective the struggle against torture and other cruel, inhuman or

³⁹ ICCPR *supra* note 24, art. 7.

⁴⁰ See Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 Chi. J. Int’l L. 327, 332 for background on the consequences of complete incorporation of the ICCPR. Goldsmith argues that “a domesticated ICCPR would generate enormous litigation and uncertainty, potentially damaging domestic civil rights law in manifold ways. Human rights protections in the United States are not remotely so deficient as to warrant these costs.” (*Id.*) [Reproduced in the accompanying textbook at Tab 28].

⁴¹ Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Convention Against Torture, 23 I.L.M. 1027 (December 10, 1984). [Reproduced in the accompanying textbook at Tab 7]. The United States is a party to the Torture Convention.

degrading treatment or punishment throughout the world.”⁴² Unfortunately, there is the very real potential that the Guantanamo detainees are victims of acts of torture, and subjecting them to such acts of torture comes with significant legal consequences. With regard to the present situation, there are some provisions of the Torture Convention that speak directly to the treatment of detained persons, specifically articles two, twelve, thirteen, fourteen and sixteen.

Article two may be of particular interest because it addresses the applicability of the Torture Convention in times of “exceptional circumstances.”⁴³ Even where a state faces “exceptional circumstances,” there is no such exceptional circumstance that allows a state to justify the invocation of torture.⁴⁴

Articles twelve, thirteen and fourteen clarify the “due process” and investigative limitations of the Torture Convention. States are obligated to ensure that a full and impartial investigation is conducted in situations where there is “reasonable ground to believe” that torture has been committed in its territory.⁴⁵ Under article thirteen, states are required to ensure that complaining persons have the ability to initiate such an impartial investigation into the alleged acts of torture.⁴⁶ States are further obligated under article thirteen to ensure that when such an impartial investigation has been initiated, the complaining party is not subject to any sort of intimidation that results from the person

⁴² *Id.*

⁴³ *Id.* Potential “exceptional circumstances” which a state could conceivably claim a (non-existent) exception might include “a state of war or a threat of war, internal political instability or any other public emergency.” *Id.*

⁴⁴ *Id.*.

⁴⁵ *Id.* at art. 12.

⁴⁶ Convention Against Torture, *supra* note 41, art. 13.

bringing the complaint against the accused state.⁴⁷ Article fourteen ensures that the judicial proceedings that are conducted pursuant to a torture complaint result in full redress and adequate compensation for victims of torture.⁴⁸

Not only are states are obligated under articles twelve, thirteen and fourteen to conduct impartial investigations and ensure fair judicial proceedings for victims of torture, but states are obligated to take preventative actions to ensure that acts of torture are not taking place within territories under the states' jurisdiction.⁴⁹

While the United States is obligated to comply with the provisions of the Torture Convention, the Convention is facially not intended to pre-empt any domestic law prohibiting the imposition of torture within lands under the state's jurisdiction. The second clause of article sixteen of the Torture Convention notes that the provisions of the Convention "are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment."⁵⁰

While the legal significance of international law is debatable, the diplomatic importance of the treatment of constitutional protections for the Guantanamo detainees is very significant. While the treatment of Guantanamo detainees may be legally justifiable, the potential political and diplomatic consequences of the United States' treatment of the Guantanamo detainees need to be taken into account. The fact of the matter is that international law is based in diplomatic relations and these relations are given significance when the diplomatic relations are bolstered by international legal

⁴⁷ Convention Against Torture, *supra* note 41, art. 13.

⁴⁸ Convention Against Torture, *supra* note 41, art. 14.

⁴⁹ Convention Against Torture, *supra* note 41, art. 16, cl.1.

⁵⁰ Convention Against Torture, *supra* note 41, art. 16, cl.2.

obligations.⁵¹ A failure of the rule of law in a state with the premier status that the United States currently holds leaves international diplomacy and the legal bases thereof, in serious trouble. While the policy bases behind international law is not a binding argument, international diplomacy is the most important external consideration in determining the constitutional rights afforded the Guantanamo Bay detainees.

⁵¹ John M. Rogers, *International Human Rights Law and U.S. Law*, 107-121, 112, in Mark Gibney ed., *World Justice? U.S. Courts and International Human Rights* (1991).

2) Citizen Detainees

A. Status⁵²

Summary

While American courts had considered the legality of military commissions in earlier cases,⁵³ the Supreme Court did not attempt to define the status of citizens facing military commissions until the *Ex Parte Milligan* decision in 1866.⁵⁴ Before the *Hamdi* decision, American courts had only addressed the legal status of citizens facing military commissions in a few cases, and even then American courts had not come to an official consensus. The *Hamdi* decision upheld the Government's ability to hold citizen detainees as "enemy combatants."

Ex Parte Milligan

The *Milligan* case addressed the arrest and detention of an attorney from Indiana who was tried before a military commission on "certain charges and specifications."⁵⁵ In

⁵² The President's Military Order of November 13, 2001, 66 Fed. Reg. 57833, [Reproduced in the accompanying textbook at Tab 10] only applies to individuals who are not United States citizens, so citizens cannot be detained pursuant to the President's Military Order of November 13, 2001. It is necessary to discuss citizen detainees, however, in the event that citizens are detained pursuant to other statutory authorities. Furthermore, as the *Hamdi* case exhibits, there have been citizens of the United States held at Guantanamo Bay. Also, since this section deals with how the United States classifies its own citizen detainees, there is no need to examine international law in this section.

⁵³ The use of military commissions in American history dates all the way back to the Revolutionary War, but until the *Milligan* case, citizens before military tribunals were referred to as "prisoners" and nothing else. See *Ex Parte Merryman*, 17 F.Cas. 144 (1861) [Reproduced in the accompanying textbook at Tab 13]. See also 10 USCS §801 (2004) (regarding general provisions for military law under the Uniform Code of Military Justice) [Reproduced in the accompanying textbook at Tab 2] and Hon. Robinson O Everett, *The Law of War: Military Tribunals and the War on Terrorism*, 48 – DEC Fed. Law. 20 (2001) (outlining the use of military courts throughout American history, with an eye to the war on terror) [Reproduced in the accompanying textbook at Tab 25].

⁵⁴ *Ex Parte Milligan*, 41 U.S. 2, 107 (1866). [Reproduced in the accompanying textbook at Tab 14].

⁵⁵ *Id.*

determining the legality of subjecting the petitioner to trial before a military commission, the Supreme Court did make an explicit decision concerning the petitioner's status under the law, but the Court did determine what status the petitioner could not be given. The *Milligan* Court determined that a civilian citizen of a non-rebellious state who was captured in that State could not be considered a "prisoner of war," despite the fact that the petitioner's activities were seen as aiding the rebellion.⁵⁶

Ex Parte Quirin

Although the *Quirin* decision dealt with the detentions of members of the German Military captured on American soil, the *Quirin* Court was the first to extend the phrase "enemy belligerents" to citizens of the United States.⁵⁷ The *Quirin* Court had already determined that the foreign petitioners were enemies from a "belligerent" nation. That said, the Court continued its analysis by holding that mere citizenship in the United States does not preclude the Government from labeling the citizen as an enemy belligerent: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."⁵⁸ While this discussion of the application of the enemy belligerent status to

⁵⁶ *Id.* at 204-05. The Court classified the petitioner as "not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service..." *Id.*

⁵⁷ *Ex Parte Quirin*, 317 U.S. 1, 37-38 (1942). [Reproduced in the accompanying textbook at Tab 15].

