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GUANTANAMO AND CITIZENSHIP: AN UNJUST TICKET HOME?

Rory T. Hood

"Trying to get Uganda to take an interest is pretty difficult; [Jamal Abdullah Kiyemba has] been here since he was 14. I am asking the [Foreign Office] whether they will allow him to apply for citizenship from Guantanamo Bay. If you are out of the country for more than two years, it can be counted against you. He probably has now been—but not of his own free will."

-Louise Christian - Atty. representing Jamal Abdullah Kiyemba

I. INTRODUCTION

Jamal Abdullah Kiyemba, Bisher al-Rawi, Jamil al-Banna, Shaker Abdur-Raheem Aamer, and Omar Deghayes are currently in the custody of the United States government at Guantanamo Bay, Cuba. A citizen of Uganda, an Iraqi exile, a Jordanian refugee, a Saudi citizen, and a Libyan exile, respectively, these men form an unlikely group; yet, each share one common trait. All five are British residents interned at Guantanamo Bay. The plight of this group led the British media to label them “The Forgotten Five.”

Alleged mistreatment of the detainees at Guantanamo Bay has created international and domestic unrest. This delicate situation led one in-

† B.A., State University of New York at Binghamton (2003); J.D. Case Western Reserve University School of Law (2006). I would like to thank Associate Dean Hiram Chodosh, Melissa Benson and William Carmines for their guidance in the development of this Note. I would also like to thank Megan Churnetski, my parents and my sister for their support.


3 Morris, supra note 2.

4 Tony Allen-Mills, Detainee claims he was MI5 link man, SUNDAY TIMES (London), Jan. 16, 2005, at 7.

international journalist to remark, "the whole Guantanamo saga has been a disgrace from the start and something that has sullied the reputation of the United States the world over." Moreover, in memoranda to superiors, numerous FBI agents allege that they witnessed aggressive interrogation practices used against the detainees. Detainees were "shackled to the floor in fetal positions for more than 24 hours at a time, left without food and water, and allowed to defecate on themselves . . .".Interrogators also used growling dogs, and "one detainee was wrapped in an Israeli flag and bombarded with loud music in an apparent attempt to soften his resistance to interrogation." Additionally, in an August 2002 memorandum to Alberto R. Gonzales, Jay S. Bybee concluded that "certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within [U.S. statutory] proscription against torture." Notwithstanding alleged abuse at Guantanamo Bay, "The Forgotten Five" remain in the custody of the United States without formal charge.

After the death of his father, at age fourteen, Jamal Abdullah Kiyemba moved to Britain from his native Uganda, to be with his mother, a British citizen. He "lived in Britain for 10 years and is eligible for citizenship, but has not so far applied due to an oversight." Although Kiyemba never obtained a British passport, "[h]e has indefinite-leave to remain [in Britain]." Born into a Roman Catholic family, Kiyemba converted to Islam while a student and began to attend the Finsbury Park mosque in London controlled by the militant cleric Abu Hamza. Kiyemba's detention

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8 Id.
9 Id.
11 Morris, supra note 2.
12 Branigan & Dodd, supra note 1.
13 Id.
may be the result of his connection to Abu Hamza and the Finsbury mosque, but the precise conditions of his detention are unknown.\textsuperscript{16} Similarly, Bisher al-Rawi’s family left Iraq twenty-five years ago to flee the oppression of Saddam Hussein’s Ba’athist regime.\textsuperscript{17} After settling in Britain, the entire family became citizens, with the exception of al-Rawi.\textsuperscript{18} As the youngest member of his family, al-Rawi retained his Iraqi citizenship so that one day his family might be able to regain assets seized by the Ba’athists.\textsuperscript{19} In 2002, al-Rawi traveled to The Gambia to establish a peanut-processing business, but local authorities took him into custody upon arrival.\textsuperscript{20} According to the United States, al-Rawi “is detained because he admitted helping Abu Qatada, a London preacher with alleged ties to Al-Qaeda, find an apartment, among other things.”\textsuperscript{21} Alternatively, al-Rawi claims that he acted as a “go-between” for British intelligence and Abu Qatada.\textsuperscript{22}

In 1994, Jamil El-Banna fled political persecution in Jordan and was granted asylum in the United Kingdom.\textsuperscript{23} Authorities arrested El-Banna, a business partner of al-Rawi, along with al-Rawi in The Gambia.\textsuperscript{24}

Shaker Abdur-Raheem Aamer is a Saudi citizen who moved to the United Kingdom in 1996.\textsuperscript{25} He allegedly traveled to Afghanistan to perform charity work, but was captured by the Northern Alliance in Afghanistan and turned over to the custody of the United States.\textsuperscript{26} The United States has disclosed no allegation against Aamer.\textsuperscript{27}

\textsuperscript{16} Cf. Dodd, supra note 15 (indicating that current and former British detainees in Camp Delta have been linked to the mosque); Sean O’Neill, \textit{How a Millfield Boy Ended Up in Camp Delta}, \textit{Times} (London), July 10, 2004, at 9.
\textsuperscript{17} O’Neill, supra note 16.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Toni Locy, \textit{Detainees’ Cases Show Another Side of Gitmo}, \textit{USA Today}, Nov. 4, 2004, at 19A.
\textsuperscript{21} Id.
\textsuperscript{22} Severin Carrell, “\textit{I was M15 Go-Between,” Says Briton Held in Guantanamo, INDEPENDENT ON SUNDAY} (London), Jan. 16, 2005, at 1.
\textsuperscript{23} Victoria Brittain, \textit{The Ones Left Behind: Four Britons Were Released from Guantanamo Bay Last Month: So Why is Jamil el Banna Still in His Cell and Why is the Government Doing Nothing?: Victoria Brittain Meets His Family}, \textit{Guardian} (London), Feb. 19, 2005, at 22.
\textsuperscript{24} Id.
\textsuperscript{25} Morris, supra note 2.
\textsuperscript{26} Id.
\textsuperscript{27} Clare Rudebeck, \textit{Family of British Resident Held at Guantanamo Appeal for His Return}, \textit{Independent} (London), Feb. 8, 2005, at 18.
Finally, Omar Deghayes is a "Libyan whose family [came to Britain after fleeing] the Gaddafi regime 19 years ago."28 Deghayes, "a partially blind law graduate . . . was allegedly moved to Guantanamo Bay after being caught by bounty hunters in Pakistan."29

