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Al Qaeda And Taliban Detainees—An Examination Of Legal Rights And Appropriate Treatment

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Introduction

The war against the terrorists who attacked the United States on September 11, 2001, is a new kind of international conflict. It does not represent traditional warfare between states adhering to the law of armed conflict. Rather, it reflects non-traditional violence against states and innocent civilians by individuals or groups for political ends without regard to the civilized behavior on the battlefield that underpins the four 1949 Geneva Conventions, including the Convention Relative to the Treatment of Prisoners of War (Geneva Convention III).²

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2. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection

The perpetrators of the September 11th violence, the al Qaeda organization, were protected and given safe haven in Afghanistan by the Pushtun Taliban militia. Although the Taliban was the strongest of the ethnic militias in Afghanistan by mid-2001, it was unable to conduct normal foreign relations or to fulfill its international legal obligations. Because the Taliban militia consistently refused to comply with UN Security Council Resolutions 1333 (2000), 1267 (1999) and 1214 (1998),³ independent press reports concluded that it had become so subject to the domination and control of al Qaeda that it could not pursue independent policies with respect to other states.⁴

While the US-led coalition together with Afghan Northern Alliance forces were successful in crushing al Qaeda and the Taliban in Operation ENDURING FREEDOM, the detainees captured in Afghanistan and transported to Guantanamo Bay, Cuba for post conflict disposition raised issues not addressed since the Vietnam Conflict when Viet Cong forces were captured in South Vietnam. Although entitled only to Common Article 3 status under

of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter GC IV]. These four conventions are all reprinted in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts and Richard Guelff eds., 3rd ed., 2000) [hereinafter DOCUMENTS ON THE LAWS OF WAR]; and in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, Dietrich Schindler and Jiri Toman eds., 3rd ed. 1988). Treaty texts are also available at the International Committee of the Red Cross website at <http://www.icrc.org/eng> (Jan. 3, 2003).

3. Security Council Resolution 1333 “strongly condemn[ed]” the Taliban for the “sheltering and training of terrorists and [the] planning of terrorist acts,” and “deplor[ed] the fact that the Taliban continues to provide a safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.” U.N. SCOR 55th Sess., U.N. Doc. S/1333/(2000). In its preamble, Resolution 1267 found that the Taliban’s failure to comply with the Council’s 1998 demand in Resolution 1214 to terminate the use of Afghanistan as a base from which to sponsor international terrorism constituted a threat to the peace. U.N. SCOR 54th Sess., U.N. Doc. S/1267/(1999). Paragraph 13 of Resolution 1214 enjoined the Taliban from providing a sanctuary and training for terrorists. U.N. SCOR 53d Sess., U.N. Doc. S/1214/(1998).

4. See, e.g., Michael Dobbs and Vernon Loeb, *2 U.S. Targets Bound By Fate*, WASH. POST, Nov. 14, 2001, at A22.

each of the four Geneva Conventions,⁵ the Viet Cong prisoners were nevertheless treated as prisoners of war (POWs).⁶

Simply stated, the issues presented US officials in Afghanistan required (1) a determination whether the 1949 Geneva Conventions applied to the conflict represented by Operation ENDURING FREEDOM and Operation ANACONDA; and (2), if so, whether members of al Qaeda as a group and the Taliban individually or as a group are entitled to POW status under Geneva Convention III.

The Application of the Laws of War in Afghanistan

Following the post-World War II review of serious breaches of customary international law and the Hague Conventions of 1899 and 1907 by the Axis Powers, a diplomatic conference invested nearly three years writing the four Geneva Conventions designed to regulate treatment of those individuals who become victims of warfare. These four conventions, like other treaties, establish legal relationships between nations, not between nations and groups or nations and subnational organizations.⁷ The United States and Afghanistan are both High Contracting Parties to the Conventions,⁸ including Geneva Convention III, and are thus bound by their terms and provisions.

