

2003

The Executive Policy toward Detention and Trial of Foreign Citizens at Guantanamo Bay

K. Elizabeth Dahlstrom

Recommended Citation

K. Elizabeth Dahlstrom, *The Executive Policy toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L LAW. 662 (2003).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol21/iss3/9>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay

By
K. Elizabeth Dahlstrom*

I. PREFACE

Shortly after initiating a military campaign in Afghanistan, the United States began transferring hundreds of suspected Taliban soldiers and al Qaeda operatives to Guantanamo Bay, Cuba. Under normal circumstances, soldiers captured in armed conflict between two states clearly would be entitled to protection under the Geneva Convention. However, because the Taliban was not viewed as a "legitimate" government and members of al Qaeda are not affiliated with any government at all, the status of these detainees is not clear under international law.

Early on, the Bush administration announced that neither Taliban soldiers nor al Qaeda operatives would receive Prisoner of War ("POW") status under the Geneva Convention ("the Convention") because they were "unlawful combatants,"¹ a term that is not defined under international law.² Furthermore, Bush announced that non-citizens captured in the war on terror might face trial before a military tribunal.³ Military tribunals have severely relaxed due process mechanisms, as opposed to trial by a civilian court or a court-martial. This move raised concern in the world community about the willingness of the United States to honor international humanitarian agreements and its commitment to multilateralism in general. While the Bush administration later reversed its position and granted POW status to members of the Taliban, it still claims that al Qaeda operatives are not entitled to specific rights under the Geneva Convention because they are not state actors. The administration also modified its proposed

* J.D. Candidate 2003, School of Law, University of California, Berkeley (Boalt Hall).

1. BBC NEWS ONLINE, *US defends handling of Afghan captives* (Jan. 12, 2002) at <http://news.bbc.co.uk/1/low/world/Americas/1756643.stm> (last visited Oct. 5, 2002).

2. The term "unlawful combatant" is taken from a 1942, pre-Geneva Convention U.S. Supreme Court case called *Ex Parte Quirin*, discussed *infra*, and has never been defined by an international agreement.

3. The Bush administration does not use the term "military tribunals," which was widely used by the press. Rather it calls the specially created judicial bodies "military commissions." In any case, both terms refer to the specially created judicial bodies which may be used to try foreign citizens suspected of terrorism.

military tribunals, satisfying some critics but leaving many others concerned that the commissions still lack the structural guarantees of openness and fairness that civilian courts offer.

The situation at Guantanamo presents several complex issues of law such as whether non-state actors should receive treatment under the Geneva Convention and the extent to which humanitarian and human rights law apply concurrently.⁴ This article attempts to explore some of those issues and present questions for further study. Part II of this article discusses the obligations of the United States under international humanitarian and human rights law. Part III provides a brief overview of the war in Afghanistan and the administration's policy announcements regarding the detention and trial of foreign citizens captured abroad. Part IV discusses the legal challenges that have been brought on behalf of the detainees in domestic and international courts. The final section examines the current status of the detainees and the possible changes that can be expected in 2003.

The status of foreign citizens captured through regular law enforcement means, as opposed to those seized during armed conflict, will not be considered in this article as they fall outside the scope of humanitarian law. Likewise, suspects detained by domestic law enforcement agencies or the Immigration and Naturalization Service within the territory of the United States are not protected by the Convention and also fall outside the scope of this inquiry.⁵

II.

RELEVANT U.S. LEGAL OBLIGATIONS

This section gives an overview of the legal obligations of the United States under international humanitarian and human rights law. For purposes of this section, humanitarian law refers to the law of international conflict, which includes the acceptable forms of warfare, appropriate behavior of soldiers and the treatment of prisoners of war. By its definition, humanitarian law is applicable only during times of war or armed conflict. International human rights law, on the other hand, refers to the permanent obligations a state has towards its citizens or foreign nationals in its custody. Human rights law is generally said to be in effect at all times, unless exceptions for the current circumstances have been explicitly provided. During times of war, humanitarian and human rights law are said to complement and reinforce one another.⁶ The United States, however,

4. John Cerone, *The Status of Detainees in International Armed Conflict and Their Protection in the Course of Criminal Proceedings*, AM. SOC'Y OF INT'L L. INSIGHTS, Jan. 2002, available at <http://www.asil.org/insights/insigh81.htm> (last visited Nov. 30, 2002).

5. See generally Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607 (2003).

6. Organization of American States, Inter-American Commission on Human Rights, *Pertinent Parts of Decision on Request for Precautionary Measures* (Mar. 12, 2002). [hereinafter IACHR Decision on Guantanamo Detainees] available at <http://www.photius.com/roguenations/guantanamo.html> (last visited February 18, 2003).

has asserted that, in the case of the Guantanamo detainees, only humanitarian law should apply.⁷

A. *The Geneva Conventions*

Mankind's willingness to exercise restraint in warfare is a relatively recent phenomenon. Originally, it was considered an inherent right of the victor to destroy or enslave the civilian population of the losing party.⁸ Slowly, through a patchwork of bilateral agreements and treaties of limited application, the modern conception of civilized warfare began to emerge. After suffering through two World Wars, a majority of states came together to create a cohesive agreement which would govern war and protect civilians and POWs from unnecessary suffering in the future.⁹ Virtually all countries in the world, including the United States, are parties to the Geneva Conventions.

The Geneva Conventions consist of four separate Conventions, each governing a distinct aspect of humanitarian law. The Conventions govern the amelioration of the sick and wounded of the armed forces in the field; the amelioration of the wounded, sick and shipwrecked members of the armed forces at sea; the treatment of prisoners of war; and the treatment of civilian persons in time of war.¹⁰ For the purposes of this article, the Third Geneva Convention regarding the treatment of POWs and of civilians is the most relevant. The Commentaries of the International Committee of the Red Cross ("ICRC"), generally considered to be the most authoritative source on the interpretation and application of the Convention, will be used to shed light on the provisions discussed *infra*.

The Third Geneva Convention was adopted on August 12, 1949 and became incorporated into domestic U.S. law via Senate ratification on July 6, 1955.¹¹ Article 2 of the Third Geneva Convention states that the Convention shall apply in all cases of declared war, in any armed conflict and in cases of partial or total occupation, even if that occupation is unopposed.¹² The use of

7. *United States: Response of the United States to Request for Precautionary Measures—Detainees in Guantanamo Bay, Cuba*, Apr. 12, 2002, International Law in Brief (June 4, 2002) available at <http://www.asil.org/ilib/ilib0508.htm> [hereinafter U.S. Response to IACHR Decision on Guantanamo Detainees] (last visited Feb. 18, 2003).

8. International Committee of the Red Cross Commentary on the Third Geneva Convention, at art. 4 [hereinafter Commentary] available at <http://www.icrc.org/ihl.nsf/WebCOMRECH?OpenView&Start=150&Expand=3#3> (last visited Mar. 5, 2003).