The British Foreign and Commonwealth Office ("FCO") actively sought the release of nine British citizens held at Guantanamo Bay, but has overlooked these men.30 Its purpose is "to work for the [United Kingdom's] interests in a safe, just, and prosperous world."31 The FCO worked diligently to insure that British citizens, "[e]ither be tried in accordance with international standards or . . . [be] returned to the UK."32 In fact, the United States released all nine British citizens from Guantanamo Bay.33 The British government did not arrest five of these men upon their return to the United Kingdom, but they remain on twenty-four hour surveillance.34 The five returned to their homes within days of their arrival back in the United Kingdom.35 The four final British detainees released from captivity face the prospect of house arrest, but are currently free without charge and permitted

28 Morris, supra note 2.
29 Id.
30 Branigan & Dodd, supra note 1. See also Qureshi, supra note 2.
31 Foreign and Commonwealth Office, Foreign and Commonwealth Office Objectives for Spending Review 2004 Period (2005-2008), http://www.fco.gov.uk/serlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=103839880888. The FCO's listed objectives are (1) A world safer from global terrorism and weapons of mass destruction (WMD), (2) Protection of the UK from illegal immigration, drug trafficking and other international crime, (3) An international system based on the rule of law, which is better able to resolve disputes and prevent conflicts, (4) An effective EU in a secure neighbourhood, (5) Promotion of UK economic interests in an open and expanding global economy, (6) Sustainable development, underpinned by democracy, good governance and human rights, (7) Security of UK and global energy supplies, (8) Security and good governance of the UK's Overseas Territories, and (9) High quality consular services to British nationals abroad. Effective regulation of entry to, and settlement in, the UK in the interests of sustainable growth and social inclusion. (Entry clearance through UK Visas.). Id.
33 Rudebeck, supra note 27. See also Qureshi, supra note 2.
34 Patrick Hennessy & Rajeev Syal, Guantanamo Britons are Still a Threat, Says Blair Freed Detainees Furious at PM's Warning, SUNDAY TELEGRAPH (London), Nov. 14, 2004.
to reunite with their families.\textsuperscript{36} The United States released many of these men despite the Pentagon’s belief that they were “dangerous.”\textsuperscript{37}

In stark contrast, Shaker Abdur-Raheem Aamer is currently in permanent solitary confinement and has not spoken to his family in eighteen months.\textsuperscript{38} Stafford Smith, a human rights attorney, visited Aamer in Guantanamo Bay in January of 2005.\textsuperscript{39} Smith claims that Aamer’s cell was “two and a half meters long” and that “[Aamer] was mentally unwell.”\textsuperscript{40} Unfortunately for Kiyemba, al-Rawi, El-Banna, Aamer, and Deghayes the FCO determined that they will only “take up [the] interests” of British nationals.\textsuperscript{41} Because of the alleged mistreatment of prisoners held at Guantanamo Bay and the contrasting conditions for released British citizens in the United Kingdom, any differential treatment raises concerns of fairness and equality. A spokesperson for Amnesty International reported that “without the UK to stand up for them there is a real danger that these men will be almost totally forgotten—left to languish in legal limbo indefinitely.”\textsuperscript{42}

This Note examines the effect citizenship status has on the detention of enemy-combatants and advocates fairness and equality in the treatment of residents. Section II describes the Geneva Conventions and the distinction it draws between prisoners of war and unlawful combatants. Section III investigates the current effect citizenship status has on detainees in international conflicts. Specifically, Section III examines disparate treatment for citizens of the United States, citizens of countries allied with the United States, and residents of countries allied with the United States. In doing so, Section III explores the disparity between incarceration at Guantanamo and detention or freedom in the United Kingdom. Section IV discusses the applicability of modern and classical theories of equality to citizenship status. Section IV also investigates whether there is a sufficiently legitimate differ-


\textsuperscript{37} Karen Mcveygh, \textit{Rights Groups Celebrate as Guantanamo Four are Released without Charge}, \textit{Scotsman}, Jan. 27, 2005, at 3.

\textsuperscript{38} Rudebeck, \textit{supra} note 27.

\textsuperscript{39} \textit{Id}.

\textsuperscript{40} \textit{Id}.


\textsuperscript{42} Morris, \textit{supra} note 2. Asim Qureshi notes that:

The nine men are now in a legal black hole as they have no one to make any representations on their behalf. Their countries of origin are the very places they fled in order to find security, while the country they fled to refuse to provide them with the protection that they deserve under the law of international human rights.

Qureshi, \textit{supra} note 2.
ence between citizens and residents to justify disparate treatment. Finally, Section V suggests that the international community should strive toward equal treatment of citizens and residents of the same country. Absent equality, current practices lead to arbitrary distinctions that favor some and disfavor others. Section V also discusses the possibility of amending the Geneva Conventions and other alternatives to accomplish this goal.

