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UNLAWFUL COMBATANT OR INNOCENT CIVILIAN? A CALL TO CHANGE THE CURRENT MEANS FOR DETERMINING STATUS OF PRISONERS IN THE GLOBAL WAR ON TERROR

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I. INTRODUCTION

"Injustice anywhere is a threat to justice everywhere."[1]

Although it has been over forty years since Dr. King wrote these words, they still ring true. In particular, injustices to people wrongfully imprisoned at the U.S. Naval Station, Guantanamo Bay, Cuba threaten justice throughout the United States and the world. Abdul Zahir is one of those people imprisoned at Guantanamo Bay, and the injustice of his imprisonment requires attention to the ongoing problems with prisoner status determinations.[2]

Following the 9/11 attacks on New York City and the Pentagon, President Bush declared that "[o]ur war on terror begins with al Qaeda, but

1. Martin Luther King Jr., *Letter from Birmingham Jail, (April 16, 1963), reprinted in* WHY WE CAN'T WAIT, at 64 (Signet Classic 2000).

2. The author was appointed detailed military defense counsel for Abdul Zahir in February 2006.

it does not end there."[3] On September 21, 2001, President Bush approved military plans to attack Afghanistan, using the operational code name, "Enduring Freedom."[4]

Like most armed conflicts, the U.S. invasion of Afghanistan produced enemy prisoners, referred to as "detainees" and classified as "enemy combatants."[5] These prisoners were either captured during hostilities or apprehended for allegedly affiliating with al Qaeda or the Taliban.[6] In an effort to capture suspected terrorists, the United States showered Afghanistan with leaflets which offered thousands of U.S. dollars for information leading to the capture of al Qaeda or Taliban "murderers and terrorists."[7] Payment of bounty had become so prevalent[8] that some analysts estimated that bounty captures made up almost 95% of prisoners transferred to U.S. custody.[9] Additionally, opposition tribal leaders, particularly those formerly associated with the Mujahideen and recently with the Northern Alliance, were paid by the United States for handing over anyone allegedly associated with al Qaeda or the Taliban.[10] The fact Mujahideen tribes had been fighting Pashtun tribes (Taliban were Pashtun) for centuries was never considered in assessing the accusers' reliability.[11]

On July 11, 2002, Abdul Zahir, a 32 year old Afghan, was arrested by U.S. forces and taken to an unknown location in Afghanistan. He suspects he was identified as al Qaeda and Taliban by an unknown source of a rival

3. President Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *in* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., FINAL REPORT, 9/11 REPORT 337 (2006), *available at* http://govinfo.library.unt.edu/911/report/index.htm.

4. *Id.*

5. Since the invasion, the Bush administration had consistently referred to detainees as "enemy combatants" rather than prisoners of war in order to prevent them from requesting legal rights defined by the Geneva Conventions. Guy Taylor, *Gitmo Inmate Not 'Enemy Combatant'; Panel Ruling Will Free Detainee*, WASH. TIMES, Sept. 9, 2004, *available at* http://www.washingtontimes.com/news/2004/sep/09/20040909-121235-8798r/.

6. Mark Denbeaux, THE 14 MYTHS OF GUANTANAMO, Senate Armed Services Committee, Apr. 26, 2007, *available at* http://law.shu.edu/media/fourteen_myths_of_gtmo_final.pdf.

7. Afghanistan Leaflets, TF11-RP09-1, http://www.psywarrior.com/afghamleaf40.html (last visited Nov. 13, 2008).

8. Nancy Gibbs & Viveca Novak, *Inside "The Wire"; Security Breaches. Suicidal Detainees. A Legal Challenge Heading to the Supreme Court. Welcome to Guantanamo*, TIME, Dec. 8, 2003, at 40; Denbeaux, *supra* note 6.

9. John Simpson, *No Surprises in the War on Terror*, BBC NEWS, Feb. 13, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/4708946.stm.

10. JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 69 (2006). *See also* Denbeaux, *supra* note 6.

11. Several released prisoners in fact have contended that they were turned over by warlords and arrested for cash based upon false information but for no other reason than for money and revenge. Paisley Dodds & Matthew Pennington, *Gitmo Detainees Say They Were Sold*, L.A. TIMES, May 31, 2005, *available at* http://www.commondreams.org/headlines05/0531-10.htm.

sub-tribe because he was Pashtun and because the source was paid. While held in Afghanistan, Abdul Zahir was questioned for several months. Because he worked as an interpreter for a suspected al Qaeda commander, he could and did provide valuable intelligence. As a result, Abdul Zahir was classified as a high value prisoner and subsequently taken to the United States Naval Facility, Guantanamo Bay, Cuba (GTMO). There, he was questioned without the presence of counsel for two more years. Based on the information he had given, Abdul Zahir was given a Combatant Status Review Tribunal, or "CSRT" and determined to be an enemy combatant.[12]

Prior to June 2004, no prisoner received hearings analogous to Geneva Convention III, Article 5 tribunals.[13] Instead, prisoners were determined as enemy combatants through a summary review of evidence by a military intelligence officer.[14] Prisoners were not entitled to examine or rebut any of the evidence or call witnesses on their behalf.[15] Essentially, no due process had been provided.

However, following the U.S. Supreme Court decision in *Rasul v. Bush*,[16] the Department of Defense gave everyone at GTMO, including Abdul Zahir, Combatant Status Review Tribunals (CSRT). At his CSRT in September 2004, Abdul Zahir was presumed an enemy combatant and all of the evidence against him was presumed true. Although he did his best to rebut the charges and evidence against him with reasoned eloquence, Abdul Zahir was determined to be an enemy combatant.[17] For the next two years, Abdul Zahir was questioned without the presence of a lawyer. Based on those interviews, the United States decided to prosecute Abdul Zahir before a military commission.

On January 18, 2006 Abdul Zahir was charged with conspiracy, aiding the enemy and attacking civilians.[18] In June 2007, the U.S. Supreme Court

12. The information provided in this section was provided to the author by Abdul Zahir. *See also* Britta Sandberg, *Dishonoring a Nation's History*, Spiegel Online International, Mar. 22, 2007, *available at* http://www.spiegel.de/international/world/0,1518,473018,00.html. *See also* SUMMARIZED SWORN DETAINEE STATEMENT (2006), http://www.dod.mil/pubs/foi/detainees/csrt/Set_12_1179-1239.pdf#1.

13. *See Hamdi*, 542 U.S. at 537-38.

14. *Id.*

15. *Id.*

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

17. SUMMARIZED SWORN DETAINEE STATEMENT (2006), http://www.dod.mil/pubs/foi/detainees/csrt/Set_12_1179-1239.pdf#1. At his CSRT, Abdul Zahir claimed he served as an interpreter to Abdul Hadi and did not know Hadi was al Qaeda. He also claimed he was an employee and not a member of al Qaeda or Taliban. Abdul Zahir also knew the names of the persons involved in a hand grenade attack on Canadian reporters, but did not know beforehand the attack would occur.

