PARLAYING PRISONER PROTECTIONS: A LOOK AT THE INTERNATIONAL LAW AND SUPREME COURT DECISIONS THAT SHOULD BE GOVERNING OUR TREATMENT OF GUANTÁNAMO DETAINEES

TABLE OF CONTENTS

I. INTRODUCTION

"Where the conduct of government is threatened by serious terrorism, difficult choices have to be made and the terrorist dimension cannot be overlooked."[1] One of the most pivotal choices that the United States has faced since the terrorist attacks of 2001 is whether to abide by international law in its treatment of Guantánamo detainees. How does a nation strike a realistic balance between safeguarding the lives of its citizens and upholding fundamental human rights for detainees in the current era of terrorist conflict?

The United States has detained more than 700 people at Guantánamo Bay, Cuba, since September 11, 2001.[2] These individuals have been

1. Appellants v. Sec'y of State, [2004] UKHL 56 (Lord Bingham of Cornhill).

2. *See* Daniel Eisenberg & Timothy J. Burger, *What's Going on at Gitmo?*, TIME, June 6, 2005, at 30, *available at* 2005 WLNR 8531677 (reporting that "[s]ome 750 detainees have passed through [Gitmo's] gates"); *see also* Erwin Chemerinsky, *Unanswered Questions*, 7 GREEN BAG 2D 323, 325 (reporting that "[s]ince January 2002, the United States government has held over 600 individuals as prisoners" at Guantánamo Bay, Cuba); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 101 (2004) (noting that as of May 2004, the United States was still holding approximately 600 prisoners at Guantánamo); Anthony Lewis, *Give Me Liberty: Individual Rights in a Time of War*, MEDIA L. &

incarcerated either because they were allegedly members of the Taliban or have connections to al Qaeda.[3] Most of the criticism about their detention has focused on whether the Guantánamo detainees should be entitled to prisoner of war (POW) status under the Geneva Conventions, because prisoners of war are automatically extended certain minimum protections.[4] There are strong arguments which suggest the United States erred in not granting at least some of the Guantánamo detainees POW status; however, this Note is not intended to debate that issue.

Instead, this Note will provide background on the United States' position regarding the status of detainees under the Geneva Conventions and will also explain what protections detainees *would* have been entitled to if the Geneva Conventions had been applied. Next, this Note will discuss other sources of international law that may provide Guantánamo detainees with protection. Customary international law, including the Universal Declaration of Human Rights and Common Article 3 of the Geneva Conventions, the International Covenant on Civil and Political Rights, and the U.N. Convention Against Torture all confer certain rights on detainees despite the fact that they are not instruments which expressly govern armed conflict.[5] Whether the United States is abiding by these authorities is an important issue, the discussion of which will highlight the fact that the United States is currently grappling with how it should approach international law. With its recent decisions concerning Guantánamo detainees, the United States Supreme Court shed some light on what the judiciary expects as far as compliance with international law

POL'Y, Summer 2004, at 6, 10 (stating that "[t]here are roughly 660 prisoners" at Guantánamo Bay).

3. *See generally* George H. Aldrich, Editorial Comments, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002) (explaining the analytical distinction between the conflict with the Taliban and the conflict with al Qaeda); Office of the Press Sec'y, The White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (discussing the condition and treatment of Taliban and al Qaeda detainees at Guantánamo).

4. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; JENNIFER ELSEA, CONG. RESEARCH SERV., TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 1–3 (2002), http://fpc.state.gov/documents/organization/9655.pdf; *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 461, 476–77 (Sean D. Murphy, ed., 2002) [hereinafter *Contemporary Practice*]; Letter from Kenneth Roth, Executive Dir. Human Rights Watch, to Condoleezza Rice, U.S. Nat'l Sec. Advisor (Jan. 28, 2002), http://www.hrw.org/press/2002/01/us012802-ltr.htm.

5. *See* discussion *infra* Parts II, IV.

standards; however, a consensus has by no means been reached. In order for the international legal system as we know it to continue, and for the democratic State's[6] duty as protector of human rights to be upheld, the United States must make a pivotal choice: Congress needs to definitively set out definite guidelines that govern how and when this country will abide by international law.[7] The United States must quickly decide how we are legally going to deal with terrorists.

II. THE GENEVA CONVENTIONS: WHAT THEY ARE AND WHAT THEY DO FOR PRISONERS

The Geneva Conventions were concluded in 1949 and are the most recent international treaties that govern armed conflict.[8] They are comprised of four Conventions for the Protection of War Victims.[9] Most nations of the world are parties to the Geneva Conventions, including the United States, Afghanistan, and Iraq.[10] Each Convention deals with

6. In the vocabulary of international law, nations are referred to as "states." BARRY E. CARTER ET AL., INTERNATIONAL LAW 1 (4th ed. 2003).

7. The reader should be apprised of the fact that the inspiration for this Note and its writing all occurred prior to April 2005. Since its completion, but prior to this publication, Congress has in fact passed the Detainee Treatment Act of 2005 that sets out guidelines for interrogation techniques and other detention issues pertinent to Guantánamo Bay detainees. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 1401–1406, 119 Stat. 3136, 3474–80; Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2680, 2739–44 (to be codified at 10 U.S.C. § 801 note, 42 U.S.C. 2000dd); *see also* John M. Donnelly, *Senate Clears Defense Authorization Bill After Extended Fight on Detainees*, CONG. Q. TODAY, Dec. 21, 2005, 2005 WLNR 20960569 ("The Senate Wednesday cleared for the president's signature the fiscal 2006 defense authorization bill, a measure that would ban abuse of detainees in the war on terror . . . ."). Information on the authorization bill, recent decisions of the federal judiciary, and other developments will be provided to the fullest extent possible in footnotes.

8. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. #3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva III, *supra* note 4; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; *see also* Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 345, 345 (Theodor Meron ed., 1984).

9. *See generally* Geneva I, *supra* note 8; Geneva II, *supra* note 8; Geneva III, *supra* note 4; Geneva IV, *supra* note 8.

10. *See* CARTER ET AL., *supra* note 6, at 1111.

treatment of a particular type of war victim who has fallen into enemy hands—wounded and sick armed forces on land;[11] wounded, sick and shipwrecked armed forces at sea;[12] prisoners of war;[13] and civilians.[14] Before one delves into the specific requirements of how these war victims should be treated, it is important to address first the Conventions from their jumping-off point. What has to happen in order for the Geneva Conventions to apply?

A. *Armed Conflict*

The Geneva Conventions "apply to all cases of declared war or . . . any other armed conflict which may arise between two or more of the High Contracting Parties."[15] The Conventions do not provide an exact definition of "armed conflict."[16] Commentators generally agree, however, that the rules set out in the Conventions apply in full to any difference arising between two or more States that leads to the intervention of members of the armed forces.[17] The application of the Conventions does not hinge on who initiated the hostilities, whether the conduct was justified under international laws of sovereignty, whether the respective nations recognize the existence of a state of war, the length of hostilities, or how much death and destruction occurs.[18] If two Parties to the Convention engage in "*de facto* hostilities," the rules and protections provided in the Conventions apply.[19]

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11. Geneva I, *supra* note 8.

12. Geneva II, *supra* note 8.

13. Geneva III, *supra* note 4.

14. Geneva IV, *supra* note 8.

15. Geneva III, *supra* note 4, art. 2; *see also* ELSEA, *supra* note 4, at 5 n.28 ("The 1949 Geneva Conventions share several types of common provisions. The first three articles of each Convention are identical.").

16. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (2d ed. 2001), *reprinted in* CARTER ET AL., *supra* note 6, at 1113.

17. *See* JORDAN J. PAUST ET AL., HUMAN RIGHTS MODULE: ON CRIMES AGAINST HUMANITY, GENOCIDE, OTHER CRIMES AGAINST HUMAN RIGHTS, AND WAR CRIMES 120 (2001) (defining "armed conflict" as "[a]ny difference arising between two States and leading to the intervention of members of the armed forces").

18. *See id.* ("[An armed conflict exists] even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place."); *see also* ELSEA, *supra* note 4, at 6 ("Parties to an armed conflict retain the same rights and obligations without regard to which party initiated hostilities and whether that conduct is justifiable under international law.").

19. PAUST ET AL., *supra* note 17, at 119–20; *see also* RATNER & ABRAMS,

The Geneva Conventions also can apply to other types of hostilities—the conflict does not have to just be between two or more nations.[20] Both internal hostilities and "combination" hostilities can be serious enough to constitute an armed conflict under the Conventions.[21] Depending on the level of hostilities, conflicts between factions wholly within a state can invoke the Geneva Conventions.[22] Additionally, whenever a foreign state intervenes in an internal conflict there is a possibility that the Conventions will be the governing law.[23]

Whether international, internal, or a combination, the classification of hostilities has significant consequences for detainees. If there is not (or was not) an armed conflict in progress as defined by the Geneva Conventions, then none of the four Conventions will apply, and the search for prisoner protection must be relegated to other sources of law.[24] If, on the other hand, there is an armed conflict in progress, the next hurdle is to determine whether the particular detainees qualify as POWs.[25]

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supra note 16, at 1113 (suggesting that in addition to the use of force, the application of the Geneva Conventions will turn on the perspectives of the participating Parties and observing States).

20. *See* ELSEA, *supra* note 4, at 16 (noting that although a declared war between two states "presents few difficulties" in classification, the Geneva Conventions can also apply to internal conflicts and situations where "a foreign state intervenes in an internal armed conflict"); *see also* PAUST ET AL., *supra* note 17, at 120–21 (discussing the scope of the Geneva Conventions based on the term "armed conflict" and suggesting that the Convention should be construed to apply "as wide[ly] as possible").

21. *See* ELSEA, *supra* note 4, at 15–17 (discussing when a foreign intervention in an internal conflict can be considered an "armed conflict" under the Geneva Conventions); PAUST ET AL., *supra* note 17, at 120–21 (discussing the conditions that indicate an internal conflict has reached a sufficient level of intensity to fall under the Geneva Conventions).

22. *See* ELSEA, *supra* note 4, at 16 ("The term 'internal armed conflict' generally describes a civil war taking place within the borders of a state . . . ."); PAUST ET AL., *supra* note 17, at 120–21 (noting the various factors, including the seriousness of the situation and the level of organization of the forces, that are considered when determining whether internal hostilities are in fact an internal "conflict").

23. *See* ELSEA, *supra* note 4, at 16–17 (noting that although scholars disagree on how to characterize situations where a foreign State gets involved in an internal conflict, at least some circumstances, including where a foreign state intervenes on behalf of a rebel movement, constitute armed conflict under the Geneva Conventions).

24. *See id.* at 15 (recognizing that whether detainees qualify as prisoners of war initially depends on how the conflict is characterized); RATNER & ABRAMS, *supra* note 16, at 1113 (noting that the applicability of the Conventions, including its protections for prisoners of war, necessarily turns upon the existence of an armed conflict).

25. *See generally* Geneva III, *supra* note 4, art. 4 (defining "Prisoner of

B. *The Geneva Convention Relative to the Treatment of Prisoners of War*

In its statements regarding Guantánamo detainees, the United States government has focused exclusively on the Geneva Convention for POWs.[26] Indeed, most of the debate within the United States and abroad has centered on whether the Guantánamo detainees should be entitled to POW status and the protections that status provides.[27] Consequently, this portion of the Note will examine the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III)[28] so that the reader can fully appreciate the implications of the United States' position.

Geneva III "is the most important source of present law relating to prisoners of war and has attained almost universal acceptance."[29] Geneva III expands the circle of people protected during armed conflict and provides important improvements for the protection of prisoners of war, including: "greater clarity and completeness of the rules . . . on capture and captivity of prisoners of war; . . . a categorical ban on reprisals against [prisoners;] and acceptance . . . that application of the . . . rules [will] be open to international scrutiny."[30]

1. *"Prisoner of War" Defined*

Article 4 of Geneva III defines the term "prisoners of war":

> Prisoners of war . . . are persons belonging to one of the following categories who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other

War").

26. *See Contemporary Practice*, *supra* note 4, at 477–79 (observing that the White House has only released policy statements that address the Third Geneva Convention).

27. *Id.* at 477–78; Letter from Kenneth Roth, Executive Dir., Human Rights Watch, to Condoleezza Rice, U.S. Nat'l Sec. Advisor, *supra* note 4; *see also* ELSEA, *supra* note 4, at 6–7 (noting the arguments as to whether "irregular combatants fall within the protection of the Geneva Conventions").

28. Geneva III, *supra* note 4, art. 2.

29. RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS § 90.1 (2d ed. 1990).

30. FRITZ KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR (1987), *reprinted in* CARTER ET AL., *supra* note 6, at 1106, 1107.

> volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, . . . provided that [they] fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
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> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.[31]

Article 5 of Geneva III is somewhat of a catch-all;[32] it states that if any doubt arises as to whether persons who have committed belligerent acts fall within a category of Article 4, they "shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal."[33] Article 5 is the only provision of Geneva III that discusses a detainee's right to a hearing for the purposes of determining his status—whether he is or is not a POW under Geneva III.[34] The text of Article 5 indicates that Geneva III does not *automatically* provide each detainee with a status hearing.[35] Rather, a hearing is convened for purposes of determining a detainee's status only when "doubt" arises as to what category he belongs.[36] Geneva III gives no further direction for what

31. Geneva III, *supra* note 4, art. 4. Article 4 also includes civilian members of military aircraft crews, war correspondents, supply contractors, and other nonmilitary prisoners of war. *Id.* However, those categories will not be discussed in this Note.

32. *See* ELSEA, *supra* note 4, at 29 (noting that Article 5 only comes into play when a person initially does not appear to be entitled to prisoner of war status but claims entitlement); ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, THE AM. SOC'Y OF INT'L LAW, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 31 (2002) (same).

33. Geneva III, *supra* note 4, art. 5.

34. *See id.*

35. *Id.*; *see also* ELSEA, *supra* note 4, at 28–30 (stating that status tribunals are not required until "doubt" arises about the detainee's status).

36. Geneva III, *supra* note 4, art. 5; *see also* ELSEA, *supra* note 4, at 29 (noting that "doubt *must* arise in order to compel the institution of such a tribunal" (emphasis

constitutes doubt or which Party or State should determine that there is in fact doubt.[37] There is arguably a presumption that detainees qualify as POWs *until proven otherwise*;[38] this would put the burden of proof on the detaining power to show that an individual *is not* entitled to POW status.[39] While there is some authority to support that proposition,[40] Article 5 *at least* ensures individual detainees who have been *denied* POW status and who claim they are entitled to privileges the right to an "adjudication of [their] status."[41]

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added)).

37. *See* ELSEA, *supra* note 4, at 29 ("[Geneva III] does not indicate . . . in whose mind the doubt must arise . . . .").

38. *See id.* ("Under the 1949 GPW, combatants are presumed to be entitled to POW status unless formally declared otherwise. The United States has in the past interpreted this language as requiring an individual assessment of status before privileges can be denied." (footnote omitted)); GOLDMAN & TITTEMORE, *supra* note 32, at 30 (noting that "[t]he Bush Administration's critics contend that Article 5 creates a presumption that a captured combatant is a prisoner of war unless a competent tribunal, and not the Executive branch, determines otherwise on an individualized basis" and that proponents of the "presumption" view rely on United States military manuals for their argument).

39. *See* United States v. Noriega, 808 F. Supp. 791, 794 (S.D. Fla. 1992).

> The government's position [that there is no need to decide whether Noriega is entitled to prisoner of war status since he is being treated *as if* he were a prisoner of war] provides no assurances that the government will not at some point in the future decide that Noriega is *not* a POW, and therefore not entitled to the protections of Geneva III. This would seem to be just the type of situation Geneva III was designed to protect against. . . . Must this determination [of whether Noriega is a POW] await some kind of formal complaint by Defendant or a lawsuit presented on his behalf? . . . [T]he Court thinks not.

Id. (footnote omitted).

40. *See id.*; U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, 110–131, para. 3-3(c)(2) (1976) ("Upon capture any person, who does not appear to be entitled to [prisoner of war] status, but who had committed a belligerent act is required to be treated as a [prisoner of war] until his status is properly determined."); U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE para. 73 (1956) [hereinafter ARMY FIELD MANUAL] (stating that "if a person is determined by a competent tribunal . . . not to fall within any of the categories listed in Article 4 [then] he is not entitled to be treated as a prisoner of war" (citation omitted)); ELSEA, *supra* note 4, at 28–29.

41. ELSEA, *supra* note 4, at 29; *see also* ARMY FIELD MANUAL, *supra* note 40, at para. 71.

> [Article 5] applies to any person not appearing to be entitled to prisoner-of-war status who has committed a belligerent act or has engaged in hostile

2. *Historical Application of Prisoner of War Status*

"Historically, the most important consideration given to POW status has been whether there is evidence that [the detainees] serve a government or political entity that exercises authority over them."[42] If no nation or organized movement involved in the conflict claims responsibility for the combative actions of a particular group, then that group may not be entitled to POW status.[43] For example, in *Military Prosecutor v. Kassem*,[44] members of the Popular Front for the Liberation of Palestine (PLFP) tried to claim POW status for acts they committed in the West Bank.[45] "[S]ince no government with which Israel was then at war claimed responsibility for the actions of the PLFP, its members were not entitled to be treated as POWs."[46]

In the case of detainees who are members of the regular armed forces of an enemy nation, however, the United States generally has provided an individual assessment of status before the Geneva Convention privileges are denied[47] and, in most cases, has given POW status to detainees.[48] Military tribunals that convened after World War II determined that Germany had committed a war crime by denying POW status to Allied troops who were captured in uniform.[49] During the Korean War, the United States granted POW status to members of the regular armed forces

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> activities in aid of the armed forces and who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists.

Id.

42. ELSEA, *supra* note 4, at 22.

43. *Id.* at 20.

44. Military Prosecutor v. Kassem, 47 I.L.R. 470 (1st. Mil. Ct. at Ramallah 1971).

45. *Id.* at 470.

46. ELSEA, *supra* note 4, at 20 (discussing *Kassem* and the possibility that detainees may not be extended POW status if no party to a conflict has authorized them to engage in combat).

47. *Id.* at 30.

48. *See* GOLDMAN & TITTEMORE, *supra* note 32, at 27 (noting the United States' practice of giving POW status during the Korean and Vietnam Wars).

49. *See The Dostler Case*, *in* U.N. WAR CRIMES COMM'N, I LAW REPORTS OF TRIALS OF WAR CRIMINALS 22, 33 (1947) (indicating that Major General Dostler was sentenced to execution by firing squad for the capture and subsequent execution of fifteen American soldiers during World War II); *Trial of Generaloberst Nickolaus von Falkenhorst*, *in* U.N. WAR CRIMES COMM'N, XI LAW REPORTS OF TRIALS OF WAR CRIMINALS 18, 30 (1949) (noting that the commando order was illegal).

of the People's Republic of China and North Korea.[50]

Because Vietnam was the first conflict with a significant amount of irregular warfare, the determination of whether captured combatants would be given POW status was an important decision for the modern law of armed conflict.[51]

> Under the [1966 directive of the United States Military Assistance Command], the captured North Vietnamese Army and Vietcong fighters were accorded POW status upon capture. "Irregulars" were divided into three groups: guerrillas, self-defense force, and secret self-defense force. Members of these groups could qualify for POW status if captured in regular combat, but were denied such status if caught in an act of "terrorism, sabotage or spying." Those not treated as POWs were treated as civil defendants, and were accorded the substantive and procedural protections of the [Geneva Conventions].[52]

The system utilized for determining POW status during the Vietnam conflict met with the approval of the International Committee of the Red Cross,[53] the organization charged with "supervis[ing] compliance with the Geneva Conventions."[54]

In the recent conflict with Afghanistan and the War on Terror, the United States' position on whether detainees can be characterized as POWs is very different from its position during Vietnam, largely because of the unique nature of terrorist warfare.[55] The United States has been reluctant to grant detainees who engaged in terrorist warfare POW status because such status would prohibit the United States from trying terrorists for "lawful acts of war."[56] This means that terrorists who attacked military and other government personnel both on the field (Afghanistan) and at

50. GOLDMAN & TITTEMORE, *supra* note 32, at 27.

51. ELSEA, *supra* note 4, at 29.

52. *Id.* at 29 (footnotes omitted).