II. THE GENEVA CONVENTIONS ON ENEMY COMBATANTS

The international community drafted the Geneva Conventions in response to horrific human rights violations committed during World War I and World War II. Much of the controversy regarding the detainees held in Guantanamo Bay involves their status under the Third Geneva Convention, which address the treatment of prisoners of war. Specifically, a heated debate emerged about whether the detainees are prisoners of war or "unlawful combatants." The Bush Administration determined that the detainees currently in custody at Guantanamo Bay, Cuba, were not prisoners of war and, therefore, not afforded the full protections of the Third Geneva Convention. Specifically, on January 9, 2002, John Yoo and Robert J. Delahunty drafted a memorandum in which they concluded that the Geneva Conventions do not apply to Al Qaeda and Taliban members in the custody of the United States. Thereafter, on January 19, 2002, the Department of Defense determined that members of Al Qaeda and the Taliban are not entitled to prisoner of war status under the Geneva Conventions.

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44 See Akbar, supra note 5.

45 See id.


This controversy and its context highlight the importance of rethinking the distinction between citizenship and residence in the treatment of detainees.

A. Prisoner of War Status

The Third Geneva Convention addresses the treatment of prisoners of war. Individuals entitled to prisoner of war status must fall into one of the broad categories set forth in Article 4 of the Third Geneva Convention. Members of the armed forces of a party to the conflict, including members of militias or volunteer corps, receive the protections guaranteed by the Third Geneva Convention. Additionally, the Third Geneva Convention protects members of other militias and volunteer groups, including organized resistance movements, if they meet four criteria. First, the group’s commander must be responsible for the acts of his subordinates. Second, the group must have a “fixed distinctive sign recognizable at a distance.” Third, the group must carry any arms openly. Finally, the group must “conduct its operations in accordance with the laws and customs of war.” Article Five of the Third Geneva Convention further provides that if there is any doubt whether an individual belongs to the categories in Article 4 “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

The Yoo/Delahunty memo determined that the Geneva Conventions do not apply to Al Qaeda because it is a “non-state” actor and, therefore, cannot be a party to the Geneva Conventions. Additionally, although the memo acknowledges that Afghanistan has been a signatory to the Geneva Conventions since 1956, it concludes that Afghanistan was a failed state ruled “by a militia faction rather than by a government.” Further, the memo found the Geneva Conventions inapplicable to the Taliban Militia because it was “functionally indistinguishable from Al Qaeda.”

Although the Yoo/Delahunty memo concludes that the Geneva Conventions do not apply to members of Al Qaeda and the Taliban, the
memo indicates that, even if the Geneva Conventions did apply, members of Al Qaeda and the Taliban are not entitled to prisoner of war status. In determining that members of the Taliban and al Qaeda are not entitled to prisoner of war status, the Yoo/Delahunty memo addresses each of the four categories above. Specifically, the Yoo/Delahunty memo maintains that "Al Qaeda members have clearly demonstrated that they will not follow these basic requirements of lawful warfare." Finally, the Yoo/Delahunty memo concludes that even if the Geneva Conventions applied to the Taliban, the Taliban fails to meet the four requirements for prisoner of war status.

B. "Unlawful Combatants"

Although the terms "unlawful combatant" or "enemy combatant" do not appear in the text of either the Third or Fourth Geneva Conventions, both terms play a crucial role in the application of the documents. The evolution of modern warfare places many combatants in a situation where attaining prisoner of war status is extremely difficult. This is especially true in the "War on Terror" where one side is not a nation, but rather an international terrorist organization. As such, the detaining power designates individuals as unlawful combatants and they do not receive the protections of the Third Geneva Convention. Professor Nathaniel Berman indicates that the legal term for such individuals is "unprivileged combatants." Their situation is "unprivileged" because they do not receive the same protections

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61 Id. at 13 & 25.
62 Id.
63 Id. at 13. The memo continues:

[Members of Al Qaeda] have attacked purely civilian targets of no military value; they refuse to wear uniform or insignia or carry arms openly, but instead high-jacked civilian airliners, took hostages, and killed them; they have deliberately targeted and killed thousands of civilians; and they themselves do not obey the laws of war concerning the protections of the lives of civilians or the means of legitimate combat.

Id.

64 Id. at 25. Specifically, "[t]he Taliban's militia's command structure probably did not meet the first of these requirements; that the evidence strongly indicates that the requirement of a distinctive uniform was not met; and that the requirement of conducting operations in accordance with the law and customs of armed conflicts is not met." Id.
66 Id. at 167.
as prisoners of war. The most significant difference between prisoners of war and "unlawful combatants" is that "unlawful combatants" "may be prosecuted for taking up arms against an enemy power."69

While "unlawful combatants" do not receive the same treatment as prisoners of war under international law, opinions differ on whether the Fourth Geneva Convention, which addresses the protection of civilians in time of war, protects "unlawful combatants". One view is that individuals engaged in fighting are clearly not civilians and, therefore, they fall outside the protections enumerated in the Fourth Geneva Convention.70 However, others believe that the Fourth Geneva Convention applies to "unlawful combatants."71 Human Rights Watch believes that "'nonprivileged' or 'unlawful' combatants are protected under the Fourth Geneva Convention, customary international law and, where applicable, Protocol I to the Geneva Conventions."72 Finally, the commentary to the Fourth Geneva Convention indicates:

[E]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention.73

The Comment continues "'[t]here is no' intermediate status; nobody in enemy hands can be outside the law."74 Despite these arguments, and where an individual falls under the Geneva Conventions, their citizenship status may play a role in their treatment by the detaining power.

