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Are The 1949 Geneva Conventions Self-Executing Treaties For Purposes Of Challenges To Military Commissions Procedures?

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CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
UNITED STATES DEPARTMENT OF DEFENSE

ISSUE #3: ARE THE 1949 GENEVA CONVENTIONS SELF-EXECUTING
TREATIES FOR PURPOSES OF CHALLENGES TO MILITARY COMMISSIONS
PROCEDURES?

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UNITED STATES CONSTITUTION

38. U.S. Const. art. 6, cl.2.

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

On September 11, 2001, the United States of American was successfully attacked by al-Qaeda terrorists in a manner that most people would never have anticipated.¹ That day, the United States government recognized it must dismantle al-Qaeda and prevent others from supporting al-Qaeda, and other terrorist groups, to prevent future attacks upon U.S. citizens. The rogue Taliban government was one group that supported al-Qaeda by hosting the terrorist group in Afghanistan. By late 2001, the United States had mobilized its troops to enter Afghanistan with the purpose of capturing al-Qaeda and Taliban individuals who had supported the 9-11 terrorists directly or by association.² As a result of this effort, 751 individuals suspected of terrorist acts have been detained at the United States Naval Base at Guantanamo Bay, Cuba.³ The United States has organized military commissions in order to try these detainees for their attacks against the United States and her citizens.

In 1950, the United States Supreme Court held in *Johnson v. Eisentrager*,⁴ that the 1929 Geneva Conventions were not self-executing treaties and therefore not applicable by U.S. courts in habeas challenges to U.S. military commissions from World War II. Since that time, lower federal courts have split their rulings as to whether the 1949 Geneva Conventions are self-executing or not. This memorandum will address

¹ Paul Thompson, *Complete 911 Timeline: Open-Content Project*, Center for Cooperative Research, at www.cooperativeresearch.org/project (accessed on Mar. 6, 2004) [hereinafter *Thompson Complete*].

² See Department of Defense, *Operation Enduring Freedom – Deployments*, available at www.globalsecurity.org/military/ops/enduring-freedom_deploy.htm (accessed on April 10, 2005).

³ Department of Defense, *Guantanamo Bay Detainees Legal Updates*, available at www.globalsecurity.org/military/facility/guantanamo-bay_legal.htm (accessed on Mar. 12, 2005) [hereinafter *Detainees Legal Update*] [Reproduced in the accompanying notebook at Tab 8]. As of March 29, 2005, there are 520 detainees and 231 individuals who have either been transferred into the custody of another nation or released. *Id.*; James M. McGarrah, *Combatant Status Review Tribunal Summary*, March 29, 2005, available at www.defenselink.mil/news/Mar2005/d20050329csrt.pdf [hereinafter *CSRT Summary*] [Reproduced in the accompanying notebook at Tab 9].

⁴ *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936 (1950) [Reproduced in the accompanying notebook at Tab 15].

whether the 1949 Geneva Conventions, in particular the Third and Fourth Geneva Conventions,⁵ are self-executing treaties for purposes of challenging these recent military commission procedures.

A. Issues

The answer to this main question is that while the 1949 Geneva Conventions may be self-executing, they do not apply for the purpose of challenging these recent military commission procedures. This memorandum will lead to that conclusion by addressing the following sub-issues:

1. What is the difference between a self-executing treaty and an executory treaty?
2. What is the status of the detainees? Are they prisoners of war? Are they soldiers of a foreign army? Are they enemy combatants? Are they unlawful combatants?
3. Is the current situation different from past detainee and military commission situations?
4. How should detainees at Guantanamo Bay be dealt with? Can they be prosecuted?

B. Summary of Conclusions

1. United States case law has a consistent stance on the distinction between the terms self-executing and executory. In order for a treaty to afford

⁵ The Fourth Geneva Convention was signed in 1949 and reaffirmed the Third Geneva Convention. About, *Geneva Conventions: Geneva Conventions Relative to the Treatment of Prisoners of War*, available at usmilitary.about.com (accessed on Mar. 12, 2005) [hereinafter *About Geneva Conventions*]; Convention concerning the Treatment of Prisoners of War, Aug. 12, 1949 [hereinafter *Geneva III*] [Reproduced in the accompanying notebook at Tab 27]; Convention concerning the Protection of Civilian Persons in Time of War, Aug. 12, 1949 [hereinafter *Geneva IV*] [Reproduced in the accompanying notebook at Tab 28].

individuals rights against a signatory, it must be a self-executing treaty. This memorandum will show that the 1949 Geneva Conventions were not intended to be self-executing and that they are not. Therefore, detainees are not entitled to private actions under the 1949 Geneva Conventions. These Conventions are only enforceable upon the United States by a Nation-State, not individuals.

2. The detainees held at Guantanamo Bay are not prisoners of war, soldiers of a foreign army, nor enemy combatants. They are unlawful combatants. It is important to determine this status in order to determine the rights of the detainees. Even if the 1949 Geneva Conventions granted protections for prisoners of war, under United States control, the Conventions do not protect these illegal combatants.
3. The post-9-11 detainee situation is very different from past situations. As just stated, the detainees in this case are not soldiers of a foreign enemy. They are not citizens of the United States.⁶ These differences lead to the detainees not having the right to challenge the authority of the current military commissions.
4. As a result of the above conclusions, the detainees at Guantanamo Bay may be prosecuted for crimes against humanity under United States law.

⁶ Only two U.S. citizens were being detained at Guantanamo Bay, Yaser E. Hamdi and Jose Padilla. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), cert. 378 F.3d 426 (C.A.4. 2004) [Reproduced in the accompanying notebook at Tab 16]; *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004) (No. 03-10277) Hamdi was released in October 2004, on the condition of giving up U.S. citizen ship, moving to Saudi Arabia where he is also a citizen, and not leave there for a period of time. Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free "Enemy Combatant,"* N.Y. Times, Sept. 23, 2004, at A1. In February 2005, a federal judge ordered the government to either charge or release Padilla. Associated Press, *Padilla must be released or charged, federal judge rules*, MSNBC, Feb. 28, 2005, available at www.msnbc.msn.com/id/7047710/.

Addressing the prior sub-issues are all ways of determining how to deal with unlawful combatants in an age without international laws that directly address how they should be dealt with, what their rights are, and how nations may protect their citizens from such unlawful combatants. In the past few years, nations have shown their confusion concerning how they are legally permitted to protect their citizens from these unlawful combatants. The U.N. Charter and Geneva Conventions were written in a day when nations waged war against other nations. Today, individuals are attacking nations and not abiding by any of the laws in the Charter or Conventions. On the other hand, nations are being criticized and often incorrectly held to the standards of these documents when dealing with unlawful combatants. There is a need for new developments in international law that will close this gap and allow nations to protect their people from unlawful combatants without being improperly criticized for their actions. Once the main issue is answered through thorough analysis, this paper will make a recommendation on how to deal with unlawful combatants in the future.

II. FACTUAL BACKGROUND

At 8:46am on September 11, 2001 (“9-11”), the world stood still,⁷ until it shook again 16 minutes later.⁸ Then, the world stood still in shock again. These were the moments when two commercial planes, which had been hijacked by terrorists, were flown into the World Trade Center’s Twin Towers in New York City. These terrorists

⁷ At 8:46 AM, Flight 11 hit the North Tower of the World Trade Center. Paul Thompson, *Complete 911 Timeline: American Airlines Flight 11*, Center for Cooperative Research, at www.cooperativeresearch.org/timeline (accessed on Mar. 6, 2004) [Reproduced in the accompanying notebook at Tab 32].

⁸ At 9:02 AM, Flight 175 hit the South Tower of the World Trade Center. Paul Thompson, *Complete 911 Timeline: United Airlines Flight 175*, Center for Cooperative Research at www.cooperativeresearch.org/timeline (accessed on Mar. 6, 2004) [Reproduced in the accompanying notebook at Tab 33].

were later identified as members of the terrorist network al-Qaeda, which is led by Osama bin-Laden.