Under Geneva Convention III, individuals entitled to POW status upon capture include members of the regular armed forces of a party, the militia, and those volunteers and volunteer units fighting with the regular armed forces of a party.⁹ Irregular forces, including militia and volunteers, fighting apart from the regular armed forces, can also qualify for POW status when captured, provided they are serving under an authority responsible for their conduct, are in uniform or are wearing a distinctive sign recognizable at a

5. Common Article 3 appears in each of the four 1949 Geneva Conventions and addresses individuals and groups who do not represent a government or state but rather an insurgency or opposition group to the recognized regime. Unlike the Viet Cong, however, neither the Taliban nor al Qaeda were factions within a state with a recognized central government. Like the Viet Cong, however, they were fighting an international coalition of the willing within the recognized borders of a nation, despite its lack of central government, which was a high contracting party to the Geneva Conventions.

6. See *Contemporary Practice of the United States*, 62 AM. J. INT'L L. 766–768 (1968) citing MACV, Annex A of Directive No. 381-46, December 27, 1967.

7. See *U.S. ex rel Saroop v. Garcia*, 109 F.3d 165, 167 (3d Cir. 1997) where the court stated that “[T]reaties are agreements between nations.”

8. The United States became a party on July 14, 1955 while Afghanistan acceded on Sep. 26, 1956.

9. GC III, *supra* note 2, art. 4(A)(1) & 4(A)(4).

distance, carry their arms openly, and conduct operations in a manner consistent with the laws of war.¹⁰

When a captive's status as a POW is challenged because a party believes the individual did not meet the criteria set forth above, that individual is to be accorded POW treatment until a tribunal convened by the captor state reviews the facts and makes a determination.¹¹ Similarly, when an individual's belligerent status is not clear upon falling into the hands of the enemy, that individual enjoys the protection of Geneva Convention III until such time as his status can be determined by an appropriate tribunal.¹²

The Administration Position

On February 7, 2002, Ari Fleischer, White House Press Secretary, gave the Administration view of the status of Taliban and al Qaeda detainees captured in Afghanistan.

President Bush today has decided that the Geneva Convention will apply to the Taliban detainees, but not to the al Qaeda international terrorists.

Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention.

Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their military operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.

10. *Id.*, art 4(A)(2); *see also* 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, Annex.

11. GC III, *supra* note 2, art. 5(2).

12. *Id.*

Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.¹³

What the White House was clearly implying, if not saying, was that this war on terrorism was not a war envisaged when Geneva Convention III was signed in 1949. In this war, global terrorists transcend national boundaries and internationally target the innocent. In the February 7 White House statement, the Bush Administration committed the United States to the principles of Geneva Convention III, while recognizing that the Convention does not cover every situation in which people may be captured or detained by military forces.

Effect of Not Applying Geneva Convention III to al Qaeda

The language of the four Geneva Conventions applies to international conflicts first¹⁴ and only then does it address the status of those involved. It is clear, however, that all international conflicts are covered. The Bush Administration position of not applying the Convention to al Qaeda appears to be at odds with these principles. More importantly, it overlooks the very fabric of the Convention which is designed to address all combatant actors in a conflict. Specifically, the Convention divides all combatants into the category of lawful combatant, or alternatively, that of unlawful combatant.

By decrying the application of Geneva Convention III to al Qaeda fighters, the US decision deprives the United States of its strongest legal rationale for jurisdiction both in US federal court and internationally. More specifically, absent the authority to act under Geneva Convention III, the authority to detain al Qaeda fighters, to remove them from Afghanistan, to try them before military commissions for war crimes, to provide them no more than humane treatment, and to send them to third countries could be challenged. Without the authority of Geneva Convention III to rely upon, the detainees could be

13. White House Press Secretary Ari Fleischer, Press Briefing at the White House (Feb. 7, 2002), at 1–2, available at Lexis, Federal News Service (Jan. 6, 2003).

14. See, e.g., GC III, *supra* note 2, art. 2. Article 2, common to all four Geneva Conventions, provides in relevant part that the conventions shall “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. . . .”

entitled to rights either enshrined in the US Constitution or the International Covenant on Civil and Political Rights (ICCPR)¹⁵ as the ICCPR is generally believed to apply to those situations in which Geneva Convention III does not apply.