III. THE CURRENT EFFECT OF CITIZENSHIP STATUS ON DETAINEES IN INTERNATIONAL CONFLICTS

The word "citizen" does not appear in either the Third or Fourth Geneva Convention. However, both the Third and Fourth Geneva Conventions employ a nationality framework. Article 16 of the Third Geneva Convention states, "all prisoners of war shall be treated alike by the Detaining

68 Id.
70 Sperber, supra note 65, at 167.
71 Rodriguez, supra note 69, at 387.
73 COMMENTARY ON GENEVA CONVENTION IV OF 1949 RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 4 (Jean Pictet ed., 1958) [hereinafter Commentary on Fourth Geneva Convention].
74 Id.
Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.”

Similarly, Article 13 of the Fourth Geneva Convention states:

[The provisions of Part II [addressing the general protection of populations against certain consequences of war] cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.]

In fact, “every major international humanitarian legal instrument” contains a prohibition against discrimination based upon nationality.

These provisions indicate that a detaining power may not make adverse distinctions based on nationality. However, these provisions of non-discrimination fail to provide definitive guidance. The detainees in Guantánamo Bay receive differential treatment based upon whether they are United States citizens, citizens of allies of the United States, or citizens of all other countries. Specifically, an individual’s citizenship may enable them to secure release from Guantánamo Bay. The international community must address this inequality and strive towards the elimination of disparate treatment based upon citizenship status.

A. United States Citizens

United States citizens have rights enumerated in the United States Constitution. As the United States is the detaining power in Guantánamo Bay, individuals with United States citizenship will likely never see the inside of a cell at Guantánamo Bay. For example, the United States government never detained John Walker Lindh, the so-called “American Taliban” at Guantánamo Bay. At the age of sixteen Lindh converted to Islam

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75 Third Geneva Convention, supra note 43, art. 16.
76 Fourth Geneva Convention, supra note 43, art. 13.
77 Sperber, supra note 65, at 167.
78 Third Geneva Convention, supra note 43, art. 16; Fourth Geneva Convention, supra note 43, art. 13; Sperber, supra note 65, at 167.
79 Sperber, supra note 65, at 167.
81 Branigan & Dodd, supra note 1.
82 An evaluation of citizenship status and the United States Constitution is beyond the breadth of this Note. This Note focuses on citizenship status and international law. In a situation where another country was the detaining power, United States citizens may not receive protections enumerated in the United States Constitution.
and by twenty, the United States government alleged that he took up arms against the United States with the Taliban.\textsuperscript{84} Raised in Marin County, California, Lindh eventually arrived in "Alexandria, Virginia, where he was to be tried in a civilian criminal court for conspiring to kill Americans."\textsuperscript{85} All the while, "the military was holding . . . foreign-born Taliban and Al Qaeda prisoners at a military base in Guantanamo Bay, Cuba, in 8-foot-by-8-foot chain link cages."\textsuperscript{86}

Similarly, Yaser Esam Hamdi was born in Louisiana, but moved to Saudi Arabia as a child before he eventually moved to Afghanistan.\textsuperscript{87} In 2001, the Northern Alliance captured Hamdi in Afghanistan and turned him over to the United States.\textsuperscript{88} In 2002, the United States government transferred Hamdi to Guantanamo Bay, Cuba.\textsuperscript{89} Later that year, after confirmation that he was an American citizen, Hamdi was transferred from Guantanamo Bay to a naval brig in Norfolk, Virginia, and later to a brig in Charleston, South Carolina.\textsuperscript{90} When Hamdi’s father filed a writ of habeas corpus, the Supreme Court of the United States held that, “although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”\textsuperscript{91}

B. Citizens of Countries Allied with the United States

Although citizens of countries allied with the United States may spend significant time at Guantanamo Bay, in many instances their countries have pressured the United States and secured their release. At one time, nine British citizens were in the custody of the United States at Guantanamo Bay.\textsuperscript{92} A statement by the British Foreign Secretary reveals that the British Government was in constant contact with the United States regarding de-

\textsuperscript{84} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 509.
\textsuperscript{92} Statement by the Foreign Secretary on Return of British Guantanamo Detainees, \textit{supra} note 32.
tainees with British citizenship. Further, British authorities visited Guantanamo Bay on numerous occasions. Finally, the FCO kept the families of these detainees and parliament informed and successfully negotiated the release of all British citizens.

In March 2004, the United States determined that five British citizens did not pose a terrorist threat and that they could obtain no more information from these men. The British government secured the release of four other British citizens in February 2005 despite the Pentagon's belief that they were "dangerous." These developments indicate that citizenship may play a crucial role in release from Guantanamo Bay. While a policy to release all British citizens is apparent, "The Forgotten Five" remain in captivity, possibly indefinitely. Disparate treatment of this nature violates fundamental principles of equality and, therefore, the international community should not allow it to persist.

The reasons given for the release of the nine British Citizens poses an important issue. However, more important is the fact that the British government negotiated their release. The British government denies Jamal Abdullah Kiyemba, Bisher al-Rawi, Jamil Al-Banna, Shaker Abdur-Raheem Aamer, and Omar Deghayes this opportunity. As such, they remain in Guantanamo Bay, charged with no formal crime and with no government to lobby on their behalf. If nothing else, political pressure from the British Government might force a reevaluation of their threat level.