A. President's Military Order

On September 14, 2001, President George W. Bush declared a state of national emergency.⁹ On November 13, 2001, President Bush issued a Military Order (“the Order”) outlining (1) the government’s strategy for detaining “terrorists”, (2) a definition of who is subject to the Order, and (3) the authority to try detained individuals in a military tribunal.¹⁰ Aspects of the Order that are important for purposes of this memorandum are the following:

1. Section 2 of the Order defines individuals subject to the

Order as:

any individual who is *not a United States citizen* with respect to whom [the President] determine[s] from time to time in writing that:

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

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

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

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) [above]; and

⁹ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) [Reproduced in the accompanying notebook at Tab 1].

¹⁰ Exec. Order No. 222, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [Reproduced in the accompanying notebook at Tab 2].

(2) it is in the interest of the United States that such individual be subject to [the Order]” (emphasis added);¹¹

2. Those targeted for detention are called *terrorists*, not *enemy combatants* nor *captured soldiers of a foreign army*;
3. These terrorists are to be *detained*, not *arrested* like common criminals;
4. Section 7 of the Order states that:
 - (a) Nothing in this order shall be construed to—
 - (1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;
 - (2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or
 - (3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.
 - (b) With respect to any individual subject to this order—
 - (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
 - (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.
 - (c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments,

¹¹ *Id.*

agencies, or other entities, its officers or employees,
or any other person.¹²

These aspects will be discussed later in this memorandum. The first aspect is important because it defines who the U.S. government is targeting for detention at Guantanamo Bay. The second and third aspects are important because the classification of detainees plays a role in the rights to which they are entitled. The fourth aspect is important because it presumes the 1949 Geneva Conventions are not applicable for these individuals.

B. Congressional Hearings

The President's definitions were broad and unclear, however, the Congressional Hearings held in November and December of 2001 added even more complexity to the issues above.¹³ In Assistant Secretary of State Paul Wolfowitz's testimony, he stated that "[t]his is not a law enforcement action; it is war."¹⁴ Additionally, he called the terrorists "war criminals." Using these war terms grants efficacy to the terrorists as if they are soldiers of a nation equal to the United States. In the testimony of Attorney General John Ashcroft, he used the terms "enemy" and "wartime."¹⁵ In the testimony of Assistant Attorney General Michael Chertoff, he stated that we are "at war" and the 9-11 terrorists committed "war crimes."¹⁶ Pierre-Richard Prosper, the Ambassador-at-Large for War

¹² *Id.*

¹³ *Military Commissions*, at www.cnss.org/militarytribunals.htm (accessed on Mar. 5, 2005).

¹⁴ Congressional Hearings and Statements on the Defending American Freedoms and the Role of Military Commissions Before the Senate Armed Services Committee, 107th Cong. (2001) (testimony of Paul D. Wolfowitz, Assistant Secretary of Defense, U.S.) *available at* www.cnss.org/wolfowitzstmt.htm [hereinafter *Wolfowitz Testimony*] [Reproduced in the accompanying notebook at Tab 4]. Wolfowitz testified on behalf of himself and Secretary of State Donald Rumsfeld. *Id.*

¹⁵ Congressional Hearings and Statements on the Defending American Freedoms and the Role of Military Commissions Before the Senate Judiciary Committee, 107th Cong. (2001) (testimony of John Ashcroft, Attorney General, U.S.) *available at* www.cnss.org/ashcroftstmt.htm [Reproduced in the accompanying notebook at Tab 5].

¹⁶ Congressional Hearings and Statements on the Defending American Freedoms and the Role of Military Commissions Before the Senate Judiciary Committee, 107th Cong. (2001) (testimony of Michael Chertoff,

Crimes Issues, stated in his testimony that “we must call these attacks by their rightful name: war crimes.” Prosper also stated “... military commissions are empowered to try violations of the law of war, their jurisdiction is dependent upon the existence of an armed conflict, which we have.” He further states that “[a] decade’s worth of hostile statements by Bin Laden over and over and over again state that he is at war against the United States.”¹⁷ Prosper’s statements best exemplify the confusion in terminology among United States government officials. Prosper’s statements about Bin Laden are befitting a nation’s leader, not the leader of a terrorist organization. Terms such as “war” and “war crimes” give terrorist more legitimacy than they are entitled. This will be discussed in more depth later in this memorandum.

Prosper may have made the worst terminology blunder among those who testified before Congress, however, part of his testimony was the most accurate. Prosper stated that “the conduct of al Qaida cannot be considered ordinary domestic crimes, and the perpetrators are not common criminals.” This statement articulated the situation more accurately than Prosper’s statements above. According to the Third Geneva Convention, individuals who wage “war” become unlawful combatants.¹⁸ Prosper was also in alignment with the Third Geneva Convention when he stated the opposite circumstance, that “[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces.” Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals

Assistant Attorney General Criminal Division, Department of Justice) *available at* www.cnss.org/chertoff.htm [Reproduced in the accompanying notebook at Tab 6].

¹⁷ Congressional Hearings and Statements on the Defending American Freedoms and the Role of Military Commissions Before the Senate Judiciary Committee, 107th Cong. (2001) (testimony of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, U.S. Department of State) *available at* www.cnss.org/prosper.htm [hereinafter *Prosper*] [Reproduced in the accompanying notebook at Tab 7].

¹⁸ *Geneva III*, *supra* note 5 [Reproduced in the accompanying notebook at Tab 27].

for acts which render their belligerency unlawful.”¹⁹ These statements will also be discussed later in the section on the detainees’ status.

C. National Security Strategy

On September 23, 2002, the President published the National Security Strategy for the United States of America, which attempted to clarify the strategy.²⁰ However, instead of making statements like Prosper that call the detainees *unlawful combatants* and declare this is a *war unlike any other*, the President continued to call the United States’ actions against terrorists a “war on terrorism” and called the terrorists “enemies.”²¹ Again, these terms complicate the determination of the detainees’ rights.

In order to properly determine the rights of the detainees, based on their status, we must first look at the facts of their detention. As part of the National Security Strategy, the President stated declared:

To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and vigorous efforts to cut off terrorist financing. The war against terrorists of global reach is a global enterprise of uncertain duration. America will help nations that need our assistance in combating terror. And America will hold to account nations that are compromised by terror, including those who harbor terrorists—because the allies of terror are the enemies of civilization. The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn.²²

¹⁹ *Id.*

²⁰ The White House, *The National Security Strategy of the United States of America*, Sept. 23, 2002, available at www.whitehouse.gov/nsc/nss.html [Reproduced in the accompanying notebook at Tab 3].

²¹ *Id.*

²² *Id.*

In furtherance of this Strategy, the United States launched an attack in self-defense²³ on the illegal Taliban government of Afghanistan²⁴ and the al-Qaeda networking that was being hosted in Afghanistan and assisted by the Taliban. Taliban and al-Qaeda members captured in Afghanistan by the United States were transported to the United States Naval Base at Guantanamo Bay, Cuba. By default, all detainees at Guantanamo Bay, were classified by the United States as “enemy combatants.”²⁵ Additionally, the U.S. government captured individuals within the United States who were suspected of having links to al-Qaeda. These people were also sent to Guantanamo Bay, under the same classification.

i. Guantanamo Bay Conditions

Since 9-11, there have been 751 individuals detained at Guantanamo Bay,²⁶ from 43 countries.²⁷ As of March 29, 2005, there are 520 detainees.²⁸ The detention center, called Camp Delta, was not complete upon arrive of the detainees.²⁹ Once a detainee arrived, he was issued an orange jump, a pair of sandals, towels and personal grooming

²³ S.C. Res. 1368, U.N. SCOR, 55th Sess., at 1, U.N. Doc. SC/7143 (2001) [Reproduced in the accompanying notebook at Tab 29]; Jack M. Beard, *The Presidency and Building a Coalition to Wage a War on al Qaeda and the Taliban Regime*, White House Studies, Spring 2004, available at http://www.findarticles.com/p/articles/mi_m0KVD/is_2_4/ai_n12417301 [Reproduced in the accompanying notebook at Tab 34].

²⁴ This memorandum will discuss below the illegal nature of the Taliban regime and the fact that it was essentially never a recognized government. Michael C. Dorf, *What is an “Unlawful Combatant,” and Why it Matters: the Status of Detained Al Qaeda and Taliban Fighters*, Jan. 23, 2002 [hereinafter *Unlawful Combatant*] [Reproduced in the accompanying notebook at Tab 35].