***The Taliban and Al Qaeda Fighters Must Be Viewed
as One for Purposes of Application of International Law***

During the period that Taliban authorities controlled the political machinery of state in Kabul, they constituted the de facto government of Afghanistan. Afghanistan continued to have the essential elements of statehood, and was called upon by the international community to comply with its obligations, as reflected in Security Council Resolutions 1267 (1999) and 1333 (2000) (which called upon the Taliban to take specific actions), and the international agreements prior Afghan governments had signed (even if it was unable or unwilling to comply with their terms).¹⁶ The close relationship between the Taliban and al Qaeda political and military elements was obvious. As Resolution 1333 recognized, “the Taliban continue[d] to provide a safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.”¹⁷

Professor Robert Turner of the University of Virginia explained that when “bin Laden masterminded the attacks on New York and Washington, Afghanistan [was] in breach of its state responsibility to take reasonable measures to prevent its territory from being used to launch attacks against other states.”¹⁸ Prior to September 11, 2001, al Qaeda supplied the Taliban with the money, material, and personnel to help it gain the upper hand with the Northern Alliance.¹⁹

15. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 1992 U.N.T.S. 171 (entered into force Mar. 23, 1976, signed by the United States Oct. 5, 1977) [hereinafter ICCPR]. The ICCPR provides the same protections, in article 14, that the President has provided to the detainees here.

16. No Security Council document exists claiming that Afghanistan had lost its right to nationhood or that it had ceased to exist as a viable state.

17. S. C. Res. 1333, *supra* note 3.

18. Robert F. Turner, *International Law and the Use of Force in Response to the World Trade Center Pentagon Attacks*, JURIST ONLINE, available at <http://jurist.law.pitt.edu/forum/forumnew34.htm> (Jan. 23, 2003).

19. Michael Jansen, *U.S. Focused Initially on bin Laden Mercenaries*, IRISH TIMES, Oct. 30, 2001 available at NEXIS, Major World Newspapers (Jan. 23, 2003).

Thus Afghanistan, as a sovereign state, under the leadership of Taliban authorities, had thoroughly aligned itself with al Qaeda forces prior to September 11. As the President stated on November 13, 2001, “[i]nternational terrorists, *including members of al Qaeda*, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”²⁰ This statement reflects recognition that the Taliban and al Qaeda are closely aligned and that the Taliban provided the safe haven in which al Qaeda could function.²¹ In light of the support and safe haven provided al Qaeda by the Taliban leadership, it must be concluded that the Taliban fighters and al Qaeda members who were together when fighting US and Northern Alliance forces when captured must be viewed as one when determining the application of Article 4(A)(1) of Geneva Convention III.

Geneva Convention III is Applicable to al Qaeda and the Taliban

Geneva Convention III applies to the detention and trial of the regular and irregular forces of a state party whose militia has been engaged in an international armed conflict.²² Article 2 of the Convention provides that it shall apply to armed conflict which “may arise between two or more of the High Contracting Parties.” As stated previously, Afghanistan has been a state party to the 1949 Geneva Conventions since 1956, the United States since 1955. The Taliban, with its al Qaeda allies, effectively controlled nearly 90 percent of Afghan territory, while exercising governmental functions therein, to include operating a system of taxation, administering Islamic courts, appointing and confirming regional governors, district leaders, mayors, and other regional and local officials, and imposing law and order.

The fact that the United States and its coalition partners did not recognize the Taliban government is immaterial to the treatment of its fighters and

20. Military Order of President of the United States, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, *available at* <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (Jan. 23, 2003) (emphasis supplied).

21. *See, e.g.*, S. C. Res. 1267, U.N. SCOR, 54th Sess., U.N. Doc. S/1267/(1999) which provides: “[d]eploing the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations. . . .”

22. *See* GC III, *supra* note 3, arts. 4 & 5.

those of the allied al Qaeda under Geneva Convention III. Article 4(3) of the Convention is clear on this point. That provision extends coverage to forces who profess allegiance to a government or an authority “*not recognized* by the Detaining Power.” This interpretation is supported by the Article 4(3) negotiating history.²³ Because the Taliban, with its al Qaeda supporters, exercised actual control over the greater part of Afghanistan prior to and after September 11, 2001, and clearly opposed the coalition’s use of force in Operation ENDURING FREEDOM, it must be concluded that an armed conflict did exist between two High Contracting Parties to Geneva Convention III.