C. Residents and Others

Jamal Abdullah Kiyemba, Bisher al-Rawi, Jamil Al-Banna, Shaker Abdur-Raheem Aamer, and Omar Deghayes are residents of the United Kingdom. Their status as residents of the United Kingdom might be beneficial considering that the British government secured the release of all nine British citizens in Guantanamo Bay. To the contrary, the British government refuses to help these men because "they were not traveling on a UK passport" when taken into custody. Jack Straw, Secretary of State for Foreign and Commonwealth Affairs, indicated that "[w]e can represent British citizens... [but] we cannot represent those who choose not to seek British citizenship and make their own choices presumably because they want to maintain the citizenship of their birth." Thus, these men "are now in a

93 Id.
94 Id.
95 Id.; Rudebeck, supra note 27.
96 Williams et al., supra note 35.
97 Mcveigh, supra note 37.
98 Morris, supra note 2.
99 Qureshi, supra note 2.
legal black hole as they have no one to make any representations on their behalf. Their countries of origin are the very places they fled in order to find security, while the country they fled to refuses to provide them with the protection that they deserve.\textsuperscript{100}

Likewise, citizens of countries that have hostile relations with the United States and citizens of countries who take no interest in the situation at Guantanamo Bay have no government to lobby on their behalf and likely will remain in custody indefinitely. Further, developing a "more permanent approach for potentially lifetime detentions" is underway at top levels of the Bush administration.\textsuperscript{101} Such a policy may include "hundreds of people now in military and CIA custody whom the government does not have enough evidence to charge in courts."\textsuperscript{102} Groups including the ACLU and Amnesty International certainly lobby on behalf of the detainees, but these groups clearly do not wield the same influence or political clout as an allied government. Absent sufficient legal protections and voices to pressure, disparate treatment persists for residents at Guantanamo Bay.

The current approach to citizenship status leads to arbitrary distinctions that favor some and disfavor others. This disparate treatment undermines the legitimacy of international law. Accordingly, the international community should incorporate notions of fairness and equality to citizenship status and its effect on the detention of enemy combatants.

IV. A DOCTRINE OF EQUALITY

\textbf{A. Theories of Equality}

Modern and classical philosophy often address the subject of equality. John Rawls, in \textit{A Theory of Justice},\textsuperscript{103} argues that justice requires that social institutions developed by society should not create unfair advantages for some at the expense of others.\textsuperscript{104} In order to create an arena of fairness and equality, institutions or conventions set up by the international community should adhere to this principle. Furthermore, the absence of equality in application undermines the legitimacy of international law.\textsuperscript{105} Specifically, Professor Ronald Dworkin argues that fairness, justice, and integrity "con-
duce to the rule of law.”¹⁰⁶ The Geneva Conventions currently fail to prevent the creation of unfair advantages in Guantanamo Bay. By failing to address citizenship directly, the Geneva Conventions allow the British government to draw adverse distinctions based on citizenship status. Critics might argue that the British government cannot lobby on behalf of everyone who requests their services. While this may be true of individuals with no attachments to Britain, Britain has a responsibility to residents of the United Kingdom because the distinction between citizens and residents is not sufficient to justify disparate treatment. Edward Davey, MP for Bisher al-Rawi’s constituency of Kingston and Surbiton, believes that, “after 19 years . . . the British government has an utter moral obligation to Bisher, and their failure to recognize that is chilling and quite spineless.”¹⁰⁷

In *Groundwork for the Metaphysics of Morals*,¹⁰⁸ German philosopher Immanuel Kant laid out three categorical imperatives. The imperatives are:

(1) Act only according to that maxim by which you can at the same time will that it should become a universal law;

(2) Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end; and

(3) All maxims as proceeding from our own [hypothetical] making of law ought to harmonize with a possible Kingdom of ends.¹⁰⁹

These Kantian imperatives would preclude all war. However, because society has yet to shed itself from the horrors of violence and war, this Note does not address that utopian topic. Kant’s categorical imperatives clearly reject the utilitarian notion of detaining the potentially innocent for the greater good of society.¹¹⁰ Such behavior would treat the detained as a means, rather than an end in itself. Nevertheless, how would Kantian theory address the disparate treatment of detained individuals based upon their citizenship status?

When the international community creates a convention, it should “will” that the principles under that convention should become universal law. Universal application of international principles assures that the international community cannot condone disparate treatment. Specifically, the

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¹⁰⁶ *Id.* at 709 (citing RONALD DWORKIN, LAW’S EMPIRE 176-224 (1986). Dworkin is Professor of Philosophy and Frank Henry Sommer Professor of Law at New York University. Additionally, Dworkin has been Professor of Jurisprudence at Oxford and Fellow of University College since 1969.

¹⁰⁷ Branigan & Dodd, *supra* note 1.

¹⁰⁸ IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (1785).

¹⁰⁹ *Id.*

¹¹⁰ Cole, *supra* note 85, at 1798.
international community should approach nationality and citizenship status with principles of universality. Such an approach prevents detaining powers from drawing adverse distinctions and promotes the legitimacy of international actions. Absent universal application, questions of inequality and disparate application may emerge. Further, the United States has an incentive to promote the universal application of international agreements to assure that when other countries detain United States citizens, they do not receive disparate treatment based upon their citizenship status.

While universal application may not be appropriate in all circumstances, the differences between citizens and residents fails to reach a level necessary to justify disparate treatment. In United States v. Verdugo-Urquidez, Chief Justice William Rehnquist recognized that “aliens receive [U.S.] constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.” Despite their substantial voluntary connection to the United Kingdom, the government of the United Kingdom does not extend “The Forgotten Five” the benefit of this standard.

Under classical Social Contract Theory, individuals give up certain rights to a sovereign in order to live in a civil society. In return for submission of their rights, the government agrees to enforce the contract between individuals of society. Thus, an argument against equal treatment of citizens and residents is that the government may have an obligation to its citizens through social contract ideas; but they have no obligation to residents with whom they arguably have not entered into a social contract. However, John Locke argued that, “consent to government may be express or tacit.” Locke explained that “[e]xpress consent consists of some manifestation of a 'positive [e]ngagement' with a political society, and tacit con-

112 Id. The full quote reads:

“Verdugo-Urquidez also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights. These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country. Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.”