18. Press Release, Department of Defense, Military Commission Charges Referred (Jan. 20,

ruled the military commission system unconstitutional.[19] Since the ruling in *Hamdan v. Rumsfeld*, the Government has not re-charged Abdul Zahir, and for reasons that are outside the scope of this Article, is unlikely to ever to re-charge Abdul Zahir. Like so many others at Guantanamo, Abdul Zahir will remain imprisoned as an enemy combatant, in isolation, and without the prospect for release. The United States claims that he is too dangerous to be released. In reality, Abdul Zahir knows too much, and simply put, cannot be released.

Proponents of the CSRT assert the Geneva Conventions do not apply in the Global War on Terrorism (GWOT) and the CSRT ostensibly provides due process, comparable to the Geneva Convention III (GCIII), Article 5[20] and the Army Regulations 190-8[21] promulgated there under. They claim detention is necessary in the GWOT for three primary reasons: (1) to identify and prevent those individuals from returning to the "battlefield"; (2) to identify those individuals for intelligence collection; and (3) to identify those individuals for prosecution before a military commission or domestic criminal court.[22]

Critics of the CSRT claim the Geneva Conventions should apply in the GWOT and must apply to those at Guantanamo Bay (GTMO).[23] They claim that prisoners at GTMO were denied due rights guaranteed under existing International Humanitarian Law and the Army Regulations.[24] As such, CSRT invariably ensures almost everyone is determined to be an enemy combatant and as such, many prisoners have been incorrectly identified as such and therefore remain unjustly incarcerated at GTMO.

Since 9/11, the lines between criminal law and the traditional concepts of armed conflict have blurred. As a result, many persons were taken prisoner and held as enemy combatants despite the lack of process for making such a determination. The CSRT not withstanding, many prisoners remain incarcerated, unjustly they contend, based on unreliable, uncorroborated evidence for which they cannot see, nor refute, nor cross-examine, nor know of its source.

2006), http://www.defenselink.mil/releases/release.aspx?releaseid=9248.

19. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

20. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 135 [hereinafter GCIII].

21. U.S. Army Regulation 190-8, Opnavinst 3461.6, AfJI 31-304, MLO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997) [hereinafter AR 190-8], *available at* www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf.

22. *See* William Glaberson, *Court Advances Military Trials for Detainees*, N.Y. TIMES, Sept. 25, 2007, *available at* http://www.nytimes.com/2007/09/25/washington/25gitmo.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1190749600-3dvjLrfvbGElQsPMtH2zCw.

23. *See* Peal, *Combatant Status Review Tribunals*, *infra* note 29, at 1643.

24. *Id.* at 1643-44.

This Article suggests that both the CSRT and the Article 5 tribunals are inadequate to accurately determine the correct status of prisoners captured in the GWOT. Neither the United States implementing regulations under Article 5 nor the CSRT procedures provide the sufficient means for determining status of prisoners. Because of these inadequacies, this Article proposes a modified model that ensures due process is provided to prisoners, particularly when making prisoner status determinations under International Humanitarian Law.

As background, Part II discusses prisoner of war status and the benefits afforded prisoners under the Conventions and Additional Protocols. It also details the process for determining status of captured prisoners under the Conventions. Part III details the process for determining status of captured prisoners under the CSRT. Then Part IV provides a critical analysis of both the Article 5 procedures and CSRT procedures relative to the GWOT. Part IV also offers a modified approach for determining prisoner status in the GWOT. Finally, Part V concludes the Article. At GTMO, Abdul Zahir like everyone else will remain an enemy combatant for as long as the GWOT lasts. This may be a very long time. Determining prisoner status through a process that is far from fair, may just be the catalyst that threatens justice everywhere, including the United States.

II. BACKGROUND

A. *Generally*

This Section will first address the sources and application of the law of armed conflict, otherwise referred to as International Humanitarian Law (IHL). This part will then discuss the kinds of persons in armed conflict: civilians, lawful and unlawful combatants, and hors de combat and will distinguish unlawful combatants from war criminals. Finally, the methods for determining status of prisoners captured in traditional armed conflict will briefly be addressed.

The Army Judge Advocate General's School teaches "The Right Kind of Conflict/The Right Kind of Person" methodology when teaching military lawyers the principles of distinction for prisoners of war.[25] In this methodology, Judge Advocates must first ask whether the parties to the

25. JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL CHARLOTTESVILLE VA INTERNATIONAL AND OPERATIONAL LAW DEPT, OPERATIONAL LAW HANDBOOK 86-87 (2006) [hereinafter OPERATIONAL LAW HANDBOOK].

conflict are States which have ratified the Geneva Conventions.[26] If so, Judge Advocates must then ask whether the armed conflict is of an international or internal nature.[27] If conflict is international, then in the second part to the methodology, the Judge Advocate must ask whether the prisoner is the right kind of person entitled to prisoner of war status.[28] As it will become more clear, the United States followed a similar methodology in the GWOT when confronted with prisoner identification issues. This Article will follow a similar methodology by asking whether the GWOT is the right kind of conflict for application of the Geneva Conventions, and if so, whether captured Taliban and al Qaeda are the right kind of persons entitled to protection under the Geneva Convention.[29]

B. *The Right Kind of Conflict*

1. Sources of the Law

a. International Humanitarian Law

The sources for IHL are found in several places, *inter alia*, the Lieber Code of 1863, the Hague Regulations of 1907, the Geneva Conventions of

26. *See* Maj. Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons:" How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT'L L.J. 681, 723 (Feb. 2005) (citing OPERATIONAL LAW HANDBOOK, *supra* note 25).

27. *Id.* at 722.

28. *Id.* at 724.

29. Whether the GWOT is an "armed conflict" and falls within the ambit of the Conventions is outside the scope of this Article. *See* Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325 (2003). It can be said that at least initially the U.S. conflict in Afghanistan was an international armed conflict whereby prisoners should have been protected and subject to Common Article 2 of the Geneva Conventions. After June 2002 however, the Loya Jirga appointed Hamid Karzai imprimatur on the transitional government. On June 19, 2002, a new cabinet was established. *See* ICRC Paper, *International Humanitarian Law and Terrorism: Questions and Answers* (May 5, 2004), http://www.icrc.org/web/eng/siteeng0.nsf/html/5YNLEV; *see also* Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995) ("[A] state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities . . ."); SEAN D. MURPHY, INTERNATIONAL LAW 35-36 (2006); Derek Jinks, *The Laws of War: Past, Present, and Future: Article: The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 VA. J. INT'L L. 165, 178-80 (2005); Robert Peal, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1633-34 (2005). However, the conflict with al Qaeda is non-international but occurring within the territory of a High Contracting Party, and is thus subject to Common Article 3. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 629-30 (2006) (quoting Common Article 3).