⁵⁸ *Id.*

American citizens is extraneous to the *Quirin* Court's decision, the Court seems to have gone out of its way to hold that the enemy belligerent status may extend to citizens.⁵⁹

Hamdi v. Rumsfeld

While the President's Military Order of November 13, 2001 only applies to non-citizens, certain citizen detainees have been held pursuant to other statutory authorities. Yaser Hamdi is one such citizen. Born an American citizen in 1980, Hamdi was captured by members of the Northern Alliance during the Afghan military campaign in late 2001.⁶⁰ Hamdi was held in Afghanistan pursuant, not to the President's Military Order of November 13, 2001, but to the Authorization for Use of Military Force (the "AUMF").⁶¹ The Supreme Court upheld the authorization to detain certain individuals pursuant to the AUMF.⁶²

Once Hamdi had been captured, the Government designated Hamdi an "enemy combatant." The *Hamdi* Court notes that while the Government has not clearly defined what an "enemy combatant" actually is, the Government is authorized to hold such

⁵⁹ See Thomas J. Lepri, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens detained as Enemy Combatants Under Ex Parte Quirin*, 71 Fordham L. Rev. 2565 (2003) (for an examination of *Ex Parte Quirin* in light of the recent *Rumsfeld v. Padilla* decision) [Reproduced in the accompanying textbook at Tab 29].

⁶⁰ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2635 (2004) [Reproduced in the accompanying textbook at Tab 18].

⁶¹ Authorization for Use of Military Force (AUMF), 115 Stat 224 (2001) [Reproduced in the accompanying textbook at Tab 5]. Section Two of the AUMF provides in relevant part: "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.*

⁶² *Hamdi*, *supra* note 60, at 2639-40 (2004) (concluding, in part, that "the AUMF is explicit congressional authorization for the detention of individuals..." *Id.*

“enemy combatants” pursuant to the AUMF.⁶³ The “enemy combatant” designation was the latest reincarnation of the “enemy belligerent” designation originally extended to citizens in *Ex Parte Quirin*.⁶⁴ The *Hamdi* decision upheld the Government’s ability to hold citizen detainees as “enemy combatants.”

B. Protections

Domestic Law

Ex Parte Milligan

Five years later, in *Ex parte Milligan*, the Supreme Court outlined the limits on executive power that exist through the United States Constitution. The majority made two key findings: first, the majority found that the trial of Milligan by military commission was an unconstitutional violation of the Sixth Amendment; and second, the majority found that Constitutional protections applied equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”⁶⁵

In regards to due process, the *Milligan* Court is famous for its strong language regarding the protections afforded citizens facing criminal charges: “All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be

⁶³ *Hamdi*, *supra* note 60, at 2639 (2004). The only definition the Court comes to is that an enemy combatant is an individual “, it alleges, was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’” there.” *Id.* quoting Brief for Respondents, 3.

⁶⁴ *Quirin*, *supra* note 57, at 37-38.

⁶⁵ *Ex Parte Milligan*, 41 U.S. 2, 1, 121-22, 214 (1866). See also WILLIAM H. REHNQUIST, *All the Laws but One*, 128-129 (1998).

frittered away on any plea of state or political necessity.”⁶⁶ The applicability of the *Milligan* case, however, to the Guantanamo detainees is questionable at best. The *Milligan* case only dealt with the rights and protections afforded American citizens, and the Court did not contemplate how the opinion would change if Milligan was a non-citizen. That said, *Ex Parte Milligan* is helpful to highlight where the law concerning the constitutional rights of persons facing military commissions originated.

Hamdi v. Rumsfeld

The *Hamdi* case is the latest in a deep well of case law that has tried to define the limits of constitutional protections for citizen detainees. In *Hamdi v. Rumsfeld*, the Supreme Court held that an American citizen-detainee captured during the military campaign in Afghanistan is entitled to certain protections of due process.⁶⁷ The *Hamdi* court begins to clarify the contemporary due process guarantees afforded citizen detainees at Guantanamo Bay, *although this is open for debate*. For example, while the Court addresses Hamdi’s constitutional protections pursuant to his status as an American citizen, the Court does not address how the analysis would change if the *Hamdi* were not an American citizen. Furthermore, the *Hamdi* Court does not explicitly address how their findings would be altered if Hamdi was held at Guantanamo Bay Naval Base, which is

⁶⁶ Milligan, *supra* note 65, at 214.

⁶⁷ Hamdi, *supra* note 60, at 2647 (2004). See also 28 U.S.C.A. § 2243 (rules regarding the issuance of a writ of habeas corpus). *Rights of Detainees*, The Guardian, August 13, 2004 (supporting the Supreme Court’s decision to allow detainees to challenge the validity of their detentions in the American judicial system) [Reproduced in the accompanying textbook at Tab 36].

under United States jurisdiction but Cuban sovereignty, rather than being held in South Carolina.⁶⁸ In this sense, the *Hamdi* case is somewhat limited in applicability to the status of non-citizen detainees at Guantanamo Bay. The *Hamdi* decision, however, does highlight that there is a case to be made for certain constitutional protections to be afforded to certain detainees. What those protections actually consist of requires some examination

In the *Hamdi* case, the Supreme Court makes it very clear that there are some constitutional protections afforded citizen detainees pursuant to their status as American citizens. First, the Court gives guarded authorization of the detention of citizen combatants. The Court determines that there is no barrier to prevent the United States from holding an American citizen as an enemy combatant,⁶⁹ the Court cautions that in American “society liberty is the norm, and detention without trial is the *carefully limited exception*.”⁷⁰ Even though the *Hamdi* Court authorizes that ability to detain citizens who are declared enemy combatants, the Court does make it clear that a citizen detainee is entitled to a writ of habeas corpus absent a declaration by Congress suspending habeas corpus.⁷¹

⁶⁸ *International Law in Brief*, ASIL (July 9, 2004) at <http://asil.org/ilib/ilib0712.htm>. [Reproduced in the accompanying textbook at Tab 48]. The United States occupies the land on which the Guantanamo Bay Naval Base sits pursuant to a Lease Agreement between the United States and Cuba in 1903 following the Spanish-American War (Lease of Lands for Coaling and Naval Stations, Feb. 23 1903, U.S. Cuba, art. III, T.S. No. 418).

⁶⁹ *Hamdi*, *supra* note 60, at 2640.

⁷⁰ *Hamdi*, *supra* note 60, at 2646 (italics added by author) citing *United States v. Salerno*, 107 S. Ct. 2095, at 2105.

⁷¹ *Hamdi*, *supra* note 60, at 2650-51. There is nothing at this moment to suggest that Congress has suspended the writ of habeas corpus for citizen-detainees.

Further defining the privileges under the writ of habeas corpus, the *Hamdi* Court addressed the procedural privileges afforded to citizen detainees under the Constitution. First and foremost, citizen detainees entitled to the writ of habeas corpus must be presented with facts supporting their classification as enemy combatants as well as given an opportunity to challenge those factual bases: a “citizen-detainee seeking to challenge his classification as an enemy combatant notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”⁷² Part of this habeas corpus opportunity to rebut the Government’s case includes the detainee’s opportunity to present facts and rebut assertions presented the Government against one’s classification.⁷³ Additionally, the Court declares that the opportunity to challenge the factual bases for one’s detention should be afforded the citizen detainee “at a meaningful time and in a meaningful manner.”⁷⁴ The Court justifies these privileges by declaring that the right to be heard at a meaningful time and in a meaningful manner is an essential principle of procedural due process.⁷⁵

These due process protections, however, are not unlimited as the *Hamdi* court notes. The Court recognizes that the due process rights afforded citizen detainees are subject to

⁷² *Hamdi*, *supra* note 60, at 2648.

⁷³ *Hamdi*, *supra* note 60, at 2644. See also 28 U.S.C. §2241(c) for further guidance. [Reproduced in the accompanying textbook at Tab 1]. Section 2241(c) of the United States Code provides:“(c) The writ of habeas corpus shall not extend to a prisoner unless -- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations;” 28 U.S.C. §2241 (2004).

⁷⁴ *Hamdi*, *supra* note 60, at 2648.