²⁵ *Detainees Legal Update*, supra note 3 [Reproduced in the accompanying notebook at Tab 8].

²⁶ *Id.*

²⁷ Interview by Jeffrey Kaye with Army Maj. Gen. Geoffrey Miller, Commander of the joint military task force that runs the Guantanamo Bay detention center, U.S. Army, Guantanamo Bay, Cuba (Jan. 22, 2003), available at www.pbs.org/newshour/bb/military/jan-june03/detainees_1-22.html [hereinafter *Miller Update*]. Currently, there should detainees from only 42 countries, as the last of seven French detainees was transferred into French custody on Mar. 7, 2005. *Detainees Legal Update*, supra note 2 [Reproduced in the accompanying notebook at Tab 8].

²⁸ *CSRT Summary*, supra note 3 [Reproduced in the accompanying notebook at Tab 9]. As of March 29, 2005, there are 520 detainees and 231 individuals who have either been transferred into the custody of another nation or released. *Id.*; *Detainees Legal Update*, supra note 2 [Reproduced in the accompanying notebook at Tab 8].

²⁹ *Miller Update*, supra note 27.

items, such as shampoo and conditioner.³⁰ Detainees are housed with units that are approximately eight-by-seven feet. Each unit contains a Koran, a marker pointing towards Mecca, a flushing toilet, a washbasin, and a metal bed with a mattress, sheets and blankets.³¹ Detainees are given 20-minute recreational periods every day. Additionally, detainees are served food that is prepared in accordance with Muslim religious requirements and is of Middle Eastern flavor.³² Further, a Muslim chaplain and medical care has been provided.³³

ii. Detain-Release-Transfer Update

As of July 7, 2004, the United States government has identified 15 detainees who are subject to the Military Commission, which is being established there under the authority of a person appointed by the Secretary of Defense.³⁴ One hundred sixty-three detainees have been released and sixty-eight have been transferred to the control of other governments.³⁵ For purposes of this memorandum, the term Detainee(s) means all non-United States citizens detained at Guantanamo Bay.

III. LEGAL ANALYSIS

In order to determine what rights detainees are entitled to, it must be determined what international or domestic law applies to these detainees. In order to determine this, we must look first at whether or not the 1949 Geneva Conventions are accessible to any detainees held by the United States. Second, we must determine if these Conventions

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Detainees Legal Update*, *supra* note 3 [Reproduced in the accompanying notebook at Tab 8].

³⁵ *CSRT Summary*, *supra* note 3 [Reproduced in the accompanying notebook at Tab 9]; News Release, U.S. Department of Defense, Detainee Transfer Announced, (Mar. 12, 2005) (on file with U.S. Department of Defense) [Reproduced in the accompanying notebook at Tab 10]. Transfers to other governments are as follows: 30 to Pakistan, 9 to Great Britain, 7 to France, 7 to Russia, 5 to Morocco, 4 to Saudi Arabia, 1 to Spain, 1 to Sweden, 1 to Kuwait, 1 to Australia, 1 to Afghanistan, and 1 to Maldives. *Id.*

apply to the Taliban and al-Qaeda detainees held at Guantanamo Bay. Third, we must determine what aspect of the 1949 Conventions would apply to these detainees, if any.

A. Self-Executing Treaty v. Executory Treaty

A key issue of whether or not the 1949 Geneva Conventions are accessible to the detainees is whether they are self-executing or executory treaties. An executory treaty operates as a contract, in which one or more parties agree to perform a particular act.³⁶ The treaty is then sent to the legislative branch, not the judiciary.³⁷ In order for the treaty to become a rule of law for the courts to use and interpret, the legislature must first execute the treaty, or contract.³⁸ A self-executing treaty is one that operates without the aid of any legislative provision.³⁹ A self-executing treaty has the weight of an act of Congress; it acts basically like a statute.⁴⁰ Such a treaty is binding upon the state and federal courts, as the supreme law of the land.⁴¹ While a nation state may be bound by a self-executing or an executed executory treaty in relation to other nation states, a nation state is only bound to a treaty in its actions towards individuals if the treaty is self-executing.⁴²

³⁶ Flores v. State, 994 P.2d 782 (Okla. Crim. App. 1999); People v. Ghent, 43 Cal.3d 739, 239 Cal.Rptr. 82 (Cal. 1987).

³⁷ *Id.*

³⁸ U.S. v. Arredondo, 31 U.S. 691, 8 L. Ed. 547 (1832).

³⁹ Bacardi Corporation of America v. Domenech, 311 U.S. 150, 61 S. Ct. 219, 85 L. Ed. 98 (1940); State v. Stepansky, 761 So.2d 1027 (Fla. 2000) [Reproduced in the accompanying notebook at Tab 17].

⁴⁰ U.S. Const. art. 6, cl. 2 [Reproduced in the accompanying notebook at Tab 38]; Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (Cal. 1952) [Reproduced in the accompanying notebook at Tab 18].

⁴¹ Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197, 112 N.W. 395 (1907); In re Zalewski's Estate, 292 N.Y. 332, 55 N.E.2d 184, 157 A.L.R. 87 (1994).

⁴² American Baptist Churches in the U.S.A. v. Meese, 712 F.Supp. 756, (N.D. Cal. 1989) [Reproduced in the accompanying notebook at Tab 19]; Asakura v. City of Seattle, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924), opinion amended, 44 S.Ct. 634 (U.S. 1924).

Whether or not a treaty is self-executing is a matter of judicial interpretation.⁴³ At least four factors are considered when courts are determining whether a treaty is self-executing or not. Those four factors are:

- (1) The purposes of treaty and objectives of its creators;
- (2) The existence of domestic procedures and institutions appropriate for direct implementation;
- (3) The availability and feasibility of alternative enforcement methods; and
- (4) The immediate and long-range social consequences of self or non-self-execution.⁴⁴

B. History Through Case Law

Before evaluating whether the 1949 Geneva Conventions are self-executing for purposes of detainees held and military commissions at Guantanamo Bay, it is helpful to review the many cases throughout American history in which U.S. courts have evaluated whether or not different treaties are self-executing. In *Johnson v. Eisentrager*, the U.S. Supreme Court evaluated the rights of German soldiers captured by the U.S. for continuing to fight against the U.S. in China, after the German army had already surrendered.⁴⁵ The *Eisentrager* court held that the 1929 Geneva Conventions were not self-executing.⁴⁶ These soldiers, called “enemy aliens,” were captured in China, tried in Nanking by a U.S. military tribunal, and sentenced in Germany. The *Eisentrager* court found that the 1929 Geneva Conventions clause on notice to the protecting power of a disciplinary trial and the clause that states that sentencing of a POW must be the same as it would be for member of the detaining power only pertained to punishment for actions

⁴³ *Sei Fujii*, 38 Cal.2d 718 [Reproduced in the accompanying notebook at Tab 18].

⁴⁴ *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 41 U.C.C. Rep. Serv. 1178 (9th Cir. 1985), cert. dismissed, 479 U.S. 957, 107 S. Ct. 450, 93 L. Ed. 2d 397 (1986) [Reproduced in the accompanying notebook at Tab 20]; *Air Transport Ass'n of America v. City of Los Angeles*, 844 F. Supp. 550 (C.D. Cal. 1994).

⁴⁵ *Eisentrager*, 339 U.S. 763 [Reproduced in the accompanying notebook at Tab 15].