9. *Id.* at art. 2 (stating that the "Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.").

10. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention or the Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

11. 101 Cong. Rec. 8537, daily ed. July 6, 1955.

12. Third Geneva Convention, *supra* note 10, at art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

the word "armed conflict" demonstrates the intent for the Convention to apply broadly and a desire to prevent states from evading their obligations by refusing to designate a conflict a "war."¹³ It further states that even if one of the powers is not a party to the Convention, countries that are parties are "bound by it in their mutual relations."¹⁴ This statement reflects the mandate issued in Article 1—to respect the Convention itself—and underscores the assumption that the provisions are not based upon reciprocity, but rather an unconditional commitment to the principles contained in the Convention.¹⁵

The criteria for POW status are found in Article 4 of the Third Geneva Convention.¹⁶ The designation of a person as a POW confers particular rights upon that person, most notably, immunity for the act of taking up arms against the Detaining Power.¹⁷ This means that POWs may not be prosecuted for acts, such as killings and property destruction committed in the course of warfare, even though such acts would usually be considered crimes.¹⁸ POWs who violate the laws of war by engaging in prohibited forms of warfare may be prosecuted for those breaches but they still retain the rights to certain treatment guaranteed to them under the Geneva Convention.¹⁹

Paragraph 1 of Article 4 confers POW eligibility upon members of the official armed forces of a Party as well as members of militias or volunteer corps forming part of such forces.²⁰ The second paragraph covers members of unofficial forces, provided that they (1) are being commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign recognizable at a distance, (3) carry their arms openly and (4) conduct their operations in accordance with the laws and customs of war.²¹ Paragraph 2 is intended to cover inhabitants who, upon approach of the enemy, spontaneously take up arms but did not have time to form themselves into regular units as required under paragraph 1.²²

Paragraph 3 provides protection for "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining power."²³ According to the ICRC, this provision includes all persons who, whether fighting individually or in organized units, do not fall within the ambit

13. Commentary, *supra* note 8.

14. Third Geneva Convention, *supra* note 10, at art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

15. Commentary, *supra* note 8.

16. Third Geneva Convention, *supra* note 10, at art. 4, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

17. See THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 326 (Dieter Fleck ed., 1995).

18. *Id.*

19. *Id.* at 336.

20. Third Geneva Convention, *supra* note 10, at art. 2, para. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

21. *Id.* at art. 4, para. 2, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

22. Commentary, *supra* note 8 (stating that since the drafting of the Third Geneva Convention was heavily influenced by the events and experiences of World War II, this provision represented an attempt to deal with the issue of "partisans" whose status had been unclear under previous agreements.)

23. Third Geneva Convention, *supra* note 10, at art. 4, para. 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

of paragraph 1 or 2.²⁴ This “catch all” provision seems to imply that the Convention is intended to cover all persons who fight for some power. The use of the term “authority” in addition to “government” in reference to a combatant’s allegiance suggests that soldiers who fight on behalf of a non-state authority should be covered by the Convention. If so, this could mean that al Qaeda fighters would be included as “members of regular armed forces who profess an allegiance to . . . an authority non recognized by the Detaining Power.”²⁵ This interpretation would, however, conflict with the general assumption that the essence of being a “combatant” is having permission to fight on behalf of a party that respects and is bound by international law.²⁶ As such, combatants are entitled to retain their military personality throughout their captivity and are not expected to have a duty of allegiance to the Detaining Power.²⁷ Non-combatants, which include members of regular armed forces who do not participate in fighting or authorized civilians who accompany an army, such as religious leaders and newspaper reporters, are entitled to the same protection as POWs under paragraph 3.

If there is any doubt as to whether an individual falls into one of the Article 4 categories, he²⁸ is entitled to presumptive POW status until his true status is determined by a “competent tribunal.”²⁹ This phrase was chosen over the term “responsible authority” on the basis that “decisions which have the greatest consequences should not be left to a single person, especially one who might be of a subordinate rank.”³⁰ The drafters of the Convention also rejected the phrase “military tribunal” in favor of “competent tribunal” due to beliefs that bringing “a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention.”³¹ In the past, federal district courts have found that when they are “properly presented” with the issue, they are “competent tribunal[s]” which can decide the Article 4 status of a person being detained in the United States, as they did in the case of General Manuel Noriega.³² There is little jurisprudence, however, on the competence of other courts or tribunals.

24. Commentary, *supra* note 8, at art. 4.

25. Third Geneva Convention, *supra* note 10, at art. 4, para 3, 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

26. HANDBOOK, *supra* note 17, at 67.

27. Numerous articles, included within the Third Convention, mandate respect for POWs, due to their status as military soldiers. They may never be deprived of their right to wear medals and decorations reflecting their rank and may not be punished for attempting to escape.

28. For purposes of this article, the pronoun “he” shall be used when referring to prisoners of war for grammatical simplicity and due to the fact that there are no women being detained at Guantanamo. The Geneva Convention does recognize, however, that women make up significant portions of the armed forces and it includes explicit provisions for according female POWs the same rights as male POWs.

29. Third Geneva Convention, *supra* note 10, at art. 5, 6 U.S.T. at 3322, 75 U.N.T.S. at 140.

30. Commentary, *supra* note 8, at art. 5.

31. *Id.*

32. United States v. Noriega, 808 F. Supp. 791 (D. Fla. 1992) (acknowledging, in a somewhat evasive way, that its decision did not preclude the executive branch from deciding whether someone is a POW in other circumstances).

Once a prisoner has been declared a POW, Articles 13-16 govern his subsequent general treatment. All POWs are to be treated humanely, and a failure to protect the life and health of a POW is considered a serious breach of the Convention.³³ POWs are also not to be subjected to medical experimentation and must be protected from acts of violence, intimidation, insults and public curiosity.³⁴ While the Detaining Power may treat POWs with respect commensurate with their age, profession or advanced rank, it may not make adverse distinctions based on "race, nationality, religious belief or political opinions, or . . . similar criteria."³⁵ Other provisions state that POWs are unable to forfeit the protections of the Convention,³⁶ that they have the right to correspond with their families no later than one week after arrival at camp,³⁷ and that they possess the right to lodge complaints against the Detaining Power.³⁸ Article 25 also requires that POWs be quartered under conditions similar to those afforded to the armed forces of the Detaining Power in the same area.³⁹ The premises must "entirely" protect POWs from dampness and shall be adequately heated and lighted.⁴⁰ Allowances shall also be made to accommodate the "habits and customs" of the detained population. POWs shall also have "complete latitude" to practice their religion and shall be provided with opportunities to engage in physical exercise, including sports and games.⁴¹ Statements regarding group activities, combined with others that refer to the necessary conditions of dormitories, kitchens and commissaries, indicate that the drafters of the Convention assumed that POWs should be kept in communal camps with some freedom to move about and interact with other prisoners.⁴² The text of the Convention is to be posted in every camp where it can be seen by all prisoners and in a language that the prisoners can understand.⁴³

Contrary to popular belief, POWs may be interrogated by the Detaining Power to obtain military information.⁴⁴ Under Article 17, however, a POW is

33. Third Geneva Convention, *supra* note 10, at art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146; see also art. 130, which states that depriving a POW of his lawful rights is a war crime itself.