1949 (and two Additional Protocols of 1977), and customary international law.[30] The Geneva Conventions are comprised of four separate Conventions. Every nation, or "state," including the United States, is a party to the Conventions. However, not every state is a party to the Additional Protocols. Although the United States has not ratified either Additional Protocol,[31] many scholars agree that several portions of both Protocols have become part of customary international law.[32] Together, these works make up what will be referred to hereinafter as IHL.

b. International Covenant of Civil and Political Rights

In addition to IHL, the International Covenant of Civil and Political Rights (ICCPR) provides law relevant to prisoner due process rights.[33] Specifically, Article 9 prohibits arbitrary arrest or detention where anyone "deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention."[34] Additionally, Article 14 provides

30. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5-12 (2004). *See generally* 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 GCI]; 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. 3114, 75 U.N.T.S. 85 [hereinafter GCII]; GCIII, *supra* note 20; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 287 [hereinafter GCIV]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII].

31. *See* DINSTEIN, *supra* note 30, at 5-12. *See also* INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW-TREATIES & DOCUMENTS (2005), *available at* http://www.icrc.org/ihl.nsf/CONVPRES?OpenView.

32. The Reagan Administration supported several provisions of API. API, *supra* note 30, arts. 75 & 44, ¶ 2 (first sentence), ¶ 3 (first sentence). *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 419 (1987). *See also* Hamdan v. Rumsfeld, 548 U.S. 557, 629-33 (2006).

33. International Covenant on Civil and Political Rights art. 5, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Both the United States and Afghanistan were parties to the ICCPR at the time when the United States invaded Afghanistan. *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, http://www2.ohchr.org/english/bodies/ratification/4.htm. *See also* Sosa v. Alvarez-Machain, 542 U.S. 693, 735 (2004) ("the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

34. ICCPR, *supra* note 33, art. 9(4).

specific minimum guarantees for those accused of a criminal offense, including the right to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[35] The U.N. Committee on Human Rights General Comment recognizes that Article 14 "applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law."[36]

It is important to note that the ICCPR provides derogation of judicial review "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," but states may not derogate if such measures are inconsistent with their other obligations under international law and do not involve discrimination.[37] Regardless, Article 5 ensures that certain minimal rights, particularly those fundamental human rights, may never be derogated.[38]

2. Application of the Law

a. The Geneva Conventions

Bearing in mind the "W" in GWOT representing "war" implies armed conflict, the Geneva Conventions is logically the first source of law relevant to prisoners. The Conventions apply "to all cases of declared war or of any other armed conflict[39] which may arise between two or more of

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35. *Id.* art. 14(3)(e).

36. U.N. Human Rights Comm., *General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)*, U.N. GAOR, 21st Sess., U.N. Doc. A/39/40 (Apr. 13, 1984), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bb722416a295f264c12563ed0049dfbd?Opendocument.

37. ICCPR, *supra* note 33, art. 4(1).

38. *Id.* art. 5.

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

See id. art. 5(2).

39. "Armed Conflict" is not defined in any of the treaties. The International Tribunal for the Former Yugoslavia (ICTY) has defined it as follows: "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on

the High Contracting Parties,[40] even if the state of war is not recognized by one of them."[41] This provision, common to all four Conventions, is known as Common Article 2, and is applicable to "classical international armed conflict,"[42] which normally exists when force is directed by one state against another, regardless of duration.[43] It may also exist when a state intervenes in an internal armed conflict either with its own armed forces or through intermediaries.[44]

Jurisdiction ¶ 70 (Oct. 2, 1995). The International Committee of the Red Cross (ICRC) Commentary provides "[s]peaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities' – conflicts, in short, which are in many respects similar to international war . . . ." INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., 1960) [hereinafter ICRC Commentary III]. Regardless, the existence of whether hostilities amount to an armed conflict is factual rather than legal and the declaration of war between parties is irrelevant in determining whether a state of armed conflict exists. HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 219 (2005). *See also* DINSTEIN, *supra* note 30, at 15.

40. A "Party" does not need to be a signatory to the Conventions, nor "even represent a legal entity capable of undertaking international obligations." ICRC Commentary III, *supra* note 39, at 37. *See also* Hamdan v. Rumsfeld, 548 U.S. at 557, 628-29 (2006).

41. GCIII, *supra* note 20, art. 2.

42. API is likewise intended to "apply in the situations referred to in Article 2 common to" the four Geneva Conventions and is to "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law . . . ." *See* API, *supra* note 30, art. 1, ¶¶ 3 & 4.

43. *See* ICRC Commentary III, *supra* note 39, ¶ 1.

> Any difference arising between two States and leading to the intervention of members of the armed forces (8) is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.

Id.

44. *See Tadic*, Case No. 1T-94-1-I, ¶ 84.

> [I]n case of an internal armed conflict breaking out in the territory of a State, it may become international {or depending upon the circumstances, be international in character alongside an internal armed conflict} if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.

For internal armed conflicts, on the other hand, Common Article 3 (common to all four Conventions), applies when armed conflict is "not of an international character occurring in the territory of one of the High Contracting Parties."[45] Common Article 3 applies to persons who are not associated with a state party involved in an armed conflict which occurs "in the territory of" a state party. It does not however involve armed conflict between nations (whether signatories or not).[46] For internal armed conflicts, Common Article 3 provides the baseline, or minimum protection, for those persons who are neither associated with a party or state to the conflict (occurring in a party's territory).[47]

In addition to the Geneva Convention I (GCI) through the Geneva Convention IV (GCIV), the Protection of Victims of International Armed Conflicts (API) Article 75 is now considered part of customary international law and provides certain minimum guarantees for those captured during international armed conflict, including the right "for an accused to be informed without delay of the particulars of the offence alleged against him."[48] Article 75 also guarantees the presumption of innocence and the right to examine witnesses against an accused.[49]

Id.

45. *See* GCIII, *supra* note 20, art. 3. Similarly, APII is intended to supplement Common Article 3 without modifying its existing conditions or application, and applies to all armed conflicts not covered by API

> and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

APII, *supra* note 30, art. 1, ¶ 1. API does not apply to internal disturbances like "riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." *Id.* art. 1, ¶ 2.

46. ICRC Commentary III, *supra* note 39, ¶ 1.

47. Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006).

48. API, *supra* note 30, art. 75.

49. API Article 75 provides:

> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: . . . (d) anyone charged with an offence is presumed innocent until proved guilty according to law; . . . (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain

b. ICCPR

In addition to the Conventions, ICCPR provides a relevant source of IHL applicable to the GWOT. But Article 2(1) specifically limits application of the ICCPR to "all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . ."[50] Whether the ICCPR requires the individual to be within the State Party's territory and subject to its jurisdiction or requires territory or jurisdiction has been the subject of much debate, particularly with regards to the prisoners held at the Naval Station, Guantanamo Bay, Cuba. The U.N. Human Rights Committee contends that the ICCPR applies extraterritorially and that the State's jurisdiction extends past its borders.[51] In its General Comment 31, the Committee states that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party" and

> the enjoyment of the Covenant rights is not limited to citizens of States Parties [sic] but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.[52]

Significantly, the Committee noted that

> [t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national

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the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Id. See also Hamdan, 548 U.S. at 635 (Both the ICCPR and API Article 75 provide certain minimum rights that have been recognized as part of customary international law).