⁴⁶ *Generally Id.*

committed while in custody, not for actions committed prior to custody.⁴⁷ This decision was based partially on a then-recent decision, in which the U.S. Supreme Court held that the District Court for the District of Columbia lacked jurisdiction to hear the habeas claims of German aliens detained at Ellis Island for deportation, because the habeas statute’s phrase “within their respective jurisdictions” required the detainees be within the United States’ territorial jurisdiction.⁴⁸

In 1973, the U.S. Supreme Court held in *Braden v. 30th Judicial Circuit Court of Kentucky* that prisoners’ presence within the territorial jurisdiction of the distinct court is not “an invariable prerequisite” for the distinct court to hear a habeas claim. This court held that the writ of habeas corpus actually acts upon the person holding the prisoner in what is alleged to be unlawful custody, instead of the prisoner himself, as long as the custodian can be reached by service of process.⁴⁹ This reversal of *Ahrens* was based on advancements since *Ahrens* in 1948.⁵⁰ Justice Rehnquist wrote a dissenting opinion, with which Chief Justice Burger and Justice Powell joined.⁵¹ In his dissent, Rehnquist stated that the court went beyond its interpretive role and acted for Congress in updating the law. He noted that Congress had not enacted legislation overruling *Ahrens* and that

subsequent ‘developments’ are simply irrelevant to the judicial task of ascertaining the legislative intent of Congress in providing, in 1867, that federal district courts may issue writs of habeas corpus ‘within their respective jurisdictions’ for prisoners in the custody of state authorities.⁵²

⁴⁷ *Id.* at 789-790.

⁴⁸ *Ahrens v. Clark*, 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948) [Reproduced in the accompanying notebook at Tab 21].

⁴⁹ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) [Reproduced in the accompanying notebook at Tab 22].

⁵⁰ *Id.* at 497.

⁵¹ *Id.* at 502 (Rehnquist, J., dissenting).

⁵² *Id.*

In a 1989 case in which El Salvadorians and Guatemalans were seeking refuge in the United States during a time of non-international conflict, the Northern District of California held that the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War was not self-executing and thus does not confer any rights on private litigants.⁵³ Additionally, in 1996, the Northern District of Illinois held that the 1949 Geneva Conventions are not self-executing and, as such, the Republic of New Afrika which defined its borders as those of the United States and wanted to overthrow the government was not provided a basis for the enforcement of private rights in domestic courts for people who were not prisoners of war.⁵⁴

Although a D.C. Circuit Court held that a federal court had no jurisdiction to hear the petitions of non-citizens captured aboard during hostilities in Afghanistan and held in U.S. military custody in Guantanamo Bay, Cuba, in 2003,⁵⁵ this was overturned in 2004 by *Rasul v. Bush*.⁵⁶ The U.S. Supreme Court held in *Rasul* that district courts could hear habeas challenges by aliens held at Guantanamo Bay, granting them private rights, as aliens.⁵⁷ In making this determination, the Court distinguishes *Rasul* from *Eisentrager*. The *Rasul* court states that *Eisentrager* was determined based on six critical factors:

The German prisoners were (a) enemy aliens who (b) had never been or resided in the United States, (c) were captured outside U.S. territory and there held in military custody, (d) were there tried and convicted by the military

⁵³ *American Baptist Churches*, 712 F.Supp. 756 [Reproduced in the accompanying notebook at Tab 19].

⁵⁴ *U.S. v. Fort*, 921 F.Supp 523,(N.D. Ill. 1996) [Reproduced in the accompanying notebook at Tab 23]. Republic of New Afrika was not granted private right to 1949 Geneva Conventions or Protocol I in domestic courts.

⁵⁵ *Al Odah v. U.S.*, 321 F.3d 1134, 192 A.L.R. Fed. 775 (D.C. Cir. 2003), cert. granted, 124 S.Ct. 524 (U.S. 2003) and cert. granted in part, 124 S.Ct. 534 (U.S. 2003) [Reproduced in the accompanying notebook at Tab 24].

⁵⁶ *Rasul v. Bush*, 124 S.Ct. 534 (U.S. 2004) [Reproduced in the accompanying notebook at Tab 25].

⁵⁷ *Id.*

(e) for offenses committed there, and (f) were imprisoned there at all times.⁵⁸

The *Rasul* Court claims its circumstances are different in that its claimants: (a) are not nationals of countries at war with the United States, (b) deny that they engaged in or plotted acts of aggression against the U.S., (c) have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing, and (d) for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.⁵⁹ While *Rasul* makes this distinction and grants habeas, it does not determine whether or not the 1949 conventions are self-executing.

The most recent case on this matter is *Hamdan v. Rumsfeld*, which was decided on November 8, 2004.⁶⁰ In this case, the District Court for the District of Columbia held that Hamdan, an “enemy combatant” held at Guantanamo Bay, has a right to be heard on habeas in district courts.⁶¹ The court also held that the Third Geneva Convention on the Treatment of Prisoners of War is self-executing and that Hamdan is entitled to its protections, as a prisoner of war.⁶² Further, the court found that the “Third Geneva Convention applied to all persons detained in Afghanistan during hostilities there.”⁶³ Overall, this court equated capture in Afghanistan with being an enemy combatant, who the Court feels is entitled to POW status under the Third Geneva Convention.

⁵⁸ *Id.* at 2688 (citing *Eisentrager*).

⁵⁹ *Rasul*, 124 S.Ct. at 2688 [Reproduced in the accompanying notebook at Tab 25]. On June 28, 2004, *Padilla* and *Hamdi* were also decided. These two cases involve U.S. citizens held at Guantanamo Bay. They will not be discussed here since they are moot in the discussion of non-citizen detainees at Guantanamo Bay. *Padilla*, 124 S.Ct. 2711; *Hamdi*, 124 S.Ct. 2633 Reproduced in the accompanying notebook at Tab 16].

⁶⁰ *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, D.D.C. (Nov. 8, 2004) (No. CIV.A.04-1519 JR), cert. requested [Reproduced in the accompanying notebook at Tab 26].

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Further, the Court held that the President's determination that al-Qaeda members were not POWs under the Geneva Conventions was not completely legitimate because it was not determined by a "competent tribunal."⁶⁴ The court did state that enemy combatants could be tried for war crimes with which they were charged, but only by court-martial convened under the Uniform Code of Military Justice (UCMJ), unless or until a competent tribunal determined that combatant was not entitled to prisoner of war status.⁶⁵

The court's rationale for determining the Third Geneva Convention is self-executing was the following: (1) the Geneva Conventions were written to protect individuals, (2) the Executive Branch implemented Geneva Conventions for 50 years without questioning absence of implementing legislation, (3) Congress clearly understood that Conventions did not require implementing legislation except in few specific areas, and (4) nothing in Third Geneva Convention itself manifested contracting parties' intention that it not become effective as domestic law without enactment of implementing legislation.⁶⁶

Hamdan carries the authority of the U.S. Supreme Court in saying that the Third Geneva Convention is self-executing and that detainees held at Guantanamo Bay are POWs entitled to protection under that Convention. At the same time, the trail of case law shows that the Fourth Geneva Convention is not self-executing.⁶⁷ The U.S.

⁶⁴ *Id.*

⁶⁵ *Id.*; UCMJ, Art. 21, 10 U.S.C.A. § 821; 32 C.F.R. §§ 9.2, 11.5(g).

⁶⁶ *Hamdan* 344 F.Supp.2d 152 [Reproduced in the accompanying notebook at Tab 26]; U.S. CONST. art. VI, § 2; Restatement (Third) of Foreign Relations Law § 111.

⁶⁷ *Geneva IV*, *supra* note 5. [Reproduced in the accompanying notebook at Tab 28].

government is appealing the *Hamdan* decision,⁶⁸ and this memorandum will show why the *Hamdan* holding was incorrect and why the government should pursue its appeal.

C. Refuting *Hamdan*

The *Hamdan* Opinion was based on facts and rational that this memorandum will show were wrong, whereby the Third Geneva Convention would not to be self-executing and the detainees should not be classified as POWs, thus the detainees would not entitled to protection under the Third Geneva Convention.

First, the court was not correct that the U.S. government has operated as if the Geneva Conventions was self-executing over the past 50 years. The cases discussed above, which were decided before *Hamdan*, show the government's many attempts to prove the Geneva Conventions are not self-executing. The 1989 and 1996 cases in California and Illinois even stated that the 1949 Geneva Conventions are not self-executing.⁶⁹

Second, the *Hamdan* court was also incorrect in its classification of the detainees. As will be shown below, the detainees are not enemy combatants nor soldiers of a foreign army. The detainees are unlawful combatants, and as such do not qualify for prisoner of war status. Therefore, they do not qualify for protection as POWs under the Third Geneva Convention.⁷⁰

Third, the court claims that the government has not determined the status of detainees by a "competent tribunal."⁷¹ On July 7, 2004, the government established the

⁶⁸ *Detainees Legal Updates*, *supra* note 3 [Reproduced in the accompanying notebook at Tab 8].