34. *Id.* at art. 13, 6 U.S.T. at 3328, 75 U.N.T.S. at 146. See Commentary, *supra* note 8, at art. 16 (stating that the use of the word "protection" indicates an affirmative obligation on the part of the Detaining Power).

35. Third Geneva Convention, *supra* note 10, at art. 16, 6 U.S.T. at 3330, 75 U.N.T.S. at 148.

36. *Id.* at art. 7, 6 U.S.T. at 3324, 75 U.N.T.S. at 142.

37. *Id.* at art. 70, 6 U.S.T. at 3370, 75 U.N.T.S. at 188.

38. *Id.* at art. 78, 6 U.S.T. at 3378, 75 U.N.T.S. at 196.

39. *Id.* at art. 25, 6 U.S.T. at 3338, 75 U.N.T.S. at 156.

40. *Id.*; see also Commentary, *supra* note 8, at art. 25, para. 3 (positing that the provision requiring adequate lighting also includes adequate darkness during the night hours so that detainees can sleep. While the Detaining Power has a right to illuminate fences and the perimeter of the camp at all times, such light should not enter the sleeping quarters of the POWs).

41. Third Geneva Convention, *supra* note 10, at arts. 34, 38, 6 U.S.T. at 3346, 3348, 75 U.N.T.S. at 164, 166.

42. See *id.* at art. 21, 6 U.S.T. at 3334, 75 U.N.T.S. at 152, which also states that "prisoners shall not be held in close confinement" except when necessary to safeguard their health and even then, only as long as those circumstances exist.

43. *Id.* at art. 41, 6 U.S.T. at 3330, 75 U.N.T.S. at 148.

44. Commentary, *supra* note 8, at art. 17 (recognizing that a "State which has captured prisoners of war will always try to obtain military information from them" and that Article 17 is intended to regulate only the manner in which the questioning is carried out.).

only *obligated* to give his name, rank, serial number and date of birth or equivalent information.⁴⁵ Although prisoners who willfully give false information may lose the ability to obtain privileges that the Detaining Power has decided to confer upon officers of their rank, such a refusal is not grounds for denying them the substantive rights guaranteed in the other parts of the Convention.⁴⁶ During interrogations, POWs must not be subjected to any form of physical or mental coercion or torture, and they may not be punished in any way for refusing to answer.⁴⁷ All questioning must be conducted in a language that the POW understands.⁴⁸

During a POW's captivity, he shall be subject to the laws of the armed forces of the Detaining Power and, as such, may be subject to disciplinary or judicial proceedings.⁴⁹ No prisoner may be tried or sentenced for an act that was not punishable by the laws of the Detaining Power or international law at the time it was committed.⁵⁰ Article 84 states that POWs shall be tried in military courts or, if the laws of the Detaining Power expressly permit, in a civilian court.⁵¹ Because of the numerous provisions requiring treatment "similar to those of the armed forces of the Detaining Power," it appears that, when the Convention uses the phrase "military courts," it means courts-martial. The Convention further states that POWs may never be tried in any court which does not meet the essential guarantees of "independence and impartiality" under generally recognized norms or a court which denies the rights and means of defense specifically outlined in Article 105 of the Convention.⁵² Article 105 rights include the right to counsel of choice or, if no choice is made, appointment of a qualified advocate or counsel by the Detaining Power.⁵³ The accused POW also has a right to meet freely with counsel, in private, for a period at least two weeks before the opening of the trial.⁵⁴ While the Convention states only that the accused should be informed of the charges against him "in good time before the opening of the trial," the ICRC believes that charges should be communicated at least two weeks before trial so that counsel can make an informed decision on how to prepare the case.⁵⁵ Counsel for the accused has a right to interview witnesses, including other POWs, and present them at trial.⁵⁶ Trials are to be conducted as quickly as possible and the accused should not be confined while

45. Third Geneva Convention, *supra* note 10, at art. 17, 6 U.S.T. at 3330, 75 U.N.T.S. at 148. This information must be obtained because Article 17 also requires the Detaining Power to issue each POW an identity card which it may not confiscate under any circumstances.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at art. 82, 6 U.S.T. at 3382, 75 U.N.T.S. at 200. Article 82 states that when deciding whether an offense shall be punishable by disciplinary or judicial proceedings, the Detaining Power should exercise leniency and impose only disciplinary punishment whenever possible.

50. *Id.* at art. 99, 6 U.S.T. at 3342, 75 U.N.T.S. at 210.

51. *Id.* at art. 84, 6 U.S.T. at 3382, 75 U.N.T.S. at 200.

52. *Id.*

53. *Id.* at art. 105, 6 U.S.T. at 3396, 75 U.N.T.S. at 214.

54. *Id.*

55. Commentary, *supra* note 8, at art. 105.

56. *Id.*

awaiting trial unless a member of the armed forces of the Detaining Power would also be confined when facing the same charges or if confinement is "essential" to national security.⁵⁷ In no circumstances shall confinement of a POW awaiting trial exceed three months.⁵⁸ Article 107 states that all prisoners shall have, "in the same manner as the armed forces of the Detaining Powers," a right to appeal any sentence and they shall be fully informed of that right and the procedures for affecting it.⁵⁹

Article 118 mandates the release and repatriation of POWs "without delay" upon the cessation of hostilities.⁶⁰ Prisoners against whom criminal proceedings are pending or those who have already been convicted may be detained until the end of the proceeding or the punishment.⁶¹ Failure to provide a POW the rights of a "fair and regular trial" is considered a grave breach of the Convention under Article 130 and is a crime of war.

Overall, the Convention attempts to provide a comprehensive framework that balances the rights of states to remove the opposing party's soldiers from the battlefield with the rights of individual POWs to be treated with dignity and respect. Despite this, the ICRC makes it clear that the Convention is designed to benefit and protect individuals, not to serve the interest of states at war. Whenever there is doubt as to whether a POW deserves the benefit of a particular provision, the ICRC generally suggests erring on the side of protection.

B. *International Covenant on Civil and Political Rights*

The United States is also a party to the International Covenant on Civil and Political Rights ("ICCPR" or "the Covenant") and is thereby legally bound by its provisions. The ICCPR entered into force in March 1973 and is considered one of the most important treaties in international human rights law. The ICCPR enumerates several rights derived from the "inherent dignity of the human person."⁶² Among those rights are the right to life⁶³ and the right to liberty and security of the person,⁶⁴ which are generally effective prohibitions on the use of the death penalty and torture.⁶⁵ In countries that have not abolished the death penalty, the Covenant states that the death penalty or the like shall only be imposed as punishment for the most serious crimes and that the sentence shall be rendered only upon final judgment of a competent court.⁶⁶

57. *Id.* at art. 103.