50. *See* ICCPR, *supra* note 33, art. 2(1).

51. U.N. Human Rights Comm., *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument.

52. *Id.*

contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.[53]

The United States has since taken a contrary position to Article 2(1) and contends that the ICCPR does not apply to GTMO because it is not a U.S. territory.[54]

C. *The Right Kind of Person*

1. Types of Prisoners in IHL

Besides asking whether the GWOT is the right kind of conflict, the next question in the Judge Advocate methodology is whether the GWOT detainees are the right kinds of persons. In doing so, this part examines the types of prisoners in IHL.

In IHL, there are two general categories of prisoners, non-combatants and combatants. Non-combatants are civilians. Combatants include two sub-groups, lawful combatants and unlawful combatants. Lawful combatants include prisoners of war and hors de combat. Unlawful combatants may include war criminals.

a. Civilians

Civilians are defined by the Conventions as anyone not belonging to "one of the categories of persons referred to in Article 4 A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."[55] If there is doubt "whether a person is a civilian, that person shall be considered to be a civilian."[56] For international armed conflict, treatment of civilians is addressed in GCIV[57] and API, Part IV.[58] Generally, IHL prohibits civilians from engaging in hostilities.[59] Civilians who do actively or directly engage in hostilities[60] become unlawful combatants and can be prosecuted as

53. *Id.*

54. MURPHY, *supra* note 29, at 306.

55. API, *supra* note 30, art. 50.

56. *Id.*

57. *See generally* GCIV, *supra* note 30.

58. API, *supra* note 30, Part IV.

59. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 53-54 (2004).

60. Whether a civilian has engaged in hostilities is a question of fact. *See id.* at 54. "Direct or active participation" in hostilities by civilians is required before a civilian becomes a combatant. DINSTEIN, *supra* note 30, at 27. Civilians can be employed by, and may accompany, the armed forces without losing status as civilians, provided they do not engage in hostilities. UK MINISTRY

such.[61] Once a civilian becomes an unlawful combatant, he loses civilian protections afforded by the Conventions and will not be entitled to prisoner of war status on capture.[62]

b. Combatants

The next type of prisoner in IHL is the combatant. The term "combatant" does not appear in the Conventions. Rather, it first appears in API Article 43 and includes members of the Party's armed forces with a right to engage in hostilities.[63] Unlike the GCIII Article 4 test,[64] Article 44(3) does not require uniforms or a fixed recognizable symbol.[65] Instead it requires combatants to openly carry their weapons while deploying for attack.[66] Combatants must comply with this two part test to receive prisoner of war status on capture.[67] Those who do not qualify will nonetheless receive many of the same protections afforded prisoners of war under GCIII.[68]

The U.S. Army defines a "combatant" as "[a]nyone engaging in hostilities in an armed conflict on behalf of a party to the conflict."[69] This definition references GCI Article 13 and GCIII Article 4 to include members of the "armed forces of a Party to a conflict; militia, volunteer corps, and organized resistance movements belonging to a Party . . .".[70]

In the least, both definitions require a level of direct participation in hostilities before someone is classified as a combatant. According to the Commentaries for API, Article 51 "direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the

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OF DEFENCE, *supra* note 59, at 53-54. Civilians accompanying the armed forces, including labor units or supply contractors, will usually be treated as prisoners of war if captured. *See* GCIII, *supra* note 20, art. 4(4).

61. *See* DINSTEIN, *supra* note 30, at 29. *See also Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 568 (Nov. 16, 1998), *available at* http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf.

62. *See* UK MINISTRY OF DEFENCE, *supra* note 59, at 38, 53. *See also* GCIV, *supra* note 30, art. 5. Distinction between lawful and unlawful combatants is discussed *infra*.

63. API, *supra* note 30, art. 43(2) (combatants do not include medical personnel or chaplains).

64. *See* GCIII, *supra* note 20, art. 4.

65. API, *supra* note 30, art. 44(3).

66. *Id.*

67. *Id.* art. 44(4).

68. *Id.*

69. OPERATIONAL LAW HANDBOOK, *supra* note 25, at 12.

70. *Id.* at 12.

personnel and equipment of the enemy armed forces."[71] The Commentaries to API, Article 43 add that "[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[72] However, there must be "a clear distinction between direct participation in hostilities" and mere "participation in the war effort."[73]

For example, sentries or guards are deemed to directly participate in hostilities.[74] Similarly, the driver who delivers ammunition to the combatants and the person gathering military intelligence in enemy territory are both direct participants and therefore combatants.[75] The distinction becomes blurred when civilian contractors operate drones engaged in combat, or when civilians retrieve military intelligence data from satellites while located in their home country.[76] The distinction is even murkier when civilians provide financing to purchase weapons by an enemy State. Some commentators have opined that the mere contribution to the general war effort (vis-à-vis supply food to combatants) is sufficient to be deemed a combatant.[77]

Essentially, combatant status depends upon the extent to which an individual has contributed to and advanced the party's war efforts, and whether that conduct is close in time and location to the hostilities.[78] Civilians who engage in hostilities on the other hand are unlawful combatants and as such, may be prosecuted under criminal law.[79]

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71. INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) OF 8 JUNE 1977, at 619 [hereinafter AP COMMENTARY]. *See also* Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*, 51 A.F.L. REV. 111, 117 (2001).

72. AP COMMENTARY, *supra* note 71, at 516.

73. *Id.* at 619.

74. *Id.* at 515-16.

75. DINSTEIN, *supra* note 30, at 27.

76. *Id.* at 27-28.

77. *Id.* at 28.

78. *See id.* at 27-28.

79. *See id.* at 31; *see* Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 750 (Nov. 16, 1998).

(1) Lawful v. Unlawful Combatants

(a) Generally

(i) *Ex Parte Quirin*

The distinction between "lawful" and "unlawful" combatants is addressed in this part. Essentially, the lawful combatant follows IHL while the unlawful combatant does not. The Conventions address the duty to do so in API, Article 44(2), which requires combatants to "comply with the rules of international law applicable in armed conflict."[80]

However, neither the Conventions nor the Additional Protocols distinguish between "lawful" and "unlawful" combatants.[81] The "lawful" qualifier first appeared *Ex Parte Quirin*, in which the U.S. Supreme Court upheld military commissions to prosecute German saboteurs who wore civilian clothes.[82] In that case, the Court distinguished, for the first time, the difference between a lawful combatant and an unlawful combatant:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[83]

80. *See* API, *supra* note 30, art. 44(2).
81. *See* GCIII, *supra* note 20, art. 4.
82. *See Ex Parte* Quirin, 317 U.S. 1, 30-31 (1942).
83. *Id.*

(ii) Hamdi & Hamdan

Since *Ex Parte Quirin*, the U.S. Supreme Court has revisited the unlawful combatant issue.[84] In *Hamdi*, the Court made a passing reference to lawful combatants but essentially ratified the principle articulated in *Ex parte Quirin* that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"[85]