⁷⁵ *Hamdi*, *supra* note 60, at 2648-49.

limits imposed by the judiciary,⁷⁶ provided that such limits do not offend the fundamental principles of due process.⁷⁷ These limits may include the increased admissibility of certain types of evidence or altering the presumption of innocence to favor the Government's evidence. In times where the "exigencies of the circumstances" demand that the proceedings afforded citizen-detainees be altered, the Court recognizes that there are clearly limits that may be placed on these judicial proceedings: "Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as...fair opportunity for rebuttal were provided."⁷⁸ Any denial of a citizen-detainee's ability to rebut the Government's evidence justifying his or her detention "falls constitutionally short."⁷⁹

International Law⁸⁰

To the extent that notions of sovereignty limit such obligations, the United States is bound to respect its obligations under international law providing the same protections to citizens that it must afford non-citizens under the provisions of the Geneva Conventions, the UN Charter, the ICCPR, and the Convention Against Torture. Therefore, not only to articles nine and fourteen of the ICCPR as well as the minimum

⁷⁶ Hamdi, *supra* note 60, at 2644.

⁷⁷ Hamdi, *supra* note 60, at 2649.

⁷⁸ Hamdi, *supra* note 60, at 2649.

⁷⁹ Hamdi, *supra* note 60, at 2651,

⁸⁰ Whereas it was not necessary to examine international law in regards to the official status of the citizen detainees, it is necessary to examine international law to determine what protections may be afforded citizens under international law.

protections guarantees under the Convention Against Torture apply to non-citizens, but such provisions also apply to American citizens under the incorporation provisions of article VI, clause two of the Constitution.⁸¹

C. Arguments

The United States makes the claim based on sovereignty and notions of self-rule that the United States should be allowed to determine what rights to be afforded its own citizens. To that end, the United States view asserts that domestic case law and domestic statutory constructions take a preferred position over relevant international law. Under the international view, the United States cannot do with its citizens as it wishes, as principles of international human rights law must be respected and celebrated.

Legally speaking, while the United States does have the sovereignty to determine how to treat its citizens as it wishes, that sovereignty is subject to the limits of international principles of human rights law. Furthermore, although domestic statutory constructions are of the highest importance in domestic policy, the United States must recognize that the provisions of treaties to which the United States is a party are incorporated as the “supreme law of the land” under article VI, clause two of the Constitution.⁸² Therefore, though the United States arguments of sovereignty over its citizens are legally correct, that sovereignty is subject to principles of international human rights law and justice.

⁸¹ U.S. CONST, *supra* note 15. The substantive law of those treaties to which the United States is a party is incorporated in the United States Constitution as the “supreme law of the land.”

⁸² U.S. CONST. *supra* note 15.

3) Members of the Taliban captured in Afghanistan

A. Status of Detainees

The protections afforded the detainees captured in Afghanistan pursuant to American military operations against the Taliban regime will depend on the official status of those detainees under both domestic and international law.

Domestic Law

Johnson v. Eisentrager

The *Johnson v. Eisentrager* decision faced a set of circumstances similar to that presented before the *Quirin* Court, but the *Eisentrager* decision dealt with distinctively different issues than those dealt with by the *Quirin* Court. In *Eisentrager*, an American military commission sitting in China tried a group of German nationals for violations of the rules of war.⁸³ The German nationals challenged their detentions in the American judicial system, petitioning the District Court of the District of Columbia and eventually arguing their case before the Supreme Court.⁸⁴

In a six-to-three decision, the Supreme Court rejected the detainees' challenge, holding that the U.S. Constitution provided no protections for enemy aliens who had never been within the territorial jurisdiction of the United States.⁸⁵ In coming to their decision, the Court made critical distinctions between the rights of an alien and the rights of an American citizen. In determining the rights afforded to an alien, the Court noted

⁸³ *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950) [Reproduced in the accompanying textbook at Tab 20].

⁸⁴ *Id.*, at 765 (1950). The District Court dismissed the detainees' petition but the Court of Appeals reversed and reinstated the petition for further proceedings. *Id.* at 767.

⁸⁵ *Id.*, at 768 (1950).

that an alien's rights under the Constitution varied in consideration of a number of different factors, the most significant of which was the alien's presence in the territorial jurisdiction of the United States.⁸⁶ The Court described the range of rights afforded aliens, noting that trend was to offer aliens more constitutional protections, but that such rights necessarily began with "the alien's presence in within (United States) territorial jurisdiction that gave the Judiciary the power to act."⁸⁷

Rasul v. Bush

The *Rasul* case dealt with two Australian citizens and twelve Kuwaiti citizens captured by the United States during the military campaign in Afghanistan.⁸⁸ The detainees had been held at the Guantanamo Bay Naval Base for nearly two years.⁸⁹ The detainees claimed that they had never been an enemy combatant against the United States, had never engaged in terrorist activity against the United States, and had never been informed of the charges against them.⁹⁰ The District Court relied on the Supreme Court's decision in *Johnson v. Eisentrager* in dismissing the detainees' action.⁹¹

Before examining what the *Rasul* Court says about the detainee's status, an important nuance of the *Rasul* case must be emphasized. First, the Court noted that the

⁸⁶ *Id.* at 770 (1950).

⁸⁷ *Id.* at 770 (1950).

⁸⁸ *Rasul v. Bush*, 124 S.Ct. 2686, 2690 (2004). [Reproduced in the accompanying textbook at Tab 22]. Shafiq Rasul, a British citizen who is listed as the primary plaintiff in this case, had been released from custody before the Supreme Court's decision.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2691.

⁹¹ *Id.*

petitioner's in the *Rasul* case were not foreign nationals of a country at war with the United States,⁹² unlike the members of the Taliban captured in Afghanistan. This means that to the extent the *Rasul* decision applies to members of the Taliban captured in Afghanistan, it applies to such detainees pursuant to their actions as fighting for the Taliban and not pursuant to their status as Afghan citizens.

This said, the *Rasul* Court does not go into great detail as to what status enemy detainees would be given in the event of active hostilities. Since the petitioners claimed that they were not combatants against the United States, the Court seems to have limited its examination to jurisdiction over "enemy aliens," rather than "enemy combatants." In fact, the *Rasul* Court distinguishes the case from the *Eisentrager* decision in that the petitioner's are not nationals of a country at war with the United States and they deny any wrongdoing against the United States.⁹³

To the extent that domestic law addresses the legal status of foreign nationals from countries at war with the United States, *Johnson v. Eisentrager*, holding that such detainees would be considered "enemy aliens," controls the issue in regards to domestic law application.

International Law

Summary

It is from an examination of international law that one can find the most definitive language regarding the legal status of foreign nationals from enemy states. The official

⁹² *Id.* at 2690.

⁹³ *Rasul*, *supra* note 88, at 2693.

legal status of what detainees captured pursuant to active hostilities with an enemy state is somewhat unclear.

There are two general types of prisoners under international law. First, there are “prisoners of war,” who are subject to specific qualifications and are afforded certain protections under Geneva (III).⁹⁴ The second general type of prisoner under international law is “enemy” or “unlawful combatants.” While the terms enemy combatants or unlawful combatants are not found in the Geneva Conventions, such persons may be provided certain protections under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War [“Geneva (IV)”].⁹⁵

Prisoners of War

In a number of instances, persons who are captured fighting in an active war are given the status of “prisoners of war,” and are thus covered under Geneva (III). In order to be considered a prisoner of war, a detainee must satisfy four conditions under Geneva (III): the detainee would have to be part of a military hierarchy, the detainee would have to wear uniforms or distinctive signs visible at a distance, the detainee would have to carry his/her arms openly, and the detainee would have to conducted their operations in accordance with the laws of war.⁹⁶ A detainee can also be considered a prisoner of war if the detainee, upon “the approach of the enemy spontaneously take arms to resist the

⁹⁴ Geneva Convention Relative to the Treatment of Prisoners of War (III), art. 4 [Reproduced in the accompanying textbook at Tab 9].