58. *Id.*

59. Third Geneva Convention, *supra* note 10, at art. 107, 6 U.S.T. at 3398, 75 U.N.T.S. at 216. This article also states that the Detaining Power shall inform the accused of the sentence, indicating that a person may be sentenced without being present. *See also* Commentary, *supra* note 8, at art. 107 (stating that Article 107 should not be taken to mean that a person may be tried *in absentia*).

60. Third Geneva Convention, *supra* note 10, at art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

61. *Id.* at art. 119, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

62. International Covenant on Civil and Political Rights, Dec. 16, 1966, pmbl., 999 U.N.T.S. 171, 172-73, 6 I.L.M. 368, 368.

63. *Id.* at art. 6(2), 999 U.N.T.S. at 174, 6 I.L.M. 370.

64. *Id.* at art. 9(1), 999 U.N.T.S. at 175, 6 I.L.M. 371.

65. *Id.* at arts. 6(1), 9(1), 999 U.N.T.S. at 174-75, 6 I.L.M. 370-71.

66. *Id.* at art. 6(2), 999 U.N.T.S. at 174, 6 I.L.M. 370.

Those who are arrested or detained on criminal charges have a right to be informed of the reason for their arrest and the charges against them at the time of their arrest.⁶⁷ They shall also be brought before a judge and tried within a reasonable time or released.⁶⁸ People may also challenge the legality of their detention before a judicial officer who shall be empowered to authorize their release.⁶⁹

Unlike the Geneva Convention, Article 4 of the ICCPR contains a clause that allows for the suspension of certain rights, "in time of public emergency which threaten the life of the nation and the existence of which is officially proclaimed,"⁷⁰ provided that such emergency measures do not involve discrimination solely on the basis of race, color, sex, language, religion or social origin. The rights to life, religion, freedom from torture, slavery and the prohibition against *ex post facto* laws, among others, may never be derogated, regardless of the national emergency.⁷¹ If a state chooses to avail itself of the Article 4 exception, it must inform the other parties to the Covenant, via the U.N. Secretary-General, of the provisions from which it has derogated and the reasons by which it was actuated.⁷² Absent from that list of non-derogable rights are those listed in Article 9, involving the right to be free from arbitrary detention, to be informed of pending charges, to be brought before a judicial officer, and to challenge an unlawful detention.⁷³

Whether the attacks on September 11, 2001 would qualify as an emergency that threatens the life of the nation is not an issue for the ICCPR, because Article 4 does not allow for second-guessing the judgment of the nation seeking to invoke it. The provision requiring notification of the Secretary-General not does imply that states need to seek permission to suspend their obligations, only that they notify the world community of their intentions. Yet, as of December 2002, the United States has not announced such an intention to suspend its obligations under the ICCPR, as required by Article 4(3).⁷⁴ Though this means that the United States is still technically bound to give effect to all the rights enumerated in the ICCPR, the Bush administration has not publicly acknowledged its position on the application of the ICCPR. This lack of acknowledgement suggests that the administration may believe that human rights law such as that contained in the ICCPR does not apply in times of war.

C. *American Convention on the Rights and Duties of Man*

The United States is a member of the Organization of American States ["OAS"], the regional treaty-based body of the Americas whose purpose is ad-

67. *Id.* at art. 9(2), 999 U.N.T.S. at 175, 6 I.L.M. 370.

68. *Id.* at art. 9(3), 999 U.N.T.S. at 175, 6 I.L.M. 370.

69. *Id.* at art. 9(4), 999 U.N.T.S. at 176, 6 I.L.M. 370.

70. *Id.* at art. 4(1), 999 U.N.T.S. at 174, 6 I.L.M. 369.

71. *Id.* at art. 4(2), 999 U.N.T.S. at 174, 6 I.L.M. 370.

72. *Id.* at art. 4(3), 999 U.N.T.S. at 174, 6 I.L.M. 370.

73. *Id.* at art. 4(2), 999 U.N.T.S. at 174, 6 I.L.M. 370.

74. *Annual Report of the Secretary General, Inter-American Commission of Human Rights, OEA/Sec. G/CP/doc. 3602/02/rev. 1* (2002), 47, para. 11.

vancing democracy and human rights, promoting trade and ensuring the collective security of its member states.⁷⁵ The OAS Charter and a separate governing document, the American Declaration of the Rights and Duties of Man ("American Declaration"), were adopted in 1948. All thirty-five countries of the Americas, including the United States, have ratified the OAS Charter and the American Declaration and are legally bound by them.⁷⁶ The introduction to the American Declaration states that the parties recognize that "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality."⁷⁷ This suggests that the American Declaration was meant to apply to all people within the Americas, regardless of their citizenship status. Certain articles of the American Declaration, such as XXV and XXVI, ensure specific rights, including protection from arbitrary arrest and the right to due process of law, respectively. In 1959, the Inter-American Commission on Human Rights was created to monitor compliance with the human rights provisions in the OAS Charter and to act as an advisory body to the OAS on human rights issues.

In 1969, an additional human rights treaty called the American Convention on Human Rights ("American Convention") was adopted and since has been ratified by twenty-five OAS member states.⁷⁸ Its provisions are enforced by the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights. The United States has not ratified the American Convention and thus is not bound by it. The United States also believes that the Declaration is non-substantive and does not confer on the United States any specific obligations.

The applicability of these three agreements—the Geneva Conventions, the ICCPR and the American Declaration—has become an open question in the post-September 11 era. Human rights groups have advocated concurrent application of all the treaties to the Guantanamo detainees, while the Bush administration has only acknowledged limited obligations under the Geneva Convention.

III. THE BUSH ADMINISTRATION'S POLICY REGARDING DETENTION AND TRIAL OF FOREIGN CITIZENS

This section discusses the factual events leading up to and surrounding the detention of the Guantanamo prisoners as well as evolution of the executive policy regarding the detainees.

75. OAS website, *The Organization of American States: Introduction*, at <http://www.cidh.oas.org/Basicos/basic1.htm> (last visited Feb. 20, 2003).

76. *Id.* at part II.

77. American Declaration of the Rights and Duties of Man, May 2, 1948, pmbi., OAS Doc. OAS/ser.LJ/V/I.4 rev. 8 (2001) available at <http://www.cidh.oas.org/basic.eng.htm> (last visited Apr. 21, 2003).

78. *Id.* at arts. 15, 16.