However, the issue in *Hamdi* was not whether the status as a combatant was lawful or unlawful, but whether Hamdi, who was a U.S. citizen, could be held as an "enemy" combatant.[86] Status as an "enemy" combatant had been articulated in *Ex Parte Quirin*, but this was the first time the Court addressed the issue since 9/11 and the GWOT. The Court recognized that the definition for enemy combatant was not well settled.[87] Instead of giving a definition, the Court simply adopted the definition provided by the Government as someone who is "'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States' to justify his detention in the United States for the duration of the relevant conflict."[88]

(b) Prisoners of War

(i) Definitions

Besides unlawful combatants, IHL also includes lawful combatants, who on capture by the enemy qualify as prisoners of war. Derived from the Hague Convention of War on Land, the Conventions provide four criteria, now part of customary international law, for defining a prisoner of war.[89] Accordingly, a prisoner of war must satisfy the following minimum criteria[90]:

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84. *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

85. *Id.* (quoting *Ex Parte Quirin*, 317 U.S. at 28, 30). The subject of unlawful combatants was similarly raised by the dissent in Hamdan v. Rumsfeld, 548 U.S. 557, 681-82 (2006).

86. *See generally Hamdi*, 542 U.S. 507.

87. *Id.* at 533.

88. *Id.* at 526.

89. DINSTEIN, *supra* note 30, at 35.

90. The Conventions set out two instances when prisoner-of-war status is granted, provided that the four conditions are fulfilled. Prisoner-of-war status is given to (1) "Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces," or to (2) other militia members and "members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and

(a) [t]hat of being commanded by a person responsible for his subordinates;[91]
(b) [t]hat of having a fixed distinctive sign recognizable at a distance;[92]
(c) [t]hat of carrying arms openly;[93]
(d) [t]hat of conducting their operations in accordance with the laws and customs of war.[94]

(ii) Advantages for Status

Like the Hague Conventions, the Lieber Code is also part of customary international law. According to the Lieber Code, the primary advantage for being a prisoner of war is combat immunity. Combat immunity is given

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operating in or outside their own territory, even if this territory is occupied," provided the four minimal conditions are fulfilled. GCIII, *supra* note 20, arts. 4(A)(1)-(2).

91. *Id.* art. 4A(2)(a).

92. *Id.* art. 4A(2)(b).

93. *Id.* art. 4A(2)(c).

94. *Id.* art. 4A(2)(d). The Additional Protocols define prisoners of war as members of the armed forces who are

> under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

API, *supra* note 30, art. 43(1). API does not necessarily require the wearing of uniforms but it does define members of the armed forces as "combatants" qualifying for prisoner of war status. Although they do not distinguish themselves from civilians, they may retain prisoner of war status provided they carry their arms openly during each military engagement, and each time the weapons must be visible to the adversary while engaged in a military deployment preceding the launching of an attack in which the combatant participates. *See id.* art. 44(3). Those who fail this test, like those criminally accused, are given all of the same rights provided prisoners of war in GCIII where the prisoner is to be "tried and punished for any offences he has committed." *Id.* art. 44(4). According to the ICRC Commentaries, these are the same rights found in GCIII, articles 82-108. *See* ICRC Commentary III, *supra* note 39. For belligerents who have engaged in hostilities, but fail to qualify as either a prisoner of war or as a civilian, API article 45, paragraph 3 provides that they shall

> be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

See API, *supra* note 30, art. 75(1).

to combatants for their legitimate or lawful conduct during armed conflict.[95] Once captured by the enemy, (lawful) combatants are entitled to prisoner of war status and may only be liable for crimes committed against the "captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities."[96] Prisoner of war status does not protect the combatant from prosecution for war crimes or violations of IHL.[97]

Since Lieber's time, the Conventions have codified many of the same principles and have given additional minimum guarantees to prisoners, including without limitation: the right to humane treatment; the right to due process; the right to be released on the cessation of hostilities; the right to speak with international protective agencies, and most importantly, combat immunity.[98]

Included in the guarantee to due process, prisoners are entitled to trials by independent and impartial courts recognized by the detaining state,[99] the prohibition on ex post facto laws, the prohibition of coerced confessions, the assistance of counsel,[100] the right to a speedy trial, and credit for pre-conviction time served.[101] Without prisoner of war status, prisoners do not get many of these rights. In the GWOT, no one at GTMO has been declared a prisoner of war, and therefore, many have been denied these fundamental rights.

As previously indicated, prisoner of war status is dependant on whether the combatant was lawful or unlawful. If the combatant complied with IHL, he is a lawful combatant, and as such, is entitled to combat immunity for his participation in hostilities. Like the civilian who has engaged in hostilities, the combatant who fails to follow IHL is an unlawful combatant and can be prosecuted for his participation in hostilities.[102]

In addition, combatants, whether lawful or unlawful, may be detained in order to prevent them from returning to the battlefield.[103] Prisoners of

95. Lieber Code, General Order 100, art. 57 (1863), http://www.au.af.mil/au/awc/awcgate/law/liebercode.htm.

96. *Id.* art. 59.

97. *Id.*

98. *See* GCIII, *supra* note 20, arts. 13, 17, 21-48, 99-108, 118-119, & 8-11.

99. *Id.* art. 84.

100. *Id.* art. 99.

101. *Id.* art. 103.

102. DINSTEIN, *supra* note 30, at 30. *See also* Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 376 n.38 (2004).

103. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS, 571, 572 (Sept. 2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, *reprinted in* 41 AM. J. INT'L L. 172, 229 (1947)),

war may be kept as long as hostilities continue.[104] Once hostilities end, prisoners of war will be released and repatriated, "without delay".[105] When hostilities end, the warring parties in most instances draft a cessation document that includes, among other things, the release and repatriation of prisoners.[106] Although the detaining powers may release prisoners and civilians, the detaining powers may continue to hold prisoners for prosecution for suspected war crimes, crimes committed while incarcerated, pre-capture domestic crimes or violations of IHL.[107] But continued detention must not be arbitrary and must be based on established legal grounds.[108]

(c) Hors de Combat

The next type of prisoner in IHL is the hors de combat. Hors de combat are combatants that either through choice (i.e., by surrender) or circumstance (i.e., wounded) are removed from combat.[109] If such person is captured, then he shall be treated as a prisoner of war.[110]

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available at http://www.icrc.org/Web/eng/siteeng0.nsf/ htmlall/5FLBZK/$File/irrc_847_Naqvi.pdf.

104. *See* GCIII, *supra* note 20, art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). *See also* Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, art. 20 (as soon as possible after "conclusion of peace"); Hague Convention (IV), Oct. 18, 1907, 36 Stat. 2277, art. 20 ("conclusion of peace"); GCIII, *supra* note 20, art. 118 (repatriation should be accomplished with the least possible delay after cessation of active hostilities). *See also* Jordan J. Praust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial,* 44 HARV. INT'L L.J. 503, 510-11 (2003) (Prisoners of war "can be detained during an armed conflict, but "the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences") (citing GCIII, *supra* note 20, arts. 118, 85, 99, 119, 129).