Taliban and al Qaeda Forces Do Not Qualify for POW Status

The fact that the Convention applies to an international armed conflict and its opposing forces does not mean that these forces will be accorded POW status under the Convention, however. Article 4(A) sets forth in pertinent detail the basic categories of persons entitled to protection as POWs. As noted earlier, these include: (1) armed forces of a party and militias and volunteer corps forming part of such armed forces; (2) members of other militia and volunteer corps who meet the four basic requirements; and (3) members of regular armed forces who profess allegiance to an authority not recognized.

Neither the Taliban nor al Qaeda forces qualify for protection under the Convention as the “armed forces of a Party,” or the “militias and volunteer corps forming part of such armed forces.” This results from their failure to fulfill the basic requirements applicable to any armed force, militia, or volunteer corps under Article 4(A) of the Convention. Neither al Qaeda nor the Taliban satisfied the requirement of wearing uniforms or other distinctive insignia;²⁴ neither were subject to a command structure that enforced the laws

23. See INTERNATIONAL COMMITTEE OF THE RED CROSS, 3 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, COMMENTARY 63 (Jean S. Pictet ed. 1960) (noting that Article 4(A)(3) is written to bring an end to the practice of refusing to give POW status to unrecognized but otherwise deserving combatants).

24. The White House and Department of Defense stated publicly that the Taliban and al Qaeda did not distinguish themselves from the civilian population. See Press Briefing at the White House, *supra* note 13.

and customs of warfare,²⁵ and neither in their operations adhered to the laws and customs of warfare.²⁶

As one independent observer has reported with regard to the lack of respect shown to the laws of war:

These non-Afghan fighters, along with the Taliban army, have not only broken the traditional norms of Afghan civil societies, they have also committed massive crimes against humanity by beheading and killing prisoners of war (POWs) and massacring thousands of civilians in different parts of the Country. In 1998 and 1999, the International Red Cross reported that the Taliban and their non-Afghan army killed thousands of civilians in Bamyan and set fire to 8,000 houses and shops.²⁷

This wanton violence has continued until quite recently. The Department of State has reported that the Taliban “massacred hundreds of Afghan civilians, including women and children, in Yakaolang, Mazar -e-Sharif, Bamayan, Qezelbad, and other towns.”²⁸ The Taliban routinely failed in its attacks to discriminate between military objectives and civilians, as required under the law of armed conflict. For example, “[t]here are reports that as many as 5,000 persons, mostly ethnic Hazara civilians, were massacred by the Taliban after the takeover of Mazar -e-Sharif.”²⁹

25. Article 4 of GC III requires that forces be “commanded by a person responsible for his subordinates.” This military command requirement is intended to ensure widespread compliance with the laws and customs of war. According to the US Department of Defense, these forces “are not commanded by any person responsible for his subordinates.” *US Department of Defense Memorandum: Why Taliban are Unlawful Combatants*, at 1 (Oct. 19, 2001) (copy on file with author).

26. The Taliban and al Qaeda as a whole ignored the laws and customs of war. According to the laws and customs of warfare, parties must take precautions to protect civilians, for example, by verifying the military nature of targets, respecting the principles of proportionality and necessity, and minimizing incidental loss of civilian life. *See generally*, GC IV, *supra* note 2; *see also*, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Part IV - Civilian Population, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 1 [hereinafter GP I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR at 419, *supra* note 2.

27. NEAMATOLLAH NOJUMI, *THE RISE OF THE TALIBAN IN AFGHANISTAN*, 229 (2002). *See also*, Lee A. Casey et. al, *By the Laws of War, They aren't POWs*, WASH. POST, Mar. 3, 2002, at A3.

28. US Department of State, *Fact Sheet: Taliban Actions Imperil Afghan Civilians*, November 2, 2001, at 1, *available at* <http://usembassy.state.gov/islamabad/www01110301.html> (Jan. 23, 2003).

29. US DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 2000–Afghanistan, at §1(g) (Feb. 2001).

The State Department also reported in November 2001 that the Taliban were using the entire populations of villages as human shields to protect their stockpiles of ammunition and weapons, that they were relocating the police ministry in Kandahar to mosques, that they had taken over humanitarian relief organization buildings, and that they were discovered transporting tanks and mortar shells in the guise of humanitarian relief.³⁰ These and other similar reports provide strong support for the President's conclusion that the Taliban (and al Qaeda) forces flagrantly violated the laws and customs of war, failed to exhibit insignia or otherwise distinguish themselves from civilians, and were not subject to responsible military command. Under these circumstances, the Taliban and al Qaeda do not meet the Article 4 criteria for groups entitled to POW status.