A. War in Afghanistan

Although the al Qaeda network had conducted terrorist attacks on American targets during the Clinton administration, the events of September 11 prompted the United States to use full-scale military action to capture suspects. It was well known to the administration that al Qaeda had been using Afghanistan as a base of operations and that their presence was tolerated, perhaps encouraged, by the oppressive Taliban regime that had ruled the country since 1996. On the evening of September 11, Bush announced that the United States would "make no distinction between the terrorists who committed these acts and those who harbored them,"⁷⁹ an early indicator that Afghanistan was under particular scrutiny. The administration immediately began demanding that Taliban officials surrender al Qaeda members, Osama bin Laden in particular, or face military consequences. At a press conference in Pakistan on September 21, 2001, Mullah Abdul Salam Zaeef delivered the final decision of the Muslim Clerics: They would not hand over Osama bin Laden peacefully.⁸⁰ U.S. air attacks began on October 7, followed by ground attacks by Special Forces troops on October 19.⁸¹

B. Proposed Military Tribunals

On November 13, 2001, the same day that the Afghan capital of Kabul was captured by U.S. and Coalition forces, President Bush, citing his power as the commander in chief and the broad authority granted to him under the USA Patriot Act, issued an executive order authorizing the creation of military commissions for the prosecution of those captured in armed conflict.⁸² To bolster its authority to create such tribunals, the administration pointed to a 1942 Supreme Court case, *Ex Parte Quirin*, which upheld the use of military commissions for German saboteurs who were captured on U.S. soil.⁸³ In *Quirin*, the Court stated that since international agreements contain references to lawful combatants, "our government has thus recognized the existence of a class of unlawful belligerents."⁸⁴ Legal scholars, such as Lawrence Tribe, stated that *Quirin* provided no direct authorization for the creation of tribunals and suggested that there be direct congressional authorization in order to avoid "a cloud of suspicion" over any convictions entered by the tribunals. Nevertheless, the administration began

79. President's Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1291 (September 11, 2001).

80. John F. Burns, *A Nation Challenged: The Taliban; Clerics answer "No, no, no!" and invoke fate of past foes*, N.Y. TIMES, Sept. 21, 2001, at B3.

81. See generally Michael Collier, *The Bush Administration's Reaction to September 11: A Multilateral Voice or a Multilateral Veil?*, 21 BERKELEY J. INT'L LAW 715 (2003).

82. Notice: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter November 13 Order].

83. U.S. *ex rel. Quirin v. Cox*, 317 U.S. 1 (1942).

84. *Id.* at 17. (using the terms "unlawful combatant" and "unlawful belligerent" interchangeably).

using the term “unlawful combatant” and firmly asserted its right to create special judicial bodies to try such individuals.⁸⁵

The November 13 order laid out the operating procedures for the proposed commissions. Individuals subject to the commissions’ jurisdiction would include non-citizens who the President determined “are or were at relevant times” members of al Qaeda and have engaged in, aided or conspired to commit acts of international terrorism, or have harbored such persons.⁸⁶ The Order stated that the crimes within the commissions’ jurisdiction would be violations of “the laws of war and other applicable laws,” but did not define nor specify what other such laws would fall within the tribunal’s ambit. The accused would have a right to counsel but the order did not state whether counsel could be of the accused’s choosing or if the government would provide representation for indigent defendants. While sections 3 and 4 mandated humane treatment and a “full and fair trial,” other provisions prevented the use of juries as triers of fact and allowed for secret hearings at any location in or outside the United States. Admission of evidence which would have “probative value to a reasonable person” would be admitted.⁸⁷ Verdicts and sentencing, including application of the death penalty, would not require unanimity but could be made upon a two-thirds vote of the tribunal. Decisions would be reviewed by the secretary of defense or the president, but section 7(b)(2) specifically precluded any individual subject to the tribunal from seeking review or appeal in any court of the United States, the court of any other country or any international tribunal. The Order was silent on a number of procedural issues, including the extent of the right to counsel, the standard of proof, and the obligation of the government to disclose evidence.

Though the concurrence of this announcement with the fall of Kabul caused many to think that the provisions would only apply to those captured in the Afghan conflict, the text of the proposal is not limited in that way. As Jennifer Trahan pointed out, it could apply to any non-citizen accused of committing a terrorist act including, for example, a German or a Basque separatist traveling through the United States who had previously committed terrorist acts against Spanish and American targets in Spain.⁸⁸ The Bush administration’s use of the term “unlawful combatants” to describe both the Guantanamo detainees and the still-hypothetical subjects of the military commissions furthered the public perception that the two were indistinguishable.

C. *Detainees Arrive at Guantanamo*

In November 2001, a violent prison uprising among detained Afghan soldiers resulted in the widely-publicized death of CIA agent Michael Spann, the

85. Tom Curry, *Critics charge Bush tribunals are invalid*, MSNBC NEWS ONLINE, Dec. 4, 2002, available at <http://stacks.msnbc.com/news/663537.asp> (last visited Mar. 5, 2003).

86. November 13 Order, *supra* note 77, at 57,834.

87. *Id.* at 57, 835.

88. Jennifer Trahan, *Trying bin Laden and Others: Evaluating the Options for Terrorist Trials*, 22 Hous. J. INT’L L. 475, 487 (2002).

first known American casualty in the conflict.⁸⁹ This incident, in part, prompted the government to begin transporting captives to locations outside of Afghanistan to better ensure the safety of U.S. military personnel. On January 11, 2001, the first group of twenty detainees flew from Afghanistan to Guantanamo Bay. Two days later, another group of thirty detainees flew to Guantanamo.⁹⁰ By January 21, that number had risen to 158, and it continued to grow steadily until it reached over 600 detainees several weeks later.

On lease to the United States by the Cuban government, Guantanamo is the oldest overseas base and the only one located in a communist country.⁹¹ Negotiated in 1903, long before Cold War tension arose between the United States and Cuba, the lease costs the United States only \$4,085 per year and can be terminated only by mutual agreement.⁹² Given the strategically advantageous location of the base, the United States has never shown any intent to abandon this valuable piece of property.

This was not the first time the United States had used the base at Guantanamo Bay as a holding tank. In 1994 when hundreds of Haitian and Cuban refugees were interdicted in the waters off the Florida coast, they were brought to Guantanamo. When that action was challenged in federal court, lawyers for the refugees argued that though the base was technically on Cuban territory, it was effectively under U.S. control.⁹³ Ultimately, the court ruled that it had no jurisdiction to hear the case since the action had not taken place on U.S. territory.

Prisoners housed at "Camp X-ray" are kept in individual cells, measuring 1.8 by 2.4 meters.⁹⁴ The cells are constructed of chain-link fence, have metal roofs and concrete floors and are partially exposed to the elements.⁹⁵ The detainees, most of whom were Muslim men, were allowed to pray but were forced to shave their beards.⁹⁶ Once the details of the prisoners' accommodations were made public, the U.S. drew sharp criticism from human rights groups, such as Amnesty International, which stated that the "cages . . . fall below minimum standards for humane treatment."⁹⁷ The ICRC also complained that the release of photos depicting the detainees shackled and confined was, in effect, exposing

89. Vernon Loeb and Josh White, *CIA Reports Officer Killed in Prison Uprising*, THE WASH. POST, Nov. 29, 2001, at A27.

90. *A Second Group of detainees arrives at the Base*, N.Y. TIMES, Jan. 14, 2002, at A8.