105. GCIII, *supra* note 20, art. 118.

106. *See* Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Non Criminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 171 (2005).

107. *See* GCIII, *supra* note 20, art. 119.

108. *See id.* arts. 99, 102, 118, 119; ICCPR, *supra* note 33, art. 9.

109. *See* DINSTEIN, *supra* note 30, at 28.

110. *Id.*

(2) Unlawful Combatants and War Criminals

(a) War Crime—Defined

Like lawful combatants or civilians, unlawful combatants may be war criminals. "There is no single binding definition of war crimes."[111] However, the most comprehensive definition comes from the Rome Statue of the International Criminal Court which incorporates IHL into its definition to include grave breaches of the Conventions and other serious violations of the laws of war.[112] The grave breaches are for the most part

111. *See id.* at 229.

112. Rome Statute of the International Criminal Court art. 8(2), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm (last visited Nov. 14, 2008). War Crimes include, *inter alia*:

> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing . . . (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; . . . (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; . . . (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law . . . It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

copied from the Conventions and are accepted as war crimes. The "other serious violations" are generally accepted norms of customary international law.[113]

In the United States, "war crimes" are defined by the War Crimes Act, which references the Conventions and Hague Convention, among others.[114] But jurisdiction for prosecution under the War Crimes Act is limited in the U.S. Federal Courts to cases where the accused or victim is a member of the U.S. armed forces or a U.S. national.[115]

The U.S. Army broadly defines war crimes to include every violation of the law of war.[116] A "war crime" is a "technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[117]

(b) Distinction between Unlawful Combatants and War Criminals

It is important to understand that unlawful combatants may not necessarily be war criminals. Similarly, war criminals may not necessarily be unlawful combatants. For instance, on the one hand, civilians who directly engage in hostilities, become unlawful combatants and can be detained and prosecuted as such. On the other hand, civilians who do not

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Id.

113. *See* DINSTEIN, *supra* note 30, at 232. *See also* API, *supra* note 30, art. 85.

114. 18 U.S.C. § 2441 (2000). War crimes are defined as

> (1) as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a violation of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Id.

115. *Id.* ¶ (b).

116. DEP'T OF THE ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE ¶ 799 (1956) [hereinafter FM 27-10], *available at* http://www.afsc.army.mil/gc/files/FM27-10.pdf.

117. *Id.* at 178.

directly engage in hostilities, although non-combatants, could still be war criminals depending on their conduct. For instance, the civilian who orders no quarter be given, wages an aggressive war, orders genocide, or authorizes torture would be criminally liable for those war crimes.[118] Such was the case for the civilian Nazi leaders convicted at Nuremburg.[119]

Although lawful combatants receive combat immunity for lawful conduct in the battlefield (and are given prisoner of war status), they may still be prosecuted by either domestic courts or by an international tribunal, provided the lawful combatants violated IHL or committed a war crime.[120] Unlike prosecution in the domestic courts, Article 85 of GCIII provides that prosecution for war crimes does not affect a detainee's status as a prisoner of war.[121] This provision remains a matter of interpretation, however.[122]

On the other hand, unlawful combatants may be criminally prosecuted under the domestic laws of the State exercising jurisdiction.[123] At the same time, an unlawful combatant may also be a war criminal, provided his conduct rises to such a level by committing, *inter alia*, a "serious breach" of the Geneva Conventions.[124] The detaining power may either prosecute the unlawful combatant under its domestic laws or proceed under international law and the IHL.[125] However, the unlawful combatant may only be prosecuted under domestic law after his status as a prisoner of war has been denied.[126]

Regardless, both lawful and unlawful combatants remain legitimate military targets. Once they fall into the enemy hands, though, the two groups are treated differently.[127] The lawful combatant will receive prisoner of war status and cannot be prosecuted (other than for war crimes) for participating in hostilities. The unlawful combatant, however, is not a prisoner of war and can be detained and prosecuted, not only for war

118. DINSTEIN, *supra* note 30, at 233-34.
119. *See id.*
120. *Id.* at 234.
121. *Id.* at 235; GCIII, *supra* note 20, art. 85.
122. DINSTEIN, *supra* note 30, at 235.
123. *Id.* at 234.
124. *Id.*
125. *Id.*
126. *Id.* at 235.
127. Civilians, on the other hand, can never be targeted, provided they are not combatants engaged in hostilities.

crimes he committed, but also for his participation in hostilities.[128] Civilians, may not be detained other than for prosecution for war crimes.

2. Methods for Determining Status of Prisoners Captured in Armed Conflict – GCIII – Art. 5

Common Article 2 applies in international armed conflicts.[129] In such instances, the Conventions provide a means for determining status of prisoners when the detaining power has concerns for the actual status of the prisoner.[130] In other words, if the detaining power cannot distinguish the prisoner as a prisoner of war or civilian, then there remains sufficient doubt that should be resolved by a tribunal.[131] Until status is resolved by a tribunal, however, then "such persons shall enjoy the protection of the present Convention."[132] In other words, the prisoner will be entitled to prisoner of war status unless otherwise determined by a tribunal.[133] The burden is on the detaining power to show the prisoner is not a prisoner of war, unless the status is not in question.[134]

If the detaining power decides a prisoner should be tried for an offense arising out of armed conflict or associated hostilities, then the prisoner "shall have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated."[135]

It is interesting to note that since the Vietnam era, the United States military has adopted and used a set of regulations which implement Article 5 tribunals intended to resolve status for captured persons.[136] The current regulations are binding upon all branches of the United States Armed Forces and found in Army Regulation 190-8, titled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees".[137] AR 190-8 tribunals were conducted by the United States in Vietnam although many Viet Cong insurgents failed the Article 4 criteria for prisoners of war

128. *See* Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 70 (2003). *See also* DINSTEIN, *supra* note 30, at 30-31.

129. GCIII, *supra* note 20, art. 2.

130. *Id.* art. 4.

131. *Id.* art. 5; DINSTEIN, *supra* note 30, art. 5.

132. GCIII, *supra* note 20, at 235.

133. *See id.* art. 5; DINSTEIN, *supra* note 30, at 235.

134. This presumption is reaffirmed in API, Article 45, where the person falling into the hands of the enemy "shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention." *See* API, *supra* note 30, art. 45(1).

135. *See id.* art. 45(2).

136. AR 190-8, *supra* note 21.

137. *Id.*

(particularly the failure to wear a distinctive sign or uniform).[138] Similarly, the United States conducted Article 5 tribunals in Grenada for prisoners of the Cuban military and the Grenadian People's Revolutionary Army.[139] Finally, the United States conducted Article 5 tribunals in the early stages of Operation Iraqi Freedom.[140]

Army Regulation (AR) 190-8 outlines the procedures for convening an Article 5 tribunal.[141] The tribunal is composed of three commissioned officers.[142] The Regulation also includes procedures for swearing the members,[143] for keeping a written record,[144] for keeping open proceedings unless security dictates otherwise,[145] for advisement of rights,[146] for presence of the person and provisions for an interpreter,[147] for calling witnesses,[148] and for testifying.[149] Evidence is reviewed by a preponderance standard and a decision is rendered by a majority of the tribunal.[150] There is no process for reviewing decisions and prisoners are not entitled to a lawyer.[151]

The tribunal may make any of the following findings:

1. Recommended RP [Retained Personnel], entitled to EPW [Enemy Prisoner of War] protections, who should be considered forcertification as a medical, religious, or volunteer aid society RP;

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138. *See* JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICES, TREATMENT OF BATTLEFIELD DETAINEES IN THE WAR ON TERRORISM 37 (2006), *available at* http://www.fas.org/sgp/crs/terror/RL31367.pdf.