Id. at 270-271 (citations omitted).
113 Reasonable minds may disagree regarding the meaning of “substantial connection.” The remainder of this Note uses the “significant voluntary connection” language of Chief Justice Rehnquist in Verdugo-Urquidez.
115 See id.
sent consists of any contact with a society that results in a person's enjoying any of the benefits of living under the government of that society." Applying Locke's theory to residents, "resident aliens may be said to tacitly consent" to be governed. By tacitly consenting, residents enter into the social contract and gain the rights thereto. Thus, applying social contract theory, the British government has a moral obligation to represent "The Forgotten Five" as Edward Davey suggests.

Additionally, the difference between citizens and residents is not sufficiently legitimate to justify adverse distinctions because the separation between citizens and residents is too attenuated to justify the distinction. To elaborate, the main difference, that residents have not applied for citizenship, is not a sufficient justification for disparate treatment. Many residents are loyal law abiding individuals who may have legitimate reasons to maintain their current citizenship status. Bisher al-Rawi's desire to remain attached with his ancestry and the possibility to reclaim their assets is one legitimate reason among many. Further, as examined below, citizenship is not always easily attainable and many countries do not offer dual citizenship. With these considerations in mind, disparate treatment is not justified based upon minute differences between citizens and residents. This is especially true when these residents have indefinite leave to stay.

A doctrine of equality for citizens and residents could have adverse consequences for detainees. For instance, equal treatment may mean treating all combatants—no matter where they are from—equally poorly. Professor Kenneth Simons indicates that "equality is a distinctively flexible norm: normally the decisionmaker may either 'level up' or 'level down' the benefits or burdens at issue, in order to rectify, or avoid creating, the inequality." The practice of "leveling down" occurs in the lawmaking process. For instance, in the United States, calls for equal educational opportunities have sometimes resulted in "leveling down" spending in wealthier schools rather than leveling up funding in poorer schools. Human Rights Groups are unlikely to favor "leveling down." However, "leveling down" is still preferable to a system where combatants are subject to adverse treatment based upon their citizenship status. At the very least, ambiguous safeguards can be replaced with clear-cut protections.

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117 Id.
118 Id.
119 Branigan & Dodd, supra note 1.
122 Id. at 1263 n.84.
B. Similarly situated Individuals

Many theories of equality seek to treat similarly situated individuals alike. In the context of citizenship status, the question becomes whether citizens of different countries are similarly situated. Furthermore, are citizens and residents of the same countries similarly situated? If the answers to the above questions are yes, then the analysis may be easy. However, if the answers are no, one must assess whether dissimilar citizenship is sufficiently significant to justify disparate treatment.

In his dissent in Hamdi, Justice Scalia argued that, "Citizens and non-citizens, even if equally dangerous, are not similarly situated."\textsuperscript{123} No mention of residents appears in Scalia's dissent.\textsuperscript{124} The majority focused on "individuals" rather than citizenship and argued that citizenship was irrelevant to the detention of enemy combatants.\textsuperscript{125} Citizenship may be irrelevant to whether an enemy combatant can be detained; however, current international standards allow it to be relevant to chances of release. The British government exemplifies this disparate treatment by failing to represent and negotiate on the behalf of residents of the United Kingdom. Further, although United States law may permit a distinction between citizens and non-citizens, international social institutions should not perpetuate such distinctions to avoid questions of legitimacy. A better approach is to have a definitive prohibition on distinctions based upon citizenship status.

Another issue is that citizenship status is a mutable trait. Unlike race or age, a person has the constrained ability to change his or her citizenship status. As such, one might argue that individuals have the power to choose which citizenship status they shall enjoy and, therefore, they must accept the consequences of their choice. This argument assumes that citizenship status is always easily attainable. On the contrary, in many countries acquiring citizenship can be quite difficult. In the United States, some of the requirements of naturalization are:

- a period of continuous residence and physical presence in the United States; residence in a particular USCIS District prior to filing; an ability to read, write, and speak English; a knowledge and understanding of U.S. history and government; good moral character; attachment to the principles of the U.S. Constitution; and favorable disposition toward the United States.\textsuperscript{126}

\textsuperscript{123} Hamdi v. Rumsfeld, 542 U.S. 507, 575 n.5 (2004).
\textsuperscript{124} Id. at 554-78.
Similarly, foreign applicants for British citizenship must:

- have lived legally in the United Kingdom for five years (the last year should have been free of any time limit); be 18 or over; not be of unsound mind; be of good character; have sufficient knowledge of English, Welsh or Scottish Gaelic (depending on their age and physical and mental condition); and stay closely connected with the United Kingdom.\(^{127}\)

Hurdles like these can make attaining citizenship status an arduous task. A second argument for dissimilar treatment based upon citizenship status contends, "[t]he very essence of war involves the drawing of lines in the sand between citizens of our country and those against whom we are fighting."\(^{128}\) The bright line suggested by this argument fails to give adequate weight to the proximity between citizens and residents. Furthermore, modern warfare, especially the "War on Terror," is not necessarily between two countries with distinct sets of citizens. Professor David Cole advocates resisting the "double standard" that exists for citizens and non-citizens because "political freedom, due process, and equal protection of the laws... are human rights, not privileges of citizenship and ought to apply whenever we seek to impose legal obligations on persons."\(^{129}\) This view starkly contrasts with the current U.S. treatment of the detainees in Guantanamo Bay.