91. U.S. Naval Base, Guantanamo Bay (Jan. 18, 2002), available at http://www.nsgtmo.navy.mil/gazette/History_98-64/Brief%20History.htm (last visited Feb. 20, 2003).

92. *Id.*; Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda (July 2, 1903), available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba003.htm> (last visited Nov. 12, 2002).

93. Cuban Am. Bar Assn. v. Christopher, 43 F.3d. 1412, 1424-1425 (11th Cir. 1995).

94. *US defends handling of Afghan captives*, supra note 1.

95. Human Rights Watch, *U.S.: Geneva Conventions Apply to Guantanamo Detainees* (Jan. 11, 2002), at <http://www.hrw.org/press/2002/01/us011102.htm> (last visited Oct. 5, 2002).

96. *See Pentagon defends treatment of detainees*, CNN.com, Jan. 15, 2002, available at <http://www.cnn.com/2002/WORLD/americas/01/14/cuba.detainees/related>.

97. *Id.*

them to public curiosity, which is prohibited by the Geneva Convention.⁹⁸ Many noted that the living quarters of the Guantanamo detainees deviated from the previous treatment offered to the Haitian refugees held on the island in 1994, who were housed in hard-walled buildings.⁹⁹ Such unequal treatment suggests deviation from the Geneva Convention's requirement that POWs be treated similarly to the armed forces of the Detaining Power. The administration rejected this criticism with Vice President Dick Cheney publicly stating that the detainees were "probably being treated better than they deserve."¹⁰⁰ Such statements are consistent with the administration's overall position that its treatment of the detainees is not only well within the bounds of its legal obligations, but the bounds of propriety as well.

D. Denial of POW status

In late January 2002, Secretary of Defense Donald Rumsfeld announced that none of the prisoners being held at Guantanamo Bay would be considered POWs under the Geneva Convention.¹⁰¹ According to the administration, the Taliban members were not entitled to POW status under paragraph 1 of Article 4 because they were not part of the armed forces of the legitimate government of Afghanistan.¹⁰² Furthermore, they would not be considered "members of volunteer forces" under paragraph 2 because they did not wear uniforms and did not always carry their arms openly.¹⁰³ As the Convention is usually the operative legal instrument in a war-time conflict, the administration's denial of its application left open the question of whether the detainees retained any legal protection at all.

The Red Cross disagreed with the administration's characterization, stating that it regards all prisoners as POWs with full rights under the Geneva Convention.¹⁰⁴ Press reports indicated that there was internal disagreement over these characterizations within the Bush Administration as well. A memo transmitted to President Bush from White House Counsel Alberto Gonzales on behalf of Colin Powell urged the president to reconsider his position and confer POW status upon both Taliban and al Qaeda members.¹⁰⁵ There were also reports that Powell urged Bush to reconsider using the term "illegal combatants."¹⁰⁶ Such disagreement among members of the same administration underscores the lack of clarity surrounding the true status of the detainees.

98. Julian Borger, *U.S. Gives Way on Prisoners*, GUARDIAN, Jan. 22, 2002, available at <http://www.guardian.co.uk/afghanistan/story/0,1284,637386,00.html>.

99. *U.S: Geneva Conventions Apply to Guantanamo Detainees*, *supra* note 95.

100. *No POW Rights for Cuba Prisoners*, BBC NEWS ONLINE, Jan. 27, 2002, at <http://news.bbc.co.uk/1/hi/world/americas/1784700.stm> (last visited Oct. 5, 2002).

101. *Id.*

102. *Id.*

103. *See id.*

104. *US defends handling of Afghan captives*, *supra* note 1.

105. *No POW Rights for Cuba Prisoners*, *supra* note 100.

106. *Id.*

E. Bush Retreats

After extensive domestic and international debate, the Bush administration announced that it was altering its positions on both the denial of POW status to all Guantanamo detainees and the structure of the proposed military tribunals. On February 7, 2002, the White House announced that it would confer POW status upon members of the Taliban because, although the United States does not recognize the Taliban as a legitimate government, Afghanistan is a party to the Geneva Convention.¹⁰⁷ It held firm to its position that al Qaeda members were not entitled to POW status due, in part, to the fact that they could not be classified as a state party to the Convention.¹⁰⁸ The administration stated that all prisoners were to be treated humanely and "consistent with the principles of the Convention."¹⁰⁹ The administration further stated that "the President has maintained the U.S. commitment to the principles of the Convention, while recognizing that the Convention simply does not cover every situation in which people may be captured or detained by military forces."¹¹⁰ The administration's statement did not address the still-lingering question of what law should apply, if not the Geneva Convention. In effect, the administration suggested that al Qaeda operatives have no specific substantive or procedural rights under any international agreement, other than the right to be treated humanely.

A little over a month later, on March 21, 2002, the Pentagon issued a "refinement" of the procedures for the proposed military tribunals. The new procedures included the presumption of innocence, the right to choose counsel, the right to a public trial and the right to remain silent with no adverse inference allowed to be drawn. The standard of proof would be "beyond a reasonable doubt," the same standard that exists in civilian criminal trials. The accused would have the right to see the prosecution's evidence, though classified information would be kept secret. The proposed tribunals would still not include certain due process mechanisms, such as the right to a jury trial, the prohibition of hearsay evidence and/or review by a civilian court.

The administration has not made further statements on the structure of the proposed military commissions since the March 2002 announcement. As of February 2003, the military commissions have not been created and there is no publicly stated timetable for their implementation. Though public discourse on the tribunals has slowed significantly, the November 13 order has not been revoked and the administration has not officially abandoned the idea of creating such commissions.

107. White House Press Secretary Ari Fleischer, *Statement by the Press Secretary*, (Feb. 7, 2002), available at <http://us-mission.ch/presss2002/0802fleischerdetainees.htm> (last visited Oct. 12, 2002).

108. *Id.*

109. *Id.*

110. *Id.*

IV. LEGAL CHALLENGES TO DETENTION AT GUANTANAMO

A. *Federal Cases*

Because of the well-developed jurisprudence on due process rights under the U.S. Constitution, it comes as no surprise that the first forum in which the detentions were challenged was in a U.S. federal district court. The successful trials of other suspected terrorists, such as those involved in the 1993 World Trade Center bombing, led many to believe that if jurisdiction could be found in a U.S. court, adequate due process rights would be ensured.

1. *Coalition of Clergy v. Bush and Lack of Standing*

Despite the adverse precedent issued by the Eleventh Circuit in the Haitian refugee case, a habeas suit was filed on behalf of the Afghan detainees in late 2001.¹¹¹ Brought by a coalition of religious leaders, lawyers and professors, the petition, filed in the District Court of the Central District of California, alleged that the Guantanamo detainees had been deprived of their liberty without due process of law, had not been informed of the nature and cause of the charges against them and had not been afforded assistance of counsel, as required by the U.S. Constitution.¹¹² It also alleged that the United States had committed violations of the Geneva Convention by transferring the detainees out of their country of capture.¹¹³ The court, however, did not address that issue.