53. *Id.*

54. CARTER ET AL., *supra* note 6, at 1106.

55. *See* U.S. Dep't of Def., Guantanamo Detainees (Mar. 16, 2004), http://usinfo.state.gov/dhr/Archive/2004/Mar/17-718401.html ("The fact that al Qaida and the Taliban do not distinguish themselves from the civilian population makes our job much more difficult than it is in traditional conflicts.").

56. *See* JORDAN J. PAUST, THE AM. SOC'Y OF INT'L LAW, THERE IS NO NEED TO REVISE THE LAWS OF WAR IN LIGHT OF SEPTEMBER 11TH 6 (2002); Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 7 ILSA J. INT'L & COMP. L. 391, 396 (2001).

home (the Pentagon) could not be charged with any crime.[57] Also, with the extension of POW status comes the requirement that the detaining power provide detainees with specific rights—many of which are equivalent to what the United States affords its own military personnel.[58] While there is moral, and perhaps legal, justification for not wanting to provide terrorists with generous protections, the position is not without criticism.[59] In sharp contrast to Vietnam, the Red Cross has publicly disapproved of the United States' interpretation of the Geneva Conventions on POW status requirements.[60] The organization warns that "captured combatants *must* be granted prisoner of war status."[61] What the Red Cross and other critics are focused on is not so much whether Guantánamo detainees are *labeled* "prisoners of war," but rather, whether detainees will be extended the *protections* that the label guarantees.

3. *Protections Provided to Prisoners of War*

The protections included in Geneva III are extended to individuals who qualify as POWs under the Convention.[62] Understanding what the

57. *See* PAUST, *supra* note 56, at 6; Scharf, *supra* note 56, at 396.

58. *See* Scharf, *supra* note 56, at 397 (writing that an additional problem with extending detainees POW status is that it "would entitle terrorists to . . . special rights beyond those afforded to common prisoners" and providing the example of General Noriega's jail cell, which "has been described as having all the amenities of a hotel suite, including a television, phone and fax machine, and a private bathroom").

59. *See* ELSEA, *supra* note 4, at 21–23 (discussing historical denials of POW status and the legal justifications for them, and outlining the criticism to the current position of the Unites States in regard to detainees); Scharf, *supra* note 56, at 397 (noting the irony of providing POWs more protection than that "afforded to common prisoners").

60. *See* Int'l Comm. of the Red Cross, International Humanitarian Law and Terrorism: Questions and Answers (May 5, 2004), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5YNLEV [hereinafter Red Cross, Q & A] (discussing the applicability and requirements of the Geneva Conventions to persons detained as a result of the fight against terrorism); Int'l Comm. of the Red Cross, U.S. Detention Related to the Events of 11 September 2001 and Its Aftermath—The Role of the ICRC (Dec. 12, 2005), http://www.icrc.org/Web/Eng/siteeng0.nsf/html/usa-detention-update-121205?OpenDocument ("For many detainees at Guantanamo Bay nearly four years have passed since their arrest. The ICRC has always maintained that those detainees remaining at Guantanamo Bay should either be charged and tried, released, or be placed within a legal framework that governs their continued detention."); *see also* PAUST, *supra* note 56, at 4 (noting that the Red Cross has publicly criticized the United States' *mischaracterization* of detainees held at Guantánamo Bay and the refusal to grant them prisoner of war status under the Geneva Conventions).

61. *See* Red Cross, Q & A, *supra* note 60 (emphasis added).

62. *See* Geneva III, *supra* note 4, art. 5 ("The present Convention shall apply

Convention actually does for POWs is essential for understanding the implications of the United States' position on Guantánamo detainees and for comparing Geneva III's protections with those provided in other international instruments.

a. *Treatment of Prisoners.* Article 13 of Geneva III provides that "prisoners of war must at all times be humanely treated."[63] This includes protection against unlawful acts causing death or endangering health and ensures that prisoners will be protected against violence and intimidation at all times.[64] Further, unlawful acts that cause death or serious endangerment of health constitute "a serious breach" of Geneva III.[65] Other provisions that pertain to specific aspects of prisoner treatment include: (1) the right to be interned in safe conditions on land;[66] (2) the right to receive adequate food[67] and medical care;[68] (3) the right to be free from torture;[69] (4) the right to practice religious and other customs;[70] (5) the right to payment for any forced labor;[71] (6) the right to send and receive written communication;[72] and (7) the right to make requests regarding conditions of captivity.[73]

Article 17 governs prisoner interrogation and torture.[74] It provides that "[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."[75] It also states that once a prisoner has refused to provide information, he "may not be threatened, insulted, or exposed to unpleasant

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to the persons referred to in Article 4 [i.e., prisoners of war] from the time they fall into the power of the enemy and until their final release and repatriation.").

63. *Id.* art. 13.

64. *See id.* (providing that "[a]ny unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited," and that "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity").

65. *Id.*

66. *Id.* arts. 22, 23.

67. *Id.* art. 26.

68. *Id.* art. 30.

69. *Id.* art. 17.

70. *Id.* arts. 25, 34.

71. *Id.* arts. 49, 62.

72. *Id.* art. 71.

73. *Id.* art. 78.

74. *Id.* art. 17.

75. *Id.*

or disadvantageous treatment of any kind."[76] Because the Geneva Conventions do not mention specific kinds of prohibited treatment, the practical boundaries for interrogation and coercion are not entirely clear.[77] Some scholars argue that interrogation tactics such as trickery and promises of improved living conditions are allowed under the Geneva Conventions and are necessary for effective investigation and waging of war.[78] Others argue that the spirit of Article 17, which requires prisoners to disclose very little information and protects them from "disadvantageous treatment" once they refuse to answer,[79] provides almost no leeway for interrogation at all.[80] Nevertheless, the International Committee of the Red Cross acknowledges that "[t]he Geneva Conventions do not preclude the interrogation of persons deprived of liberty."[81] Although it remains "a common practice for militaries to interrogate prisoners as soon as possible after capture to exploit their knowledge concerning tactical positions and plans,"[82] the acceptable *boundaries* for interrogation remain somewhat uncertain.

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76. *Id.*

77. *See* Jason R. Odeshoo, Note, *Truth or Dare?: Terrorism and "Truth Serum" in the Post-9/11 World*, 57 STAN. L. REV. 209, 221 (2004) (noting that even the Red Cross acknowledges that Article 17 is not entirely clear on some points).

78. ELSEA, *supra* note 4, at 32.

79. *See* Geneva III, *supra* note 4, art. 17.

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.
>
> . . . .
>
> . . . Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Id.

80. *See* Odeshoo, *supra* note 77, at 221 (arguing that the "general tenor" of Article 17 rules out treatment that is coercive, unpleasant, and disadvantageous); *see also* Lewis, *supra* note 2, at 13 (criticizing the Administration for keeping detainees in stringent conditions, solitary confinement, and subjecting them to frequent interrogation).

81. Int'l Comm. of the Red Cross, U.S. Detention Related to the Events of 11 September 2001 and Its Aftermath—The Role of the ICRC (Apr. 30, 2005), http://gvalnwb23.icrc.org/web/eng/siteeng0.nsf/iwpList199/541ACF6DC88315C4C125700B004FF643.

82. ELSEA, *supra* note 4, at 33 (footnote omitted).

b. *Due Process.* Articles 99–108 of Geneva III provide specific due process and other protections for prisoners during their actual trials.[83] These proceedings differ from a hearing on status in that the prisoner, who has *already been deemed a prisoner of war under Geneva III*, actually is being tried for acts engaged in during hostilities that violated the laws of war.[84] Geneva III provides that prisoners cannot be tried for acts that were not illegal under United States law or international law at the time they were committed;[85] a prisoner must be informed of the charges against him in a language that he understands;[86] a prisoner has the right to present a defense and to counsel;[87] he is to "be informed as soon as possible of the offenses which are punishable" by death;[88] if a prisoner is confined due to national security concerns while he awaits trial, his confinement cannot exceed three months;[89] sentencing must be conducted by the same courts and with the same procedure as it is for members of the Detaining Power's armed forces;[90] and if the armed forces of the Detaining Power have a right to an appeal, then prisoners also shall have an opportunity to appeal.[91]

Many of the due process protections afforded POWs under Geneva III mirror American standards of due process[92]—either because the

83. Geneva III, *supra* note 4, arts. 99–108.

84. *See id.* art. 99 (specifying that the sections on judicial proceedings apply to "prisoners of war" under Geneva III and that a prisoner cannot be tried "for an act which is not forbidden by the law of the Detaining Power or by international law in force at the time the act was committed"); PAUST, *supra* note 56, at 4–8 (discussing that under the Geneva Conventions, prisoners of war have "combat immunity" for acts they engaged in during hostilities that complied with the laws of war, but that prisoners who have engaged in conduct that violated the laws of war, such as crimes against humanity, can be tried and sentenced for those crimes); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 256 (2002) (noting that the laws of war give military commissions jurisdiction to try individuals for violations of the international laws of war); Neil A. Lewis, *Guantánamo Prisoners Getting Their Day, but Hardly in Court*, N.Y. TIMES, at A17, Nov. 8, 2004, *available at* 2004 WLNR 6564162 (explaining the differences, procedural and otherwise, between combatant status review tribunals, which determine whether a detainee has been properly deemed an unlawful enemy combatant, and military commissions, which are "war-crimes trials").

85. Geneva III, *supra* note 4, art. 99.

86. *Id.* art. 105.

87. *Id.* art. 99.

88. *Id.* art. 100.

89. *Id.* art. 103.

90. *Id.* art. 102.

91. *Id.* art. 106.

92. Joshua S. Clover, Comment, *"Remember, We're the Good Guys": The*

provisions are expressly similar or because they require POWs to be granted the same rights as the Detaining Power's armed forces.[93] The due process rights under Geneva III provide much greater protection for the trial process than has actually been afforded the Guantánamo detainees (at least prior to the Supreme Court's 2004 summer term decisions),[94] which may indicate that the policy impact and the cost of compliance with these provisions were influential factors in the United States decision regarding the status of detainees.

c. *Release and Repatriation.* Article 118 gives instruction on what a Detaining Power is supposed to do with prisoners after a conflict is over.[95] It provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."[96] Geneva III does not provide instruction for when "active hostilities" can be said to have concluded.[97] While it is clear that hostilities have ended when the parties to a conflict enter into an agreement "with a view to the cessation of hostilities,"[98] it is difficult to determine when hostilities have ended in situations where war has not been declared or where nations are intervening in internal conflict and are maintaining a role of quasi-occupation.[99] Currently, there is debate about whether Article 118 could even be applied to the uniquely "global and indefinite campaign" against terror.[100] The concern is that Article 118 could be used to justify detention

Classification and Trial of the Guantanamo Bay Detainees, 45 S. TEX. L. REV. 351, 368 (2004).

93. *See* Geneva III, *supra* note 4, art. 102; Clover, *supra* note 92, at 368–69 (discussing similarities between Constitutional protections and those in Geneva III).

94. *See generally* U.S. Dep't of Def., *supra* note 55 (outlining the process for determining enemy combatant status, the process of review, and the protections the government planned to provide in military commissions).

95. Geneva III, *supra* note 4, art. 118.

96. *Id.*

97. *See* Letter from Kenneth Roth, Executive Dir., Human Rights Watch, to Donald Rumsfeld, United States Secretary of Defense 5 (May 29, 2002), http://www.hrw.org/press/2002/05/pentagon-ltr.htm ("The key question [under Article 118 of the Geneva Conventions] is: when have 'active hostilities' concluded?").

98. Geneva III, *supra* note 4, art. 118.

99. *See* Clover, *supra* note 92, at 370 (noting that scholars "agree that the decision about when to release the[] detainees is at best unclear under the Convention"); Letter from Kenneth Roth to Donald Rumsfeld, *supra* note 97 (noting the distinction between the conflict with Afghanistan and the conflict with al Qaeda and questioning how the requirement of repatriation at the close of "active hostilities" will be implemented in a "rhetorical war" against terrorism that is not necessarily "active armed conflict" as it was intended in the Conventions).

100. *See* Joan Fitzpatrick, *Jurisdiction of Military Commissions and the*

with indefinite release, because the War on Terror could "go on for decades."[101] While other articles of Geneva III also appear somewhat outdated, Article 118 is a clear example of why some believe Geneva III is not adaptable to fights against terrorism.[102]

III. OUR POSITION: STATUS OF GUANTÁNAMO DETAINEES UNDER THE GENEVA CONVENTIONS

The United States' position on whether the Geneva Conventions are applicable to the conflict with Afghanistan and to the War on Terror has changed over time and has undergone sharp criticism.[103] The wisdom of the United States' stance on this issue and its potential repercussions for future conflicts has been the source of countless publications; this is not such a publication. Instead, this Note will accept the United States' determination that the Geneva Conventions are inapplicable to Guantánamo detainees and will proceed to discuss the more practical issue of what laws *are* applicable. First, however, an explanation of the historical background and the basis for the United States position regarding the detainees' POW status will provide a helpful framework for further discussion.

A. *Distinction Between the Taliban and Al Qaeda*

Although the two groups are often referred to interchangeably, there is at least a definitional difference between the Taliban and al Qaeda.[104] In

Ambiguous War on Terrorism, 96 AM. J. INT'L L. 345, 345 (2002).

101. Jim Noteboom & Aaron Noteboom, Note, *A Principled Approach*, OR. ST. B. BULL., Nov. 2002, at 15, 19 ("[S]ooner or later we have to deal with the repatriation question. Holding everyone until we all agree that the war on terrorism is over is probably not a viable option. The war may go on for decades."); *see also* Fitzpatrick, *supra* note 100, at 347 ("If the war on terrorism is now to be conceived of as an international armed conflict, it is one of startling breadth, innumerable 'combatants,' and indefinite duration").

102. *See* Clover, *supra* note 92, at 370 (stating that "[b]ecause the duration of the current war on terror appears indefinite, some argue that the Geneva Convention's provisions for repatriation at the end of hostilities have little use"(footnote omitted)); *see also* Letter from Kenneth Roth to Donald Rumsfeld, *supra* note 97 (making suggestions of other applicable human rights treaties that would better protect detainees against indefinite detention than Article 118 of Geneva III).

103. *See* ELSEA, *supra* note 4, at 1 (noting the extensive international criticism of the United States' position on detainees); *Contemporary Practice*, *supra* note 4, at 476–77 (discussing the United States' position on detainees and its changes).

104. *See* Aldrich, *supra* note 3, at 893 (explaining the analytical distinction between the conflict with the Taliban and the conflict with al Qaeda, but also

fact, the United States' position on whether the Geneva Conventions apply to the conflict and whether detainees qualify as POWs is based on the premise that the Taliban and al Qaeda are two distinct groups.[105] Thus, becoming familiar with the unique history of each group will help clarify what the United States' position is and the reasons for it.

1. *The Taliban*

The Taliban was considered the effective government of Afghanistan because it was in control of most of the country at the time hostilities with the United States began.[106] Only Saudi Arabia, the United Arab Emirates, and Pakistan ever officially recognized the Taliban as the lawful government of Afghanistan.[107] Nevertheless, the Taliban constituted the "de facto" government of Afghanistan under international law standards.[108] By 2001, it governed eighty percent of Afghanistan's national territory.[109] It is worth mentioning that the Taliban's first official act in Kabul was to torture and castrate the former President, drag his body behind a jeep, and hang it from a lamppost.[110] Such barbarism was just a taste of the human rights violations, including massacres of women and children and brutal public executions—"homosexuals were crushed to death under walls"—that would continue in Afghanistan for the duration of Taliban control.[111]

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suggesting that "practical problems" result from the distinction, such as "when [al] Qaeda personnel are captured while accompanying Taliban armed forces").

105. *See* Office of the Press Sec'y, *supra* note 3.

106. *See* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 481 (2d ed. 2002).

107. *See* PAUST, *supra* note 56, at 3 (noting that only a "handful of countries, including Pakistan and Saudi Arabia" ever recognized the Taliban "as the *de jure* government of Afghanistan"); Diane K. Hook, *Detainees or Prisoners of War?: The Applicability of the Geneva Convention to the War on Terrorism*, 58 J. MO. B. 346, 347 (2002) (citing Alissa Rubin, *Response to Terror: Sorting Through Truth, Fiction in Afghan Prison*, L.A. TIMES, Feb. 17, 2002, at A1).

108. *See* ROBERTSON, *supra* note 106, at 481 ("The Taliban, although fighting a civil war, constituted the government of Afghanistan under the current declaratory theory of recognition, since they effectively administered 90 percent of the country . . . ." (footnote omitted)); *see also* GOLDMAN & TITTEMORE, *supra* note 32, at 23.

109. *Compare* GOLDMAN & TITTEMORE, *supra* note 32, at 23 ("[A]s of October 2001 the Taliban . . . [had] at least nominal control over no less than *eighty percent* of national territory." (emphasis added)), *with* ROBERTSON, *supra* note 106, at 481 (asserting that the Taliban "effectively administered *90 percent* of the country" (emphasis added)).

110. ROBERTSON, *supra* note 106, at 475.

111. *See id.*

It is likely that most nations withheld recognition of the Taliban as Afghanistan's lawful government because they disapproved of the Taliban's policies and human rights violations, not because they doubted that the Taliban was actually in control of the country.[112]

2. *Al Qaeda*

"Al Qaeda is . . . a [terrorist] organization consisting of elements in many countries and . . . composed of people of various nationalities . . . ."[113] Al Qaeda "advances" its political and religious objectives by committing terrorist acts;[114] it has an organizational policy of murdering civilians *en masse*, particularly Americans.[115] Osama bin Laden formed al Qaeda in 1988, apparently as a way for his followers to keep in touch with relatives and to transport mail.[116] The organization developed into a terrorist network and first targeted the United States when it stationed troops in Saudi Arabia during the Gulf War.[117] By 1998, al Qaeda had "6,000 members, several hundred million dollars, training camps and quarters throughout Afghanistan and cells in at least thirty-five . . . countries."[118] Al Qaeda has either claimed responsibility or is suspected to be behind the attacks outside the United States embassies in Kenya and Tanzania, a hotel bomb in Aden, the murder of United States servicemen in Mogadishu, two bombings in Saudi Arabia that killed Americans, the bombing of the USS Cole, and the attacks on the World Trade Center and the Pentagon.[119] Many of al Qaeda's attacks likely will be deemed crimes against humanity.[120] "Its methods brand it as a criminal organization under national laws and as an international outlaw."[121]

112. *See id.* at 481.

113. Aldrich, *supra* note 3, at 893.

114. *Id.*

115. *See* ROBERTSON, *supra* note 106, at 476–77 (documenting a number of al Qaeda terrorist attacks on the United States).

116. *Id.* at 476.

117. *See id.* (finding that America became a target because al Qaeda believed America committed sacrilege by placing troops in Saudi Arabia).

118. *Id.* at 477.

119. *See id.* at 476–77.

120. *See* JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH 464–65 (2003) (suggesting that terrorist acts, including the September 11th attacks, are crimes against humanity, and that "there is sufficient breadth in the definition of crimes against humanity to try crimes of terrorism").

121. Aldrich, *supra* note 3, at 893.

B. *Making Up Our Minds About the Geneva Conventions*

The United States has consistently denied the Taliban and al Qaeda detainees POW status since the September 11th attacks.[122] The legal basis for that decision, however, has changed over time.[123] A brief outline illustrating the evolution of the United States' position provides a backdrop for further analysis and demonstrates just how uncertain the United States is about international law and its application to detainees.