139. *Id.*; *but see* Geoffrey Corn et al., *Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher*, 116 YALE L.J. Pocket Part 327, 332 (2007).

140. THE CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003) 43-46 (2004) [hereinafter CLAMO, LEGAL LESSONS: VOLUME I], *available at* http://www.fas.org/irp/doddir/army/clamo-v1.pdf. *See also* THE CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME II, FULL SPECTRUM OPERATIONS (2 MAY 2003 TO 30 JUNE 2004) 71-73 (2005) [hereinafter CLAMO, LEGAL LESSONS: VOLUME II], *available at* http://www.fas.org/irp/doddir/army/clamo-v2.pdf.

141. AR 190-8, *supra* note 21.

142. *Id.* ¶ 1-6c.

143. *Id.* ¶ 1-6e(1).

144. *Id.* ¶ 1-6e(2).

145. *Id.* ¶ 1-6e(3).

146. *Id.* ¶ 1-6e(4).

147. *Id.* ¶ 1-6e(5).

148. *Id.* ¶ 1-6e(6).

149. *Id.* ¶ 1-6e(7).

150. *Id.* ¶ 1-6e(9).

151. AR 190-8, *supra* note 21.

2. Innocent Civilian who should be immediately returned to his home or released;
3. Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.[152]

Those determined to be something other than a prisoner of war, yet retained, are "a 'protected person' within the meaning of Article 4, GCIV."[153] This category could conceivably include unlawful combatants who are held but not prosecuted.[154]

The options listed in AR 190-8 are by no means exclusive since they are just "possible board determinations."[155] Not included amongst those options are "unlawful combatant," "enemy combatant," and "unlawful enemy combatant." Since September 11th, these terms have become increasingly prominent in our lexicon, particularly as they relate to the GWOT.

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152. *Id.* ¶ 1-6e(10)(b-d).

153. *See generally* FM 27-10, *supra* note 116. Protected persons, like civilians, are distinguished from prisoners of war under GCIV, and are given many of the same guarantees as prisoners of war, including but not limited to the right to humane treatment, certain due process rights, freedom from coercive interrogations, and the right to be repatriated. Jinks, *supra* note 102, at 380.

154. The International Committee for the Red Cross opines that there are two categories of prisoner. Prisoners are either civilians (and consequently, protected persons), or prisoners of war, and there are no gaps between the protections afforded under GCIII and GCIV. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSON IN TIME OF WAR (Jean S. Pictet, ed., 1958) [hereinafter ICRC Commentary IV]. According to the GCIV Commentary, there is no intermediate status: anyone in enemy hands is either a prisoner of war or a civilian. *Id.* ¶ 4. Noting the ICRC Commentary to GCIV, the International Criminal Tribunal for the Former Yugoslavia has similarly noted

> there is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions), he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied.

Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 271 (Nov. 16, 1998). In another case before the International Criminal Tribunal for the Former Yugoslavia, where the Court held that GCIV is intended to protect persons with a perceived "allegiance" to the enemy and "who do not have the nationality of the belligerent in whose hands they find themselves." Prosecutor v. Tadic, Case No. IT-94-1-A, at 164, Judgment, ¶ 164 (July 15, 1999). In a different case, the ICTY added that GCIV should be interpreted to protect civilians to the "maximum extent possible." Prosecutor v. Delalic, Case No. IT-96-21-A 57, Judgment, ¶ 57 (Feb. 20, 2001).

155. *See* AR 190-8, *supra* note 21, ¶1-6e(10).

III. THE COMBATANT STATUS REVIEW TRIBUNAL

A. *Historical Development* – Hamdi & Rasul

This next section focuses on the Combatant Status Review Tribunals which replaced the Article 5 tribunals in the GWOT. This section first examines the historical development of the CSRT, beginning with the U.S. Supreme Court rulings in *Hamdi* and *Rasul*, and then turns to the development and eventual implementation of the CSRT procedures. The section also examines the methods for reviewing the CSRT findings as provided in the Administrative Review Board and the Detainee Treatment Act. Finally, it examines comparative systems for determining prisoner status, helpful in the Analysis section of Part IV.

Following the 9/11 attacks on New York City and the Pentagon, President Bush told a joint session of Congress that evidence showed al Qaeda was responsible for the attacks.[156] During that speech, President Bush demanded the Taliban turn over all leaders of al Qaeda, release all foreign nationals including U.S. citizens who have been unjustly imprisoned, and protect foreign journalists, diplomats and aid workers in Afghanistan.[157] The President also demanded the Taliban give the United States full access to terrorist training camps and "hand over the terrorists or they will share in their fate."[158] These demands, the President asserted, should be met immediately, and were non-negotiable. [159]

Soon after the President's address, Congress passed the Authorization for Use of Military Force resolution which authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[160]

On October 7, 2001 United States and British forces conducted targeted military operations in Afghanistan, striking in particular airfields, air defense systems, terrorist training camps and concentrations of Taliban

156. President George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001) [hereinafter Bush's Address], http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/.

157. *Id.*

158. *Id.*

159. *Id.*

160. Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also* note following 50 U.S.C.S. § 1541 (LexisNexis 2008).

and al Qaeda personnel.[161] During the course of the military campaign, U.S. and Northern Alliance forces captured alleged members of the Taliban and al Qaeda. Initially held in Afghan prisons, many prisoners were eventually transferred to the U.S. Naval Station, Guantanamo Bay, Cuba.[162] On October 17, 2001, Central Command Commander General Tommy Franks directed all troops under his command comply with the laws of war, including the Geneva Conventions.[163] The Conventions, he ordered, were to apply to all captured persons.[164] General Franks ordered that all belligerents be screened to determine prisoner of war status in accordance with the procedures set out in AR 190-8.[165]

However, in Washington DC, Deputy Assistant Attorney General John Yoo thought otherwise. In his memorandum dated January 9, 2002, Yoo concluded that the Geneva Conventions do not apply to members of al Qaeda or Taliban[166] because al Qaeda is not a "State" and not a signatory to the Geneva Conventions. Therefore, Yoo claimed, the Conventions and the protections afforded there under did not apply to al Qaeda.[167] He also claimed the Conventions did not apply to the Taliban because Afghanistan was a "failed state whose territory" was "overrun and held by violence by a militia or faction rather than by a government."[168]

On January 18, 2002, White House legal counsel Alberto R. Gonzales concurred with the Yoo opinion and so advised the President. Later that day, the White House announced neither members of al Qaeda or Taliban would receive prisoner of war status.[169] Consistent with the new White

161. Dan Balz, *U.S., Britain Launch Airstrikes Against Targets in Afghanistan*, WASH. POST, Oct. 8, 2001.

162. John Mintz, *On Detainees, U.S. Faces Legal Quandary*, WASH. POST, Jan. 27, 2002.

163. REPORT OF INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS, AUGUST 2004 (SCHLESINGER REPORT), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, at 947 (Karen J. Greenberg and Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS].