Instead, the court issued a multi-part decision dismissing the case for lack of standing and jurisdiction.¹¹⁴ First, the court held that the petitioners lacked standing to bring the suit because they failed to satisfy the two-part "next friend" test enumerated in *Whitmore v. Arkansas*,¹¹⁵ which allows one person to bring a suit on behalf of another. The first part requires a showing that the real party in interest does not have access to the court or that he is mentally or legally incapacitated.¹¹⁶ The second part of the test requires the petitioners to prove that they have a "significant relationship" with the real party.¹¹⁷

In *Coalition of Clergy*, the court stated that the petitioner's assertion that Guantanamo detainees "appear to be held incommunicado and have been denied access to legal counsel" was conclusory and insufficient to prove actual lack of access.¹¹⁸ The court took judicial notice of news articles attached to the petitioners' memo, which stated that some Guantanamo detainees were allowed to write to family members, contact their diplomatic representatives and meet with

111. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1038 (C. D. Cal. 2002), *aff'd in part, vacated in part*, F.3d 1153 (9th Cir. 2002).

112. *Id.* at 1038.

113. *Id.*

114. *Id.* at 1039.

115. *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (denying "next friend" standing to a death row prisoner who was petitioning on behalf of another prisoner who had declared his intention not to appeal his execution).

116. *Coalition of Clergy*, 189 F. Supp. 2d at 1040.

117. *Id.*

118. *Id.* at 1041.

members of the Red Cross.¹¹⁹ Second, the court noted that not one relative, diplomatic or religious representative, or anyone with a direct tie to a particular detainee, had authorized the petition.¹²⁰ Furthermore, the petitioners failed to prove that they attempted to communicate with any of the Guantanamo detainees, further undermining their assertions that they are appropriate representatives of the prisoners.¹²¹ Though the court stated in dicta that common sense indicates that the detainees would not oppose the petition, the lack of a real relationship between the petitioners and any detainee meant that the "significant relationship" part of the standing test was not satisfied.¹²²

The court also issued a ruling that it lacked jurisdiction because none of the named respondents were physically present in the Central District of California.¹²³ The court, however, refused to transfer the case because under its analysis of the transfer requirements and relevant case law, it appeared that no district court in the United States could exercise jurisdiction over the case.¹²⁴ Because this portion of the court's ruling was later vacated by the Ninth Circuit, it will not be discussed in depth here.

On November 18, 2002, the Ninth Circuit upheld the district court's ruling on lack of "next friend" standing.¹²⁵ On the issue of lack of access to the court, it agreed with the lower court that the detainees were not being held incommunicado.¹²⁶ It did acknowledge, however, that they were being held in a faraway location without the ability to meet with lawyers and, as such, could not be said to have full access to a court.¹²⁷ The court said that the precise extent of this access was not necessary to determine since the Coalition members could not meet the second prong of the *Whitmore-Massie* test.¹²⁸ The Coalition members attempted to challenge the requirement of proving a "significant relationship," but the court stated that such proof enhanced the probability that the petitioners were "dedicated to the best interests" of the prisoners.¹²⁹ Since the Coalition members had not established that they enjoyed any relationship with the detainees, the court found that they lacked "next-friend" standing to litigate the case.¹³⁰

After affirming the district court's decision that the Coalition lacked standing, the Ninth Circuit declined to address the issue of jurisdiction.¹³¹ It stated that once the lower court had found that the petitioners lacked standing, it should

119. *Id.* at 1041-42.

120. *Id.* at 1043.

121. *Id.* at 1043-44.

122. *Id.* at 1043.

123. *Id.* at 1045.

124. *Id.* at 1050.

125. *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002).

126. *Id.* at 1160.

127. *Id.* at 1161.

128. *Id.*

129. *Id.* at 1165.

130. *Id.* at 1163.

131. *Id.* at 1165.

not have addressed the scope of rights and privileges of the detainees.¹³² The court then vacated the part of the ruling that held that the District Court of California lacked jurisdiction as well as the “far-reaching ruling that there is no United States court that may entertain any of the habeas claims of any of the detainees.”¹³³ While this ruling foreclosed the possibility that public interest groups could advocate on behalf of the detainees, it did suggest that people with a more direct relationship—for example, family members—could gain standing to represent the detainees in federal court.

2. *Rasul v. Bush and Lack of Jurisdiction*

On February 19, 2002, while *Coalition of Clergy v. Bush* was pending, British citizens Shafiq Rasul and Asif Iqbal and Australian citizen David Hick had filed a habeas petition in the District Court for the District of Columbia.¹³⁴ The petitioners, all of whom were detained at Guantanamo Bay, were joined on the petition by some of their parents. The petitioners alleged violations of the Fifth, Sixth, Eighth and Fourteenth Amendments as well as the ICCPR and the American Declaration on the Rights and Duties of Man.¹³⁵ They requested that the detained petitioners be released from unlawful custody, be allowed to meet with their attorneys in private and be free from interrogation while litigation was pending.¹³⁶ In May, a separate request for preliminary and permanent injunctive relief was filed by the family members of twelve Kuwaiti citizens detained at Guantanamo in *Odah v. United States*. Unlike the petitioners in the earlier case, they were not seeking release from confinement based on a writ of habeas corpus, but rather the ability to meet with their families, to be informed of any charges against them, to meet with counsel of their choice and to have access to a court or impartial tribunal.¹³⁷ The petitioners based their allegations on the Fifth Amendment of the U.S. Constitution, the Alien Tort Claims Act and the Administrative Procedure Act. When the government moved to dismiss the cases for lack of jurisdiction, the court decided to consider the two cases together, collectively titling the action *Rasul et al.*

In its decision, the court relied heavily on *Johnson v. Eisentrager*,¹³⁸ a 1950 Supreme Court case involving twenty-one German nationals taken captive by the U.S. military after World War II for failing to cease hostile activities after Germany’s surrender. After a trial by a U.S. military commission sitting in China with the approval of the Chinese government, the German nationals were returned to Germany to serve their sentences in a prison under the control of a U.S. Army officer. Soon after, the Germans filed a writ of habeas corpus alleg-

132. *Id.*

133. *Id.*

134. *Rasul v. Bush*, 215 F. Supp. 2d 55, 57 (D.D.C. 2002)

135. *Id.* at 62.

136. *Id.*

137. *Id.* The court concluded that, although the petitioners in *Odah* were trying to avoid the appearance of invoking the writ of habeas corpus, they were essentially asking to challenge the legality of their detention. As such, the court treated the matter as if it were a habeas case.