1. *Our First Try: September 2001–January 2002*

As of January 18, 2002, President Bush had determined that the Geneva Conventions did not apply to either al Qaeda or Taliban detainees.[124] This decision was based on the view that the Conventions could not apply to al Qaeda because al Qaeda is a terrorist organization; it could never be a party to the Geneva Conventions because it is not a nation-state.[125] Furthermore, al Qaeda members failed to meet the requirements set out in Article 4(A)(2) of Geneva III,[126] which includes responsible command, a recognizable sign, carrying arms openly, and, most importantly, conducting operations in accordance with the laws of war.[127] As for the applicability of the Conventions to the Taliban, the apparent rationale was that Afghanistan was not a functioning state during the conflict.[128] The Taliban was never recognized as the official government of the nation, so Afghanistan "did not continue as a party" to Geneva III.[129]

2. *Criticism*

The assertion that the Geneva Conventions did not apply either to al Qaeda or the Taliban received considerable criticism from the United States' European allies, human rights organizations, and international legal scholars.[130] Even U.S. Secretary of State Colin Powell requested that the

122. *See Contemporary Practice*, *supra* note 4, at 477–78 (discussing the United States' rationale for denying POW status to detainees); Office of the Press Sec'y, *supra* note 3 ("[N]either the Taliban nor al Qaeda detainees are entitled to POW status.").

123. *Contemporary Practice*, *supra* note 4, at 476–77.

124. *Id.* at 477–78.

125. *See id.* at 477.

126. *Id.*

127. *See* Geneva III, *supra* note 4, art. 4.

128. *See Contemporary Practice*, *supra* note 4, at 477.

129. *Id.*

130. *Id.*; ELSEA, *supra* note 4, at 1–2; *see also* Letter from Kenneth Roth to Condoleezza Rice, *supra* note 4 ("We write to address several arguments advanced for

position be reconsidered.[131] While some argued that any conflict with international repercussions should be covered by the Geneva Conventions,[132] most were primarily concerned with the applicability of the Conventions to the Taliban.[133] Article 2 of Geneva III provides that the "Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties."[134] The Nation of Afghanistan is a party to all four of the Geneva Conventions[135] and was recognized as a state by both the United Nations and the United States throughout the conflict.[136] The fact that the Taliban was never recognized by the *United States* as the legitimate government of Afghanistan arguably was irrelevant to whether the Geneva Conventions applied to the conflict.[137]

3. *Our Current Answer: February 2002–Present*

On February 7, 2002, the President announced a revised position on whether the Geneva Conventions apply to the Guantánamo detainees.[138]

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not applying Article 5 of the Third Geneva Convention [to the Guantánamo detainees].").

131. *See Contemporary Practice*, *supra* note 4, at 477.

> . . . U.S. Secretary of State Colin Powell soon requested that the [initial] position be reconsidered . . . . Secretary Powell's position reportedly was that each detainee should be accorded the opportunity to have his status reviewed . . . . This position was itself reportedly driven largely by the secretary's concern that a failure to recognize the Convention's application might weaken the future ability of the United States to secure its protections for U.S. soldiers.

Id. (footnotes omitted).

132. ELSEA, *supra* note 4, at 17.

133. PAUST, *supra* note 56, at 3.

134. Geneva III, *supra* note 4, art. 2.

135. ELSEA, *supra* note 4, at 17.

136. *Contemporary Practice*, *supra* note 4, at 477.

137. Article 4(3) extends POW status to "[m]embers of regular armed forces who profess allegiance to a government or an authority [even if it is] not recognized by the Detaining Power." Geneva III, *supra* note 4, art. 4; *see also* ELSEA, *supra* note 4, at 17 ("[I]t is not necessary for the governments of states engaging in hostilities to recognize each other . . . ." (footnote omitted)).

138. *See generally* Office of Press Sec'y, *supra* note 3. This revised position has since been affirmed by the Court of Appeals for the District of Columbia in *Hamdan v. Rumsfeld*, 415 F.3d 33, 40–42 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) (mem.). *See* U.S. Dep't of Def., News Release, Military Commissions to Resume (July

According to this revised—and current—position of the United States, the Geneva Conventions apply to members of the Taliban but not to members of al Qaeda.[139] "Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention."[140] Recognition that the conflict with the Taliban constituted an international armed conflict[141] quelled some of the criticism discussed previously;[142] however, the President further determined that "[u]nder the terms of the Geneva Convention . . . the Taliban detainees do not qualify as POWs."[143] The United States interprets the Geneva Conventions to afford POW status only to enemy forces that follow certain rules.[144] Because the Taliban had at times deliberately attacked civilians, did not wear recognizable clothing, and were closely associated with al Qaeda, Taliban detainees were not eligible for POW status under the Convention.[145] Apparently, the United States also decided "that there was no 'doubt' regarding the status of any of the detainees," because Article 5 tribunals for determining POW status were not discussed.[146] Consequently,

18, 2005), http://www.defenselink.mil/releases/2005/nr20050718-4063.html (stating that the Court of Appeals for the District of Columbia "upheld President Bush's February 2002 determination that the Geneva Convention does not apply to al Qaeda terrorists").

139. Office of Press Sec'y, *supra* note 3.

140. *Id.*

141. *See* Fitzpatrick, *supra* note 100, at 346.

142. *See* PAUST, *supra* note 56, at 3 (noting that the President abandoned prior advice in recognizing that the Geneva Conventions applied to the U.S. war against the Taliban); Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12, *available at* 2002 WLNR 4010388 (reporting that Britain and France had warned they might not turn over suspects captured by their troops unless the Conventions were observed).

143. Office of Press Sec'y, *supra* note 3.

144. *See* U.S. Dep't of Defense, *supra* note 55 ("The Third Geneva Convention of 1949 accords POW status only to enemy forces who . . . wear uniforms; do not deliberately target civilians; and otherwise fight in accordance with the laws and customs of war."). *But see* ELSEA, *supra* note 4, at 4 (stating that "under a plain reading of [article 4 of the Geneva Convention]," the Taliban seems to be potentially eligible for prisoner of war status).

145. U.S. Dep't of Def., *supra* note 55; *Contemporary Practice*, *supra* note 4, at 477. *But see* Aldrich, *supra* note 3, at 894 (arguing that the provisions cited by the press secretary regarding uniforms and carrying arms openly are meant to apply only to "members of militias or other volunteer corps that are not part of the armed forces of a party to the armed conflict").

146. *Contemporary Practice*, *supra* note 4, at 478.

the detainees remained unaffected by the United States' "change of position."[147] Although the Geneva Conventions apply to the armed conflict with Afghanistan, and therefore to the Taliban, members of the Taliban and al Qaeda still do not have POW status.[148]

IV. FORGOTTEN INTERNATIONAL LAW: DO DETAINEES STILL HAVE PROTECTION?

The fact that customary human rights laws and numerous human rights treaties *apply all the time*, both in times of peace and during armed conflict,[149] has been largely forgotten and ignored in the hysteria over the President not affording POW status to Guantánamo detainees. "Unlike the law of armed conflict [i.e., the Geneva Conventions], international human rights law applies to all persons at all times . . . ."[150] This portion of the Note will examine the international law to which the United States is bound, either through custom or treaty, that affords protections to detainees and that should be applied regardless of whether detainees are deemed POWs under the Geneva Conventions. This means that although the United States has determined that the Geneva Conventions do not apply to the conflict with al Qaeda and has further determined that members of the Taliban do not qualify as POWs under Geneva III, the United States is still bound by international law to afford prisoners certain minimum protections. In other words, the detainees being held at Guantánamo Bay are not abandoned to the vagaries of the United States government. Rather, customary international law,[151] the International

147. *See* ELSEA, *supra* note 4, at 1 (acknowledging that the 2002 decision with respect to the application of the Geneva Conventions "is not likely to affect the treatment of any of the detainees held at the U.S. Naval Base" in Cuba).

148. *Id.*

149. *See* GOLDMAN & TITTEMORE, *supra* note 32, at 39 (stating that "[i]t is well recognized that the international human rights commitments of states apply at all times, whether in times of peace or situations of armed conflict, to all persons subject to a state's authority and control"); *see also* PAUST ET AL., *supra* note 17, at 124 (indicating "that some treaties and customary norms apply in all social contexts, *e.g.*, in times of relative peace or times of armed conflict").

150. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 747 (2004); *see also* Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 178 (2004) (noting the international human rights laws "apply at all times to those states upon whom they are binding, except when derogation precepts activate, as per the provisions of particular treaties").

151. *See, e.g.*, CARTER, ET AL., *supra* note 6, at 5 (defining "customary

Covenant on Civil and Political Rights,[152] and the U.N. Convention Against Torture[153] should be applied.

A. *Customary International Law*

"Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[154] Whether a consistent practice has in fact become binding law depends on several factors, including how long and how consistently the practice has been followed and whether the nations at issue have reached a general consensus that the particular practice is binding law.[155] It is important to understand that customary international law is generally "not expressed in treaties."[156] Consequently, international norms are derived from diplomatic relations between states, including acts or declarations by governments and their representatives, the practice of international organizations, and nations' domestic laws and court decisions.[157] Today it is generally recognized that the principle of non-intervention; the inviolability of diplomats and other state representatives; and the prohibitions against genocide, slavery, and torture are all international norms that constitute binding customary international law.[158]

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international law" as "law that results from a general and consistent practice of states that [is] follow[ed] from a sense of legal obligation").

152. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

153. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter U.N. Convention Against Torture].

154. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

155. *See* WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 16 (3d ed. 2000) (noting that there are "four elements for resolving whether . . . a practice is [customary international law]: (1) duration or passage of time; (2) substantial uniformity or consistency of usage by the affected nations; (3) generality of the practice, or degree of abstention; and (4) *opinio juris et necessitatis*—international consensus about, and recognition of, the particular custom as binding" (citing I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5–7 (4th ed. 1990))).

156. *Id.*

157. *See* I.A. SHEARER, STARKE'S INTERNATIONAL LAW (11th ed. 1994), *reprinted in* CARTER ET AL., *supra* note 6, at 120, 121–22 (explaining the three sets of circumstances from which customary rules are formed).

158. *See, e.g.*, OSCAR SHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991), *reprinted in* CARTER ET AL., *supra* note 6, at 129, 131 (discussing international norms that would retain validity despite inconsistent practice). It should be noted that genocide, slavery, and official torture are considered peremptory

Although customary international law is most often based on the consistent practice of nations and international organizations, it is also possible that written instruments can serve as evidence of customary international norms if they espouse principles that have been consistently followed by nations over a period of time out of a sense of legal obligation.[159] There are a few international instruments that have come to be considered part of customary international law and, as such, are arguably binding on all states.[160] The most pertinent to this discussion are the Universal Declaration of Human Rights,[161] which is considered the "touchstone" for human rights law,[162] and Common Article 3 of the Geneva Conventions,[163] which provides "fundamental humanitarian protections."[164]

1. *The Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (Universal Declaration) was adopted in the aftermath of World War II by the United Nations General Assembly.[165] Its purpose was to promote a worldwide human

norms—*jus cogens*—which cannot be violated by any nation, regardless of whether the nation agrees with them. CARTER ET AL., *supra* note 6, at 126.

159. *See* CARTER ET AL., *supra* note 6, at 127 ("[T]reaties can also play a significant role in the development of customary international law."); ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolph Bernhardt ed. 2000), *reprinted in* CARTER ET AL., *supra* note 6, at 127, 127 ("Multilateral law-making or codification treaties have become a means of creating widespread or even universal norms of international law, of speeding up the slow process of generating customary international law and of forming conclusive evidence of an otherwise elusive or unwieldy 'soft' law.").

160. *See* GOLDMAN & TITTEMORE, *supra* note 32, at 34–36 (discussing various human rights instruments and noting that protections under the Universal Declaration and particularly Article 3 of the Geneva Conventions "constitute a part of customary international law binding on all states").

161. Universal Declaration of Human Rights, G.A. Res. 217A, at 71 U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration]; *see also* CARTER ET AL., *supra* note 6, at 128 (noting that many commentators regard the Universal Declaration of Human Rights as evidence of customary international law).

162. Bennoune, *supra* note 150, at 199.

163. Geneva I, *supra* note 8, art. 3; Geneva II, *supra* note 8, art. 3; Geneva III, *supra* note 4, art. 3; Geneva IV, *supra* note 8, art. 3; *see also* ELSEA, *supra* note 4, at 5 n.28 ("Common Article 3 is now considered to have attained the status of customary international law." (citing KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 188 (2001))).

164. Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 399 (2004).

165. *See* CARTER ET AL., *supra* note 6, at 770–71 (discussing the history of the

rights standard that all nations would strive to meet and maintain.[166] It is important to note that the Universal Declaration, like all General Assembly declarations, is not *express* international law—it is not a treaty.[167] Some nations, including the United States,[168] have emphasized that because the Universal Declaration is not an international convention, it is not legally binding.[169] They maintain that the Declaration is "aspirational" in nature and provides a *policy goal* for humanity.[170] Nevertheless, many argue that the Universal Declaration expresses "rules that already were recognized by customary international law."[171] Under this view, the Universal Declaration has authority because it is a written expression of conduct that has become internationally accepted as law.[172]

While the Universal Declaration "lists a variety of political, social,

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Universal Declaration and noting that it "was adopted by the General Assembly without dissent"); Bennoune, *supra* note 150, at 201 ("It should not be forgotten that the [Universal Declaration], just like the 1949 Geneva Conventions, was born out of the ashes of World War II. It was inspired by the revulsion to that conflict's horrors.").

166. *See* CARTER ET AL., *supra* note 6, at 770 (noting that the Universal Declaration "attempted to set forth 'a common standard of achievement for all peoples and all nations'" on human rights and related issues).

167. Louis B. Sohn, *The New International Law: Protections of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982), *reprinted in* CARTER ET AL., *supra* note 6, at 771, 772.

168. *See* Bennoune, *supra* note 150, at 200.

> The confusion as to [the Universal Declaration's] exact legal status remains a challenge to using [it] as a source. As the U.S. was a key architect of [it,] this should enhance the document's authority . . . . Still, the official U.S. position at the time of drafting was that the declaration was a wish list, rather than a piece of law.

Id.; Eleanor Roosevelt, Speech to the Second Nat'l Conference on UNESCO: Making Human Rights Come Alive (April 1, 1949), http://www.udhr.org/history/114.htm (stating that the Declaration "has no legal binding value").

169. *See* Sohn, *supra* note 167, at 772 (discussing the debate among nations as to whether the Universal Declaration is legally binding).

170. Universal Declaration, *supra* note 161, at 72 (proclaiming the Declaration to be "a common standard of *achievement*" and requiring every State to "*strive* . . . to secure [the] universal and effective recognition" of its provisions (emphases added)); Prof. Hunter Clark, Lecture on Public International Law at Drake University (Jan. 19, 2005) (on file with author).

171. Sohn, *supra* note 167, at 772.

172. *See* CARTER ET AL., *supra* note 6, at 3 (quoting Article 38 of the Statute of the International Court of Justice, which defines "international customary law" as "evidence of a general practice accepted as law"); Sohn, *supra* note 167, at 772 (noting that under the customary international law view, the Universal Declaration "possess[es] a binding character").

economic, and cultural rights,"[173] there are certain provisions that are relevant to detainees. They include: (1) Article 5, which states "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment";[174] (2) Article 9, which provides that "[n]o one shall be subjected to arbitrary arrest [or] detention";[175] and (3) Articles 10 and 11, which ensure that "[e]veryone is entitled . . . to a fair . . . hearing by an independent and impartial tribunal, in the determination . . . of any criminal charge against him," that an accused is presumed innocent until proven guilty, and that an accused shall have "all the guarantees necessary for his defen[s]e."[176] The Universal Declaration does not include a derogation provision; that is, nothing in the text indicates that the rights provided can be suspended during times of war or emergency.[177] Thus, even during armed conflict, a nation is obligated to give detainees protection from degrading treatment and arbitrary detention and is supposed to provide detainees with a trial and due process.[178] This has interesting implications for the United States' treatment of detainees, because although the Universal Declaration is not "universally" considered binding law,[179] it constitutes a good indication of what the international community expects of every nation, even during war.

2. *Common Article 3 of the Geneva Conventions*

Article 3, which is common to all four of the Geneva Conventions, states that it applies to "armed conflict[s] *not* of an international character."[180] This means that where the conflict is *internal*, Article 3 applies.[181] If the conflict is international or involves military occupation,

173. CARTER ET AL., *supra* note 6, at 770.

174. Universal Declaration, *supra* note 161, at 73.

175. *Id.*

176. *Id.*

177. *See* Bennoune, *supra* note 150, at 201 (suggesting that because "there is nothing in the text [of the Universal Declaration] which allows for derogation or suspension in emergency, it is a framework that remains relevant in time of war").

178. *See* Universal Declaration, *supra* note 161, at 73.

179. *See* SLOMANSON, *supra* note 155, at 16 ("Some commentators contend . . . that *universality* of practice is required for a custom to be binding under International Law. . . . The problem with this position is that universality is rarely achieved in an international system composed of many diverse nations.").

180. Geneva I, *supra* note 8, art. 3; *accord* Geneva II, *supra* note 8, art. 3; Geneva III, *supra* note 4, art. 3; Geneva IV, *supra* note 8, art. 3.

181. *See* Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 150 (Feb. 20, 2001) ("[T]he rules contained in common Article 3 . . . constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect

however, the provisions of Article 3 are replaced by more specific provisions found in the other Articles of each Convention.[182] As mentioned previously, the United States recognized the conflict with Afghanistan as *international*.[183] Consequently, Article 3 cannot apply to Taliban detainees. Whether the United States committed error by choosing not to replace the protections of Article 3 with those provided to POWs or civilians under the other Articles appropriately is the source of much debate, but again, is not the subject of this Note.

The application of Article 3 to *al Qaeda* detainees requires a different analysis: the key is to determine whether there is in fact an *armed conflict* under the Geneva Conventions.[184] To say that a war with terrorists constitutes an armed conflict does stretch the meaning of the term beyond its intended scope and traditional interpretation.[185] The concept of modern terrorism was not even envisioned at the time the Geneva Conventions were drafted.[186] Moreover, the term "armed conflict" as it has thus far been understood is based on concepts of territoriality and sovereignty.[187] Armed conflict under the Geneva Conventions includes hostilities of international, internal, or a combined character that exist *between two or more nation-states*, or, in the case of internal conflict, between factions within a state.[188] Terrorists simply do not qualify: (1) terrorists are not States, are not claimed by any State, and can never be party to an international treaty; and (2) terrorists are not limited to specific geographic boundaries because they have followers from many nationalities in many

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of international conflicts . . . .").

182. *See, e.g.*, Geneva III, *supra* note 4, art. 2 ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . . The Convention shall also apply to all cases of partial or total occupation . . . .").

183. *See supra* note 141, and accompanying text.

184. *See* Geneva III, *supra* note 4, art. 3 (providing that Article 3's protections shall apply "[i]n the case of *armed conflict*" (emphasis added)).

185. *See* Fitzpatrick, *supra* note 100, at 348 (arguing that, based on the text and intended scope, the Geneva Conventions do not apply to conflicts with terrorists unless we are suggesting that the Conventions now be interpreted to include the "new paradigm" of terrorist warfare).

186. *See id.* at 345 (writing that the Geneva Conventions do not contemplate or "provide a legal framework for . . . a global and indefinite campaign against nonstate actors").

187. *See id.* at 348 ("[T]he Geneva Conventions envision[] armed conflict between states, as only states may become high contracting parties.").