Finally, the distinction between citizens and residents is too attenuated to justify disparate treatment. First, the differences between citizens and residents are not always stark. For example, Bisher al-Rawi lived in Britain for more than twenty-five years before his incarceration. He likely has more of an affiliation with Britain than an individual who recently gained citizenship. Regardless, applying the Lockean theory of tacit consent, "The Forgotten Five" have entered into social contracts with the British government and, therefore, the government has a moral obligation to represent them.

V. AN AMICABLE SOLUTION

The United States determination that the Geneva Conventions do not apply to members of Al Qaeda and the Taliban is a source of constant debate.\(^{130}\) The nature of modern warfare plays a pivotal role in the controversy surrounding the application of the Conventions.\(^{131}\) It has been over


\(^{128}\) Cole, supra note 85, at 957. David Cole is a Professor of Law at the Georgetown University Law Center.

\(^{129}\) Id.

\(^{130}\) See id.

fifty years since the drafting of the Geneva Conventions. Since then the
Conventions have not changed, save for two protocols adopted in 1977, to
which the U.S. is not a signatory.132 The Geneva Conventions sought to
establish rules for a different type of conflict. Some wars are now waged
without regards to borders or governments. In certain instances, conflicts
have moved off the battlefield and into the streets of society. International
organizations, rather than specific countries, can carry out attacks. Accord-
ingly, the international community should reexamine and modernize the
Geneva Conventions in an effort to avoid future complications.

An area of specific importance is the non-discrimination provisions
of the Third and Fourth Geneva Conventions.133 These provisions protect
prisoners of war and civilians from discrimination based upon national-
ity.134 "Unlawful Combatants" do not fall within either of these two catego-
ries.135 Thus, they are arguably unprotected from adverse distinctions based
upon their citizenship status. However, as the Commentary to the Fourth
Geneva Convention indicates, "there is no’ intermediate status; nobody in
enemy hands can be outside the law."136 Currently, no matter where an
individual falls under the Geneva Conventions, their citizenship status may
play a role in their treatment by the detaining power. In an effort to promote
justice and equality, the international community should expand the non-
discrimination provisions in the Geneva Conventions to prevent disparate
treatment based upon citizenship status to all individuals in the hands of the
enemy. Inserting fairness, justice, and integrity into the detention of "unlaw-
ful combatants" promotes the legitimacy of international law.137 Thus, re-
gardless of an individual’s status under the Conventions, adverse distinc-
tions based upon citizenship status should be prohibited.

A. Amending the Geneva Conventions

The situations of Kiyemba, al-Rawi, Al-Banna, Aamer, and
Deghayes exemplify the problem of disparate treatment based on citizenship
status. The British government’s ability to ignore their situation, and the

132 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the
Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [here-
inafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and
Relating to the Protections of Victims of Non-International Armed Conflicts, June 8, 1977,
133 Third Geneva Convention, supra note 43, art. 16; Fourth Geneva Convention, supra
note 43, art. 13.
134 Third Geneva Convention, supra note 43, art. 16; Fourth Geneva Convention, supra
note 43, art. 13.
135 See Berman, supra note 67.
136 Commentary on Fourth Geneva Convention, supra note 73.
137 Franck, supra note 105, at 709.
United States determination that the Conventions do not apply to members of Al Qaeda and the Taliban, demonstrates that the Geneva Conventions fail to prevent disparate treatment based on citizenship status. This disparity undermines the legitimacy of equality in international law. Most notably, conventions set up by the international community should not create unfair advantages for some at the expense of others based upon citizenship status.

Although the Geneva Conventions fail to provide this protection, the document should not simply be discarded. A better course is to amend the Geneva Conventions. The Geneva Conventions do not provide a procedure for amendment. However, Article 97 of the Protocol I provides an amendment process. This process provides that: "Any High Contracting Party may propose amendments to this Protocol." Protocol I continues, "the text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment." Further, "the depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol." Finally, Comment 3780 to Protocol I recognizes that "[i]t should be noted that this article only deals with amendments to the Protocol. However, a procedure for amending the Conventions could—as they do not contain a provision to this effect—apply this article by analogy.

Amending a document signed by numerous nations would obviously be a complex undertaking. However, the task is not insurmountable for three reasons. First, the international community has an incentive to avoid apparent disparate treatment. Cries of improper treatment surround the situation in Guantanamo Bay. Amending the Conventions to prevent disparate treatment based on citizenship status would be a step forward in the treatment of the detainees in Guantanamo Bay. Second, nations like Britain will have to address the problem of residents eventually. Constant lobbying from human rights groups and pressure from the detainees' families cannot remain unheard forever. As such, addressing the problem on an international level allows countries like Britain to avoid undertaking the

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138 Protocol I, supra note 132, art. 97.
139 Id.
140 Id.
141 Id.
143 See Akbar, supra note 5.
problem alone. Finally, the procedural hurdles for amendment in Article 97 of Protocol I are not difficult to meet.\textsuperscript{144} Once the international community establishes incentives to amend, it can proceed with amending the Geneva Conventions. One course of action is to add an article to each Convention that provides a blanket prohibition on discrimination based upon citizenship status. This principle of non-discrimination must extend to all individuals in the custody of a detaining power, regardless of their status under the conventions because “nobody in enemy hands can be outside the law.”\textsuperscript{145} By doing so the international community can take a significant stance against disparate treatment based upon citizenship status.