⁶⁹ *American Baptist Churches*, 712 F.Supp. 756 [Reproduced in the accompanying notebook at Tab 19]; *U.S. v. Fort*, 921 F.Supp 523 (N.D. Ill. 1996) [Reproduced in the accompanying notebook at Tab 23].

⁷⁰ *Geneva III*, *supra* note 5 [Reproduced in the accompanying notebook at Tab 27].

⁷¹ *Hamdan* 344 F.Supp.2d 152 [Reproduced in the accompanying notebook at Tab 26].

Combatant Status Review Tribunal (“CSRT”).⁷² The purpose of the CSRT is to give the detainees a chance to challenge their status as “enemy combatants.”⁷³ This process was designed to meet the U.S. Supreme Court’s guidelines for due process for detainees as laid out in *Hamdi v. Rumsfeld*, which involved an American citizen held as a detainee.⁷⁴ The *Hamdi* court held that providing notice of the factual basis for a detainee’s classification and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker would satisfy due process requirements for depriving someone of life, liberty or property rights.⁷⁵ Additionally, the *Hamdi* court stated that it is possible to satisfy these standards via a military tribunal,⁷⁶ specifically citing Army Regulation 190-8 as standards that should satisfy the requirement.⁷⁷ As such, the CSRT were designed with this in mind.⁷⁸

The proof that the government has not operated as if the Geneva Conventions are self-executing was presented above. Therefore, the correct detainee classification will be discussed next, followed by a discussion of the CSRT.

⁷² Memorandum from Deputy Secretary of Defense Paul Wolfowitz, to the Secretary of the Navy (July 7, 2004) (on file with the Department of Defense), *available at* www.defenselink.mil/news/Jul2004/d20040707review.pdf [hereinafter *Wolfowitz Memo to Navy*] [Reproduced in the accompanying notebook at Tab 11].

⁷³ *Id.*

⁷⁴ Department of Defense, *Factsheet: Combatant Status Review Tribunals*, July 7, 2004, *available at* <http://www.globalsecurity.org/security/library/policy/dod/d20040707factsheet.pdf> [hereinafter *Factsheet: CSRT*] [Reproduced in the accompanying notebook at Tab 12].

⁷⁵ *Hamdi*, 124 S.Ct. 2648 [Reproduced in the accompanying notebook at Tab 16].

⁷⁶ *Id.* at 2651.

⁷⁷ *Id.*

⁷⁸ *Factsheet: CSRT*, *supra* note 74 [Reproduced in the accompanying notebook at Tab 12]. “The tribunals established under [Army Regulation 190-8] are relatively informal and occur without counsel or a personal representative. The process is a streamlined process designed to allow for expeditious determinations; in citing it, the Court recognized the military’s need for flexibility and indicated that the process might provide all that was needed even for a citizen. Even in a traditional conflict, such a hearing is not provided to everyone who is detained, but only in cases of doubt as to the basis for detention.” *Id.*

D. Detainee Status

It is very important to determine the status of the detainees, because this will impact their rights. Depending on their status, the detainees may be entitled to protection under the 1949 Geneva Conventions.⁷⁹ A Prisoner of War (“POW”) is entitled to the rights contained in the Third Geneva Convention.⁸⁰ Therefore, we must first determine if the detainees are Prisoners of War. In order to be classified as a POW a detainee must be a lawful combatant or a non-combatant.⁸¹

i. Lawful Combatants

1. Uniformed Armed Forces

In order to be a lawful combatant an individual must be a member of an armed force of a party to a conflict or another party to a conflict which is recognized by international law. All of the following are armed forces: (1) organized armed forces, (2) organized armed forces groups, (3) organized armed forces units, (4) militias integrated into armed forces, and (5) voluntary corps integrated into armed forces.⁸² These armed forces must be (1) under a command responsible to that party for the conduct of its subordinates and (2) subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.⁸³

⁷⁹ The 1949 Geneva Conventions are the Third Geneva Convention on the Treatment of Prisoners of War and the Fourth Geneva Convention on the Law and Customs of War on Land. *Geneva III*, *supra* note 5 [Reproduced in the accompanying notebook at Tab 27]; *Geneva IV*, *supra* note 5 [Reproduced in the accompanying notebook at Tab 28].

⁸⁰ *Generally Geneva III*, *supra* note 5 [Reproduced in the accompanying notebook at Tab 27].

⁸¹ *Id.* at art. 4.

⁸² *Id.* at art. 4, para. 1-2.

⁸³ Protocol Additional to the Geneva Conventions of 12 August 1949, and concerning the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, art. 43, para. 1 [hereinafter *Protocol I*] [Reproduced in the accompanying notebook at Tab 30].

Lawful combatants have a duty to distinguish themselves from civilians during attacks.⁸⁴ One way a combatant can distinguish himself is by wearing a uniform. Among states, this is the generally agreed method for members of regular armed forces to distinguish themselves.⁸⁵

Members of the Taliban could not fall under the criteria of category of being members of an army of a state because the Taliban government was never the recognized government of Afghanistan. It was never recognized by the United Nations nor the United States and only a few nations ever established formal diplomatic relations with the regime.⁸⁶ Even if the Taliban were a recognized government and they could show there was a formal command structure in place, they would not meet the second criteria of having an internal disciplinary system that enforced compliance with the rule of international law in armed conflict. Under international law, lawful combatants must distinguish themselves from the civilian population in order to prevent attacks upon civilian populations.⁸⁷ The Taliban members fought without distinguishing themselves from the civilian population and even hid military equipment among the civilian population.⁸⁸ Therefore, Taliban fighters cannot qualify as POWs under this definition.

Al-Qaeda is comprised of people from many nations who join together to attack civilian populations.⁸⁹ As such, al-Qaeda fighters are not members of a national army either. Even if they were members of a national army, the very nature of their purpose is a clear violation of international law. This purpose is outlined in Osama Bin Laden's

⁸⁴ *Id.* at art. 44, para. 3.

⁸⁵ *Id.* at art. 44, para. 7.

⁸⁶ *Unlawful Combatant*, *supra* note 24 [Reproduced in the accompanying notebook at Tab 35].

⁸⁷ *Protocol I*, *supra* note 83, art. 48 [Reproduced in the accompanying notebook at Tab 30].

⁸⁸ *Id.*

⁸⁹ *Unlawful Combatant*, *supra* note 24 [Reproduced in the accompanying notebook at Tab 35].

1998 fatwa which states all Muslims must “kill the Americans and their allies--civilians and military--is an individual duty for every Muslim who can do it in any country in which it is possible to do it.”⁹⁰ With this being the group’s purpose an internal disciplinary system that enforced compliance with the rule of international law in armed conflict could not be present. Therefore, captured al-Qaeda members cannot be considered POWs under this definition either.

2. Militia and Volunteer Corps

Combatants, who are not members of a uniformed armed force, may still qualify as lawful combatants if they fall into one of the other categories listed above, such as militia or volunteer corps.⁹¹ In order to qualify as a POW when captured, combatants who are part of a militia or volunteer corps who belong to a party to the conflict must (1) be commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign visible from a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws and customs of war. This applies whether the individuals are operating in or outside their own territory, even if the territory is occupied.⁹² If an individual is a member of a resistance movement, the same standard is applied.⁹³

According to this definition of a lawful combatant, Taliban and al-Qaeda members do not qualify as lawful combatants of a militia, volunteer corps, or resistance movement.⁹⁴ It is possible to determine that they are part of an organization, and as such

⁹⁰ Usamah Bin-Muhammad Bin-Ladin, *Text of Fatwah Urging Jihad Against Americans*, Feb. 23, 1998, available at <http://www.ict.org.il/articles/fatwah.htm> [Reproduced in the accompanying notebook at Tab 31].

⁹¹ *Geneva III*, *supra* note 5, para. 2 [Reproduced in the accompanying notebook at Tab 27].

