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International Law and United States Policy Issues Arising from the United States' Conflict with Al Qaeda

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INTERNATIONAL LAW AND UNITED STATES POLICY ISSUES ARISING FROM THE UNITED STATES' CONFLICT WITH AL QAEDA

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I. INTRODUCTION

This essay, a summary of remarks delivered at the 2010 Ben J. Altheimer Symposium at the University of Arkansas at Little Rock William H. Bowen School of Law on prisoners' rights, aims to outline some of the key issues in the debates over the rights of alleged terrorists detained in the United States' conflict with Al Qaeda. The detention practices implemented by the United States are governed by the text of relevant United States statutes and case law interpreting those texts.[1] In addition, courts may look to the international law of war; however, these laws do not have controlling force in United States courts.

In January 2010, the United States Court of Appeals for the D.C. Circuit decided *Al-Bihani v. Obama*.[2] The court held that "[t]he international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts."[3] The court reasoned that "[t]here is no indication in the [Authorization for Use of Military Force] AUMF,[4] the Detainee Treatment Act of 2005,[5] or the [Military Commissions Act] MCA of 2006 or 2009,[6] that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF."[7] Moreover, "[e]ven assuming Congress had at some earlier point implemented the laws of war as domestic law through appropriate legislation, Congress had the power to authorize the President in the AUMF and other later statutes to exceed those bounds."[8] In

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1. *See* Al-Bihani v. Obama, 590 F.3d 866, 871–72 (D.C. Cir. 2010).
2. *Id.* at 866.
3. *Id.* at 871 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3), (4) (1987)).
4. Pub. L. No. 107-40, 115 Stat. 224 (2001).
5. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2741–43 (2005).
6. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in part at 28 U.S.C. § 2241).
7. *Al-Bihani*, 590 F.3d at 871.
8. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987)).

addition, "the international laws of war are not a fixed code . . . ."[9] "Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers."[10] Therefore, according to recent precedent, United States detention law is separate and apart from the international law of war and is the only law that has controlling force in United States courts.

II. HOW DO WE DISTINGUISH BETWEEN DIFFERENT CLASSES OF DETAINEES?

A. International Law

International law recognizes three classes of detainees: prisoners of war (P.O.W.), protected persons, and others. Article 4 of the Third Geneva Convention sets forth the requirements for prisoner of war status, and the list is exhaustive.[11] "Protected persons" is defined by Article 4 of the Fourth Geneva Convention as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[12] Paragraph 2 of Article 4 excludes from this definition nationals of a co-belligerent state. In addition, nationals of neutral states in the home territory of a party to the conflict, so long as the neutral state "has normal diplomatic representation in the state in whose hands they are."[13] This exclusion does not apply to nationals of neutral states who find themselves in occupied territory.[14] Such individuals qualify as protected persons irrespective of the status of diplomatic relations between their state of nationality and the "state in whose hands they are."[15]

There is limited guidance in the Third Geneva Convention regarding status determinations.

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9. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b, c (1987) (stating there is "no precise formula" to identify a practice as custom and that "[i]t is often difficult to determine when [a custom's] transformation into law has taken place")).

10. *Id.* (citing Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (O'Connor, J., plurality)).

11. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention, P.O.W.s].

12. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug.12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention, Civilian Protection].

13. *Id.*

14. *Id.*

15. *See id.*

> [Article 5] directs that should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories in Article 4 [the applicable article regarding the persons covered by the Third Geneva Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[16]

This rule is subject to manipulation on two fronts: It does not stipulate which person or entity is entitled to make the decision whether there is any doubt, and it lacks detail about the nature of the tribunal that will make the status determination in cases of doubt.[17]

> Article 45 of Additional Protocol I provides some additional detail regarding status determination. First, it allows the detained person, or the state party on whom he depends . . . to claim prisoner of war status, thereby allowing him or her to raise the issue and require a tribunal to be held before the status could be denied. Second, Article 45 grants any individual being tried for an offense arising from hostilities the right to litigate the issue of his or her entitlement to prisoner of war status . . . before a "judicial tribunal." Finally, it provides that even if prisoner of war status is denied, the individual is still entitled to protections of Article 75 of Additional Protocol I, which applies to all persons detained in connection with an armed conflict subject to Additional Protocol I.[18]

However, Additional Protocol I is subject to the same manipulation as the Third Geneva Convention because it too fails to "provide any detail regarding the nature of the tribunal or the procedure it is to follow in making status determinations."[19]

B. United States Law and Policy

Although the United States has not ratified Additional Protocol I, it has implemented Article 5 of the Third Geneva Convention in a manner that provides more due process protections than is required by the Third Geneva Convention or Additional Protocol I.[20] United States law differentiates be-

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16. James A. Schoettler, Jr., *Detention of Combatants and the Global War on Terror*, *in* MICHAEL W. LEWIS, THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 67, 87 (2009) (citing Geneva Convention, P.O.W.s, *supra* note 11).