\textbf{B. Alternative Solutions}

An alternative solution is to add a third protocol to the original conventions. The international community has added two protocols to the Geneva Conventions since 1949.\textsuperscript{146} Thus, one benefit to adding an additional protocol is that the international community is already familiar with the process. Accordingly, this solution may prove easier logistically. However, some countries may resist an entirely new document and refuse to sign the agreement. For instance, the United States has not ratified the two protocols additional to the Geneva Conventions.\textsuperscript{147} Political pressure and the desire to avoid future complications in the application of the Geneva Conventions may provide a valuable incentive for reluctant countries.

A second alternative to amending the Geneva Conventions is to create an arena for the nation of citizenship and nation of residence to work together to address the problem. For example, Britain and Uganda could collectively address Jamal Abdullah Kiyemba’s detention in Guantanamo Bay. An advantage of this approach is that part of the burden of addressing the problem is removed from the country of residence. For example, Britain would not bear exclusive responsibility for its residents. A second advantage is that this alternative avoids the ratification and adoption concerns that arise in alternative solutions.

This approach presents three problems. First, Uganda does not have the resources or political power of Britain. As a result, the United States may not take political pressure from Uganda as seriously as it would take political pressure from a more powerful ally. However, Uganda can avoid this problem if it acts in concert with Britain. Second, Uganda may not care or may not be in a position to commit resources to the process. Louise

\textsuperscript{144} Protocol I, supra note 132, art. 97.
\textsuperscript{145} Commentary on Fourth Geneva Convention, supra note 73.
\textsuperscript{146} Protocol I, supra note 132; Protocol II, supra note 132.
\textsuperscript{147} Protocol I, supra note 132; Protocol II, supra note 132.
Christian, attorney for Jamal Abdullah Kiyemba acknowledges that, "trying to get Uganda to take an interest is pretty difficult." Other countries that must address numerous domestic issues may be in a similar position regarding their detained citizens. Finally, the logistics of organizing a forum for the countries to meet and compelling their presence could prove overly burdensome.

A third alternative is to allow combatants to apply for citizenship from within Guantanamo Bay. Jamal Abdullah Kiyemba’s attorney "is asking the government to help him apply for citizenship from within the U.S. naval base because the Foreign Office refuses to help non-Britons." This could avoid the problem entirely because "a successful application would force the government to take responsibility for him."

Although promising, governments are unlikely to be receptive to Guantanamo applicants because of their alleged affiliation with Al Qaeda or the Taliban. Further, it may be politically unwise for governments to permit detainees to gain citizenship from within Guantanamo Bay. The story of Abdurahman Khadr, a Canadian citizen released from Guantanamo Bay, illustrates this point. Since his release and return to Canada, Khadr has received many threatening phone calls and 10,000 Canadian citizens have signed an online petition demanding the removal of Khadr and his family from the country. Further, in the case of Britain, the “Home Office staff do not have access to [Guantanamo Bay], while the [FCO] insists that citizenship applications are Home Office responsibility.” Finally, it may be burdensome for countries to process numerous requests for citizenship. Specifically, would permission to apply for citizenship status be limited to residents or could any individual apply for citizenship from within Guantanamo Bay?

Finally, the United Nations ("U.N.") could address inequality in the detention of enemy combatants. The U.N. may be the most appropriate forum to address this international issue because one of its purposes is “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character..." However, the General Assembly can only make recommendations regarding human rights

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148 Branigan & Dodd, supra note 1.
149 Id.
150 Id.
151 Colin Freeze, Khadr’s Citizenship Fuels Public Outcry, GLOBE AND MAIL (Canada), Apr. 17, 2004. Such threats include messages stating: “You’re not wanted in this country... . Get the hell out of this country, you bastards... . I thought maybe by now you’d get the hell out of here and take off back to Pakistan with your al-Qaeda friends... .” Id.
152 Branigan & Dodd, supra note 1.
153 U.N. Charter pmbl.
and has "no power to take binding decisions." Thus, the General Assembly is unlikely to contribute the necessary initiative on its own. Moreover, concerns of unilateral and isolationist actions by member nations could undermine such efforts. Specifically, one of the five permanent members of the U.N. Security Council (Peoples Republic of China, France, Russian Federation, United States, and United Kingdom) could veto a potential initiative. Thus, pursuing a policy of non-discrimination through the U.N. could prove an extremely strenuous task.

VI. CONCLUSION

The nature of modern warfare generates controversy surrounding the application of the Geneva Conventions. Specifically, the "War on Terror," which can involve international terrorist organizations rather than state actors, creates confusion regarding the applicability of the Geneva Conventions. Because of this uncertainty, prisoner of war status can be extremely difficult to attain. Thus, many individuals are designated "unlawful combatants" and not protected by the Geneva Conventions. Moreover, the Geneva Conventions, in their current capacity, fail to deliver equal treatment to persons of diverse citizenship. As a result, a detaining power can treat members of the same group that take up arms differently based upon the citizenship status they can prove. Specifically, this Note demonstrates that United States citizens, citizens from countries allied with the United States, and citizens of all other countries currently receive differential treatment in the "War on Terror." The predicament of "The Forgotten Five" illustrates the disparate treatment of detainees at Guantanamo Bay. While some argue that these individuals are not similarly situated, the theories of equality presented indicate that, as an institution, international law should not allow individuals to have an unfair advantage based upon a characteristic such as citizenship status. Absent equality, current practices lead to arbitrary distinctions that favor some and disfavor others. The international community can correct existing inequalities in numerous ways. Amending and strengthening the Geneva Conventions to prevent countries from drawing adverse distinctions between citizens and residents is the most appropriate response. Principles of non-discrimination should extend to all individuals in the custody of a detaining power, regardless of their status under the conventions. Finally, although the cages at Guantanamo may one day be unlocked, prin-


ciples of equality must continue to play a role in international law to secure its legitimacy.