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Unlawful Combatant*, *supra* note 24 [Reproduced in the accompanying notebook at Tab 35].

were commanded by a superior.⁹⁵ However, as stated above, it is unlikely the commander would internally punish those in his command who violate international law, since this is the type of behavior they openly encourage.⁹⁶

Neither Taliban nor al-Qaeda members wore any type of fixed distinctive sign. While the Taliban members may have carried arms openly, al-Qaeda members do not.⁹⁷ Hiding weaponry is part of al-Qaeda, and most terrorist organizations', strategy for attacking civilians without warning.⁹⁸

Finally, the actions of Taliban and al-Qaeda members were not conducted in accordance with the laws and customs of war. The Taliban hid military equipment among civilian populations. This is a clear violation of international humanitarian law,⁹⁹ which was established to protect the civilian population. Although many devious military tactics are permitted, such as camouflage, decoys and misinformation, hiding military personnel or equipment among the civilian population is prohibited because it endangers the civilian population.¹⁰⁰ Parties, must at all times, distinguish between civilian objects and military objects.¹⁰¹ Likewise, al-Qaeda members do not abide by international laws and customs of war. They hid among civilian populations, dressed as civilians, and target civilians. According to Protocol I of the Geneva Conventions, at all times, while engaged in an attack or in preparation of an attack, a combatant must

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Unlawful Combatant*, *supra* note 24 [Reproduced in the accompanying notebook at Tab 35].

⁹⁸ *Id.*

⁹⁹ *Geneva III*, *supra* note 5, para. 2 [Reproduced in the accompanying notebook at Tab 27].

¹⁰⁰ *Protocol I*, *supra* note 83, art. 48 [Reproduced in the accompanying notebook at Tab 30].

¹⁰¹ *Id.*

distinguish himself from the civilian population¹⁰² and operations shall be directed “only against military objects.”¹⁰³ Al-Qaeda members clearly violated these laws during 9-11.

3. Lawful Combatants in Soon to be Occupied Territories

According to the Third Geneva Convention, there are situations in which civilians can take up arms and immediately gain the status of a lawful combatant.¹⁰⁴ This exception occurs when inhabitants of a non-occupied territory are being approached by the enemy. In this situation, the civilians can spontaneously take up arms to protect themselves in order to try to prevent occupation without having time to form themselves into regular armed units.¹⁰⁵ These individuals will be regarded as lawful combatants if they carry arms openly and respect the laws and customs of war. This is called *levee en masse*.¹⁰⁶

Even if Taliban and al-Qaeda members argue that they were defending themselves from American occupation of Afghanistan, they still cannot qualify under this definition of a lawful combatant, because even though they were not part of a nation, they were not innocent civilians. Also, neither Taliban nor al-Qaeda members abide by the laws and customs of war, as discussed above. Al-Qaeda members additionally cannot qualify under this definition because they attacked American civilians on American soil.

ii. Non-Combatants

The definition of non-combatants are those individuals who are a part of a formal army but do not participate in the fighting, such as cooks, religious staff, and medical

¹⁰² *Id.* at art. 44, para. 3.

¹⁰³ *Id.* at art. 48.

¹⁰⁴ *Id.* at art. 4, para. 6.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

staff.¹⁰⁷ These people lose their protection as non-combatants if they take up arms and participate in the hostilities.¹⁰⁸ There are exceptions, however, such as self-defense.¹⁰⁹ Even if the detained Taliban or al-Qaeda members were part of a formal army, they would not qualify for non-combatant protection, since they were captured for participating in the hostilities and none of the exceptions for a non-combatant to take up arms apply to the circumstances in which the detainees were captured.

iii. Not Enemy Combatants

In addition to not being lawful combatants or non-combatants, the detainees are not enemy combatants either. In the factual background section above, many government officials are quoted as using the terms: war, wartime, war against the United States, war on terrorism, and war crimes. According to Webster's dictionary, war is "open armed conflict between countries or between factions within the same country."¹¹⁰ Under the Geneva Conventions, international wars are those fought between states.¹¹¹

Since neither the Taliban nor al-Qaeda is a state, they cannot be engaged in a "war." If the United States is, or was, literally and legally at "war" against these organizations this would mean that Taliban and al-Qaeda members are entitled to and obligated to provide the same rights as members of the United States Armed Forces.¹¹² Not only does this give legitimacy to the terrorist efforts by deeming their attacks "acts of war," but it also creates unrealistic expectations. Taliban and al-Qaeda members have shown they do not intend to abide by the rules of war, as outlined by the United Nations

¹⁰⁷ *Geneva III*, *supra* note 5, art. 4, para. 4 [Reproduced in the accompanying notebook at Tab 27].

¹⁰⁸ *Protocol I*, *supra* note 83, art. 43, para. 2. [Reproduced in the accompanying notebook at Tab 30].

¹⁰⁹ *Id.*

¹¹⁰ WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 844 (2d Concise ed. 1979).

¹¹¹ Jelena Pejic, *Three Misconceptions about the Law of War*, Oct. 29, 2004, available at www.crimesofwar.org/onnews/news-miscon.html [hereinafter *Pejic*] [Reproduced in the accompanying notebook at Tab 36].

¹¹² *Id.*

(“UN”) in the U.N. Charter, Geneva Conventions, and the Additional Protocols of the Geneva Convention, in any respect, whether it is in the method of their attack, targets of their attack, or how they treat captured soldiers or civilians. There is no reciprocity on the side of terrorists to try to minimize collateral damage, avoid killing innocent women and children, or abide by the laws concerning treatment of prisoners under the Geneva Conventions.¹¹³ On the contrary, the goal of terrorists is the target innocent people and cause massive damage, such as attempting to crash four civilian planes into highly populated civilian and government buildings and succeeding with three.¹¹⁴ This is how terrorists attempt to change political opinions, by killing and instilling terror in people to think there will be more killing in the future if the government and civilians do not change their actions or philosophies as the terrorists’ desire.

Deeming the United States’ efforts to root out terrorists the acts of “war” not only creates unrealistic expectations that terrorist organizations, such as al-Qaeda, would abide by international law. This “war” designation may also obligate the United States to grant terrorists the benefits of international law connected with war, such as POW status. Additionally, the term “war” gives legitimacy to terrorist groups and may give legitimacy to their terrorist acts. If the terrorists’ acts were regarded as legal, acts of war instead of terrorist acts, this could mean that even though the target is usually civilian, the attacks may be interpreted as legal targets and the civilian injuries and damages civilian property were just collateral damage. Meaning, if there were not excessive casualties or damage to civilian property due to an attack upon a legal target a terrorist would not be held

¹¹³ *Geneva III*, *supra* note 5 [Reproduced in the accompanying notebook at Tab 27].

¹¹⁴ *Thompson Complete*, *supra* note 1.

accountable for the damage.¹¹⁵ These are some of the current and potential problem with deeming the U.S. efforts to root out terrorists acts of war. That is why Detainees should not be prosecuted as war criminals for war crimes.¹¹⁶

The definition of a war crime is intentionally attacking civilians while aware of their civilian status.¹¹⁷ By its nature, war crimes can only be committed during times of war. This applies regardless of whether a party to a conflict is a state.¹¹⁸ Every violation of the laws of war makes the violator a war criminal. While a war criminal does not have to be a party to the conflict, the overall conflict does require two states in order to be deemed a war.¹¹⁹ The United States is a nation involved in the conflict. However, in order for a second state to be involved, the Taliban or al-Qaeda would need to be a state. Again, if that were true, which it is not, many other rights would be afforded to the Taliban and al-Qaeda which would not be reciprocal and would be more than they deserve as terrorist organizations. Therefore, while it may appear wise to call the rooting out of terrorists “war,” in order to prosecute them for war crimes, it is not.

iv. Unlawful Combatants

So, what is the status of these detainees? They do not qualify as lawful combatants, non-combatants, or enemy combatants. Individuals who participate in the hostilities but do not have combatant status are unlawful combatants. Such fighters do not belong to a state or a party to the conflict recognized as a subject of international law. As such, they are not authorized to commit armed attacks against the adversary.

¹¹⁵ *Geneva III*, *supra* note 5, art. 51, para. 5 [Reproduced in the accompanying notebook at Tab 27].