A Group Determination of Status Does Not Violate the Convention

Article 5 of Geneva Convention III provides that where doubt arises as to the proper status of an individual or individuals, "such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal." For the reasons set forth above, there can be no doubt that the Taliban and al Qaeda do not qualify for POW status, a decision the President came to after consulting with his most senior advisors, and undertaking a careful and reasoned analysis.

The process of group determination exercised by the Executive Branch was consistent with the drafters' intent that questions of status are given serious consideration by responsible leaders.³¹ It was also consistent with US and allied decisions on POWs in Korea and Vietnam, although Article 5 Tribunals were established in Vietnam to address individual cases where doubt existed.³² Nevertheless, the President determined that the detainees would continue to enjoy the protections of the present convention as long as they are held.

The protections to be accorded all prisoners of war are contained in Part II of Geneva Convention III. Those protections, which the President has determined applicable to all al Qaeda and Taliban detainees, even though these individuals do not warrant designation as POWs, require humane treatment

30. US Department of State, *Fact Sheet: The Taliban's Betrayal of the Afghan People*, November 6, 2001, available at <http://usembassy.state.gov/islamabad/www01110702.html> (Jan. 23, 2003).

31. See, e.g., FRITZ KALSHOVEN AND LIESBETH ZEBVELD, *CONSTRAINTS ON THE WAGING OF WAR* 53 (2001).

32. See, e.g., Roberts, *supra* Chapter VII, note 22 and accompanying text.

and protection from insults, reprisals, and public curiosity.³³ Part II also requires free “maintenance” and medical attention. The detainees are being provided meals that reflect their Muslim culture and religion, and clothing, shelter, pads for sleeping, blankets, and medical care.³⁴ They are also receiving additional privileges, including the ability to send and receive mail, the right to visit individually with the ICRC, and the opportunity to worship with the assistance of a Muslim chaplain provided by the US Navy.

While the detainees at Guantanamo are being accorded all protections due POWs under Part II of Geneva Convention III, they are not subject to the privileges and benefits accorded POWs under the Convention. These benefits include respect for rank,³⁵ pay,³⁶ and traditional courtesies accorded military personnel by others in the profession of arms.³⁷

The Trial of Detainees before Military Commissions

When President Bush issued his Military Order of November 13, 2001, the trial of non-citizens before military tribunals had not been contemplated since World War II, and then not specifically for terrorist defendants. In this case, the use of military commissions to try these defendants for war crimes provides important advantages over civilian trials. As White House Counsel Alberto Gonzales stated,

[t]hey spare American jurors, judges and courts the grave risks associated with terrorist trials. They allow the government to use classified information as evidence without compromising intelligence or military efforts. They can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals.

And they can consider the broadest range of relevant evidence to reach their verdicts. For example, circumstances in a war zone often make it impossible to meet the authentication requirements for documents in a civilian court, yet

33. GC III, *supra* note 2, art. 13.

34. *Id.*, arts. 15–16. The rights announced by President Bush in his Military Order of November 13, 2001, *supra* note 19, at 2, are consistent with the provisions of these two articles.

35. *Id.*, arts. 44–45.

36. *Id.*, arts. 54, 62.

37. See, e.g., GC III, *supra* note 2, art. 18, which provides, in pertinent part, that “badges of rank and nationality, decorations, and articles having above all a personal or sentimental value may not be taken from prisoners of war.”

documents from al Qaeda safe houses in Kabul might be essential to accurately determine the guilt of al Qaeda cell members hiding in the West.³⁸

The procedures for trials by military commission are carefully set forth in Department of Defense Military Commission Order No. 1, signed by Secretary Rumsfeld on March 21, 2002.³⁹ As the Order makes clear, “[t]hese procedures (discussed in detail below) shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission”⁴⁰

Military commissions do not gain their authority from Article III of the Constitution which underlies our federal court system. Rather, these tribunals operate as a function of the President’s Commander-in-Chief authorities under Article I and have been specifically approved by the US Supreme Court.⁴¹ The nature of the proceedings and the nature of the evidence are shaped by the law of armed conflict. That body of law has very different premises than our domestic criminal law. Under domestic law, the killing of another person is presumed unlawful unless justified or excused by a specific defense (e.g., self-defense) or condition (e.g., mental defect). Under the law of armed conflict, there is a presumption that the killing of another combatant is lawful unless some other norm is violated, such as the status of the aggressor as an unlawful combatant. In such cases, the individual had no combatant immunity to engage in belligerent acts.