17. *See id.*

18. *See id.* at 88 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977) [hereinafter Protocol] ("Article 75 ensure[s] that the detained individual [still] retains certain protections under international law even if he or she is determined to be a combatant who is not entitled to be treated as a prisoner of war")).

19. *Id.* at 89 (citing Protocol, *supra* note 18, at art. 45).

20. *Id.* at 90.

tween lawful and unlawful enemy combatants. Those persons falling within the former category are afforded P.O.W. status and the protections of the Third Geneva Convention.[21] The MCA of 2006 defines unlawful combatant as:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[22]

This definition "indicate[s] that persons who materially support a terrorist group need not actually commit belligerent acts in order to be treated as enemy combatants."[23] Those persons falling within this category are not afforded the protections provided by the Geneva Conventions.[24] For the purposes of determining whether members of al Qaeda and other terrorist groups should be treated as combatants, the United States has adopted a broad definition that includes persons who are either "part of or supporting forces hostile to the United States or its coalition partners and engaged in an armed conflict against the United States."[25] "This definition has been adopted by United States courts in evaluating combatant status determinations."[26]

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21. Memorandum from William J. Haynes II, United States Dep't of Def., Gen. Counsel, to Members of the ASIL-CFR Roundtable (Dec. 12, 2002), *available at* http://www.cfr.org/publication/5312/enemy_combatants.html [hereinafter Haynes Memorandum].

22. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948q(a)(1)–(2), 120 Stat. 26000 (codified in part at 28 U.S.C. § 2241).

23. Schoettler, Jr., *supra* note 16, at 80.

24. Haynes Memorandum, *supra* note 21.

25. Schoettler, Jr., *supra* note 16, at 79 (citing Hamdi v. Rumsfeld, 543 U.S. 507, 517 (2004) (O'Connor, J., plurality)).

26. *Id.* (citing Boumediene v. Bush, 583 F. Supp. 2d 133 (D.C. 2008) (setting forth combatant definition for use in habeas corpus proceedings)).

III. PROCESS OF DETENTION

A. International Law

Under the Geneva Conventions, a State may detain an individual who is either a prisoner of war,[27] protected person,[28] or other combatant. According to international human rights law, a state may detain an individual as a security detainee, so long as the grounds for detention are not arbitrary and are based on grounds previously established by law.[29]

Whether a detainee may challenge his detention depends on the detainee's status. For prisoners of war, there is no express requirement under the Third Geneva Convention to allow for an opportunity to appeal status determinations or to provide any subsequent review of whether continued detention is necessary.[30] If the detainee is a civilian detainee, then the Fourth Geneva Convention requires that he be permitted to appeal his detention, with such appeal to be decided "with the least possible delay."[31] Further, if the decision to detain is upheld, "it shall be subject to periodical review, if possible every six (6) months, by a competent body set up by the [Occupying] Power."[32]

B. United States Law

The power to detain cannot be narrower than the power of a military commission to prosecute.[33] The AUMF authorizes the President to "use all

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27. *See* Geneva Convention, P.O.W.s, *supra* note 11, at art. 21.

28. *See* Geneva Convention, Civilian Protection, *supra* note 12, at art. 42.

29. Doug Cassel, *International Human Rights Law and Security Detention*, 40 CASE W. RES. J. INT'L L. 383, 384 (2009). Professor Cassel derived the elements of the IHRL consensus on security detention, in part, from (1) International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M 368, (Dec. 16, 1966); (2) Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/180 (Dec. 12, 1948); and (3) Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, G.A. Res., 39/46, at 197, U.N. GAOR, 93d plen. mtg., (Dec. 10, 1984). *Id.* at 385.

30. Schoettler, Jr., *supra* note 16, at 85 (citing Geneva Convention, Civilian Protection, *supra* note 12, at art. 5).

31. *Id.* (citing Geneva Convention, Civilian Protection, *supra* note 12, at art. 5).