¹¹⁶ *Wolfowitz Testimony*, *supra* note 14 [Reproduced in the accompanying notebook at Tab 4]; *Prosper*, *supra* note 16 [Reproduced in the accompanying notebook at Tab 7].

¹¹⁷ *Protocol I*, *supra* note 83, art. 51 [Reproduced in the accompanying notebook at Tab 30].

¹¹⁸ *Geneva III*, *supra* note 5, art. 2 [Reproduced in the accompanying notebook at Tab 27].

¹¹⁹ *Id.* at art. 2, para. 1.

Unlawful combatants who are captured are not to be treated as prisoners of war.¹²⁰ These individuals can be prosecuted as criminals and sentenced for their direct participation in hostilities.¹²¹ They can be charged as criminals for each death, injury, and damage to property.¹²² Although these individuals are not POWs, they are entitled to at least be treated humanely in accordance with Article 75 of the Additional Protocol I of the Geneva Conventions.¹²³

E. Guantanamo Bay Detainees Distinguished From Past Cases

To review, this memorandum has shown that the detainees are unlawful combatants. The detainees are not representatives of a nation, not soldiers of a foreign army, and not enemy combatants. These facts make this situation different from those which the United States has dealt with in the past.

This being the case, even if the 1949 Geneva Conventions are considered self-executing, they do not protect these detainees as POWs. Therefore, the *Hamdan* court's reasoning that the POW status of all detainees entitled them to protection under the Third Geneva Convention is moot. Secondly, one of the *Hamdan* court's reasons for bestowing this POW status was because the U.S. government had not held a "competent tribunal" to determine the detainees' status was different. As mentioned above, the U.S. government has established both the Combatant Status Review Tribunal ("CSRT") and the Administrative Review Board.¹²⁴ These establishments change the facts that the court was presented with in order to determine there was not a tribunal in place.

¹²⁰ *Id.* at art. 45.

¹²¹ *Id.*

¹²² *Pejic, supra* note 111 [Reproduced in the accompanying notebook at Tab 36].

¹²³ *Protocol I, supra* note 83 [Reproduced in the accompanying notebook at Tab 30].

¹²⁴ United States Department of Defense, *Combatant Status Review Tribunals/Administrative Review Boards* available at http://www.defenselink.mil/news/Combatant_Tribunals.html (accessed Mar. 15, 2005).

On July 7, 2004, the United States Deputy Secretary of Defense issued, to the Secretary of the Navy, an Order Establishing a Combatant Status Review Tribunal (“Tribunal Order”).¹²⁵ This CSRT will provide one opportunity for detainees to challenge their status as “enemy combatants.” Under the government’s definition, for purposes of the CSRT, an enemy combatant is

an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.¹²⁶

Each detainee was to be informed of the opportunity to contest their designation within 10 days after the Tribunal Order.¹²⁷ Each detainee was assigned a military officer to assist them in preparing and presenting their case.¹²⁸ Within 30 days after the detainee’s personal representative had an opportunity to review the relevant materials and consult with the detainee, a CSRT was to be convened to review the detainee’s status.¹²⁹ The CSRT was to be comprised of three neutral commissioned officers of the U.S. Armed Forces, none of whom were involved in the apprehension, detention, interrogation or previous determination of status of the detainee.¹³⁰ One of the three was to be a judge advocate.¹³¹

¹²⁵ *Wolfowitz Memo to Navy, supra* note 72 [Reproduced in the accompanying notebook at Tab 11].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

The CSRT did not begin processing challenges until July 30, 2004.¹³² A CSRT summary shows that, as of March 29, 2005, 558 tribunals have been held and all have convened authority final action.¹³³ Of that 558, 520 detainees maintained their enemy combatant status and 38 were given neo-enemy combatant status.¹³⁴ This appears to be quite a competent tribunal that abided by the court's guidance in *Hamdi* for establishing a competent tribunal.¹³⁵

In addition to the CSRT where detainees may challenge their status the government has also established a separate Administrative Review Board ("ARB").¹³⁶ If the detainees are still detained after their Tribunal, they will have the opportunity once a year to go before the ARB.¹³⁷ The ARB will not assess the status of the detainee, but it will assess whether there is a continued reason to believe that the detainee poses a threat to the U.S. or its allies, or whether there are other factors bearing upon the need for continued detention, including the detainee's intelligence value in the global effort to root out terrorism.¹³⁸ After the assessment, the ARB can recommend that detainees should be released, be transferred with conditions, or continue to be detained.¹³⁹ This recommendation will be reviewed by the designated civilian official overseeing this

¹³² News Release, United States Department of Defense, Combatant Status Tribunal Implementation Guidance Issued (July 30, 2004) (on file with the U.S. Department of Defense) *available at* www.defenselink.mil/releases/2004/nr20040730-1072.html [Reproduced in the accompanying notebook at Tab 13].

¹³³ *CSRT Summary*, *supra* note 3 [Reproduced in the accompanying notebook at Tab 9].

¹³⁴ *Id.*

¹³⁵ *Factsheet: CSRT*, *supra* note 74 [Reproduced in the accompanying notebook at Tab 12].

¹³⁶ News Release, Office of the Assistant Secretary of Defense (Public Affairs), Administrative Review Implementation Directive Issued (Sept. 15, 2004) (on file with the U.S. Department of Defense) *available at* www.defenselink.mil/releases/2004/nr20040915-1253.html [Reproduced in the accompanying notebook at Tab 14].

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

process, currently Secretary of the U.S. Navy Gordon R. England, for final decision.¹⁴⁰ If the final order is for continued detention, the next review is scheduled at that time, in an effort to prevent missed reviews.¹⁴¹ This appears to be much like the review that the Israeli government conducts every six months of its detainees. In that process, the Israeli government evaluates the danger of releasing a detainee based on new information about the detainee and whether old information on the detainee is still relevant.¹⁴²

As stated above, the *Hamdan* court held that the President's determination that al-Qaeda members were not POWs under the Geneva Conventions was not completely legitimate, because it was not determined by a "competent tribunal."¹⁴³ However, now the detainees have access to the CSRT and the ARB. Therefore, it seems the *Hamdan* court no longer has the justification that the detainees' status is not determined by a competent tribunal. Therefore, when another case like *Hamdan* is brought before the U.S. Supreme Court, these issues should be raised. In the meanwhile, it may be helpful to understand what these unlawful combatants can be prosecuted for and what new laws may be needed in the future.

F. Laws to Combat Terrorism

In order to evaluate what new international laws may be needed to protect a nation's citizens from this upswing of terrorism committed by unlawful combatants, it must first be understood what can currently be done with these unlawful combatant.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Thomas F. Powers, *When to Hold 'Em: The U.S. Should Detain Suspected Terrorists – Even if it Can't Make a Case Against Them in Court*, Legal Affairs, available at http://www.legalaffairs.org/issues/September-October-2004/argument_powers_sepoct04.msp (accessed on Mar. 12, 2005).

¹⁴³ *Hamdan*, 344 F.Supp.2d 161-62 [Reproduced in the accompanying notebook at Tab 26].

i. Crimes Against Humanity

As discussed above, member of Taliban and al-Qaeda do not qualify for POW status and did not abide by the international laws of war. While a POW cannot be prosecuted unless it is determined he is a war criminal, a non-POW can be prosecuted for violations of international law.¹⁴⁴ Detainees who are prosecuted shall be prosecuted and punished under the national criminal law of the detaining power, the United States.¹⁴⁵ Since there was not a formal war being conducted while the detainees were captured, they cannot be charged with war crimes. However, crimes against humanity do not require the presence of a war in order for them to be committed.¹⁴⁶

Crimes against humanity are basically acts that, by their scale or nature, outrage the conscience of humankind. The most recent codified definition of crimes against humanity is “participation in and knowledge of a widespread or systematic attack against a civilian population,” and “the multiple commission of [such] acts...against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹⁴⁷ The elements required for this crime are: (1) “the perpetrator killed one or more persons,” (2) “[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population,” and (3) “[t]he perpetrator knew that the conduct was part of, or intended the conduct to be part of, a widespread or systematic

¹⁴⁴ *Geneva III*, *supra* note 5, art. 99-108 [Reproduced in the accompanying notebook at Tab 27]. Prisoners of War must be treated humanely, evacuated to a safe area, not be subject to public curiosity or reprisal, not be tortured, and not be prosecuted unless determined to be a war criminal. *Generally Id.*

¹⁴⁵ *Id.* at art. 99-108.