188. *See* Geneva III, *supra* note 4, art. 2; PAUST ET AL., *supra* note 17, at 120 (defining "armed conflict" under the Geneva Conventions).

sovereign States.[189]

The result of this analysis is that Article 3 cannot apply to al Qaeda detainees because terrorist conflict is not recognized under the Geneva Conventions. Likewise, Article 3 cannot apply to Taliban detainees because their conflict with the United States was international rather than internal. So is Article 3 useless for providing Guantánamo prisoners with protection? Unfortunately, it is—*unless* the principles contained therein have become customary international law applicable to every kind of conflict.[190] Many scholars are suggesting that Article 3 *has* become customary international law.[191] It has been described as "'pure human rights law'"[192] because it sets forth "a general formula" of respect for humanity.[193] Proponents of this view argue that the protections provided in Article 3 should apply regardless of the characterization of the conflict and the affiliation of the detainees[194]—that Article 3 constitutes binding

189. *See* Fitzpatrick, *supra* note 100, at 348 ("The Geneva Conventions . . . make no provision for an international armed conflict between a state and a transnational criminal network with control over no territory, a 'head of state' who is apparently stateless, a multinational membership, and operational cells in many states."); *see also* Hamdan v. Rumsfeld, 415 F.3d 33, 40–42 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) (mem.) (holding "that the 1949 [Geneva] Convention does not apply to al Qaeda and its members" because the conflict is distinct from those specified in the Convention).

190. *See* SLOMANSON, *supra* note 155, at 20 (noting that multilateral treaties bind the nations who are party to the treaty and may also "provide evidence of international consensus"; the principles contained in a treaty may constitute binding customary international law "if it codifies the general practice of most or many nations;" the International Court of Justice has affirmed that "'this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed'" (quotations omitted)).

191. *See* ELSEA, *supra* note 4, at 5 n. 28 ("Common Article 3 is now considered to have attained the status of customary international law." (citing KITTICHAISAREE, *supra* note 163, at 188)); Jinks, *supra* note 164, at 406 ("[T]he text of Common Article 3 . . . establishes an evolving standard that, *by design*, tracks customary international law in this area." (footnote omitted)).

192. *See* GOLDMAN & TITTEMORE, *supra* note 32, at 35–36 (quoting Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 n.19 (1997)).

193. *See* ELSEA, *supra* note 4, at 5 n.28 ("Common Article 3 has been described as 'a convention within a convention' to provide a general formula covering respect for intrinsic human values that would always be in force, without regard to the characterization the parties to a conflict might give it." (citation omitted)).

194. *See Hamdan*, 415 F.3d at 44 (Williams, J., concurring) (arguing that Article 3 should apply to the conflict with al Qaeda, regardless of its characterization, because its guarantees "are recognized as indispensable by civilized peoples"

customary international law.[195]

Common Article 3's provisions on humane treatment and fair trial protections are more detailed than those provided in the Universal Declaration of Human Rights.[196] Article 3 states the following:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms . . . shall in all circumstances be treated humanely . . . .
>
> To this end the following acts are and shall remain prohibited . . .
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[197]

It is quite possible that the United States has not wholly complied with the principles set forth in Article 3 in its treatment of Guantánamo detainees. Specifically, the infamous "torture memo"[198] and reports of

(quotation omitted)); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 163 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) (mem.) (stating that "Common Article 3 embodies 'international human norms'" (quoting Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002))).

195. *See* ELSEA, *supra* note 4, at 5 n.28 (noting that "Common Article 3 is now considered to have attained the status of customary international law" (citing KITTICHAISAREE, *supra* note 163, at 188)); GOLDMAN & TITTEMORE, *supra* note 32, at 35–36 (noting that Article 3 common to the Geneva Conventions "reflects the 'elementary considerations of humanity' applicable in all armed conflicts" and that it is "widely considered to constitute a part of customary international law").

196. *See* GOLDMAN & TITTEMORE, *supra* note 32, at 36 (writing that Article 3 "addresses minimum standards governing humane treatment, deprivations of liberty and fair trial protections"). *See generally* Geneva III, *supra* note 4, art. 3.

197. Geneva III, *supra* note 4, art. 3.

198. *See generally* Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002), http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf [hereinafter August 2002 Memo] (writing that "acts must be of an extreme nature to rise to the level of torture . . . . [C]ertain acts may be cruel, inhuman, or

abuse likely indicate that Guantánamo detainees have been subjected to what would constitute "humiliating and degrading treatment."[199] Further, many would argue that the United States is failing to provide detainees with adequate trial protections.[200] A government response to such allegations, although not given as of yet,[201] likely would focus on the fact that the principles contained in Article 3 have not gained international

degrading, but still not produce pain and suffering of the requisite intensity to [constitute] torture"). Although this memo is specifically analyzing the definition of "torture" under the U.N. Convention Against Torture, 18 U.S.C.A. §§ 2340–2340B (West 2000 & Supp. 2005), its definition of "torture"—which allows for intensely negative treatment—could indicate that the coercion practices of the United States with respect to detainees constitute "outrages upon personal dignity" and, thus, violate Article 3. *See* Geneva III, *supra* note 4, art. 3(1).

199. Geneva III, *supra* note 4, art. 3(1)(c); *see* David Johnston & Neil A. Lewis, *Bush's Counsel Sought Ruling About Torture*, N.Y. TIMES, Jan. 5, 2005, at A1, *available at* 2005 WLNR 116926 (discussing the August 2002 Memo, its narrow definition of torture, and noting that "human rights groups have complained that it created a permissive atmosphere that led to serious abuses of detainees in Iraq, Afghanistan, and Guantánamo Bay"); R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST, Jan. 4, 2005, at A1 (writing that the August 2002 Memo gave CIA interrogators a "legal blessing" to continue administering interrogation tactics that could be considered torture).

200. *See* Jinks, *supra* note 164, at 405–06 (suggesting that the use of military tribunals instead of "regularly constituted court[s]" and the relaxed due process protections of tribunal proceedings violate Article 3); Lewis, *supra* note 84 (arguing that the status hearings and war crimes trials fail to provide basic fair trial protections for detainees); *see also* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 160–65 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) (mem.) (suggesting that the military commissions, which allow testimony to be given and hearings to be conducted outside the presence of the accused, violate Common Article 3).

201. Although the government has never specifically addressed the application of Common Article 3 to the treatment of detainees, it recently submitted its second report to the United Nations Committee Against Torture—the committee that oversees compliance with the U.N. Convention Against Torture. *See* U.S. DEP'T OF STATE, SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE (May 6, 2005), http://www.state.gov /documents/organization/62175.pdf [hereinafter SECOND PERIODIC REPORT]. The report, issued in May of 2005, is significant because it constitutes "the first official response of the U.S. government to allegations that prisoners are mistreated in Guantanamo Bay." Wikipedia, *Periodic Report of the United States of America to the United Nations Committee Against Torture*, http://en.wikipedia.org/wiki/Periodic _Report_of_the_United_States_of_America_to_the_United_Nations_Committee_Aga inst_Torture (last visited Apr. 2, 2006). The text reiterates the position that the United States does not subject detainees to torture. It also provides numerous examples where alleged acts of abuse and mistreatment of detainees have been investigated and prosecuted. *See* SECOND PERIODIC REPORT, *supra*, at 64–69.

acceptance as binding customary law. It would also highlight the protections that *are* being afforded Guantánamo detainees, which will be discussed further in conjunction with the U.N. Convention Against Torture and with the United States Supreme Court decisions.[202]

Customary international law, as evidenced by consistent practice, the Universal Declaration of Human Rights, and Common Article 3 of the Geneva Conventions, converge in certain respects. It requires that a detaining power exercise a general respect for human life, which includes a prohibition against torture,[203] that a detained person should have the right to a trial,[204] and suggests that there should be some form of due process extended to each detainee.[205] These international law norms demonstrate the "philosophical root" of other sources of law[206] that have a more binding character—international treaties and the domestic law of the United States.

B. *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) was drafted by the U.N. Commission on Human Rights, in part to address more specifically issues expressed in the Universal Declaration of Human Rights.[207] It was ratified by the United States in 1992—it is a treaty.[208] While the law of armed conflict, including the Geneva Conventions, generally only applies during war, the International Court of Justice has stated that the protections of the ICCPR never cease.[209] The ICCPR was not specifically drafted to deal with armed conflict,[210] and this analysis is not meant to suggest that it could alone take the place of the Geneva Conventions; however, the ICCPR does set out requirements that govern

202. *See* discussion *infra* Part V.

203. *See supra* notes 174, 198 and accompanying text.

204. *See supra* note 175 and accompanying text.

205. *See supra* notes 176, 178 and accompanying text.

206. *See* Bennoune, *supra* note 150, at 200 (suggesting that the Universal Declaration of Human Rights and other General Assembly resolutions "should be the philosophical root of a human rights approach to armed conflict").

207. SCOTT N. CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1–2 (2003).

208. S. EXEC. REP. NO. 102-23, at 1 (1992).

209. Goldman & Tittemore, *supra* note 32, at 39–40 ("[T]he protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." (quotation omitted)).

210. *See id.* at 45 (recognizing the inadequacy of the ICCPR for regulation of certain aspects of armed conflict).

how a detaining state treats its prisoners and the due process protections it affords them.[211]

1. *Treatment of Detainees (Articles 7 and 10)*

Articles 7 and 10 govern treatment of detainees during their internment.[212] Article 10 of the ICCPR, which specifically addresses detainees, provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[213] Article 7 further provides that "[n]o one[, detainees or otherwise,] shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[214] Although the U.N. Human Rights Committee has determined that Article 7 "clearly" applies to detainees,[215] the terms included in the Article, and the types of conduct that are prohibited by it, have never been defined.[216] The Human Rights Commission has held in various cases that certain actions violated Article 7, including: being undressed, strapped to the floor of a cell, and having electric shocks applied to one's genitals; being forced to stand for fourteen hours continuously; being beaten to the point of unconsciousness;[217] being denied medical care;[218] being kept in incommunicado detention for more than one year;[219] having a bucket of urine poured on one's head;[220] and being chained to bed springs for several months.[221]

211. *See* ICCPR, *supra* note 152, arts. 7, 9, 10, 14.

212. *See id.* arts. 7, 10.

213. *Id.* art. 10.

214. *Id.* art. 7.

215. CARLSON & GISVOLD, *supra* note 207, at 73.

216. *See id.* at 74 (noting that "[w]hat constitutes torture, cruel, inhuman, or degrading treatment in violation of Article 7 has not been specifically defined. In some of its cases, the [Human Rights] Committee has indicated that assessing what constitutes torture is a subjective endeavor that depends on all of the circumstances of the case").

217. *See, e.g.*, SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 140–97 (2000) (providing examples of the treatment and condition of prisoners); NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 86–88 (2d ed. 1999) (same).

218. *See* Linton v. Jamaica, Comm. No. 255/1987, U.N. GAOR Hum. Rts. Comm., 46th Sess., U.N. Doc. CCPR/C/46/D/255/1987 (1992).

219. *See* Polay Campos v. Peru, Comm. No. 577/1994, U.N. GAOR Hum. Rts. Comm., 61st Sess., U.N. Doc. CCPR/C/61/D/577/1994 (1998).

220. *See* Francis v. Jamaica, Comm. No. 320/1988, U.N. GAOR Hum. Rts. Comm., 47th Sess., U.N. Doc. CCPRA/C/47/D/320/1988 (1993).

221. *See* Wight v. Madagascar, Comm. No. 115/1985, U.N. GAOR Hum. Rts.

Whether the sometimes questionable and highly publicized treatment of Guantánamo detainees by the United States reaches the level of an Article 7 violation is unclear. One could argue that the treatment of Guantánamo detainees does not compare in severity to the extreme conduct that has been held to violate Article 7. On the other hand, one could argue that regardless of whether the United States' treatment of detainees constitutes "torture" under the Convention, some of the coercion tactics that are commonly used would certainly qualify as "cruel, inhuman, or degrading treatment or punishment."[222] The entire issue of whether such conduct violates Article 7 may be irrelevant because the United States has reserved the right to define "torture" under the ICCPR as being synonymous with the domestic law concept of "cruel and unusual punishment" prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.[223] Apparently this means that "the United States considers itself formally bound by Article 7 only to the extent that its limitations conform to . . . the U.S. Constitution."[224] The phrase "cruel and unusual punishment" likely embodies less protection, or a lower standard of treatment, than Article 7 of the ICCPR;[225] certainly,

Comm., 24th Sess., U.N. Doc. CCPR/C/61/D/577/1994 (1985).

222. ICCPR, *supra* note 152, art. 7.

In November 2005, the Department of Defense issued a directive addressing some of the questionable methods of coercion that had been used up to that point in combating terror. *See* U.S. DEP'T OF DEF., DIRECTIVE 3115.09, DOD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (Nov. 3, 2005), http://www.dtic.mil/whs/directives /corres/pdf/d311509_110305/d311509p.pdf. For the first time since the September 11th attacks, dogs were absolutely forbidden to be used in interrogations or as a method "to harass, intimidate, threaten, or coerce a detainee for interrogation purposes." *Id.* at 4. The directive also expressly prohibits "[a]cts of physical or mental torture" and indicates that "[a]pplicable law and policy may include the law of war [and] relevant international law." *Id.* at 2. The directive is one of several steps the United States government has taken since this Note was written to provide a clearer standard for how detainees should be treated. *See* Merle D. Kellerhals, Jr., *Pentagon Adopts New Detainee Interrogation Policy*, WASH. FILE, Nov. 8, 2005, *available at* http://www.usembassy.org.uk/terror613.html (writing that "the directive consolidates and codifies many procedures that have been put in place as a result of a dozen military investigations into detainee abuse in Iraq, Afghanistan and the detention center at . . . Guantanamo Bay"); Jim Garamone, *New DOD Directive Sets Detainee Interrogation Policy*, AM. FORCES PRESS SERV., Nov. 8, 2005, *available at* http://www.defenselink.mil/news/Nov2005/20051108_3267.html (noting that the directive establishes procedural requirements for interrogations).

223. Odeshoo, *supra* note 77, at 239.

224. *Id.* at 240.

225. *See id.* at 241 ("[T]here is some reason for thinking that the Eighth

common sense dictates that there would be no reason for the reservation otherwise.

2. *Arbitrary Arrest and Detention (Article 9)*

Protection from arbitrary arrest and detention is covered in Article 9 of the ICCPR. It states the following:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.[226]

Article 9 does not prevent a state from arresting people.[227] It does, however, require that the state conduct detentions and arrests in accordance with "established legal norms,"[228] for purposes of law enforcement, and only with specific procedures.[229] The Human Rights Commission has declared that the term "arbitrary," as used in Article 9(1), means detention for an inappropriate reason or in a manner that is unpredictable.[230] The term does not prohibit preventive detention for

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Amendment embodies less protection against ill treatment than the ICCPR.").

226. ICCPR, *supra* note 152, art. 9.

227. *See id.* ("No one shall be subjected to *arbitrary* arrest or detention." (emphasis added)); CARLSON & GISVOLD, *supra* note 207, at 81 (noting that "Article 9 does not prohibit all . . . restrictions on liberty of person").

228. CARLSON & GISVOLD, *supra* note 207, at 82.

229. *See* ICCPR, *supra* note 152, art. 9(1) ("No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."); CARLSON & GISVOLD, *supra* note 207, at 81–83 (noting that while Article 9 does allow detentions, a State must comply with certain requirements in the process).

230. Hugo van Alphen, U.N. GAOR Hum. Rts. Comm., 39th Sess. U.N. Doc. CCPRA/C/39/D/305/1998 (1990).

national security purposes.[231]

Sections 2 and 3 govern the procedure that must be followed when an individual is detained.[232] These provisions apply to both normal and preventive detention.[233] The detainee must be informed within a short period of time—less than seventy-two hours[234]—of the reason for his arrest.[235] If the detainee is charged with a crime, the State has a duty to provide him with a hearing, which must occur within a few days from the date he was arrested.[236] While not an express requirement, there is some authority to support the proposition that the Article 9(3) hearing must be conducted by an officer or judge who is completely independent from the executive.[237] Finally, there is a limitation on the amount of time someone can be held before being given a trial; the Human Rights Commission has stated that any pre-trial detention should be "as short as possible."[238]

The United States has not violated Article 9 merely by detaining people for purposes of national security; however, it has breached the Article in other respects. The requirement that anyone arrested be

231. *See* CARLSON & GISVOLD, *supra* note 207, at 81–82 (writing that a state can utilize preventive detention on public security grounds, but is still subject to the detention requirements contained in Article 9).

232. ICCPR, *supra* note 152, art. 9(2), 9(3).

233. *See* CARLSON & GISVOLD, *supra* note 207, at 82 ("[S]pecial provisions to deal with security threats, such as terrorism, are not exempt from the protections of Article 9.").

234. Human Rights Comm., *Concluding Observations of Human Rights Committee: Ukraine*, ¶ 17, U.N. Doc. CCPR/CO/73/UKR (Nov. 12, 2001); Human Rights Comm., *Concluding Observations of Human Rights Committee: Uzbekistan*, ¶ 12, U.N. Doc. CCPR/ACO/71/UZB (Apr. 24, 2001).

235. *See* CARLSON & GISVOLD, *supra* note 207, at 84 ("The requirement that this information be delivered 'promptly' has been understood to mean as of the time of any initial interrogation, or within a short period of time.").

236. *See id.* (discussing the requirement of "prompt" judicial processing and noting that while the appropriate length of time between an individual's arrest and hearing is not exactly specified, it "'must not exceed a few days'" (quoting Human Rights Committee, General Comment 8, Article 9 (16th Sess. 1982), Compilation of General Comments & General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.\ at 8 (1994) [hereinafter General Comment 8])).

237. *See id.* at 84–85 (stating that "technical independence from the executive branch of government is not sufficient" if one looks to certain human rights cases and considers the requirements imposed on the European Court of Human Rights).

238. General Comment 8, *supra* note 236; *see also* CARLSON & GISVOLD, *supra* note 207, at 85 (writing "that pre-trial detention should be the exception rather than the [rule]" under the ICCPR and when utilized, it should only last for a very short amount of time).

brought promptly before a judicial officer[239] has clearly not been followed. "Most [detainees] have been at Guantanamo for over three years now, and they still haven't gotten any process."[240] Many detainees have never been fully informed of the factual basis for their detention because the information is classified.[241] That certainly does not comport with the Article 9 requirement that a detainee be informed within a few days of the reason for his arrest.[242] Article 9 also provides that detainees "shall" be entitled to a trial within a reasonable amount of time.[243] Although it is unclear exactly how long is considered reasonable under the Convention, it could certainly be argued that the government is taking too long to provide detainees with criminal trials. In fact, as of November 2004—more than three years after the September 11th attacks—the military had only heard pre-trial motions on the first set of trials for war crimes.[244]

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239. ICCPR, *supra* note 152, art. 9(3).

240. Molly McDonough, *Split Decision Divides Detainees' Fates: Supreme Court Will Likely Have to Decide, Sooner or Later*, A.B.A. J. EREPORT, Feb. 4, 2005, *available at* 4 No. 5 A.B.A. J. E-Report 1 (Westlaw) (quotation omitted).

241. *See* Lewis, *supra* note 84 (noting that detainees are "given an unclassified summary of the charges [against them], but the evidence to support the most serious accusations is classified").

242. *See* ICCPR, *supra* note 152, art. 9(2).

243. *See id.* art. 9(3).

244. *See* Kathleen T. Rhem, *Supreme Court Hears Arguments on Legality of Military Commissions*, AM. FORCES PRESS SERV., Mar. 28, 2006, http://www.defenselink.mil/news/Mar2006/20060328_4641.html ("[Hamdan] first appeared in court in a military commission pre-trial hearing at Guantanamo Bay in August 2004.").