It is also important to note that the purpose of holding the detainees at Guantanamo is not specifically in anticipation of trial, but rather as a traditional function of the US war effort. This is based on a common-sense recognition that if released, detainees would quickly rejoin the hostilities. For this reason, trials—if any are held—will not begin until the conflict is over. At the end of hostilities, the equation, of course, could change. Continued detention at that point would have to be based on a legitimate judicial or law

38. Alberto R. Gonzales, *Military Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A18.

39. DOD Military Commission Order number 1 – Procedures for Trials by Military Commissions of Certain Non-United States Citizens In the War Against Terrorism (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (Jan. 23, 2003) [hereinafter DOD Military Commission Order].

40. *Id.*, at 1.

41. See *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942). This case involved the trial by military commission of unlawful combatants who were German soldiers smuggled into the United States by submarine who discarded their uniforms upon entry, but were captured prior to committing acts of sabotage.

enforcement need. It is premature at this point to determine to whom the need might apply.

At the conclusion of hostilities, those individuals for whom investigations have revealed violations of the law of war could be charged with offenses before a military commission. Under the provisions of Military Commission Order No. 1: (1) the accused will be furnished a copy of the charges sufficiently in advance of trial to prepare a defense; (2) a presumption of innocence will apply; (3) the standard of proof is beyond a reasonable doubt; (4) at least one defense counsel shall be provided; (5) the accused shall not be required to testify; (6) the accused and his counsel shall have access to the prosecution's evidence, including exculpatory evidence, in advance of trial; (7) defense witnesses and evidence may be presented; and (8) the accused shall be present at all phases of the proceeding.⁴²

Within this construct, commission membership shall include between 3 and 7 members who shall be commissioned officers of the US armed forces.⁴³ The presiding officer shall be a judge advocate.⁴⁴ This official shall ensure the expeditious conduct of the trial as well as its fairness.⁴⁵ Prosecutors shall either be judge advocates from the US armed forces or special trial counsel from the Department of Justice made available by the Attorney General.⁴⁶

The conduct of each trial before a commission follows the federal model and is precisely set forth in Article 6(E) of DOD Order No. 1. Post-trial procedures include a formal review process by a three officer review panel, with one of the officers experienced as a judge.⁴⁷ The Secretary of Defense will then review each record of trial and the recommendation of the review panel. Finally, after review by the Secretary, the record of trial and all recommendations will be forwarded to the President for review and final decision.⁴⁹

Conclusion

The Bush Administration has embarked upon a careful process of identification and detention of al Qaeda and Taliban combatants, investigation of

42. DOD Military Commission Order, *supra* note 39, art. 5.

43. *Id.*, art. 4A(2), (3).

44. *Id.*, art. 4A(4).

45. *Id.*, art. 4A(5)(a), (c).

46. *Id.*, art. 4B(2).

47. *Id.*, art. 6H(4).

48. *Id.*, art. 6H(5).

49. *Id.*, art. 6H(6).

offenses, and the development of a thorough and fair adjudicative process. While differences may exist in terms of how al Qaeda members are characterized in terms of Geneva Convention III, the regime established to examine the conduct of their actions and the actions of the Taliban fighters will likely result in a mere “distinction without a difference.”

The President has stated that he will only try foreign enemy war criminals before military commissions, and then only if they are chargeable with offenses against the international laws of war. Trials before military commissions will be as open as possible, consistent with the urgent needs of national security. Each defendant before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a robust defense.

The President’s Military Order of November 13, 2001, like the Secretary of Defense’s Military Commission Order No. 1 of March 21, 2002, is designed to ensure that individuals subject thereto receive a full and fair trial. The military commissions that are authorized will not undermine the constitutional values of any American nor violate the civil liberties of any non-US national appearing before them. Rather, the regime created draws a delicate balance between the President’s obligation to defend the nation and the desire of all Americans that any commission established under the President’s Constitutional authorities provide the same procedural and substantive protections evident in the domestic courts of this country.