⁹⁵ *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, Human Rights Watch, 3, (2002), available at <http://www.hrw.org/backgrounder/usa/pow-bck.pdf>. [Reproduced in the accompanying textbook at Tab 43].

⁹⁶ Geneva (III), *supra* note 94, at art. 4, A(2).

invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws...of war.”⁹⁷ The language of this provision would seem to indicate that the provision would apply whether or not the detainee is an official member of the enemy military. The status of a detainee as a POW can also be extended to members of militia forces and inhabitants of a non-occupied territory who take up open arms in order to resist the occupying military.⁹⁸ In the event that a detainee’s status is in doubt, the detainee is to enjoy the protections of Geneva (III) until their status can be determined by a “competent tribunal” such as the United States Supreme Court or the International Court of Justice.⁹⁹

B. Protections

Domestic Law

Ex Parte Milligan

In the *Milligan* case, the Supreme Court forcefully declared that the Constitution “is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”¹⁰⁰ Whether this passage in the *Milligan* case provides for wide constitutional protections for non-

⁹⁷ Geneva (III), *supra* note 94, at art. 4, A(6).

⁹⁸ Human Rights Watch, *supra* note 95.

⁹⁹ Geneva (III), *supra* note 94, at art. 5.

¹⁰⁰ *Milligan*, *supra* note 54, at 120-21.

citizens is questionable, as it most likely was not meant to apply to non-citizen “classes of men.”¹⁰¹

Johnson v. Eisentrager

The *Eisentrager* court further distinguished the constitutional rights of non-citizen aliens between those rights afforded “friendly” aliens and those rights afforded “enemy” aliens. A friendly alien, as the Court describes, is “accorded a generous and ascending scale of rights as he increases his identity with our society.”¹⁰² This “scale of rights” begins with an “implied assurance of safe conduct” and expands once the friendly alien expresses intent to seek citizenship.¹⁰³ From there, the friendly alien’s rights gradually increase to include due process and other important constitutional protections.¹⁰⁴

The *Eisentrager* Court, however, sees the treatment of enemy aliens as a different issue altogether. Enemy aliens are subject to executive activity in times of war.¹⁰⁵ Resident enemy aliens, during times when war has been declared, are “constitutionally subject to summary arrest, internment and deportation.”¹⁰⁶ Furthermore, enemy aliens

¹⁰¹ An argument can be made, however, that the passage was meant to extend constitutional protections in times of both war and peace. Since that argument could plausibly be made, the passage is included in this section. The relative strength of the argument, however, is fairly weak.

¹⁰² Johnson, *supra* note 83, at 770 (1950).

¹⁰³ Johnson, *supra* note 83, at 770-71 (1950).

¹⁰⁴ Johnson, *supra* note 83, at 771 (1950).

¹⁰⁵ Johnson, *supra* note 83, at 774 (1950).

¹⁰⁶ Johnson, *supra* note 83, at 775 (1950).

have no right to a writ of habeas corpus, are not immune from military commissions, and are not afforded access to the American judicial system.¹⁰⁷

In Re Yamashita

The *Yamashita* Court dealt with the case of a commanding general of the Japanese Army who was captured by United States forces during World War II.¹⁰⁸ Yamashita was tried as an enemy combatant before a military commission, and Yamashita petitioned for a writ of habeas corpus review.¹⁰⁹

In his petition, Yamashita claimed, among other allegations, that the military commission he was subjected to did not have jurisdiction over him as an alien enemy combatant.¹¹⁰ The Supreme Court rejected his claim, as its holding was focused on the jurisdiction of the military commission and whether such jurisdiction was acceptable.¹¹¹ The Court made some extraneous findings, however, passing judgment on Yamashita's ability to defend himself. The Court found that an enemy belligerent was entitled the opportunity to defend himself before a duly convened judicial body and, further, that the provision of a military commission was not a violation of this right to defend himself. The Court decided that since he was entitled the right to defend himself, and the military

¹⁰⁷ Johnson, *supra* note 83, at 776-85 (1950).

¹⁰⁸ *In re Yamashita*, 327 U.S. 1, 5 (1946) [Reproduced in the accompanying textbook at Tab 19].

¹⁰⁹ *Id.* at 5-6.

¹¹⁰ *Id.* at 5-6.

¹¹¹ *Id.* at 7.

commission constituted such an opportunity to present a defense, the military commission was not a violation of his constitutional right to present a criminal defense.¹¹²

International Law

Summary

Although the Constitution provides citizen detainees with a number of protections under domestic law, there are certain tenets of international law that apply to citizen detainees as well. Since the United States is a party to the Geneva Conventions, the United States is bound to treat its own citizens in accordance with the Geneva Conventions. Furthermore, the ICCPR and the Convention Against Torture provide certain *jus cogens* protections that are afforded all people at all times, including citizen detainees.

Geneva Conventions

Should the Geneva Conventions apply, there are a number of protections that are afforded detainees who are covered under the provisions of the Geneva Conventions. Like all treaties to which the United States is a party, these protections arise to the level of constitutional guarantees.¹¹³ The prisoners must be given humane treatment,¹¹⁴ which includes proper confinement,¹¹⁵ food and clothing,¹¹⁶ and medical care.¹¹⁷ The prisoners

¹¹² *Id.* at 9.

¹¹³ U.S. CONSTITUTION, *supra* note 10.

¹¹⁴ Geneva (III), *supra* note 94, at art. 13.

¹¹⁵ Geneva (III), *supra* note 94, at art. 21.

need to be afforded the opportunity for certain relations with the exterior world.¹¹⁸ Most importantly, if the detainees at Guantanamo Bay are considered prisoners of war under the Geneva Conventions, there are certain judicial proceedings guaranteed to the detainees amounting to international due process.¹¹⁹ Prisoners of war covered under the Conventions need be released “without delay” after active hostilities have ended.¹²⁰ There are further protections regarding the imposition of the death penalty. These protections would include the ability to be informed as soon as possible of which offenses for which they are accused are punishable by the death penalty¹²¹ and the punishments need be served in the same procedures afforded “members of the armed forces of the Detaining Power.”¹²²

C. Arguments

In regards to the status of the Taliban detainees at Guantanamo Bay, there has been some dissension among important parties regarding the correct legal status of said detainees.

The United States Government has not been altogether clear on what status it has given the Taliban detainees at Guantanamo Bay. Originally, the United States asserted

¹¹⁶ Geneva (III), *supra* note 94, at art. 25.

¹¹⁷ Geneva (III), *supra* note 94, at art. 15.

¹¹⁸ Geneva (III), *supra* note 94, at art. 69.

¹¹⁹ Geneva (III), *supra* note 94, at sec. V.

¹²⁰ Geneva (III), *supra* note 94, at art. 118.

¹²¹ Geneva (III), *supra* note 94, at art. 100.

¹²² Geneva (III), *supra* note 94, at, art. 108.

that the members of the Taliban captured in Afghanistan were to be regarded as “unlawful combatants.”¹²³ As time wore on, however, the United States changed its designation of the Taliban detainees to a somewhat undetermined status. Despite the fact that the United States captured the detainees during active hostilities, the United States insisted that the Taliban detainees were not “prisoners of war,” and thus not afforded the protections granted in the Geneva Conventions.¹²⁴

While the United States has been unclear on the status it feels should be afforded Taliban detainees, the United States will continue to make the argument that such detainees are not prisoners of war. The United States will rely heavily on the four conditions a prisoner of war must satisfy, namely those of military hierarchy, uniform or discernible mark, open arms, and respect for the laws of war.¹²⁵ The United States will claim that status classifications aside, the the Taliban detainees would indeed be afforded the rights and privileges of prisoners of war.¹²⁶

Critics of this approach would argue that, under the Geneva Conventions, the United States cannot unilaterally classify all detainees from a particular conflict as being exempt from prisoner of war status without some sort of judicial determination.¹²⁷ Furthermore, critics argue that since the United States has provided doubtful classifications for the Taliban detainees, they must be considered prisoners of war under Geneva (III).¹²⁸ These

¹²³ Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POW's*, 96 AM. J. INT'L L. 475, 476-77 (2002) [Reproduced in the accompanying textbook at Tab 31].