The military is not entirely to blame for the slow progress with respect to war crimes tribunals. In *Hamdan v. Rumsfeld*, the Circuit Court for the District of Columbia literally halted all military tribunal proceedings from December 2004 until July 2005 when the decision was overturned. *See* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (2005), *cert. granted*, 126 S. Ct. 622 (2005) (mem.) (holding that until the Military Commission amended its trial procedures to comply with UCMJ Article 39, the trials were unlawful); *see also* U.S. Dep't of Def., News Release, *supra* note 138 (announcing that the military commissions would reconvene in light of the United States Court of Appeals for the District of Columbia Circuit's reversal). Since the decision reinstituting the tribunals was handed down, the Department of Defense has moved forward with four cases of detainees who have been formally charged with war crimes. Kathleen T. Rhem, *Officer Describes Military Commissions Procedures*, AM. FORCES PRESS SERV., July 19, 2005, http://www.defenselink.mil/news/Jul2005/20050719_2124.html (listing the four detainees as Salim Ahmed Hamdan, David Hicks, Ali Hamza Ahmad Sulayman al Bahlul, and Ibrahim Ahmed Mahmoud al Qosi). In addition, "[t]he president has found 'reason to believe' that eight other[]" detainees committed war crimes, although they have yet to be formally charged. *Id.*

3. *Due Process (Article 14)*

Article 14 of the ICCPR sets forth sophisticated due process rights.[245] The Article reflects the United States' influence and also demonstrates the evolving and progressive international understanding of fundamental human rights.[246] It provides the following:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded . . . for reasons of . . . national security . . . .
>
> 2. Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees . . .
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, . . . and to have legal assistance assigned to him [if he does not have assistance] . . . ;
>
> (e) To examine . . . witnesses against him and to obtain the attendance and examination of witnesses on his behalf . . . .[247]

An overarching requirement of Article 14 is that the court or tribunal which hears a criminal case must be independent and impartial.[248]

245. *See generally* ICCPR, *supra* note 152, art. 14; *see also* CARLSON & GISVOLD, *supra* note 207, at 38 ("Article 14 is a foundation Covenant article that is necessary for the proper implementation of all basic substantive rights.").

246. *See* CARLSON & GISVOLD, *supra* note 207, at 38 (discussing the United States' role in drafting the article and noting that the article demonstrates "what is now commonly understood as the 'rule of law'").

247. ICCPR, *supra* note 152, art. 14.

248. *See* CARLSON & GISVOLD, *supra* note 207, at 40 ("What is essential for all

Specifically, this means that the judicial body should be separate from other branches of government and the judge who hears the case should be unbiased as to the particular issue in the case.[249] While it is clear that the right to a public hearing may be suspended in the interests of national security,[250] the Human Rights Commission has indicated that at the very least, judgments—"with certain strictly defined exceptions"—should be made public.[251] As in the United States' domestic criminal law, the ICCPR provides that an accused must be considered innocent until proven guilty.[252] This means that the burden of proof lies with the accuser—the government—to prove guilt "beyond a reasonable doubt."[253] Furthermore, the right of presumed innocence includes the right to be treated with respect and without prejudgment by public authorities.[254]

In order to comply with Article 14(3)(a), a detaining authority "must clearly explain the law that the individual is accused of breaking . . . and state the specific facts of the case against [him]."[255] This requires the detaining power to provide the accused with more detailed information than its companion provision for arrest in Article 9(2), specifically because Article 14 is meant to ensure that the accused has enough information to

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courts is that the law provide guarantees that secure the independence and impartiality of the judicial body."). *See generally* ICCPR, *supra* note 152, art. 14.

249. CARLSON & GISVOLD, *supra* note 207, at 40.

250. *See* ICCPR, *supra* note 152.

> The press and the public may be excluded from all or part of a trial for reasons of morals, public order . . . or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary . . . in special circumstances where publicity would prejudice the interests of justice . . . .

Id. art. 14(1).

251. *See* Human Rights Comm., General Comment 13, Article 14 (21st Sess. 1984), Compliation of General Comments & General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994) [hereinafter General Comment 13].

252. ICCPR, *supra* note 152, art. 14(2).

253. General Comment 13, *supra* note 251; *see also* CARLSON & GISVOLD, *supra* note 207, at 43 (discussing burden of proof and other implications of the right to presumed innocence).

254. *See* General Comment 13, *supra* note 251 (noting that the presumption of innocence implies a right to be *treated* as innocent by government officials until proven otherwise).

255. CARLSON & GISVOLD, *supra* note 207, at 44; *see generally* ICCPR, *supra* note 152, art. 14(3)(a).

begin preparing his defense.[256] The accused must be given this information when the prosecuting authority takes formal, procedural steps to charge the accused with a crime.[257]

Article 14(3)(c) establishes the right of the accused "[t]o be tried without undue delay."[258] This provision applies from the point at which the accused is informed of the charge against him until the date of the judicial body's final decision.[259] In determining how long of a delay in the process is reasonable, the circumstances and complexity of the individual case will be considered.[260] The European Court of Human Rights has held that periods longer than ten years are reasonable in certain cases.[261]

The right of the accused to cross-examine witnesses against him[262] includes the right to be informed by the prosecution within a reasonable time of the witnesses it intends to call.[263] Further, it implicitly requires that such witnesses not be anonymous.[264] Anonymity might only be allowed if the witness has reasonable fears that he is or will be in physical danger as a result of choosing to testify.[265] As for the accused testifying, Article 14(3)(g) provides that he has the right "[n]ot to be compelled to testify against himself or to confess guilt."[266] This protection should be considered in conjunction with Articles 7 and 10[267] and although not expressly inadmissible, the Human Rights Committee interprets the Articles to

256. *Compare* ICCPR, *supra* note 152, art. 14(3)(a), *with id.* art. 9(2); *see also* CARLSON & GISVOLD, *supra* note 207, at 44 (discussing the two provisions and the rationales behind them).

257. *See* CARLSON & GISVOLD, *supra* note 207, at 44 (discussing the Human Rights Commission's definition of "prompt" as provided in Article 14(3)(a)).

258. ICCPR, *supra* note 152, art. 14(3)(c).

259. CARLSON & GISVOLD, *supra* note 207, at 45.

260. *Id.*

261. *See id.* (noting that the holding was based on the analogous provision in the European Covenant on Human Rights).

262. *See* ICCPR, *supra* note 152, art. 14(3)(e).

263. CARLSON & GISVOLD, *supra* note 207, at 46–47.

264. *See id.* at 47 (noting that Article 14(3)(e) "presumes" that witnesses are not anonymous).

265. *See id.* ("Exceptions to the [rule against anonymous witnesses] may only be permitted when the witness has reasonable fears of reprisal from the defendant . . . .").

266. ICCPR, *supra* note 152, art. 14(3)(g).

267. *See* CARLSON & GISVOLD, *supra* note 207, at 47 (noting that the Human Rights Committee "has emphasized that the protections provided in Articles 7 and 10(1) should be considered in the application of this paragraph").

prohibit admission of all coerced testimony.[268]

Finally, Article 14(5) states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal."[269] This provision ensures that every person convicted of a crime has a legal right to *one* appeal; however, the defendant must be given the same number of appeals that are provided by the domestic system, which may mean that he will have the opportunity to appeal more than once.[270] Unlike the United States' appeals system, the ICCPR requires the higher tribunal to provide a hearing and to fully review both the facts and the law.[271] Thus, an appeal limited to errors in law would not satisfy the requirements of Article 14(5).[272]

In March of 2002, the Department of Defense announced the process by which detainees who were allegedly members of al Qaeda or who were otherwise involved with terrorism will be tried for violations of the laws of war.[273] These criminal trials, formally called "military commissions,"[274]

268. *See id.* at 47–48 (discussing coerced testimony and noting that the Human Rights Committee has interpreted the evidence as "not admissible"); General Comment 13, *supra* note 251 (indicating that evidence obtained through coercion is "wholly unacceptable").

269. ICCPR, *supra* note 152, art. 14(5).

270. *See* CARLSON & GISVOLD, *supra* note 207, at 48–49 ("The absolute right to an appeal in a criminal trial is limited to one appeal. However, if the domestic legal system provides for additional appeals, the defendant must have equal access to these as well.").

271. *See id.* at 48 (writing that under Article 14(5), appellate review must be "full review of the conviction in terms of facts and law").

272. *See id.* (discussing the types of appellate review that would fall short of Article 14(5) requirements).

273. *See generally* DEP'T OF DEF., DEPARTMENT OF DEFENSE ORDER ON MILITARY COMMISSIONS (Mar. 21, 2002), http://www.defenselink.mil/news/Mar2002/d20020321fact.pdf.

After the text of this Note was drafted, the Department of Defense announced several specific changes to be made to the structure of the military commissions. U.S. Dep't of Def., News Transcript, Special Defense Department Briefing on Military Commissions (Aug. 31, 2005), http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html; *see also* Kathleen T. Rhem, *Officials Announce Changes to Military Commissions Procedures*, AM. FORCES PRESS SERV., Aug. 31, 2005, http://www.defenselink.mil/news/Aug2005/20050831_2583.html. Most notably, capital cases must now have a seven-member officer panel presiding, while non-capital cases require a panel of three officers. U.S. Dep't of Def., *supra*. In addition, there is now greater assurance that an accused will have the right to be present at his own trial. *Id.* Finally, evidence that would result in the denial of a full and fair trial (which likely means admissions and other evidence obtained through the use of improper coercion) must be excluded. *Id.*

should fall under Article 14 of the ICCPR because the United States has determined that the Geneva Conventions do not apply. An analysis of the military commissions under Article 14 reveals that the United States has not wholly complied with its requirements.

The military commissions would not be considered "impartial" under Article 14 because they are made up of members of the United States Armed Forces that are appointed by the executive branch.[275] It is unclear whether the United States has complied with the requirement that the accused be tried without "undue" delay because forcing detainees to wait three to four years before granting them a trial could be considered unreasonable.[276] Further, the commissions do not have the elaborate appeals process that Article 14 provides.[277] Instead, a panel appointed by the Secretary of Defense will review trial findings, and it is highly unlikely that de novo review, required under Article 14, will be permitted.[278]

Nevertheless, the military commissions do substantially comply with Article 14 in the following respects: the accused has the right to choose his own counsel; he will be presumed innocent until proven guilty beyond a reasonable doubt; and he will be extended the right of cross-examination and the right not to testify.[279] Additionally, the commissions have the "authority to close proceedings [in order] to protect classified information or to protect the safety of defendants, witnesses, and commission members."[280] This power appropriately falls under Article 14(1), which allows the press and public to be excluded in the interests of national security.[281]

4. *Derogation (Article 4)*

As mentioned previously, the provisions set forth in the ICCPR are

274. U.S. Dep't of Def., *supra* note 273 (defining and outlining the procedure for a military commission). The Supreme Court announced in November of 2005 that it would grant certiorari in order to hear a case challenging the validity of these military commissions. *See infra* note 421.

275. *See* ICCPR, *supra* note 152, art. 14; *see also* U.S. Dep't of Def., *supra* note 273 (indicating that the Secretary of Defense will either appoint members of the commissions or elect an "appointing authority" to do so).

276. *See* ICCPR, *supra* note 152, art. 14(3)(c).

277. *See id.* art. 14(5); U.S. Dep't of Def., *supra* note 273.

278. U.S. Dep't of Def., *supra* note 273.

279. *Id.*

280. *Id.*

281. *See* ICCPR, *supra* note 152, art. 14(1).

supposed to apply at all times.[282] There is somewhat of a loophole to that rule, however, because the ICCPR allows nations to suspend the application of its provisions under certain circumstances. Article 4 states that nations may derogate their obligations "[i]n time of public emergency which threatens the life of the nation."[283] Indeed, the drafters of the ICCPR were fully aware that dire circumstances often necessitate the suspension of some civil and economic rights.[284] Nevertheless, derogation is supposed to be seen "as an exceptional and temporary step."[285] A state may only derogate from provisions of the ICCPR when it is necessary to do so considering the circumstances[286] and must formally record such derogation with the U.N. Secretary General as soon as possible.[287]

Does this mean that the protections of the ICCPR can be suspended indefinitely during armed conflict or during any type of hostilities? Fortunately, it does not. There are some provisions, including Article 7

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282. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8) ("[T]he protection of the [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."); *see also* GOLDMAN & TITTEMORE, *supra* note 32, at 39–40 (discussing the applicability of human rights and humanitarian law during times of war and peace).

283. ICCPR, *supra* note 152, art. 4(1).

284. *See* CARLSON & GISVOLD, *supra* note 207, at 33–34.

> The Covenant's drafters recognized that repudiation or suspension of human rights protections in times of national crisis was foreseeable. Indeed, many states have similar suspension authority in their basic laws and/or constitutions. The United States Constitution, for example, allows Congress to suspend the *writ of habeas corpus* "when in cases of rebellion or invasion the public safety may require it." There was . . . near universal acceptance among the drafters of the Covenant regarding the need for a provision allowing derogation.

Id. (footnote omitted).

285. *Id.* at 34.

286. *See* ICCPR, *supra* note 152, art. 4; *see also* CARLSON & GISVOLD, *supra* note 207, at 35 ("A derogating state must justify that the actual measures of derogation are specifically required by the situation.").

287. *See* ICCPR, *supra* note 152, art. 4(3).

> Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

Id.

("Prohibition Against Torture"), that cannot be derogated under any circumstance.[288] Freedom from genocide, slavery, and torture are fundamental tenets of human rights law and are often considered most important during times of national emergency;[289] thus, any state that decides to suspend a non-derogable right is committing a clear violation of the treaty. Secondly, the human rights provisions of the ICCPR are meant to apply simultaneously with humanitarian law during armed conflict—the protections included in the ICCPR cannot be derogated simply because an armed conflict exists.[290] Rather, the state wanting to suspend rights provided in the Convention must be in the midst of circumstances that "threaten the whole nation . . . and . . . cast in doubt the continued physical integrity of the population, the political independence, or territorial integrity of the state."[291]

The threat of major terrorist attacks, such as the one that occurred on September 11, 2001, would almost certainly have constituted a national crisis sufficient to justify the suspension of derogable rights under the Convention. After the World Trade Center attacks, it became apparent that the citizens of the United States were being threatened with physical harm and that the independence of important government agencies was at stake.[292] The international community likely would have agreed that denying Guantánamo detainees some of the rights they are normally entitled to under the Convention was appropriate, at least for a period of time.[293] The United States lawfully could have derogated the requirements

288. *See* ICCPR, *supra* note 152, art. 4(2).

289. *See* CARLSON & GISVOLD, *supra* note 207, at 34 ("[T]he Committee has indicated that full compliance with Article 4 requires protection for human rights despite the occurrence of a state of emergency.").

290. *See supra* note 209 and accompanying text; *see also* CARLSON & GISVOLD, *supra* note 207, at 34.

291. CARLSON & GISVOLD, *supra* note 207, at 34 (noting further that "every disturbance or catastrophe does not qualify as a public emergency" (internal quotations omitted)).

292. *See* Fitzpatrick, *supra* note 100, at 350–51 ("The attacks of September 11 arguably created an emergency [sufficient to justify derogation from the ICCPR], especially while the identity of the perpetrators remained unknown and the nation was apprehensive about imminent additional attacks.").

293. *See* CARLSON & GISVOLD, *supra* note 207, at 33–35 (discussing the requisite circumstances for derogation from the ICCPR and also noting that "indefinite states of emergency are incompatible with Article 4") (citing Human Rights Comm., *Concluding Observations: Syrian Arab Republic*, ¶ 6, U.N. Doc. CCPR/CO/71/SYR (Apr. 24, 2001); Human Rights Comm., *Comments on Egypt*, ¶ 9, U.N. Doc. CCPR/C/79/Add.23 (July 20, 1993)); Fitzpatrick, *supra* note 100, at 350–51 (noting that the September 11 attacks likely reached the requisite level of national crisis to justify

for detention and arrests included in Article 9, and could have suspended at least some of the procedural due process requirements in Article 14.[294] Despite an almost "given" approval of derogation, however, the United States did not register notice of derogation with the United Nations in regard to the Guantánamo detainees and still has not.[295]

To put it simply, the United States has breached the treaty: the executive branch is denying Guantánamo detainees some of the rights that are ensured under the ICCPR but has not formally communicated an intent to derogate. Additionally, there is no assurance that the United States *could* justify derogation from the Convention at this point, because the actual attacks occurred in 2001. The threat to national security would be deemed significantly lessened and the time period for derogation would likely be rejected as too indefinite.[296] As previously noted, it is relatively easy for a state to argue its way out of compliance with customary international law that has not yet been universally deemed binding. It is more difficult for a state to argue successfully that it is complying with a ratified treaty when, in fact, it is not.[297]

C. *U.N. Convention Against Torture*

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (U.N. Convention Against Torture) has been ratified by 132 countries, including the United

derogation from the ICCPR, but that the derogation could not be indefinite).

294. *See* ICCPR, *supra* note 152, art. 4(2) ("No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."); *see also* CARLSON & GISVOLD, *supra* note 207, at 36 (noting that the Human Rights Committee has indicated that due process protections "cannot be subject to derogation if so doing would circumvent the Covenant as a whole, the non-derogable rights listed, or other international obligations").

295. *See* Bennoune, *supra* note 150, at 206.

296. *See* CARLSON & GISVOLD, *supra* note 207, at 35 (writing that indefinite derogation is not appropriate under the ICCPR); Bennoune, *supra* note 150, at 206 (writing that derogation measures "must be both exceptional and temporary" (quotation omitted)); Fitzpatrick, *supra* note 100, at 351 ("A permanent risk of international terrorism . . . would not satisfy [the] threshold [for derogation under the ICCPR] because of the essential temporary nature of emergencies.").

297. *See* Vienna Convention on the Law of Treaties, art. 14, Jan. 27, 1980, 1155 U.N.T.S. 331 ("[C]onsent of a State to be bound by a treaty is expressed by ratification . . . ."); *id.* art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *id.* art. 27 ("A party may not invoke . . . internal law as justification for its failure to perform a treaty.").

States.[298] It is basically an expansion of the prohibition against torture found in Article 7 of the ICCPR.[299] Although Article 7 of the ICCPR and the U.N. Convention Against Torture are similar, the U.N. Convention Against Torture provides a much more detailed definition of the term "torture"[300] and has also been implemented in the United States by Congressional legislation.[301]

> Article 1 of the U.N. Convention Against Torture states that
>
> > "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession, punishing him for an act he . . . has committed or is suspected of having committed, or intimidating or coercing him . . . , or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[302]

According to the U.N. Special Rapporteur on Torture, coercion tactics such as beating; extraction of nails and teeth; burns; electric shock; suffocation; exposure to excessive light or noise; sexual aggression; administration of drugs; and prolonged denial of rest, food, or medical attention would constitute torture under the U.N. Convention Against Torture.[303] Although the definition of "torture" in Article 1 is detailed, it arguably would not include mind control and other psychological techniques the effects of which would be difficult to objectively qualify as

298. *See* CARTER ET AL., *supra* note 6, at 781 (writing that the Convention "took effect in 1987 and, as of January 2003, had been ratified by 132 countries. The United States ratified this treaty in 1994.").

299. *See* U.N. Convention Against Torture, *supra* note 153, pmbl. ("Having regard to . . . article 7 of the [ICCPR] . . . which provide[s] that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . . ."); ICCPR, *supra* note 152, art. 7; *see also* Odeshoo, *supra* note 77, at 245 ("At first blush, the [U.N. Convention Against Torture] might appear to be something of a redundancy. If the ICCPR prohibits torture, one might wonder why a second international instrument should be necessary to ban such conduct.").

300. *See generally* U.N. Convention Against Torture, *supra* note 153, art. 1.

301. *See generally* 18 U.S.C.A. §§ 2340, 2340A, 2340B (West 2000 & Supp. 2005).

302. U.N. Convention Against Torture, *supra* note 153, art. 1.

303. Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, 12 HUM. RTS. BRIEF 1, 3 (2004).

"severe."[304]

Article 2 of the U.N. Convention Against Torture includes an absolute prohibition against derogation. "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[305]

Article 16 prohibits "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1,"[306] but does not provide express definitions for those terms.[307] Nevertheless, it is likely that questionable coercion tactics, such as the threat of torture, severe sleep deprivation, and hooding—all of which would not rise in severity to the level of torture—would qualify as cruel and inhuman treatment under the Convention.[308] It should be noted that the United States has filed an express reservation to the U.N. Convention Against Torture with respect to Article 16.[309] The United States considers itself bound to the prohibition against cruel, inhuman, and degrading treatment or punishment only to the extent that the conduct is prohibited by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.[310] This means that unless a coercion tactic: (1) rises to the level of torture as defined by Article 1; or (2) violates a constitutional amendment, it will not warrant legal consequences.[311]

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304. *See* Odeshoo, *supra* note 77, at 248 (citing CHRIS INGELSE, THE U.N. COMMITTEE AGAINST TORTURE: AN ASSESSMENT 208 (2001)).