32. *Id.* (citing Geneva Convention, Civilian Protection, *supra* note 12, at art. 5). A similar right can be found in Article 43, regarding alien enemies detained in a State's home territory.

33. In fact, this power is probably broader. *See also* Schoettler, Jr., *supra* note 16, at 80–81 (citing Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, re: Guantanamo Bay Detainee Litigation, Misc. No. 08-422, 5–6 (TFH) (Mar. 13, 2009) (arguing that the authorization of force granted in the AUMF necessarily includes the authority to detain under the law of war and reasoning that this authority permits the detention of anyone who was "part of" the groups targeted by

necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[34] In *Hamdi*, the Supreme Court of the United States held that "necessary and appropriate force," includes the power to detain combatants subject to such force.[35]

In 2006, Congress provided guidance on the class of persons subject to detention under the AUMF by defining "unlawful enemy combatants" who can be tried by military commissions as

> those who are engaged in hostilities or who [have] purposefully and materially supported hostilities or who [have] purposefully and materially supported hostilities against the United States or its co-belligerents who [are] not lawful enemy combatant[s] (including [persons] who [are] part of the Taliban, al Qaeda, or associated forces).[36]

In 2009, Congress enacted a new version of the MCA with a new definition that authorized the trial of "unprivileged enemy belligerents," which includes those persons who "purposefully and materially supported hostilities against the United States or its coalition partners."[37] Therefore, under United States detention law, the President, at minimum, has the power to detain those persons whom military commissions have the power to prosecute under MCA 2006 and 2009.

Whether a detainee may invoke habeas to challenge his detention depends on the detainee's nationality, where he committed his crimes, and the type of detention facility in which he is being held. In *Hirota v. MacArthur*, the Supreme Court held that habeas jurisdiction does not exist where the detainees are foreign nationals who are held by a foreign military tribunal—even where the tribunal was set up, in part, by the United States.[38] Conversely, in *Munaf v. Geren*, the Supreme Court held that habeas jurisdiction exists

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the AUMF just as the law of war permits detention of any member of an enemy armed force)).

34. Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (citing Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

35. *Id.* at 872 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (O'Connor, J., plurality)).

36. *Id.* at 872 (citing Military Commissions Act of 2006, Pub. L. No. 109-366, § 948a(1)(A)(i), 120 Stat. 2600 (codified in part at 28 U.S.C. § 2241)).

37. *Id.* (citing Military Commissions Act of 2009 sec. 1802, §§ 948a(7), 948b(a), 948(c), Pub. L. No. 111-84, tit.18, 123 Stat. 2190, 2575–76).

38. 338 U.S. 197, 198 (1948). The military tribunal set up in Japan by General MacArthur, as the agent of the Allied powers, is not a tribunal of the United States and the courts of the United States have no power or authority to review, affirm, set aside, or annul the judgments and sentences imposed by it on these petitioners, all of whom are residents and citizens of Japan. *Id.*

under section 2241(c)(1) of title 28 of the United States Code, where the detainees are American citizens, held by American forces, who answer only to an American chain of command.[39] However, the detainees at issue were found not to be entitled to habeas relief.[40] The Court reasoned that Iraq had a sovereign right to prosecute the detainees for crimes allegedly committed in Iraq and habeas could not be used to defeat the criminal jurisdiction of a foreign sovereign.[41] This was held to be true even if application of that sovereign's laws would allegedly violate the United States Constitution.[42] Lastly, the Court held that the detainees' claims that their transfer to Iraqi custody would likely result in torture presented a matter for the political branches, not the judiciary.[43]

IV. RELEASE OF DETAINEES

A. International Law

Under the international laws of war, the point in time at which a detainee must be released depends on the detainee's status. If the capturing state concludes that an individual is an enemy combatant, he or she can be held until the end of hostilities.[44] Conversely, if the detaining state determines that the detainee is a civilian, there is no authority under the Geneva Conventions for his indefinite detention.[45] Rather, detention may only continue as long as the situation requires, consistent with the security of the detaining state.[46] Moreover, the detainee must be granted a right of periodic appeal to determine if detention is still required.[47]

B. United States Law

According to *Ludecke v. Watkins*, the determination of when hostilities have ceased is a political decision.[48] In the absence of an authoritative congressional declaration purporting to terminate the war, the courts will defer to the Executive's opinion on the matter.[49] In *Al-Bihani v. Obama*, the D.C.