¹²⁴ BARRY CARTER, ET AL. *International Law*, Fourth Edition, 87 (2003). [Reproduced in the accompanying textbook at Tab 39].

¹²⁵ Geneva (III), *supra* note 94, at 4, A(2).

¹²⁶ CARTER, ET AL., *supra* note 124, at 87.

¹²⁷ Human Rights Watch, *supra* note 95, at 5.

¹²⁸ Geneva (III), *supra* note 94, at art. 5.

critics are skeptical of the claims by the United States that the detainees are afforded the rights and privileges commensurate with those afforded prisoners of war.

Until a competent tribunal has explicitly determined that the members of the Taliban captured in Afghanistan are not prisoners of war, the best argument is in favor of those who insist that the United States must afford the Taliban detainees at Guantanamo Bay prisoner of war status. Policy considerations aside, Geneva (III) is the controlling law on this issue, and in the case of doubt, the best argument is that Taliban detainees should be given prisoner of war status. Therefore, under Geneva (III), the Taliban detainees should be given a certain degree of humane treatment,¹²⁹ a trial or release without delay after hostilities have ended,¹³⁰ and punishment proportional with those afforded members of the United States Military.¹³¹

¹²⁹ Geneva (III), *supra* note 94, at art. 13.

¹³⁰ Geneva (III), *supra* note 94, at art. 118

¹³¹ Geneva (III), *supra* note 94, at art. 108.

4) Al Qaeda Members in Afghanistan

A. Status

Domestic Law

Summary

The status of Al Qaeda members in Afghanistan is basically one of first impression for domestic courts. Whereas much of the previous case law had dealt with enemy belligerents who were representing a particular state, the Al Qaeda detainees were not fighting in the name of a territory or state. As members of an international terrorist network, there are serious questions as to whether or not domestic and international law treat such detainees as “prisoners of war” or as “enemy combatants.”¹³² International law provides the best framework for this debate, so it will be most helpful to analyze exclusively international law on this issue.

International Law

Summary

Whereas domestic law may not provide for specific constitutional protections for non-citizen detainees, sources of international law may provide certain protections that arise to the level of constitutional protections through incorporation under article VI, clause 2 of the Constitution. These sources include potentially applicable provisions of the Geneva Conventions. Provisions of the ICCPR and the Convention Against Torture, particularly articles seven, nine and fourteen of the ICCPR, and articles twelve, thirteen,

¹³² See generally Jeffrey S. Becker, *A Legal War on Terrorism: Extending New York v. Quarles and the Departure from Enemy Combatant Designations*, 53 DePaul L. Rev. 831 (2003) (arguing that the use of the “enemy combatant” designation is a way for the government to circumvent legitimate legal limitations). [Reproduced in the accompanying textbook at Tab 24].

fourteen and sixteen of the Convention against Torture, will apply even to non-citizen members of international terrorist organizations that know no territorial allegiance.

Geneva Conventions (III)

The Geneva Conventions have been recognized as binding international law on the countries that are parties to the treaty.¹³³ Of particular interest to the present discussion is the Geneva Convention on the Treatment of Prisoners of War. Since the United States is a party to the Geneva Convention on the Treatment of Prisoners of War, the provisions of the Convention are incorporated into the United States Constitution through clause two of article VI and are thus provisions of domestic law as well as provisions of international law.¹³⁴ Therefore, if the Geneva Conventions apply to the detention of accused members of Al-Qaeda and the Taliban, the provisions of the Geneva Conventions are incorporated into domestic law and are considered part of the potential constitutional package afforded the Guantanamo detainees.¹³⁵

A few significant issues have arisen, however, concerning the applicability of the Geneva Conventions to the detentions at Guantanamo Bay. First, the Geneva Conventions apply in a case of “declared war or of any other armed conflict which may

¹³³ Some analysts argue that certain provisions of the Geneva Conventions have risen to the level of customary international law, making them binding on not only those states that are parties to the Conventions, but to all states around the world. This issue will be examined in greater detail later.

¹³⁴ U.S. CONST. *supra* note 10.

¹³⁵ Steven R. Swanson notes that beyond those treaties that are considered legally binding, there are a number of advisory conventions that would bring into question the activities of the United States with regard to the Guantanamo detainees. Swanson points out that the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment adopted by the United Nations provides that detainees are entitled to access to judicial proceedings, communication with legal counsel, and the right to contact the outside world. Swanson further claims that the “United States may even have violated the Vienna Convention on Consular Relations by failing to allow adequate access to detainees.” [Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 Ariz. St. L.J. 939, 968-69 (2003). [Reproduced in the accompanying textbook at Tab 34].]

arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹³⁶ The language extending the applicability of the Convention to cases of “any other armed conflict” clearly suggests that the provisions of the Convention apply to more than just cases of “declared war.”¹³⁷ This means that there is no requirement that either side declare war, only that “de facto hostilities” exist between the two parties.¹³⁸ While there is some doubt as to whether the current campaigns in Afghanistan constitute major combat operations, it is clear that a de facto state of hostilities does in fact exist between the United States and terrorist groups worldwide like Al-Qaeda. Though the United States has argued that detainees who are accused of being members of Al-Qaeda are not “prisoners of war” covered under the Geneva Conventions, until the Supreme Court definitively decides that the detainees at Guantanamo Bay are not considered “prisoners of war,” article five of Geneva III provides that the detainees might “enjoy the protection of the present Convention until such time as their status has been determined by a *competent tribunal*.”¹³⁹

B. Protections

¹³⁶ Geneva (III), *supra* note 94, at art. 2. (italics added by author)

¹³⁷ CARTER, ET AL, *supra* note 124, at 1113.

¹³⁸ CARTER, ET AL, *supra* note 124, at 1113. Whether a situation arises to the level of an armed conflict “will turn upon the perspectives of the belligerents and states observing the situation.” (*Id.*).

¹³⁹ Geneva (III), *supra* note 94, at art. 5 (italics added for emphasis). It has been argued that the Supreme Court is the only government entity with the authority to make this decision: “the text of the treaty leads to the conclusion that a competent tribunal – and not the president of the United States acting unilaterally – must determine whether or not anyone captured is a lawful combatant.” Daryl A. Mundis, *Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 A.J.I.L. 320, 325 (2002) [Reproduced in the accompanying textbook at Tab 30]. Another analyst argues that the United States’ claims concerning the inapplicability of the Geneva Conventions “have been so unclear as to make this argument dubious.” Steven R. Swanson, *supra* note 135.

Domestic Law

Rasul v. Bush

The *Rasul* Court focused its’ analysis on whether detainees held in an area under American jurisdiction but not American sovereignty were entitled to a writ of habeas corpus. The Court thoroughly analyzed the history of the writ of habeas corpus, noting “this Court has recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace.”¹⁴⁰ While recognizing that the District Court had invalidated the detainee’s actions on the basis of the *Eisentrager* decision, the Supreme Court made clear distinctions between the *Eisentrager* case and the *Rasul* detainees: the *Rasul* detainees “are not nationals of countries at war with the United States...they have never been...charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”¹⁴¹ The Supreme Court stated that these distinctions made the *Eisentrager* decision distinguishable from the *Rasul* case. Those distinctions notwithstanding, the Supreme Court then took it’s analysis a step further. The Supreme Court declared that decisions filed since the *Eisentrager* decision had filled a “statutory gap” that had been present at the time of the *Eisentrager* decision.¹⁴² The Court determined that people who were “detained outside the territorial jurisdiction of any federal district court no longer need rely on the constitution as the source of their right to federal habeas

¹⁴⁰ *Rasul*, *supra* note 88, at 2692-93.