305. U.N. Convention Against Torture, *supra* note 153, art. 2(2).

306. *See id.* art. 16.

307. *See id.*; Goldman, *supra* note 303, at 2 (recognizing the "treaty [] prohibits, but does not define the terms cruel, degrading, and inhuman treatment").

308. *See* U.N. Convention Against Torture, *supra* note 153, art. 16 (prohibiting degrading treatment that does not amount to torture); Goldman, *supra* note 303, at 3 ("[P]hysically restraining, in very painful conditions, and hooding a person can amount to cruel, degrading, or inhuman treatment.").

309. 136 CONG. REC. 36192, 36192 (1990).

310. *Id.*; *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 579, 592 (Sean D. Murphy, ed., 2004); Human Rights Watch, *Summary of International and U.S. Law Prohibiting Torture and Other Ill-Treatment of Persons in Custody*, http://www.hrw.org/english/docs/2004/05/24/usint8614.htm (last visited Apr. 17, 2006); *see also* discussion *supra* notes 223–24 and accompanying text.

311. *See* Memorandum Opinion from the U.S. Dep't of Justice to the Deputy Attorney General (Dec. 30, 2004), http://www.usdoj.gov/olc/18usc23402340a2.htm [hereinafter December 2004 Memo] ("'Torture' is . . . to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to

1. *Implementing Legislation (18 U.S.C. §§ 2340–2340B)*

In 1994, Congress passed implementing legislation[312] to comply with the U.N. Convention's requirement that "[e]ach State Party . . . take such measures as may be necessary to establish its jurisdiction over . . . offences" committed by a national of that State.[313] Section 2340A criminalizes the commission of torture by a United States national outside the United States.[314] Thus, once it is established that the conduct was (1) committed by a United States national; and (2) occurred outside the United States, one must look to § 2340 to determine whether the conduct constitutes torture as defined by that statute.

Section 2340 sets forth a detailed definition of "torture" that is similar but not identical to the definition included in Article 1 of the U.N. Convention Against Torture.[315]

> (1) "[T]orture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration of application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or

warrant the severe legal consequences that the Convention provides in the case of torture." (quotation omitted)).

312. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236 § 506(a), §§ 2340–2340B, 108 Stat. 382, 463–64.

313. U.N. Convention Against Torture, *supra* note 153, art. 5; *see also* Odeshoo, *supra* note 77, at 252 (noting that § 2340 was intended to implement the U.N. Convention Against Torture).

314. 18 U.S.C.A. § 2340A (West 2000 & Supp. 2005).

315. *Compare* 18 U.S.C.A. § 2340, *with* U.N. Convention Against Torture, *supra* note 153, art. 1. *See also* Odeshoo, *supra* note 77, at 246 ("[T]he implementing legislation passed by Congress in order to comply with [the U.N. Convention Against Torture] contains a much more specific definition of torture . . . .").

> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .[316]

2. *"Torture Memos"*

Despite this seemingly detailed provision, the exact interpretation of § 2340 has been the source of much debate.[317] The Justice Department's August 2002 Memo indicated that a United States national could only be convicted under the statute if the perpetrator had specifically intended to inflict severe pain or suffering and if the acts were extreme.[318] For example, physical pain had to "be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" before it would be considered actual "torture" under § 2340.[319] Mental pain had to "result in significant psychological harm" of at least several months' duration to qualify.[320] This narrow definition of torture resulted in outraged human rights activists and legal scholars who claim that the memo "distort[ed] the definition of torture"[321] and allowed President Bush to "circumvent domestic and international prohibitions against torture in the name of national security."[322] Arguably, the August 2002 Memo amounted to official permission (or at least tacit acquiescence) for abusive interrogation techniques being conducted at Guantánamo Bay, including solitary confinement, extreme temperatures,[323] "waterboarding,"[324] physical attacks,

316. 18 U.S.C.A. § 2340.

317. *See, e.g.*, Goldman, *supra* note 303, at 3–4; Johnston & Lewis, *supra* note 199; Smith & Eggen, *supra* note 199.

318. *See* August 2002 Memo, *supra* note 198, at 3, 6 (writing that to satisfy the requisite intent, "the infliction of [severe] pain must be the defendant's precise objective" and that the necessary degree of pain must be equivalent to a "serious physical condition or injury").

319. *Id.* at 1.

320. *Id.*

321. Goldman, *supra* note 303, at 3.

322. Johnston & Lewis, *supra* note 199.

323. *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A19, *available at* 2004 WLNR 12506677 (documenting the ICRC's findings during a 2004 visit to Guantánamo).

324. *See* Smith & Eggen, *supra* note 199 (discussing Gonzales's failure to raise objections to the interrogation technique known as "waterboarding," which is "a tactic intended to make detainees feel as if they are drowning").

and humiliating treatment.[325]

The Justice Department has since repudiated the August 2002 Memo and has released a new legal opinion[326] that, according to *The Washington Post*, "returns U.S. policy closer to international standards."[327] The December 2004 Memo acknowledges the controversial nature of the previous requirement that to constitute torture under 18 U.S.C. § 2340, "severe physical pain" must be inflicted.[328] The new test is whether the perpetrator intended to[329] and actually did inflict physical or mental pain or suffering of an "intense, lasting, or heinous" nature.[330] Physical torture is no longer limited to severe physical *pain*, and can include persistent physical *suffering* (something less than actual pain) of an extended duration and intensity.[331] The December 2004 Memo also clarifies that mental harm can constitute torture, even if the damage is not permanent, so long as it results from one of the predicate acts listed in the statute and the psychological effects last for a "prolonged" period of time.[332]

Although the December 2004 Memo could be viewed as merely a

325. *See* Jessica Azulay, *Guantanamo Abuses Caught on Tape, Report Details*, NEW STANDARD NEWS, Feb. 2, 2005, http://newstandardnews.net/content/index.cfm/items/1430 (reporting one former detainee's allegations that authorities "pepper-sprayed him in the face, pinned him down and attacked him, poked their fingers in his eyes, forced his head into a toilet pan . . . , dragged him out of his cell in chains, and shaved his beard, hair, and eyebrows"); Lewis, *supra* note 323 (writing that the ICRC report included findings that interrogators had submitted detainees to "humiliating acts" and "some beatings" (internal quotation marks omitted)).

326. *See* December 2004 Memo, *supra* note 311 (indicating that the document "supercedes the August 2002 Memorandum in its entirety" and that that the Attorney General already officially withdrew the August 2002 Memo in June 2004).

327. *Palliatives for Prisoners*, WASH. POST, Jan. 5, 2005, at A16, *available at* 2005 WLNR 9617112.

328. *See* December 2004 Memo, *supra* note 311.

329. *See id.* (writing that it is not useful to define the precise meaning of specific intent "[i]n light of the President's directive that the United States not engage in torture"; however, "[i]t is clear that the specific intent element . . . would be met if a defendant performed an act and 'consciously desire[d]' that act to inflict severe physical or mental pain or suffering," as opposed to a situation where the defendant "acted in good faith" (third alteration in original)).

330. *Id.*

331. *Id.*

332. *See id.* It should be noted that the December 2004 Memo does not provide a length of time in terms of days or months to help determine what "prolonged" means. It does indicate, however, that the amount of time it takes to develop a mental disorder—"such as post-traumatic stress disorder or . . . chronic depression"—could qualify. *Id.* at n.25.

semantics game which effectively allows the authorities at Guantánamo Bay to continue to engage in coercion tactics that the international community considers torture, it does seem that the Administration has taken a major policy step in the right direction.[333] President Bush's directive that the United States is not to engage in torture, and the promise that "[t]orture is abhorrent both to American law and values and to international norms," [334] indicates that the United States' current policy is to abide by the U.N. Convention Against Torture and 18 U.S.C. § 2340 to prohibit interrogation tactics that violate those instruments. For Guantánamo detainees, this should mean that many of the coercion tactics that were previously allowed under the August 2002 Memo's definition of torture are now prohibited. Considering the fact that the ICRC and other human rights organizations are keeping a close eye on detainee treatment,[335] it is likely that interrogation practices employed at Guantánamo Bay will now be kept in check.[336]

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333. *See Palliatives for Prisoners*, *supra* note 327 (stating that the new standard set out in the December 2004 Memo is "vague" and that it remains unclear whether any change in the actual treatment of prisoners will result); Polkonline.com, *What About Those Memos on Torture?* (Jan. 7, 2005), http://www.polkonline.com /stories/010705/opinion_torture.shtml ("[W]e should be pleased that the department finally came around to this even if it took more than two years . . . [although] [t]he drafters couldn't quite bring themselves to a flat-out prohibition of torture . . . .").

334. December 2004 Memo, *supra* note 311.

335. *See supra* note 325 and accompanying text.

336. Since the completion of this Note, reports of abuse taking place at Guantánamo Bay are still relatively common. Detainees have reportedly been shackled in a fetal position for twenty-four hours without food or water and left in their own excrement; one detainee was forced to wear a bra and to put a thong on his head, to stand naked in front of women, and dance with a male interrogator; interrogators several times have mishandled the Quran, including one incident where a Quran was thrown in a toilet; and a female interrogator smeared red ink on a captive's face after telling him it was menstrual blood. *See, e.g.*, Eisenburg & Burger, *supra* note 2; *U.S.: Guards, Detainees Mishandled Quran*, June 4, 2005, CNN.COM, http://www.cnn.com /2005/US/06/04/guantanamo.quran/index.html [hereinafter *Mishandled Quran*]; Peninsula Peace and Justice Center, Investigators Recommended Disciplining Gitmo Commander (July 13, 2005), http://peaceandjustice.org/ (search "search PPJC" for title of the article); Kathleen T. Rhem, *Alleged Guantanamo Abuse Did Not Rise to Level of 'Inhumane,'* AM. FORCES PRESS SERV. (July 13, 2005), http://www.dod.gov /news/Jul2005/20050713_2053.html.

In response to these reports and Amnesty International's scathing label of Guantánamo Bay as "the gulag of our times," the Bush Administration and the Department of Defense emphatically deny that the interrogation tactics constitute torture. *See* Irene Khan, 2005 Human Rights Report, Foreword, http://www.web.amnesty.org/report2005/message-eng (last visited Apr. 17, 2006); *see also Rights Group Leader Says U.S. Has Secret Jails*, June 6, 2005, CNN.COM,

D. *Synthesis of Protections Provided Under International Law*

Can customary international law, the ICCPR, and the U.N. Convention Against Torture be synthesized to provide a working system of rights that should be afforded Guantánamo detainees even if the Geneva Conventions do not apply? Looking to all three sources of international law, it is clear that torture is absolutely proscribed. Customary international law, as evidenced by consistent practice, the Universal Declaration of Human Rights, and Common Article 3 of the Geneva Conventions, dictates that a detaining power must exercise a general respect for human life by prohibiting the use of torture.[337] The ICCPR requires that detained persons be treated humanely and specifically states that "no one shall be subjected to torture."[338] Finally, the U.N. Convention Against Torture and 18 U.S.C. §§ 2340–2340A prohibit the use of torture, which is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."[339] The U.N. Convention is considered the principal instrument on torture, and as a result its definition is used by most scholars to define the types of conduct that are prohibited under the previously mentioned other sources of international law as well.[340]

In addition to the right to be free from torture, detainees who have been charged with a crime have the right to a trial under international law. The Universal Declaration of Human Rights provides that everyone charged with a crime is entitled "to a fair and public hearing by an independent and impartial tribunal."[341] Common Article 3 prohibits "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court."[342] The ICCPR specifically states that

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http://www.cnn.com/2005/US/06/05/amnesty.detainee/ (reporting that President Bush found the gulag-Guantánamo comparison "absurd"); Rhem, *supra* (reporting that the senior investigating officer on the abuse claims determined that the treatment did not "cross[ ] the threshold of being inhumane"). The Bush Administration continues to espouse this position despite the fact that investigators have found several violations of the Geneva Conventions at Guantánamo and Defense Secretary Rumsfeld has acknowledged that "some detainees have been mistreated, even 'grievously' at times." *See Mishandled Quran*, *supra*; Peninsula Peace and Justice Center, *supra*.

337. *See* discussion *supra* Part IV.A.

338. ICCPR, *supra* note 152, art. 7.

339. U.N. Convention Against Torture, *supra* note 153, art. 1; *see also* 18 U.S.C.A. §§ 2340–2340A (West 2000 & Supp. 2005).

340. Goldman, *supra* note 303, at 2.

341. Universal Declaration, *supra* note 161, at 73.

342. Geneva III, *supra* note 4, art. 3.

"[a]nyone arrested or detained on a criminal charge shall be . . . entitled to a trial . . . or to release."[343] Thus, both customary international law and the ICCPR—a ratified treaty—provide that detained persons must be granted a trial for the determination of any criminal charges against them.

As for whether due process protections should be extended in the course of the trial process, customary international law provides a general requirement that the accused receive a fair trial: the Universal Declaration provides for a presumption of innocence until proven guilty and also states that an accused shall have "all the guarantees necessary for his defens[e]."[344] Common Article 3 requires that a detainee be "afford[ed] all the judicial guarantees which are recognized as indispensable by civilized peoples."[345] The ICCPR expands these general provisions into a working and highly protective due process framework. Under Article 14, the accused must be presumed innocent until proven guilty, promptly informed of the charges against him, allowed to choose and communicate with counsel, tried without undue delay, have the right to cross-examination of witnesses and the right to refuse to testify, and be granted an appeal.[346]

International law clearly extends protections to detainees who have actually been charged with war crimes, but is there any protection for individuals who are being held indefinitely without formal charges because they allegedly pose a threat to national security? Article 9 of the ICCPR, discussed in detail previously, provides these individuals with some protection from arbitrary arrest and detention.[347] Article 9 does not forbid detention for national security purposes; however, it does require that a detainee be informed of the reason for his detention and that he be provided an opportunity to contest it.[348] The United States Supreme Court specifically addressed and affirmed that right in two cases brought by persons detained in the conflict with Afghanistan and as a result of the War on Terror.

343. ICCPR, *supra* note 152, art. 9(3).

344. Universal Declaration, *supra* note 161, at 73.

345. Geneva III, *supra* note 4, art. 3.

346. *See* discussion *supra* Part IV.B.3.

347. *See* discussion *supra* Part IV.B.2.

348. *See* ICCPR, *supra* note 152, art. 9; *see also* CARLSON & GISVOLD, *supra* note 207, at 84 ("This requirement of timely information ensures that persons in custody receive sufficient information to submit a well-founded challenge to their incarceration.").

V. U.S. DOMESTIC LAW: SUPREME COURT DECISIONS GIVE DETAINEES PROTECTION

On June 28, 2004, the Supreme Court announced three highly anticipated decisions addressing the rights of detainees being interned as a result of the conflict with Afghanistan or the War on Terror.[349] Two of the decisions, *Hamdi v. Rumsfeld*[350] and *Rasul v. Bush*,[351] are particularly pertinent to this discussion because they provide a framework of due process protections that must be afforded detainees under United States domestic law.[352] Admittedly, the Supreme Court left unanswered some of

349. *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

350. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

351. Rasul v. Bush, 542 U.S. 466 (2004).

352. Because it was reversed and remanded by the Supreme Court, the third case, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), was not incredibly pertinent to the topic of this Note at the time it was being written. Nevertheless, there have been developments in the case which should be discussed. In 2004, the Supreme Court held that the petitioner, an American citizen who was apprehended on American soil, filed his habeas corpus claim in the wrong place. *Id.* at 445–47. Instead of suing the President and the Defense Secretary in New York, Padilla should have sued the custodian of his internment facility in South Carolina. *Id.* at 446. Thus, the case was remanded for dismissal without prejudice so that Padilla could refile in the appropriate jurisdiction. *Id.* at 451. Padilla did refile in South Carolina and since this Note was written, the Fourth Circuit Court of Appeals issued a decision that has received quite a bit of media attention. *See* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, No. 05-533, 2006 WL 845383 (Apr. 3, 2006); *see also, e.g.*, Molly McDonough, *4th Circuit Wants Answers on Padilla*, A.B.A. J. EREPORT, Dec. 2, 2005, http://www.abanet.org/journal/ereport/d2padilla.html [hereinafter McDonough, *4th Circuit*].

In *Padilla v. Hanft*, the Fourth Circuit addressed "[t]he exceedingly important question" of whether the President has authority to detain American citizens as enemy combatants. *Padilla*, 423 F.3d at 389. The court held that the President does in fact possess such authority. *Id.* at 391–92. The court rejected Padilla's argument that the availability of the criminal justice system should disallow his indefinite detention as an enemy combatant. *Id.* at 394–95. The fact that a detainee is an American citizen and *could* be tried criminally "cannot be determinative of the [President's] power to detain" because the President's purpose for detaining people in the War on Terror differs greatly from the reasons for detention in the criminal system. *Id.*

The most important aspect of the Fourth Circuit's decision was its interpretation of *Hamdi.* The Fourth Circuit determined that *where* a detainee is captured—on United States soil or on the battlefield—*has no bearing whatsoever* on whether the President can hold the detainee as an enemy combatant. *See Padilla*, 423 F.3d at 393–94 (stating that the "locus of capture" is "irrelevant"). This clarifies *Hamdi* because in that case, the Supreme Court held that the President had properly detained an American citizen who had been *captured abroad*. *See Hamdi*, 542 U.S. at

the crucial questions regarding how the United States should deal with terrorists.[353] The Court was applauded, however, for "emphatically

517–18. In *Padilla*, the Fourth Circuit acknowledged that the locus of capture was part of the *context* of *Hamdi* but held that it was not essential to the *reasoning* of the decision. *Padilla*, 423 F.3d at 393. As the law stands right now, then, the President has the power to detain any American citizen, whether apprehended in the United States or on the battlefield, as an enemy combatant in the War on Terror.

Not surprisingly, various developments have occurred even since the Fourth Circuit's ruling. In a complete turnabout, the government asked the Fourth Circuit to vacate its opinion, the Attorney General indicted Padilla on criminal charges, and the President ordered Padilla to be released to federal civilian authorities. *See* Molly McDonough, *High Court Poised to Weigh Padilla Appeal*, A.B.A. J. EREPORT, Jan. 6, 2006, http://www.abanet.org/journal/ereport/j6padilla.html [hereinafter McDonough, *High Court*]; Molly McDonough, *Drop Enemy Combatant Ruling, DOJ Says*, A.B.A. J. EREPORT, Dec. 16, 2005, http://www.abanet.org /journal/ereport/d16padilla.html [hereinafter McDonough, *Drop Ruling*]; McDonough, *4th Circuit*, *supra*. Padilla, on the other hand, asked that the transfer from enemy combatant to civilian jurisdiction be delayed. *See* McDonough, *High Court*, *supra*. Why the "seeming reversal of roles"? *Id.* Both sides appeared to be making strategic moves either to prevent or encourage the Supreme Court to grant certiorari in the case. *Id.*; Molly McDonough, *Drop Ruling*, *supra*.