¹⁴⁶ Ben Ferencz, *Macmillan Reference USA's* of ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY (*forthcoming*), vol. 3, available at <http://www.benferencz.org/encyclo.htm> (accessed on Apr. 1, 2005) [Reproduced in the accompanying notebook at Tab 37].

¹⁴⁷ The Rome Statute of the International Criminal Court (2002) [hereinafter *Rome Statute*].

attack against a civilian population.”¹⁴⁸ While war crimes can only be committed in time of war, crimes against humanity can be committed in times of peace or times of conflict. Detainees who can be linked to acts that fall under the above definition committed crimes against humanity.

Those who commit crimes against humanity cannot raise a defense of following superior orders and there is no statute of limitations on these crimes. Individuals who commit these crimes are held individually criminally responsible for their actions. They are not to be granted amnesty and all states are responsible for bringing these violators to justice.¹⁴⁹ Therefore, the detainees should be tried for crimes against humanity under United States law.

ii. Command Responsibility

Crimes against humanity are treated differently than regular military combat. Those who commit, order, or condone crimes against humanity are individually criminally responsible for their actions.¹⁵⁰ There are circumstances in which commanders can be held criminally liable for these crimes committed by their subordinates.¹⁵¹ In recent international criminal tribunal decisions, this doctrine of command responsibility has been upheld and is codified in the Rome Statute for the International Criminal Court.¹⁵² There are two forms of command responsibility: (1) direct responsibility for orders that are unlawful and (2) imputed responsibility, when a superior failed to prevent or punish crimes committed by a subordinate acting on his own

¹⁴⁸ Article 7(1)(a), *Finalized draft text of the Elements of Crimes Adopted by the Preparatory Commission for the International Criminal Court*, Nov. 2, 2000, U.N. Document PCNICC/2001/Add.2.

¹⁴⁹ *Erased In A Moment: Suicide Bombing Attacks Against Israeli Civilians*, 47, Human Rights Watch (2002) [hereinafter *Erased In A Moment*].

¹⁵⁰ *Id.* at 109.

¹⁵¹ See Major-General (Retired) A.P.V. Rogers, *Command Responsibility Under the Law of War* (1999) (transcript available at <http://www.law.cam.ac.uk/RCIL/Archive.htm>).

¹⁵² *Rome Statute*, *supra* note 147.

initiative. The latter depends on whether the superior had actual or constructive notice of the subordinates' crimes and was in a position in which the subordinate could be stopped and punished.¹⁵³ In order for either form of this doctrine to be applicable two conditions must be met. First, a superior-subordinate relationship must exist. Second, the superior must exercise "effective control" over the subordinate.¹⁵⁴ Effective control includes the ability to give orders or instructions, to ensure their implementation, and to punish or discipline subordinates if the orders are disobeyed.¹⁵⁵ The International Criminal Tribunal for the former Yugoslavia determined that a link must be made and the effective control must be shown, "lest injustice will be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote."¹⁵⁶ This being said, it is quite clear in many cases that the actors who are being detained at Guantanamo Bay, were order to commit crimes against humanity by others. Those who ordered or condoned these crimes against humanity, such as hijacking four commercial planes and flying two of them into civilian buildings and one into the Pentagon, should be prosecuted for these crimes against humanity. But is this enough?

G. Recommendation: A Need for New International Laws

The Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper was very insightful when he stated that we are in "an unconventional war conducted by unconventional means by an unprecedented aggressor."¹⁵⁷ The First Geneva Convention

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Prosecutor v. Delali, Judgment No. IT-96-21-T, Nov. 16, 1998 (Celebici case), para. 378. See also Prosecutor v. Karanac, Kunac and Vokovic, Judgment No. IT-96-23-T & IT-96-23/1-T, Nov. 22, 2001, para. 396.

¹⁵⁷ *Prosper, supra* note 17 [Reproduced in the accompanying notebook at Tab 7].

was agreed upon in 1864 and originally signed by 12 nations.¹⁵⁸ That convention provided for protection of all medical facilities, their personnel and any civilians aiding the wounded.¹⁵⁹ The Second Geneva Convention was signed in 1906, which extended protections under the First Convention to wounded combatants at sea and shipwrecked sailors.¹⁶⁰ The Third Geneva Convention was signed in 1929 and provided specific protections for prisoners of war.¹⁶¹ The Fourth Geneva Convention was signed in 1949, which reaffirmed the requirements of the first three conventions and provided protections for civilians during wartime.¹⁶² These conventions were created and adopted in a time when the only massive, organized combat was conducted by one nation upon another nation or between nations. The nations that engaged in *war* understood the customs of war. In order to stimulate most nations to abide by the *rules of war*, the Geneva Conventions were written and adopted in light of the horrific events of each new massive war. In each time, the world thought it would not see anything as horrific as it had in the most recent war. It was thought that these *rules of war* were broad enough to govern the worst possible acts invented. The world is very different today and people have once again found a way to surpass the horrors of the past.

Martyrs¹⁶³ and terrorists have existed for a long time. Today's situation is unique because there mass organization among terrorist who choose to kill themselves in an effort to defeat progress and freedom. Today's martyred terrorists are devoted to their terrorist logic and are committed to their mission. President Bush is making progress in

¹⁵⁸ *About Geneva Conventions, supra* note 5.

¹⁵⁹ *Id.*

¹⁶⁰ Wikipedia, *Second Geneva Convention*, at en.wikipedia.org/wiki/Second_Geneva_Convention (updated Mar. 4, 2005).

¹⁶¹ *About Geneva Conventions, supra* note 5.

¹⁶² *Id.*

¹⁶³ Kamikazes, suicide warriors, have long been a tradition in Japanese culture, at least since 1281. Wikipedia, *Kamikaze*, at <http://en.wikipedia.org/wiki/Kamikaze> (accessed on Apr. 1, 2005).

his efforts to help the people of these cultures experience and understand democracy and freedom. However, this is a long process. Meanwhile, terrorist efforts will continue and grow. As the spread of and desire for democracy progresses, it will be met with resistance by terrorist who fear the loss of control and the introduction of modern civilization.

Given this situation, the United States and other civilized nations struggle to understand how they can protect their citizens. Today, the government is being held to standards and interpretations of archaic documents that are not intended to govern this type of *unconventional war conducted by unconventional means by an unprecedented aggressor*. The Geneva Conventions assumes both sides of the battle know and respect the international laws of war and international humanitarian law. The following acts show this is not the situation: hijacking commercial airlines and crashing them into civilian buildings, kidnapping civilian contractors or reporters and beheading them on television, and driving civilian looking cars into police recruiting centers.

Since the Geneva Conventions, and all other international laws, do not clearly state how a nation can protect its citizens from these acts of terror, new laws are needed. The new laws must be clear, permit for self-defense by nations against these terrorists, and allow for the fact that terrorists hide in nations of which they do not belong and which they did not attack.

These are not simple guidelines. This is not a simple task. However, this is a necessity.

IV. CONCLUSION

While there is a need for new laws, the reality of today is that the United States government should operate in accordance with the current international laws. Pre-*Hamdan* case law found that the 1949 Geneva Conventions are not self-executing.¹⁶⁴ By clarifying the Combatant Status Review Tribunal procedure and the detainees status, in accordance with this memorandum, it is possible the U.S. Supreme Court could find that the Geneva Conventions are not self-executing and do not apply to detainees, with regard to challenging the military tribunals. Even if the 1949 Geneva Conventions were self-executing, this memorandum has shown that since the detainees are unlawful combatants who do not qualify for POW status, they are not protected as POWs under the 1949 Geneva Conventions, and therefore the Geneva Conventions do not apply for the purposes of challenging the military commission procedures.

¹⁶⁴ *American Baptist Churches*, 712 F.Supp. 756 [Reproduced in the accompanying notebook at Tab 19]; *Fort*, 921 F.Supp 523 [Reproduced in the accompanying notebook at Tab 23].