¹⁴¹ *Rasul*, *supra* note 88, at 2693.

¹⁴² *Rasul*, *supra* note 88, at 2695. The *Rasul* Court noted that *Eisentrager* dealt with the whether a foreign national could rely on constitutional protections, rather than statutory protections, in seeking a writ of habeas corpus, leaving a “statutory gap” between the protections afforded under the Constitution and those protections afforded under statutory law.

review.”¹⁴³ Detainees could now rely on statutory constructions to assert federal courts’ jurisdiction. The Supreme Court reasoned that this meant the non-citizen detainees could present habeas corpus challenges to their detentions under § 2241 of the United States Code.¹⁴⁴ In holding that United States District Courts have jurisdiction to hear the cases of *Rasul v. Bush* set a precedent declaring that foreign nationals captured outside the United States may challenge the legality of their detentions through the United States judicial system.

Furthermore, not only are non-citizen detainees entitled to a writ of habeas corpus to challenge the legality of their detentions, the Supreme Court makes clear in the *Rasul* decision that non-citizen detainees are also entitled to bring civil action in United States district court.¹⁴⁵ This privilege is conferred on nonresident aliens pursuant to the Alien Tort Claims Act, which provides that district courts have original jurisdiction in cases where an alien brings a “civil action for a tort committed in violation of the law of nations or a treaty of the United States.”¹⁴⁶ In coming to this conclusion, the Supreme Court explicitly stated that the fact that the persons bringing suit “are being held in

¹⁴³ *Rasul*, *supra* note 88. The Court cites *Braden v. 30th Judicial Circuit Court of Ky.* 410 U.S. 484 (1973) as authority that a prisoner can be brought under the territorial jurisdiction of a district court by statute rather than the Constitution. In the *Braden* case, the Supreme Court held that a prisoner need not necessarily be in the territorial jurisdiction of a district court in order for that district court to exercise federal habeas corpus jurisdiction.

¹⁴⁴ *Rasul*, *supra* note 88, at 2698. The Court invokes Section 2241 of the US Code to determine that non-citizen detainees were entitled to a writ of habeas corpus in challenging their detentions. Note that this is the same Section of the US Code relied upon by the Hamdi Court in determining that citizen detainees were entitled to a writ of habeas corpus.

¹⁴⁵ *Rasul*, *supra* note 88, at 2699.

¹⁴⁶ ATCA, *supra* note 6.

military custody is immaterial to the question” of whether or not the District Court has jurisdiction over those tort claims.¹⁴⁷

International Law

Summary

If an accused member of Al Qaeda detained at Guantanamo Bay was captured in Afghanistan, the detainee may be afforded certain protections under the Geneva Convention (III),¹⁴⁸ article 14 of the ICCPR,¹⁴⁹ and the Convention Against Torture.

Geneva Conventions

Should the Geneva Conventions apply, there are a number of protections that are afforded detainees who are covered under the provisions of the Geneva Conventions. Like all treaties to which the United States is a party, these protections arise to the level of constitutional guarantees.¹⁵⁰ The prisoners must be given humane treatment,¹⁵¹ which includes proper confinement,¹⁵² food and clothing,¹⁵³ and medical care.¹⁵⁴ The prisoners

¹⁴⁷ Rasul, *supra* note 88, at 2699 (2004).

¹⁴⁸ Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 325-28 (2003) [Reproduced in the accompanying textbook at Tab 33].

¹⁴⁹ Jordan J. Paust, *supra* note 22, at 12.

¹⁵⁰ U.S. CONSTITUTION, *supra* note 10, at 2.

¹⁵¹ Geneva (III), *supra* note 94, at art. 13.

¹⁵² Geneva (III), *supra* note 94, at art. 21.

¹⁵³ Geneva (III), *supra* note 94, at art. 25.

¹⁵⁴ Geneva (III), *supra* note 94, at art. 15.

need to be afforded the opportunity for certain relations with the exterior world.¹⁵⁵ Most importantly, if the detainees at Guantanamo Bay are considered prisoners of war under the Geneva Conventions, there are certain judicial proceedings guaranteed to the detainees amounting to international due process.¹⁵⁶ Prisoners of war covered under the Conventions need be released “without delay” after active hostilities have ended.¹⁵⁷ There are further protections regarding the imposition of the death penalty. These protections would include the ability to be informed as soon as possible of which offenses for which they are accused are punishable by the death penalty¹⁵⁸ and the punishments need be served in the same procedures afforded “members of the armed forces of the Detaining Power.”¹⁵⁹

ICCPR

The United States must comply with Article 14 of the International Covenant on Civil and Political Rights in determining the due process rights afforded the detainees at Guantanamo Bay.¹⁶⁰ It is through incorporation of this article that the Guantanamo detainees may be afforded the most expansive protections under the United States

¹⁵⁵ Geneva (III), *supra* note 94, at art. 69.

¹⁵⁶ Geneva (III), *supra* note 94, at. V.

¹⁵⁷ Geneva (III), *supra* note 94, at art. 118.

¹⁵⁸ Geneva (III), *supra* note 94, at art. 100.

¹⁵⁹ Geneva (III), *supra* note 94, at art. 108.

¹⁶⁰ Paust, *supra* note 22, at 12.

Constitution.¹⁶¹ Among these protections would include equality before the court,¹⁶² a fair and public hearing before an impartial tribunal,¹⁶³ the presumption of innocence,¹⁶⁴ and the right to appeal a conviction to some higher authority.¹⁶⁵

Perhaps the most significant international law protections due the detainees are found in Section three of Article 14 of the ICCPR.¹⁶⁶ Section three provides that “everyone shall be entitled” to certain “minimum guarantees, in full equality.”¹⁶⁷ Incorporation of this section of the ICCPR would mean that the detainees at Guantanamo are entitled to the minimum guarantees of the right to be informed promptly in a language which the detainee understands,¹⁶⁸ the right to communicate with “counsel of his own choosing,”¹⁶⁹ the right to be tried without undue delay,¹⁷⁰ the right to defend oneself in person,¹⁷¹ the right to examine witnesses,¹⁷² the right to an interpreter if needed,¹⁷³ and

¹⁶¹ U.S. CONSTITUTION, *supra* note 10. Again, the fact that the United States is a party to the treaty incorporates the provisions of the treaty as the “highest law of the land” under article VI, clause 2 of the Constitution.

¹⁶² ICCPR, *supra* note 24, at art. 14, §1.

¹⁶³ ICCPR, *supra* note 24, at art. 14, §1.

¹⁶⁴ ICCPR, *supra* note 24, at art. 14, §2.

¹⁶⁵ ICCPR, *supra* note 24, at art. 14, §5.

¹⁶⁶ ICCPR, *supra* note 24, at art. 14, §3.

¹⁶⁷ ICCPR, *supra* note 24, at art. 14, §3.

¹⁶⁸ ICCPR, *supra* note 24, at art. 14, §3, (a).

¹⁶⁹ ICCPR, *supra* note 24, at art. 14, §3, (b).

¹⁷⁰ ICCPR, *supra* note 24, at art. 14, §3, (c).

¹⁷¹ ICCPR, *supra* note 24, at art. 14, §3, (d).

¹⁷² ICCPR, *supra* note 24, at art. 14, §3, (e).

¹⁷³ ICCPR, *supra* note 24, at art. 14, §3, (f).

the right to be free from being compelled to testify against oneself.¹⁷⁴ These minimum protections of due process are afforded all people in all circumstances by customary international law.¹⁷⁵

While the ICCPR seeks to protect the rights provided through all of article fourteen, the language of section three of article fourteen would seem to indicate that a state could be in accordance article fourteen without providing for all the rights contained therein. While section three is meant to apply to all people in all sections, the designation of such privileges as “minimum guarantees” would seem to imply that compliance with section three would be sufficient to satisfy to article fourteen as a whole.