Padilla's case presented such important issues for the country that many thought the Supreme Court *had* to hear it. *See* McDonough, *High Court*, *supra* ("'[The] case presents an issue of . . . especial national importance . . . .'") (quoting J. Michael Luttig). Nevertheless, on April 3, 2006, the Court denied certiorari by a single vote. *See* David L. Hudson, Jr., *Padilla Decision Leaves Unanswered Questions*, A.B.A. J. EREPORT, Apr. 7, 2006, http://www.abanet.org /journal/ereport/a7padilla.html. In an "unusual" concurring opinion, Justice Kennedy, joined by Chief Justice Roberts and Justice Stevens, provided some explanation for the denial. *Padilla*, No. 05-533, 2006 WL 845383, at *1–2 (Kennedy, J., concurring); *see* Hudson, *supra*. Kennedy focused on the fact that Padilla was already scheduled to be tried on criminal charges in the federal system. *Padilla*, No. 05-533, 2006 WL 845383, at *1–2. Because Padilla was no longer classified as an enemy combatant, any ruling on the question of whether the President can hold United States citizens arrested in the United States as enemy combatants would be "hypothetical." *Id.* at *2. *But see id.* (Ginsburg, J., dissenting) (writing that the question was "of profound importance to the Nation" and should have been decided two years ago (quotation omitted)). Apparently the Administration's strategy to keep the case out of the Supreme Court had worked. Even so, the victory was not overwhelming. Kennedy also wrote that the "court would be in a position to rule quickly" if the government "change[d] the status of . . . Padilla's custody." *Id.* (Kennedy, J., concurring). The statement sends a clear message to the President not to change Padilla's status. *Id.*; *see* Hudson, *supra*; *see also Fox Special Report with Brit Hume* (Fox television broadcast Apr. 3, 2006), *available at* 2006 WLNR 5649652. It remains to be seen whether the opinion also will deter the President from classifying *additional* United States citizens as enemy combatants.

353. *See* Erwin Chemerinsky, *Three Decisions, One Big Victory for Civil Rights*, TRIAL, Sept. 2004, at 74, 77 (2004) ("These rulings certainly do not resolve all the crucial issues concerning civil liberties and the war on terrorism.").

[upholding] the rule of law and the rights of people detained as part of the war on terrorism."[354]

A. Hamdi v. Rumsfeld

In *Hamdi*, the Supreme Court held that a United States citizen who is apprehended on foreign soil and detained as an "'enemy combatant' has a right to challenge the factual basis for his detention."[355] The detainee in the case, Yaser Esam Hamdi, allegedly was a member of the Taliban during the United States' armed conflict with Afghanistan.[356] He was born in the United States and is an American citizen, although he was living in Afghanistan when he was seized by the Northern Alliance in 2001.[357] Upon being turned over to the United States military, Hamdi was initially detained at Guantánamo Bay and eventually transferred to a brig in South Carolina.[358] Hamdi's father filed a petition for writ of habeas corpus on his behalf, alleging that: (1) Hamdi's detention was not legally authorized because he was not being detained pursuant to an act of Congress; and (2) that as an American citizen, Hamdi could not be detained "without charges, access to an impartial tribunal, or assistance of counsel."[359]

The district court held that the government failed to provide a sufficient basis for denying Hamdi access to counsel.[360] The Fourth Circuit Court of Appeals reversed, holding that the President has the power to declare any person captured in any theater of military operations an enemy combatant,[361] and that Hamdi's status as an American citizen "d[id] not entitle him to a searching review of the factual determinations underlying his seizure."[362]

The Supreme Court, in turn, vacated and remanded the Fourth Circuit decision.[363] Justice O'Connor announced the judgment of the Court

354. *Id.* at 74.

355. Jinks & Sloss, *supra* note 2, at 100 (citing *Hamdi*, 542 U.S. at 533).

356. *Hamdi*, 542 U.S. at 510.

357. *Id.*

358. *Id.*

359. *Id.* at 511.

360. *See* Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 532 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507.

361. *See Hamdi*, 316 F.3d at 471–72, *vacated*, 542 U.S. 507 (noting that the courts should give great deference to the President when he acts under constitutional authority and makes decisions involving foreign policy and national security).

362. *Id.* at 475.

363. *See Hamdi*, 542 U.S. at 539.

and wrote the plurality opinion which was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer.[364] Two issues were before the Court: first, does the President have the authority to detain American citizens apprehended in a foreign country as "enemy combatants"?[365] Second, if the President has such authority, what due process protections must be afforded American citizens who dispute their enemy combatant status?[366]

With respect to the first issue, the Court did not determine whether the President, acting alone, has the power to detain American citizens captured abroad as enemy combatants.[367] Instead, the Court decided that the Authorization for the Use of Military Force, which Congress passed after September 11th,[368] constituted "explicit congressional authorization" for the President to detain members of the Taliban and al Qaeda—even if the detainees are American citizens.[369] In a separate opinion, Justice Thomas also concluded that the President has authority to detain American citizens as enemy combatants, but he determined that the President has inherent authority to do so pursuant to Article II of the Constitution.[370] Because five Justices ruled that the President has authority to detain American citizens captured abroad as enemy combatants, the

364. *Id.* at 509.

365. *Id.* at 516.

366. *See id.* at 524.

367. *See id.* at 516–17.

> The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the [Authorization for Use of Military Force].

Id.

368. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (enacted on Sept. 18, 2001).

369. *See Hamdi*, 542 U.S. at 518.

> [The detention of] individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for th[e] attacks, . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.

Id.

370. *See id.* at 579 (Thomas, J., dissenting).

Court went on to address the second issue.[371]

O'Connor held that in order to determine what due process protections should be extended to American citizens disputing their enemy combatant status, the private interest of the detainee should be weighed against the asserted governmental interest.[372] O'Connor acknowledged that Hamdi's private "interest in being free from physical detention" was at stake[373] and further recognized that "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real."[374] On the Government's side, O'Connor acknowledged there was a genuine interest in preventing enemy combatants from returning to the battlefield[375] and also took into account the Government's argument that affording detainees due process protections would unnecessarily burden the military during an armed conflict.[376]

O'Connor's opinion sets forth a "constitutional balance" that ensures citizen-detainees the following minimal due process protections: (1) a citizen-detainee who challenges his classification "must receive notice of the factual basis for his classification"; and (2) must be afforded "a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[377] This effectively means that American citizens who have been deemed enemy combatants have the right to challenge their classification, receive information about the reason for it, and are entitled to have the issue heard and determined by an unbiased decision-maker.[378] Additionally, the requirement that the detainee be given a "fair opportunity" to rebut his classification likely includes the right to assistance of counsel in the proceeding.[379]

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371. *See Hamdi*, 542 U.S. at 524–25 (plurality opinion); Chemerinsky, *supra* note 353, at 77.

372. *See Hamdi*, 542 U.S. at 529 (explaining that the appropriate analysis involves "weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process" (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976))).

373. *Id.*

374. *Id.* at 530.

375. *Id.* at 531.

376. *Id.* at 531–32.

377. *See id.* at 532–33 (acknowledging the importance of the decision for "the Nation during this period of ongoing combat").

378. *See id.*; *see also* Chemerinsky, *supra* note 353, at 77 ("Although the eight justices in the majority did not specify which procedures must be followed in Hamdi's case, they held explicitly that he must be given a meaningful factual hearing.").

379. *See Hamdi*, 542 U.S. at 539 (stating that Hamdi "unquestionably has the

It is important to note that these status hearings are probably not required to include "the full protections that accompany challenges to detentions in other settings."[380] Specifically, Justice O'Connor suggests that military tribunals could preside at the hearings rather than regularly constituted United States courts.[381] Relaxed rules of evidence, including the admission of hearsay, would also be appropriate.[382] Finally, the Government may not be required to bear the burden of proof: "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as th[e] presumption" is rebuttable and a fair opportunity for rebuttal is in fact extended to the detainee.[383] Justices Souter and Ginsburg, who concurred in the result, emphasized that they did not endorse O'Connor's suggestions that status hearings may be heard by military tribunals instead of an independent court or that the government could claim an evidentiary presumption at the hearing.[384]

In the final analysis of this case, it is clear that an American citizen apprehended on foreign soil and detained as an enemy combatant is entitled to contest the factual basis for his detention. Nonetheless, the Court did not reach a consensus on how the process of challenging detention will actually work in terms of the rules of evidence and the appropriate judicial body to preside over the case.

B. Rasul v. Bush

"In *Rasul*, the Court held that aliens imprisoned at Guantanamo Bay,

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right to access to counsel in connection with the proceedings on remand"); Chemerinsky, *supra* note 353, at 77 (writing that "[a]t a minimum," the meaningful factual hearing assured detainees in the plurality includes "the right to be represented by an attorney").

380. *Hamdi*, 542 U.S. at 535.

381. *See id.* at 538 ("There remains the possibility that the standards we have articulated could be met by [a] . . . military tribunal."). *But see id.* at 553–54 (Souter, J., concurring in part and dissenting in part) (writing that he does not intend to assert agreement with O'Connor's determination "that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas").

382. *See id.* at 533–34 (plurality opinion) ("Hearsay . . . may need to be accepted as the most reliable available evidence from the Government in [the] proceeding.").

383. *Id.* at 534.

384. *See id.* at 553 (Souter, J., concurring in part and dissenting in part) ("I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas." (citation omitted)).

Cuba . . . as 'enemy combatants' have a right of access to U.S. courts."[385] The case involved fourteen detainees being held at Guantánamo Bay who filed habeas corpus petitions in federal court in the District of Columbia.[386] They were "seeking to be informed of the charges against them, to be allowed to meet with . . . counsel, and to have access to the courts or some other impartial tribunal."[387] The detainees claimed that denial of these due process rights violated the United States Constitution, United States treaties, and international law.[388]

The Government initially moved to dismiss, contending that the federal courts lacked the authority to hear Guantánamo prisoners' habeas corpus petitions.[389] Agreeing with the Government, the district court dismissed for lack of jurisdiction.[390] In affirming the district court, the Court of Appeals relied on the *Johnson v. Eisentrager*[391] decision, in which the Supreme Court held "that the privilege of litigation" does not extend to aliens in military custody who have no presence in "any territory over which the United States is sovereign."[392] According to the District Court's analysis, no court in the United States has jurisdiction to hear the detainees' petitions because the United States does not possess sovereignty over Guantánamo Bay.[393] The Supreme Court granted certiorari to determine whether the habeas corpus statute grants detainees who are being held in a territory over which the United States does not exercise "'ultimate sovereignty'" the right to have the legality of their detention reviewed by a United States court.[394]

Writing for the majority, Justice Stevens first examined the federal habeas corpus statute, 28 U.S.C. § 2241.[395] It "grant[s] federal district courts, 'within their respective jurisdictions,'" the power to hear petitions from anyone "who claims to be held 'in custody in violation of the

385. Jinks & Sloss, *supra* note 2, at 100–01; Rasul v. Bush, 542 U.S. 466, 483–84 (2004).

386. *Rasul*, 542 U.S. at 470–72.

387. *Id.* at 472. *See generally* Ronald Dworkin, *What the Court Really Said*, N.Y. REV., Aug. 12, 2004, at 28 (summarizing the *Rasul* case).

388. *Rasul*, 542 U.S. at 472.

389. Rasul v. Bush, 215 F. Supp. 2d 55, 61 (D.D.C. 2002), *aff'd*, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, *Rasul*, 542 U.S. 466.

390. *See id.* at 72–73.

391. Johnson v. Eisentrager, 339 U.S. 763 (1950).

392. *Id.* at 777–78.

393. *See Rasul*, 215 F. Supp. 2d at 72–73.

394. *Rasul*, 542 U.S. at 475.

395. *Id.* at 473–75. *See generally* 28 U.S.C.A. § 2241 (West 1994 & Supp. 2005).

Constitution or laws or treaties of the United States.'"[396] Stevens noted the importance of the statute as a means of reviewing the legality of detention,[397] particularly in situations (including times of armed conflict) where the Executive has chosen to detain individuals without also extending them the right to a judicial trial.[398] As for the *Eisentrager* decision, the Court held that it was not controlling.[399] First, there were important factual differences between the two cases.[400] Second, the *Eisentrager* Court focused solely on the Constitution (rather than the habeas corpus statute) in making its determination that the detainees did not have a right to habeas review.[401]

Subsequent decisions more clearly address the issue of whether detainees have a statutory right under 28 U.S.C. § 2241 to have the legality of their detention reviewed by United States courts.[402] In *Braden v. 30th Judicial Circuit Court of Kentucky*,[403] the Supreme Court held that the determinative issue for purposes of the habeas corpus statute is not whether the *detainee* is being held within the territorial jurisdiction of the district court; rather, the issue is whether the detainee's *custodian* can be reached by the court for service of process.[404] Thus, the district court with

396. *Rasul*, 542 U.S. at 473 (quoting 28 U.S.C. § 2241(a), (c)(3)).

397. *See id.* at 473–75 ("'The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.'" (quoting Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring))).

398. *See id.* (noting that "'[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest'" (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001) (alteration in original))).

399. *See id.* at 476–77 (distinguishing *Eisentrager* and noting its unique facts and historical context).

400. *See id.* at 476 (noting that the "petitioners [are] differently situated from the *Eisentrager* detainees").

401. *See id.* ("[T]he Court in *Eisentrager* made quite clear that . . . its disposition [was] relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. The Court had far less to say on the question of the petitions' *statutory* entitlement to habeas review.").

402. *See id.* at 478 ("Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to 'fundamentals,' persons 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 review.").

403. Braden v. 30th Judicial Cir. Ct., 410 U.S. 484 (1973).

404. *See id.* at 495; *see also Rasul*, 542 U.S. at 478–79.

> [T]he prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus

appropriate jurisdiction is generally the one where the official responsible for the detainee is located. If the detention facility and the custodian are outside the physical borders of one of the fifty states, the Court must determine whether the location is under "'the territorial jurisdiction'" of the United States.[405]

Even though congressional legislation is not supposed to have effect outside the United States,[406] Justice Stevens did not agree that it would be an improper extension of the habeas corpus statute to provide Guantánamo detainees with the right to petition United States courts for habeas review.[407] Stevens held that the question of whether United States courts have jurisdiction to hear detainees' petitions depends on the level of control that the United States government exercises over the area where they are being held.[408] Consequently, the fact that the United States (1) exercises "'complete jurisdiction and control'" over Guantánamo Bay; (2) has express authority to do so pursuant to agreements with Cuba; and (3) may continue exercising such control permanently if it chooses[409] provides a sufficient level of U.S. "sovereignty" to allow enemy combatants who are not American citizens to contest their detention. "Aliens held at [Guantánamo Bay, like] American citizens, are entitled to invoke the federal courts' authority under § 2241."[410]

> does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process."

Id. (quoting *Braden*, 410 U.S. at 494–95).

405. *Id.* at 480 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)); *see also* Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains "the Power to Wage War Successfully*," 53 DRAKE L. REV. 851, 880–81 (2005) (stating that the limitation to *Rasul* is that only prisoners held in foreign locations where United States control is pervasive can apply for the writ; although the Court does not expressly list the locales to which its holding applies, it seems that the naval base at Cuba may be the only place to fit the Court's description).

406. *See* Kmiec, *supra* note 405, at 880 (recognizing "the longstanding principle of American law that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested" (quotation omitted)).

407. *See Rasul*, 542 U.S. at 480 ("Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." (quoting *Foley Bros., Inc.*, 336 U.S. at 285)).

408. *See id.*

409. *Id.*

410. *Id.* at 481.

C. *Interpreting the Decisions*

Two days after the *Hamdi* and *Rasul* decisions were handed down, the White House announced that it was moving to put a process in place for reviewing the status of Guantánamo detainees that would both "respect[] the concerns [of] the Supreme Court" and "the authority of the President to exercise his constitutional responsibility . . . . [to protect] the safety and security of the American people."[411] The hearings that the Government put in place a few weeks later are formally called "combatant status review tribunals."[412] As of November 2004, 320 detainees had appeared before the status tribunals; out of 104 final judgments, only one detainee was released.[413] The rest were found to have been properly deemed enemy combatants.[414]

These status tribunals have undergone extensive criticism because they are conducted by military personnel rather than an independent court, detainees are not given the right to counsel, and detainees are not provided access to much of the factual evidence being used to keep them in detention.[415] On the other hand, the Department of Defense continues to assert that the tribunals provide an appropriate venue and process for the "'detainees to meaningfully challenge their enemy combatant designation.'"[416] The District of Columbia is currently split on the issue:[417] one federal district court judge recently held that the system for reviewing

411. Press Briefing, The White House, Scott McClellan, Office of the Press Secretary (June 30, 2004), http://www.whitehouse.gov/news/releases/2004/06/20040630-2.html.

412. Lewis, *supra* note 84; *see also* Memorandum from the Sec'y of the Navy (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf (outlining the structure and procedural process of the status review tribunals).

413. Lewis, *supra* note 84. In its Second Report to the Committee Against Torture, issued subsequent to the writing of this Note, the State Department reported that final action had been taken in the 558 cases heard by the status review tribunals. SECOND PERIODIC REPORT, *supra* note 201, at 54; Dep't of Def., Combatant Status Review Tribunal Summary, http://www.defenselink.mil/news/Mar2005/d20050329 csrt.pdf (last visited Apr. 18, 2006). In total, thirty-eight detainees were found to no longer be enemy combatants—twenty-three had been released, and arrangements were being made to release the others. SECOND PERIODIC REPORT, *supra* note 201, at 54.

414. Lewis, *supra* note 84.

415. *Id.*; Bill Mears & Bob Franken, *Judge: Gitmo Detainees Can Challenge Detentions*, CNN, Feb. 2, 2005, http://www.cnn.com/2005/LAW/01/31/gitmo.ruling /index.html.

416. Mears & Franken, *supra* note 415 (quoting a Pentagon press officer).

417. *See generally* McDonough, *supra* note 240 (providing a comparison of the two cases).

detentions is adequate.[418] "[T]o the extent these non-resident detainees have rights, they are subject to . . . the military process already in place . . . ."[419] Less than two weeks later, another district court judge held that the combatant status review tribunals fail to comport with the requirements of due process because detainees are not provided lawyers and do not have access to the evidence against them.[420]

Will this question of whether the status review tribunals are affording detainees adequate due process protections be resolved? Experts suggest that this issue will yet again be before the Supreme Court for clarification in the near future.[421] What is clear, however, is that the United States is in

418. *See* Khalid v. Bush, 355 F. Supp. 2d 311, 328 (D.D.C. 2005) (explaining that it is not the judiciary's job to review detention decisions).

419. *Id.* at 330.

420. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 468, 481 (D.D.C. 2005).

421. *See, e.g.*, Mears & Franken, *supra* note 415 ("The issue of detainee rights is moving on several legal tracks that soon could find their way back to the Supreme Court."); McDonough, *supra* note 240 ("[L]egal experts only question how quickly this issue will be back before the U.S. Supreme Court.").

Although the validity of the detainee *status* tribunals has not yet been before the Supreme Court for further clarification, the validity of the military commissions—the war crimes trials—soon will be. The Supreme Court announced on November 7, 2005, that it will be granting certiorari in the case of *Hamdan v. Rumsfeld.* *See* Hamdan v. Rumsfeld, 126 S. Ct. 622 (2005) (mem.); G.M. Filisko, *Supreme Court to Review Military Tribunals*, A.B.A. J. EREPORT, Nov. 11, 2005, http://www.abanet.org/journal/ereport/n11terror.html. The district court that initially decided the case wrote a lengthy and stinging opinion which ultimately found the military commissions to be unlawful. *See generally* Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (2005) (mem.). The court disagreed with the Government's position that the United States is involved in separate conflicts with Afghanistan and al Qaeda and further disagreed that the Geneva Conventions do not provide protections for either the Taliban or al Qaeda detainees. *See id.* at 160–62. Judge James Robertson wrote that "United States courts are bound to give effect to international law and to international agreements of the United States," *id.* at 164, and, under the Geneva Conventions, Hamdan must be given the protections of a POW, *id.* at 162, unless and until he is deemed not to qualify as a POW by a competent tribunal, *id.* at 173. He further held that the status tribunals implemented by the President following the 2004 Supreme Court decisions are not competent tribunals to make that determination. *See id.* at 162 (writing that the status tribunals determine a prisoner's enemy combatant status, not whether the detainee qualifies as a prisoner of war under the Geneva Conventions). In light of the court's holding, it is clear that the President had overstepped his bounds. *See id.* at 172–73; *see also* Kathleen T. Rhem, *Government to Appeal Ruling That Halts Guantanamo Proceeding*, AM. FOREIGN PRESS SERV., Nov. 9, 2004, http://www.dod.gov/news/Nov2004/n11092004_2004110903.html. Hamdan should be tried in a court-

martial and afforded the normal due process protections that a military trial affords. *See Hamdan*, 344 F. Supp. 2d at 166–72. The fact that a detainee can be tried, convicted, and punished without even being present to hear the evidence against him is "a dramatic deviation from the confrontation clause" and constitutes a violation "of international humanitarian and human rights law." *Id.* at 168 (citing ICCPR, *supra* note 152, art. 14(d)(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75.4(e), 1125 U.N.T.S. 3, 1B I.L.M. 1391, 1424). The court order "enjoined the Secretary of Defense from conducting any further military commission proceedings against Hamdan." *Hamdan*, 415 F.3d at 36; *Hamdan*, 344 F. Supp. 2d at 173.