39. 553 U.S. 674, 674–75 (2008).
40. *Id.* at 688.
41. *Id.* at 690–91.
42. *Id.* at 691–92.
43. *Id.* at 697.
44. Schoettler, Jr., *supra* note 16, at 86.
45. *Id.* at 86 (citing Geneva Convention, Civilian Protection, *supra* note 12, at art. 5, 42, & 78).
46. *Id.*
47. *Id.* (citing Geneva Convention, Civilian Protection, *supra* note 12, at art. 78).
48. 335 U.S. 160, 168–69 & n.14 (1948).
49. Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010).

Circuit rejected petitioner's argument that, in the absence of an express Presidential pronouncement that a war was ongoing, *Ludecke v. Watkins* should not be applied.[50] The D.C. Circuit went on to hold that denying the protections of the Third Geneva Convention to a detainee entitled to P.O.W. status does not strip the United States of its authority to detain him.[51] The court reasoned that "the AUMF, DTA, and MCA of 2006 and 2009 do not hinge the government's detention authority on proper identification of P.O.W.s or compliance with international law in general."[52] In fact, in a provision that was unaltered by the MCA of 2009, the MCA of 2006 explicitly precludes detainees from claiming the Geneva conventions as a source of rights.[53]

V. CONCLUSIONS REGARDING UNITED STATES COMPLIANCE WITH INTERNATIONAL LAW

The question of whether United States courts are bound by international law depends on a number of factors. As a result, significant debate surrounds whether and to what extent United States foreign detention practice is consistent with international detention law. Some argue that the United States practice is inconsistent with the international laws governing detention, particularly European detention practice.[54] According to these commentators, if security detention is to be allowed at all, it should only be permitted by derogation from international law standards.[55] Thus, the standard that should be applied to security detention should be no less than a preponderance of the evidence.[56] In this circumstance, security detention is not preferred, and therefore, if it is to be allowed, "its use [should] be kept to an absolute minimum and subjected to rigorous and redundant procedural safeguards."[57]

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50. *Id.* at 875. ("A clear statement requirement is at odds with the wide deference the judiciary is obliged to give to the democratic branches with regard to questions concerning national security. In the absence of a determination by the political branches that hostilities in Afghanistan have ceased, [the defendant's] continued detention is justified.").

51. *Id.*

52. *Id.*

53. *Id.* (citing Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(a), 120 Stat. 26000 (codified in part at 28 U.S.C. § 2241)). The court goes on to say that, although Justice Souter's separate opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 553 (Souter, J., concurring in part, dissenting in part, and concurring in judgment), does discuss a "clean hands" theory, this theory finds no support in law.

54. Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811, 817 (2008).

55. *Id.* at 851.

56. *Id.*

57. *Id.* at 852.

Others argue for limiting the current United States detention methods by noting that the United States government has only avoided applying the law by misnaming those being held as detainees.[58] For example, according to Professor Honigsberg, the United States government unilaterally redefined international humanitarian law (as expressed by the Geneva Conventions) by renaming lawful and unlawful combatants as "enemy combatants" after 9/11 to avoid providing such combatants with certain protections.[59] Honigsberg highlights that the government has proliferated inconsistent definitions of "enemy combatant," beginning with the introduction of the term in 2002, up until the MCA, for the first time, statutorily defined the term.[60] Finally, Honigsberg concludes that the government conceived the term "enemy combatant" specifically to avoid accepted norms and standards of international and constitutional law; thus, current United States detention practice is not only out of sync with international law, but also with its own.[61]

Despite these arguments, security detention persists and detainees are still referred to as "enemy combatants." Therefore, at least for the time being, the administration appears satisfied that its procedures are either consistent with international law or international law need not be strictly applied to the "new" circumstance of alleged terrorists.

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58. Peter Jan Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1, 1–6 (2007).

59. *Id.* at 22–46.

60. *Id.* at 46–70 (reviewing letters and memoranda issued by Pentagon Counsel William J. Haynes II, documents and publications issued by the DOD, and reports, orders, and statements issued by the Bush administration along with the administration's reliance on *Ex Parte* Quirin and the Court's failure to impact the legitimacy and application of the term in *Hamdi* and *Hamdan*).

61. *Id.* at 70–73.