There may be other provisions of the ICCPR that may apply to the Guantanamo detainees as well. In particular, the United States may be held to the provisions of article seven of the ICCPR, which provides protections from “torture” or “cruel, inhuman or degrading treatment or punishment.”¹⁷⁶ In regards to the ICCPR as a whole, there are a number of provisions in the ICCPR that are more expansive than domestic law. To that end, there are legitimate reasons for not incorporating every provision of the ICCPR.¹⁷⁷ Article fourteen, section three is the exception to that rule. The protections of section three are necessary for the United States to fulfill its’ international obligations. As such,

¹⁷⁴ ICCPR, *supra* note 24, at art. 14, §3, (g).

¹⁷⁵ Paust, *supra* note 22, at 12. See also Mundis, *supra* note 139, at 324 (“Article 14 of the International Covenant on Civil and Political Rights...is the most important human rights treaty provision governing due process rights.”).

¹⁷⁶ ICCPR, *supra* note 24, at art. 7.

¹⁷⁷ See Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 Chi. J. Int’l L. 327, 332 for background on the consequences of complete incorporation of the ICCPR. Goldsmith argues that “a domesticated ICCPR would generate enormous litigation and uncertainty, potentially damaging domestic civil rights law in manifold ways. Human rights protections in the United States are not remotely so deficient as to warrant these costs.” (*Id.*) [Reproduced in the accompanying textbook at Tab 28].

since the United States is a party to the ICCPR, the United States would at the very least have to apply the provisions of at least section three of article fourteen to the Guantanamo detainees.

C. Arguments

In a manner consistent with the United States's declarations concerning the status of Taliban detainees, instead of being able to definitively determine what status the Al Qaeda detainees were to be given, the United States only determined what status they were not to be given. The United States declared that since the Al Qaeda detainees were members of a terrorist organization and not members of a state party to the Geneva Conventions, the Al Qaeda detainees were not to be considered prisoners of war.¹⁷⁸

The International community provides much greater protections for the Al Qaeda detainees than United States domestic law. Under international obligations, the Al Qaeda detainees may be considered "prisoners of war," and would need to be provided the protections of Geneva (III). Certainly the Al Qaeda detainees would only be detained so long as "active hostilities" were continuing.

The best argument lies somewhere in the middle. While it is in the United States' interests to hold the Al Qaeda detainees as long as they can under the idea that such detentions may prevent future terrorist attacks, international law provides that such detention can only last as long as active hostilities persist. This is weighed against the default rule that in the event of doubt, detainees are to be considered prisoners of war

¹⁷⁸ CARTER, *supra* note 124, at 87.

under Geneva (III).¹⁷⁹ The application of this provision to the Al Qaeda detainees depends on whether or not one considers the United States as in a de facto state of war with Al Qaeda. While there are certainly very active military campaigns being conducted against Al Qaeda organs, it is debatable whether these continuing campaigns constitute a state of war to justify continuing “active hostilities.” While the United States has continually denied that it is in a war against Al Qaeda in the strict sense of the idea, the United States has repeatedly called its campaign against Al Qaeda a “war on terror.” The United States should consider making the argument that the United States is in a de facto state of war with Al Qaeda. If the United States is successful in making this argument, the United States could hold the Al Qaeda detainees for, conceivably, as long as the war on terror will last. Given the fact that the war on terror looks like it will be here to stay, the United States could detain Al Qaeda prisoners for a potentially indefinite time without having to resort to legal creativity.

¹⁷⁹ Geneva (III), *supra* note 94, at art. 5

5) Al Qaeda Members Captured Abroad or Extradited from Other Territories

A. Status

Domestic Law

Summary

It has been suggested that the capture of Al Qaeda members in areas not directly involved with the active hostilities of Afghanistan presents an entirely different situation than any of the other scenarios.¹⁸⁰ In fact, there seems to be a judicial gap in this area, as the contemporary case law that deals with so many different aspects of this debate seems very quiet in this area.

President's Military Order of November 13, 2001

The most guidance in the realm domestic law that one can get on the issue of detainees accused of terrorism who are captured outside Afghanistan is the President's Military Order of November 13, 2001. The order was aptly named "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."¹⁸¹

In the Military Order, the President details a clear definition of the individuals subject to the Military Order. In particular, the Military Order explicitly declares that the Order shall apply to non-citizens, who the United States has reason to believe, have either participated in or supported acts of international terrorism or have knowingly harbored

¹⁸⁰ CARTER, *supra* note 124, at 89.

¹⁸¹ *President's Military Order*, *supra* note 52, at 57833. See also 10 USCS §836 (2004) (granting president authority to establish military commissions).

persons who have participated in such activity.¹⁸² Through this provision of the Military Order, the President has declared the legality of the jurisdiction of military commissions over any person that the United States has reason to believe has participated in some supportive act of terrorism. This Military Order applies not only in Afghanistan, but also throughout the world.¹⁸³ The President has delegated the authority to enforce the provisions of the order, as well as the authority to conduct trials of individuals subject to the order, through section four of the Military Order.¹⁸⁴

International Law

Summary

The status of detainees accused of being members of Al Qaeda is similarly up for debate, although the standards to be applied to the Al Qaeda detainees are quite different. Since those detainees are not captured pursuant to “active hostilities,” the analysis is going to be much different. It is difficult to argue that the Al Qaeda detainees deserve prisoner of war status, and the Geneva (III) protections that accompany such status. Al Qaeda detainees may be more properly termed enemy combatants, but that does not mean that the Al Qaeda detainees may be denied all protections of international law.

¹⁸² *President’s Military Order*, *supra* note 52, at 57833. Section two provides in relevant part: “(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 writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order.” *Id.*

¹⁸³ *President’s Military Order*, *supra* note 52, at 57833. The Military Order expresses concern for finding “individuals acting alone and in concert involved in international terrorism” *Id.* at 57833.

¹⁸⁴ *President’s Military Order*, *supra* note 52, at 57833.

While the applicability of the Geneva Conventions may be debatable, once again these particular detainees are entitled to protections under the ICCPR and the Convention Against Torture. The Al Qaeda detainees are afforded basic humane treatment and minimum protections of due process under the ICCPR and they are entitled freedom from torture in accordance with the Convention Against Torture.

Geneva Convention (IV)

It has been suggested that persons captured pursuant to a war on terror should be considered enemy combatants and are entitled protections under the Geneva Convention Relative to Protection of Civilian Persons in Time of War [“Geneva (IV)”].¹⁸⁵ In order for an enemy combatant to fall under the protection of Geneva (IV), the enemy combatant must be considered a “protected person” under the Convention.¹⁸⁶ Geneva (IV) draws a fine distinction between those that may be considered “protected persons” under the Convention and those that cannot be considered “protected persons.” Article four defines “protected persons” as people who “find themselves...in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹⁸⁷ This vague provision would seem to suggest that a “protected person” under article four would be one who is not a national of the occupied state, but “finds” themselves fighting for the occupied state. Article four exempts from the class of protected persons those people who are either nationals of a neutral state in the territory of a belligerent state or those

¹⁸⁵ Human Rights Watch, *supra* note 21, at 3.

¹⁸⁶ Geneva Convention Relative to Protection of Civilian Persons in Time of War (IV), art. 3 [Reproduced in the accompanying textbook at Tab 9].

¹⁸⁷ *Id.* at 4.

people who are nationals of associated belligerent states.¹⁸⁸ Persons in this class who do not qualify as “protected persons” are not subject to the protections of Geneva (IV).

This view can be contrasted with an alternative interpretation of the Geneva Conventions. It has also been suggested that persons who are captured outside of a territory of active hostilities and have no direct relationship to said active hostilities are not entitled to the protections of the Geneva Conventions.¹⁸⁹ Persons falling in this category would not be subject to either Geneva (III), which only applies to prisoners of war, or Geneva (IV), which would only apply to protected persons.