Needless to say, this dramatic decision put the executive branch in an interesting position. Should it halt all military commission proceedings or should it cite various sources for the President's constitutional authority to allow the commissions to continue? The President chose to suspend the commissions temporarily, "pending further review by the federal courts." Press Briefing, The White House, Scott McClellan, Office of the Press Secretary (June 20, 2005), http://www.whitehouse.gov/news/releases/2005/06/20050620-20.html. Ultimately, the court of appeals proved favorable to the President; the district court's decision was reversed. *Hamdan*, 415 F.3d at 44. Judge Randolph, who wrote the opinion, seemed disturbed by the lower court's decision: "We have difficulty understanding the [district] court's rationale." *Id.* at 41. According to the court of appeals, the President's power to evaluate the type of conflict and the applicable international law falls within his "'independent authority to act' in foreign affairs." *Id.* (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003)). Thus, President Bush's conclusion that the conflicts with Afghanistan and al Qaeda are separate and that the Geneva Conventions do not apply to detainees should prevail. Despite its ruling that the President's determination must be given deference, the court looked further at the merits of Hamdan's Geneva Convention claim. *Id.* at 42–43. Again, it agreed with the President: the conflict with al Qaeda does not readily fit under the definition of "armed conflict" as it is understood in the Geneva Conventions, and, even if it did, Hamdan would not be entitled to POW protections because members of al Qaeda "do not fit the Article 4 definition of a 'prisoner of war.'" *Id.* at 40–41. Because the Geneva Conventions are not applicable and detainees are not prisoners of war, the military commissions are lawful; the President does have authority, granted by Congress in the Authorization for Use of Military Force, to implement them. *See id.* at 37–38. Moreover, the *manner* in which Hamdan is tried by military commission, including concerns regarding due process, is not an issue that can be decided by civilian courts. *Id.* at 36–37, 42. "[C]omity would dictate that [the federal courts] defer to the ongoing military proceedings" for questions about how the commissions may try detainees. *Id.* at 42.

What is particularly interesting about the court of appeals opinion is its holding with respect to the federal courts and international law. *See id.* at 38–40. "[I]nternational agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Id.* at 39 (quotation omitted). Essentially, the court said that the responsibility for enforcing treaties lies with Congress, the President, and the military. So although the federal courts were granted power under *Rasul* to hear the detainees' habeas corpus claims, they cannot provide relief if the detainee's claim relies on an international

a quandary not only about what exact protections should be afforded detainees in the status review process, but about what other protections detainees should be afforded as well. This "quandary" is not a problem the Supreme Court alone can resolve.

VI. CONCLUSION

The United States has determined that the detainees being held at Guantánamo Bay, Cuba, do not qualify as "prisoners of war" under the Geneva Conventions.[422] Detainees who were members of the terrorist

treaty. *Contra Hamdan*, 344 F. Supp. 2d at 164 ("Treaties made under the authority of the United States are the supreme law of the land. United States courts are bound to give effect to international law and to international agreements of the United States . . . ." (citation omitted)). Consequently, the district court's ruling—a judgment that the Geneva Conventions should apply to Hamdan and an order that the military commission proceedings against him should therefore cease—was inappropriate. *See Hamdan*, 415 F.3d at 36, 38, 40, 42; *id.* at 44 (Williams, Sr. Cir. J., concurring). The federal courts of the United States do not have authority to enforce provisions of international treaties. *Id.* at 39–40 (majority opinion).

After the court of appeals decision was handed down in July of 2005, the Department of Defense reinstituted the military commission proceedings. *See* News Transcript, *supra* note 273. The executive branch may yet again be forced to put the commissions on hold, however, because the Supreme Court is set to hear arguments in this case starting in March 2006. Filisko, *supra.* According to David Vladeck, a professor at Georgetown Law School, "'[t]he Supreme Court, by the simple act of granting certiorari in this case, raises questions about the [court of appeals'] ruling.'" *Id.* "'If the Supreme Court thought it would uphold the [court of appeal]'s opinion, it's not . . . likely to have taken [the] case.'" *Id.* Other scholars are confident that the Court will take this opportunity to answer some of the questions not dealt with in the 2004 decisions. *See id.* (quoting one law professor who anticipates that the Court will clear up "'what the courts are supposed to do, what law they're supposed to apply, and the scope of the courts' involvement when the habeas petition is filed'").

It will be fascinating to see how the Supreme Court approaches this case. Will the Court rely on Congressional authorization for the President to create the military commissions? *See id.* Will it examine constitutional requirements in deciding whether the commissions provide adequate due process? *See id.* Will it go further and render judgments about the applicability of the Geneva Conventions to detainees? *See id.* And will it set precedent that allows federal courts to enforce international laws to which the United States is a party? *See id.* (suggesting issues the Supreme Court must resolve in this case). While scholars are not in agreement about how narrow or broad the Court's decision will be, it is evident that "the justices believe the federal judiciary has a role to play in this area." *Id.* With its separation of powers, constitutional due process, and international law implications, this case promises to be one of the most important the Supreme Court has heard in the past sixty years. *See id.* (suggesting vital issues the Court must address).

422. *See supra* Part III.B.

organization known as al Qaeda do not qualify as POWs because the Geneva Conventions are only applicable to "armed conflicts"—a term that does not include conflicts with terrorists.[423] While the Geneva Conventions *were* applicable to the armed conflict with Afghanistan, Taliban detainees have not been afforded POW status because they fail to meet certain requirements set out in Article 4 of Geneva III.[424] Because they have not been conferred POW status, both al Qaeda and Taliban detainees are ineligible to receive the important protections that the Geneva Conventions provide.[425]

Nevertheless, the Guantánamo detainees are not completely out of luck. Indeed, under international human rights laws—which apply to all persons at all times—the detainees must still be given certain minimum protections.[426] This means that the United States should be applying the protections provided by customary international law, the International Covenant on Civil and Political Rights, and the U.N. Convention Against Torture to the treatment of detainees being held at Guantánamo Bay.[427] After analyzing the various sources of international human rights law and the protections they provide, it is evident that the United States has not fully complied with its obligations under international law with respect to the treatment of detainees.[428] It seems that the United States is currently in compliance with the prohibition against torture;[429] however, other protections, especially those included in the ICCPR, are being extended only partially or not at all.[430]

In June of 2004, the United States Supreme Court ruled that citizen-detainees who have been classified as enemy combatants have the right to contest the factual basis for their classification.[431] Further, both American citizens and alien detainees being held at Guantánamo Bay can now petition United States federal courts for habeas corpus review.[432] Although the Supreme Court did not expressly reference the need to comply with treaties or other sources of international law, the August 2004 decisions are

423. *See supra* Parts II.A, III.B.3.
424. *See supra* Parts II.B.1–2, III.B.3.
425. *See supra* Part II.B.3.
426. *See supra* Part IV.
427. *See supra* Parts IV.A–C.
428. *See supra* Part IV.
429. *See supra* Part IV.C.2.
430. *See supra* Part IV.B.
431. *See supra* Part V.A.
432. *See supra* Part V.B.

a tentative step in the right direction—they certainly bring the United States more in line with the requirements of treaties it has ratified and, perhaps more importantly, with the expectations of the international community.

The Supreme Court decisions pertaining to detainees provide a very general framework of rights that the United States government must extend to prisoners being held at Guantánamo Bay; however, questions about the exact protections that must be provided cannot be effectively answered by the Court on a case-by-case basis. The judiciary's interpretive process would take too long and each holding would likely be seen as confined to the facts of the particular case. Moreover, the international community remains apprehensive as to how the United States is going to approach international law in general—an apprehension that is quickly affecting rapport, even with our allies. The international community wants to know whether the United States is going to ignore international treaties, including those governing human rights, whenever it determines that doing so is in the interest of national security.

As the leading and most powerful nation in the world, the United States needs to step up—and the quickest, cleanest, and least controversial way of reaching a consensus on this issue is for Congress to act.[433]

433. Apparently, Congress agreed: the Detainee Treatment Act of 2005, chiefly sponsored by Senator John McCain of Arizona, was added to both the Defense Authorization Act and the Defense Appropriations Act for 2006. *See supra* note 7; *see also, e.g.*, Donnelly, *supra* note 7; Rick Maze, *Detainee-Treatment Issue Delays Defense Bill*, ARMY TIMES, Dec. 13, 2005, http://www.armytimes.com/story.php?f=1-292925-1410597.php. The amendment met with the support of prominent Republicans (e.g., Colin Powell) and Democrats alike, ultimately passing in the Senate by a 90-9 vote. *See* Jim Angle et al., *Bush, McCain Reach Deal on 'Cruel, Inhuman' Treatment Ban*, FOX NEWS, Dec. 15, 2005, http://www.foxnews.com/story/0,2933,178822,00.html; Maze, *supra*; Fareed Zakaria, *Pssst . . . Nobody Loves a Torturer*, NEWSWEEK, Nov. 14, 2005, at 36, *available at* 2005 WLNR 18060305. The National Defense Authorization Act, which included the McCain Amendment, was passed in both the House and the Senate and cleared for the President's signature on Dec. 21, 2005. Donnelly, *supra* note 7.

The Administration initially vowed opposition to the amendment. *See* Angle et al., *supra*. Vice President Dick Cheney was described as being "uncharacteristically impassioned" during a closed-door November appeal to Republican senators; in his view, the amendment would "tie the President's hands and end up costing 'thousands of lives.'" Daniel Klaidman & Michael Isikoff, *Cheney in the Bunker*, NEWSWEEK, Nov. 14, 2005, at 30, *available at* 2005 WLNR 18060329. Despite the initial threats of veto, however, the President appears to have reconsidered. Angle et al., *supra*. This change of heart is likely due to the ever-increasing criticism of the President's enemy combatant detention policies and the fact that the window of opportunity for Congress to complete the 2006 defense bills before it adjourned for the

Legislation should be passed that adequately addresses the "complex mass of questions" posed by the (1) potentially lifelong detention (2) of foreign nationals (3) who are being detained on a military base (4) that is outside the total sovereignty of the United States (5) during an open-ended war.[434]

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year was quickly closing. *Id.*; Zakaria, *supra*.

On Thursday, December 16, 2005, the President and Senator John McCain announced they had reached an agreement on the amendment. *See* Angle et al., *supra*; Associated Press, *Detainee Treatment Deal Allows Congress to Act on Defense Bills*, FOX NEWS, Dec. 16, 2005, http://www.foxnews.com /story/0,2933,178906,00.html. According to the President, the amendment "will 'make it clear to the world that this government does not torture and that we adhere to the international convention of torture, whether it be here at home or abroad.'" Associated Press, *supra* (quoting President Bush).

The passage of the Detainee Treatment Act is an example of the progess, however slow, that the United States is making with respect to the treatment of Guantánamo detainees. The contents of the Act are analyzed in greater detail and with comparisons to the other international instruments discussed in this Note at footnote 434 below. *See infra* note 434. After looking closely, it is evident that the Act provides clarification on only a few issues and does little to ensure additional protections for detainees. *See infra* note 434. Nevertheless, the Act is not without merit. Its purpose is to send a clear message to the international community about the standards the United States will apply to the treatment of detainees in the War on Terror. *See* John M. Donnelly, *House May Skip Vote on Defense Authorization*, CONG. Q. TODAY, Dec. 13, 2005, http://www.roa.org/legislative_affairs /newsletter_details.asp?id=69. Whether those standards are in total compliance with customary international law and treaties is doubtful: it seems that neither the President nor Congress agree that human rights laws such as the ICCPR should apply to detainees—even though human rights protections are supposed to be enforced at all times. *See supra* note 149 and accompanying text. What is important is that Congress *has acted* on this issue. The treatment of detainees is no longer under the complete discretion of the President. Individual detainees will no longer have to go through lengthy court battles in order to have federal judges decide the exact perimeters for how enemy combatants should be treated. The international community no longer has to wait for the President to give a clear and consistent answer on this issue because the methods of interrogation and treatment have finally been codified (at least to some extent).

Although the Author is somewhat disappointed that the Act is not more detailed and that it does not take a stronger stance on the prohibition against torture, this is still a monumental step. And perhaps, for now, this Act is the *necessary* step in order for President Bush to effectively fight the War Against Terror. Perhaps the need to ensure the safety of Americans and the security of our Nation's borders in an era of unprecedented terrorism justifies treating detainees *almost* as if they are prisoners of war even though we are in a "war" that is not actually an "armed conflict."

434. *See Setting Rules for Detainees*, WASH. POST, Jan. 21, 2005, at A16.

As discussed in note 433, the Detainee Treatment Act contains an amendment that does address some of the pressing issues for detainees being held at Guantánamo Bay. The Detainee Act appears in both the National Defense

Authorization Act and the Department of Defense Appropriations Act; the section numbers referenced herein refer to the Detainee Act as it is numbered in the National Defense Authorization Act. Section 1403 of the Act provides that "[n]o individual in the custody or under the physical control of the United States Government . . . shall be subject to cruel, inhuman, or degrading treatment or punishment." Detainee Treatment Act, Pub. L. No. 109-163, § 1403(a), 119 Stat. 3136, 3475. "'[C]ruel, inhuman, or degrading treatment or punishment'" is defined as the "treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture." *Id.* § 1403(d), 119 Stat. at 3475. The term that is noticeably absent from the amendment is "torture." If Congress took the trouble to specifically legislate about the standards of treatment for detainees, why did it not include a prohibition against torture? The strategically political reason, clarified by President Bush, is that the Act is intended to affirm the fact that the United States *already* bans torture. *See* Angle et al., *supra* note 433 ("Bush made clear that the language [in the Act] is not about banning torture. That is something the United States already prohibits."). To pass an Act that bans torture would be cumulative (because the United States already adheres to the U.N. Convention Against Torture) and would send the wrong message. The international community might think that Congress decided to legislate because the government had actually been in the practice of torturing detainees.

Instead, the purpose of the bill is to further prohibit *other* kinds of treatment that do not reach the level of "torture."

> . . . [T]he Administration has held that the prohibition [against cruel, inhumane, and degrading treatment] does not legally apply to foreigners held overseas. They can, apparently, be treated inhumanely. This means that America is the only country in the world that asserts a legal right to engage in cruel and inhuman treatment. What this also means is that confusion about the rules becomes rampant again. With this simple amendment, we can restore clarity on a simple and fundamental question: Does America treat people inhumanely? My answer is no . . . .

Press Release, Senator John McCain, Statement of Senator John McCain Statement on Detainee Amendments on (1) the Army Field Manual and (2) Cruel, Inhumane, Degrading Treatment (Nov. 4, 2005), http://mccain.senate.gov/index.cfm ?fuseaction=Newscenter.ViewPressRelease&Content_id=1621. Military personnel may now only engage in treatment and interrogation techniques that are "authorized by and listed in the United States Army Field Manual on Intelligence Interrogation." Detainee Treatment Act, § 1402(a), 119 Stat. at 3475. Our soldiers must now adhere to what is supposed to be a bright line rule: if the Army Field Manual does not say you can do it, then you cannot. Senator John McCain is confident that this amendment will "cut down the significant level of confusion" about what is allowed and will prevent abuses like the ones reported at Abu Ghraib and Guantánamo. Press Release, Senator John McCain, *supra*. Whether the future of detainee treatment will be quite that rosy remains to be seen. Does this amendment really ban the types of conduct currently getting media attention and worldwide criticism? *See* discussion *supra* Part IV.C.2.

The scope of the Act may prove disappointing; it only bans treatment that is already prohibited by the Fifth, Eighth, and Fourteenth Amendments. *See* Detainee

Congressional legislation would provide the best possible blueprint of the American public's opinion on how and even whether the United States

Treatment Act, § 1403(d), 119 Stat. at 3475. Although Senator McCain compares his Act to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the U.N. Convention Against Torture, those international instruments likely provide a higher level of protection than what the United States Constitution affords. *See* Press Release, Senator John McCain, *supra*; *see also supra* notes 225–26 and accompanying text. Thus, the definition game is circular: the new Act bans cruel and degrading treatment or punishment that is prohibited by the United States Constitution and by the U.N. Convention Against Torture, including the U.S. Reservations to that Convention. Detainee Treatment Act, § 1403(d), 119 Stat. at 3475. The reservations to the U.N. Convention Against Torture provide that the United States adheres to the Convention only to the extent that certain treatment is prohibited by the U.S. Constitution. *See supra* notes 224–26 and accompanying text. Thus, this portion of the Act merely affirms standards of treatment set out in the Constitution and the U.N. Convention Against Torture that the United States had a responsibility to implement all along.

If that is the case, then does the amendment contain anything new? Although this is not a complete list of relevant provisions, there are several sections worth mentioning. First, § 1405(b)(1) requires status review tribunals to now assess "(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value, if any, of such statement." Detainee Treatment Act, § 1405(b), 119 Stat. at 3477. Whether a detainee was coerced or mistreated in interrogations must now be considered when determining the probity of statements or confessions that have bearing on enemy combatant status. Another provision provides government personnel with a defense in any lawsuit having to do with detention standards or interrogation techniques used on enemy combatants. *Id.* § 1404(a), 119 Stat. at 3475–76; Associated Press, *supra* note 433. "[I]t shall be a defense that such . . . agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." Detainee Treatment Act, § 1404(a), 119 Stat. at 3477–79. Finally, the amendment disallows traditional habeas corpus suits. H.R. 1815, 108th Cong. § 1405 (2005). Section 1405(e) limits the jurisdiction of domestic federal courts so that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." *Id.* Instead, detainees may now seek to have the legality of their detention reviewed by the Court of Appeals for the District of Columbia, but only after a status review tribunal has reached a final decision. *Id.* § 1405(e)(2), 119 Stat. at 3477–78.

The Detainee Act does not provide detailed instruction on the legality of detaining enemy combatants for indefinite periods of time or the appropriate laws to govern an open-ended war against terrorism. It does not provide a complete answer to the questions posed by a conflict that is unprecedented and that may not be manageable under traditional laws of war. Nevertheless, it will likely be strategic in removing some of the "tarnish" from our international image. The United States is finally trying to make "the terrible photos and stories of prison abuse . . . a thing of the past." Press Release, Senator John McCain, *supra*.

should protect terrorists.[435] It would also provide the international community with a long-awaited answer as to whether the United States agrees that international human rights laws are applicable to detainees.[436] Congress must legislate so that the United States can emerge from its current state of "legal fog"[437] with a national consensus on the appropriate treatment of detainees that will build confidence and cooperation both at home and abroad.

*Heather L. Rooney**

435. *See supra* note 433.

436. *See supra* note 433.

437. Michael Chertoff, *Why Is This Ball in Our Court?*, WALL ST. J., June 17, 2004, at A18.

* B.A., Evangel University, 2003; J.D. Candidate, Drake University Law School, 2006. I would like to thank my parents for their help and support in getting this Note finished. Mom, your role as proofreader in all my academic pursuits has finally paid off! Dad, the amount of research put into this Note could never have happened without our late-night printing sessions. Thank you also to Professor Hunter Clark for helping me develop my idea. Finally, I want to thank Kathryn Lindley and Adam McAuley: your benchmark was excellence, and for that you forever have my respect.