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

ing several violations of the U.S. Constitution and demanding to be seen before a federal district court. The Supreme Court in *Eisentrager* dismissed the case and explained:

The privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign and the circumstances of their offense [and] their capture . . . were all beyond the territorial jurisdiction of any court in the United States.¹³⁹

The District Court in *Rasul* found that the Guantanamo detainees were factually and legally indistinguishable from the German prisoners in *Eisentrager*.

The court said that the most relevant question was not whether the petitioners were “enemy aliens” but whether they were within the court’s territorial jurisdiction.¹⁴⁰ The court seized on the use of the word “sovereignty” in the *Eisentrager* case and thus was not persuaded by petitioners’ arguments that Guantanamo was under *de facto* control of the United States. Finding that Guantanamo was indeed located in the sovereign territory of a foreign country, the court pronounced that it lacked jurisdiction over the case. The court also rejected the petitioners claim that, without vindication in the U.S. courts, they would be without recourse. Instead, the court relied on the government’s contention at oral argument that

there’s a body of international law that governs the rights of people who are seized during the course of combative activities . . . [and that] the scope of those rights are for the military and political branches to determine—and certainly that reflects the idea that other countries would play a role in that process.¹⁴¹

Though the court seemed to rely on the efficacy of international law to resolve debate over the status of the Guantanamo detainees, this statement is little more than dicta and does not require the administration to ensure that other countries actually do play a role in the process.

The combined rulings of *Coalition of Clergy* and *Rasul* suggest that, while the detainees (or their representatives) may be able to gain standing in federal district court, any case brought before such a court could not be heard due to lack of territorial jurisdiction. The result is a complete denial of access to the federal civilian court system as a venue for litigating the rights of the detainees.

B. The Inter-American Commission Case

In early 2002, an American non-governmental organization called the Center for Constitutional Rights filed a suit before the Inter-American Commission on Human Rights claiming that the Guantanamo detainees were entitled to protection under the American Declaration of the Rights and Duties of Man. On March 12, 2002, the members of the Commission voted unanimously to issue a

139. *Id.* at 777-778.

140. *Rasul*, 215 F. Supp. 2d at 67 (refusing to consider government suggestions that the court take judicial notice that the petitioners were “enemy combatants” because the fact was subject to “reasonable dispute”).

141. *Id.* at 56.

request to the United States to “take urgent measure to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.”¹⁴² The Commission particularly noted possible violations of the rights to life, equality before the law, fair trial, protection from arbitrary arrest and right to due process of law, under various articles of the American Declaration.¹⁴³ Announcement of the OAS decision went largely unnoticed in the American media, garnering no airtime on prime time news and only short articles deep in the interior of the *New York Times* and the *Washington Post*.

On April 12, 2002, the United States rejected the Commission’s request for provisional measures, stating that the Commission had neither jurisdiction nor basis “in law or fact” to issue such measures.¹⁴⁴ The United States argued that humanitarian law, not human rights law, should govern the status of the detainees at Guantanamo.¹⁴⁵ As such, the Inter-American Commission, “whose mission it is to interpret human rights under the [American Declaration of the Rights and Duties of Man],”¹⁴⁶ does not have jurisdiction to apply humanitarian law. The United States further argued that precautionary measures were unnecessary because the detainees clearly did not meet the criteria for prisoner of war status and because they were not “in peril or facing irreparable harm.”¹⁴⁷ Once again, the Bush administration failed to provide an affirmative explanation of what law should apply or which forum would be appropriate for adjudicating the rights of the detainees.

V.

LOOKING FORWARD

At the close of 2002, the situation of the Guantanamo detainees remains as follows: Federal district courts deny jurisdiction over the detainees and explicitly designate the matter to be decided in the international arena, yet the Bush administration has thus far refused to recognize the jurisdiction of the preeminent human rights body of the Americas. Until further developments, the detainees remain under the exclusive control of the executive branch.

Political discourse on the military tribunals has come to a near stand-still after the Bush administration’s announced modifications. By late 2002, no military tribunals have actually been created and there is no publicly stated timetable for their implementation. No one being detained at Guantanamo Bay has been charged with a crime or allowed to meet with a lawyer. No detainees have been publicly identified as high-ranking members of al Qaeda. In October 2002, after the administration concluded that a number of detainees were low-level soldiers and that they had no important information, the United States released them back to Afghanistan. Meanwhile, a permanent, medium-security facility is in

142. IACHR Decision on Guantanamo Detainees, *supra* note 6.

143. *Id.*

144. U.S. Response to IACHR Decision on Guantanamo Detainees, *supra* note 7.

145. *Id.*

146. *Id.*

147. *Id.*

the process of being constructed at Guantanamo. In December 2002, the commanding officers began offering detainees rewards for cooperative behavior during interrogations.¹⁴⁸ Such benefits include the ability to eat, sleep and pray with other detainees as well as possible transfer to the new medium-security area.¹⁴⁹ Army Major Gen. Geoffrey Miller, task force commander at Guantanamo, stated that the new incentives "give them hope [and] hope is of enormous importance."¹⁵⁰ The Bush administration continues to assert its right to hold and interrogate battlefield detainees, regardless of their POW status, while it ponders the next step. Defense Secretary Donald Rumsfeld has stated that there is "no rush" to try the detainees as long as the information they are providing is "saving Americans and our friends and allies."¹⁵¹

Perhaps debate on the fate of the Guantanamo detainees will renew itself if the administration makes efforts to implement the tribunals. Perhaps as time passes, the issue of indefinite detention will arise, and demands to charge or release the detainees will come forth. This seems unlikely, however, given that reports in early 2003 that detainees were increasingly attempting suicide did little to stir public consciousness.¹⁵² Furthermore, most Americans consider the conflict in Afghanistan over and are looking ahead to a possible war with Iraq.¹⁵³ If war in Iraq does occur, the plight of the Guantanamo detainees may become an isolated phenomenon as Iraq is a party to the Geneva Convention, and soldiers captured in its territory would almost assuredly be entitled to POW status. The more pressing question is whether the failure to afford POW status and civilian trials to the citizens of other countries will be perceived as a general disregard for international norms, thus hampering the ability of the United States to garner international support for future military actions or to effectively negotiate on behalf of American soldiers captured abroad.

148. Kaity Dagle, *U.S. Offers Guantanamo Detainees Rewards*, ASSOC. PRESS, Dec. 6, 2002.

149. *Id.*

150. *Id.*

151. BBC NEWS ONLINE, *Suicide Attempts in Guantanamo Camp*, Feb. 6, 2003, at <http://news.bbc.co.uk/2/hi/americas/2733397.stm> (last visited Mar. 5, 2003).

152. *Id.* (stating that four detainees attempted suicide in a period of three weeks, bringing the total number of attempts to fourteen).

153. See generally Allison Ehlert, *Iraq: At the Apex of Evil*, 21 BERKELEY J. INT'L L. 731 (2003).