B. Protections

Domestic Law

Summary

Again, the treatment of international terrorism in American case law is rather sparse; to this point American courts have not had to deal with the protections afforded such accused terrorists to any significant degree. In regards to the protections currently afforded detainees accused of supporting international terrorism, the President’s Military Order of November 13, 2001 provides the most guidance.

President’s Military Order of November 13, 2001

There are two specific sections of the President’s Military Order that provide certain protections for individuals who are brought before military commissions on allegations in international terrorism.

¹⁸⁸ *Id.*

¹⁸⁹ CARTER, *supra* note 124, at 89.

The protections afforded the detainees captured subject to the President's Military Order of November 13, 2001 can be divided into two types of protections. First, section three outlines the treatment privileges and protections to be afforded the detainees subject to the jurisdiction of the military commissions. In particular, the detainees are to be treated humanely without discrimination, are to be afforded adequate food and medical treatment and are to be allowed free exercise of their religions.¹⁹⁰ Second, section four of the Military Order outlines the procedural protections afforded the detainees before the military commissions. Under section four, the individuals detained under the Military Order are to be brought before military commissions that may sit at any time and place that the Secretary of Defense may determine.¹⁹¹ The detainees are to be afforded a full and fair trial, rules of evidence to the extent that such evidence would have value to a reasonable person, conviction and sentencing by a two-thirds majority of the members of the commission, and review by the President or the Secretary of Defense.¹⁹²

International Law

Summary

The scope of protections due the individuals detained for reasons of support of international terrorism again depends on whether or not the Geneva Conventions apply to the class of persons accused of supporting international terrorism. Whether or not the Geneva Conventions apply, the relevant provisions of the ICCPR and the Convention

¹⁹⁰ *President's Military Order*, *supra* note 52, at 57834. See also Department of Defense, *Military Commission Order No.1*, (Mar. 21, 2002) [Reproduced in the accompanying textbook at Tab 44].

¹⁹¹ *President's Military Order*, *supra* note 52, at 57834.

¹⁹² *President's Military Order*, *supra* note 52, at 57834.

Against Torture will still apply minimum protections, as they do to all persons in all circumstances.

Geneva Conventions

The protections afforded detainees accused of being members of terrorist organizations will depend on the applicability of the Geneva Conventions to the case at hand.

If one accepts the argument that a person accused of supporting terrorism can be considered a protected person under Geneva (IV), the protections of Geneva (IV) would apply to those persons. In the case of a detainee who is determined to be a “protected person” under Geneva (IV), the detainee would be entitled to a number of procedural and substantive protections. Among other rights and privileges, such persons are free from “physical or moral coercion” for interrogative purposes.¹⁹³ Protected persons are also afforded the opportunity to present witnesses at trial,¹⁹⁴ a punishment proportionate to the offense,¹⁹⁵ as well as the right to appeal.¹⁹⁶

If one were to accept the view that persons captured outside active hostilities are not “protected persons” under Geneva (IV), such persons would not be subject to any of the protections of the Geneva Conventions. This would mean that such detainees would not be covered under the “cessation of active hostilities” protection. If this were indeed

¹⁹³ Geneva (IV), *supra* note 186, at art. 31.

¹⁹⁴ Geneva (IV), *supra* note 186, at, art. 72

¹⁹⁵ Geneva (IV), *supra* note 186, at, art. 67.

¹⁹⁶ Geneva (IV), *supra* note 186, at, art. 73.

the case, the state holding the detainee could conceivably detain the person for an indefinite time without violating the person's rights and privileges under international law.¹⁹⁷

C. Arguments

There are very serious arguments on both sides of the debate as to the protections afforded individuals detained for allegations of supporting international terrorism.

The argument advanced by the United States takes the view that the detention of such individuals is necessary to protect the national security of the United States. The policy of the United States is particularly driven by a desire to prevent another attack from occurring, no matter what the procedural costs may present. The President's Military Order declares as much: "have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency."¹⁹⁸

There has been fear of widespread constitutional violations of due process in the pursuit of the War on Terrorism, most of which has come from the media and the international community.¹⁹⁹ As if recognizing this criticism, American authorities have

¹⁹⁷ CARTER, *supra* note 124, at 89 (2003).

¹⁹⁸ *President's Military Order*, *supra* note 52, at 57833-34.

¹⁹⁹ Initial media analysis of the first round of military commissions was highly critical of the commissions' policies and procedures. The Miami Herald criticized the "enemy combatant" designation of the detainees, claiming that the potential for convicting innocent defendants presented a worst-case scenario for the administration. (*Wrongly Held at Gitmo*, Miami Herald, September 10, 2004) [Reproduced in the accompanying textbook at Tab 38]. The Los Angeles Times labeled the procedures a "Captain Kangaroo" court (*Guantanamo Farce*, Los Angeles Times, September 2, 2004) [Reproduced in the accompanying

tried to codify the constitutional protections to be afforded the individuals subject to the military commissions. The United States has declared that it will provide for the humane treatment of the detainees without discrimination, the provision of adequate food and medical treatment, and the protection of free exercise of their religions.²⁰⁰ Procedurally speaking, the United States has declared that it will provide the detainees a full and fair trial, rules of evidence to the extent that such evidence would have value to a reasonable person, conviction and sentencing by a two-thirds majority of the members of the commission, and some measure of review by the President or the Secretary of Defense.

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The international community continues to express its concern for what it sees as a series of activities aimed at denying individuals their rights under domestic and international law. The international community has taken particular issue with the provision of death penalties for the individuals facing military commissions, the lack of judicial oversight of the military commission's decisions, and the prorated rules of evidence provided for by the military commissions.²⁰² There is a very real fear throughout the international community that the military commissions will subvert the

textbook at Tab 35]. Not all the analysis was negative, however. The Washington Post praised the commissions soon after the commissions began: "On the positive side, pretrial hearings for four detainees have begun, and the detainees are being given a chance to respond to the serious allegations against them. The members of the commission and its prosecutors and defense teams alike appeared to take their roles and duties seriously. Defense challenges to the service of officers on the five-member commissions yielded candid exchanges. For all the criticism the commissions have taken from human rights groups and others, they did not appear to be kangaroo courts in which the results are preordained." (*The Tribunals Begin*, The Washington Post, August 29, 2004) [Reproduced in the accompanying textbook at Tab 37].

²⁰⁰ *President's Military Order*, *supra* note 52, at 57834.

²⁰¹ *President's Military Order*, *supra* note 52, at 57834.

²⁰² See generally Human Rights Watch, *Human Rights Watch Briefing Paper on U.S. Military Commissions*, (Jun 25, 2003) [Reproduced in the accompanying textbook at Tab 46], and Human Rights, Watch, *U.S.: Commission Rules Meet Some, Not All Rights Concerns*, (Mar. 21 2002) [Reproduced in the accompanying textbook at Tab 47], available at <http://hrw.org/press/2002/03/tribunals0321.htm> (last accessed on October 4, 2004).

rule of law worldwide, and that the protections that should be afforded the detainees under international law will be disregarded.

While the legal concerns of the international community are important to consider, particularly the concerns about the death penalty, the length of detentions and the lack of judicial appeal, the protections provided by the United States should be enough to satisfy its obligations under international law. The provisions of the President's Military Order of November 13, 2001, as well as the provisions released by the Department of Defense concerning the protections to be afforded in the military commissions, should be enough as a whole to satisfy the minimum protections of equality under the ICCPR. Furthermore, so long as the United States continues to honor its commitment to provide the detainees with humane treatment, the United States should be able to comply with the Geneva Conventions and the Convention Against Torture. Therefore, while the Al Qaeda detainees are most definitely afforded certain constitutional protections through incorporation of international law, the United States has taken the necessary steps to comply with the minimum protections that must be afforded the Al Qaeda detainees