164. *Id.*

165. *Id.*

166. Memorandum from John Yoo for William J. Haynes II, General Counsel, Department of Defense, Re. Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Yoo Memo], *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 38-79. This Memorandum was forwarded from Jay S. Bybee, Assistant Attorney General, to Alberto Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Re. Application of Treaties and Laws to al Qaeda and Taliban Detainees, (Jan. 22, 2002) [hereinafter Bybee Memo], *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 81-117.

167. *See* Yoo Memo, *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 48, 50.

168. *See* Yoo Memo, *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 50.

169. *See* Memorandum from Alberto Gonzales, Counsel to the President for the President, Re. Applic. of Treaties and Laws to al Qaeda and the Taliban (Jan. 22, 2002) [hereinafter Gonzales Memo], *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 81-117.

House policy, Secretary of Defense Rumsfeld overruled General Franks' previous order, and on January 22, 2002, directed that members of al Qaeda and Taliban would not receive prisoner of war status, but instead would be treated humanely "consistent with military necessity, [and] in a manner consistent with the principles of the Geneva Conventions of 1949."[170] Six days later, Gonzales forwarded his conclusions to the President who subsequently announced that the Geneva Conventions would not apply to members of either al Qaeda or Taliban.[171]

Meanwhile, on January 25, 2002, Secretary of State Colin Powell lodged his objections to the policy with the White House. He believed the United States should apply the Geneva Conventions for several reasons, including its past reliance on the Conventions and that failure to comply with the Conventions undermined U.S. military culture.[172] By denying prisoner of war status and ignoring the Conventions, other states could similarly deny status and application of the Conventions to U.S. forces.[173] According to Secretary Powell, the United States would pay "a high cost in terms of negative international reaction."[174] He added that this change in policy would "reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general."[175]

On February 1, 2002, Attorney General Ashcroft advised the President that the Geneva Conventions should not apply to the conflict in Afghanistan for two reasons.[176] First, Attorney General Ashcroft stated that Afghanistan was a failed state and the protections afforded it by the

170. Memorandum from the Secretary of Defense for Chairman of the Joint Chiefs of Staff, Subject: Status of Taliban and Al Qaeda (Jan. 29, 2002) *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 80.

171. *See* Gonzales Memo, *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 81-117.

172. Memorandum from Colin Powell, Secretary of State, for Alberto Gonzales, Counsel to the President Subject, Draft Decision Memorandum on the Applicability of the Geneva Convention to the Conflict in Afghanistan [hereinafter Powell Memo], *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 122-25.

173. *Id.*

174. *Id.* at 123.

175. *Id. See also* OPERATIONAL LAW HANDBOOK, *supra* note 25, at 39 (The Army has provided several reasons for compliance with IHL, even though the enemy may not: compliance ends the conflict sooner otherwise mistreatment encourages the enemy to fight and resist capture; compliance enhances public support of the military mission; compliance encourages reciprocal conduct from the enemy; compliance reduces waste of resources in combat and costs of reconstruction; required by the law.).

176. Letter from Attorney General John Ashcroft to the President, George W. Bush Re. Humane Treatment of al Qaeda and Taliban Detainees (Feb. 1, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 163.

Geneva Conventions did not apply during the period of armed conflict.[177] Second during the times Afghanistan was a party to the Geneva Convention, al Qaeda and Taliban fighters did not follow the laws of war.[178] As a result, he concluded that the prisoners did not qualify as prisoners of war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.[179]

Assistant Attorney General Jay Bybee advised the President in a second memorandum dated February 7, 2002, that the President may "obviate the need for Article 5 tribunals" based on reasonable grounds "that the Taliban, as a whole, is not legally entitled to POW status under Articles 4(A)(1) through (3) [of GCIII]."[180]

Finally, on February 7, 2002, the President set out the policy regarding the Geneva Conventions, to wit: (1) none of the Conventions would apply to the conflict with al Qaeda since that organization is not a Party to the Conventions; (2) although the President has the authority to suspend the Conventions, he would not, but instead determined that the Conventions would apply to the conflict with the Taliban; (3) Common Article 3 does not apply to either al Qaeda or Taliban detainees since the conflict with them is international in scope; and, (4) Taliban detainees are unlawful combatants and therefore not entitled to prisoner of war status.[181] The President also provided that since the Conventions did not apply to al Qaeda, those detainees would not receive prisoner of war status.[182] In an attempt to clarify the apparent policy conflict between applying the Conventions yet denying prisoner of war status, the United States contended that "detainees" receive many of the same privileges as prisoners of war consistent with the principles of the Conventions.[183]

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177. *Id.*

178. *Id.*

179. *Id.*

180. Memorandum from Jay Bybee for Alberto R. Gonzales, Counsel to the President, Re: Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949 (Feb. 7, 2002) [hereinafter Bybee Memo 2], *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 136-43.

181. Memorandum from the President of the United States for the Vice President et. al., Subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Memo], *reprinted in* THE TORTURE PAPERS, *supra* note 163, at 134-35.

182. *Id.* at 135.

183. The White House Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), http://www.whitehouse.gov/news/ releases/2002/02/20020207-13.html (Four years later, following the Supreme Court decision in *Hamdan v. Rumsfeld*, the United States changed course again and admitted the GenevaConventions apply to both al Qaeda and Taliban.). Charles Babington & Michael Abramowitz, *U.S. Shifts Policy on Geneva Conventions*, WASH. POST, July 21, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/ AR2006071100094.html?referrer=email.

Eventually, the prisoners held at GTMO were reclassified as "detainees" so as not to be confused with prisoners of war.[184] Because the United States contended the Conventions did not apply because status was never in doubt, no one at GTMO received an AR 190-8, or any comparable process under GCIII Article 5.[185] This policy eventually reached the U.S. Supreme Court in 2004.[186]

The Supreme Court in *Hamdi* ratified its earlier holding in *Ex Parte Quirin* that "capture, detention, and trial of unlawful combatants" are "important incident[s] of war."[187] The Court also held that a citizen-detainee challenging his status as an enemy combatant was "entitled to a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[188]

Issued the same day as *Hamdi*, the Court's opinion in *Rasul* held that the Federal District Court had jurisdiction to hear a statutory writ of habeas corpus challenge by alien-detainees held at Guantanamo Bay, Cuba.[189] Relying on an interpretation of the habeas corpus statute, the Court held that statutory habeas corpus drew no distinction between Americans and aliens held in federal custody, and as such aliens may invoke the Federal Court's jurisdiction under statutory habeas corpus.[190] Because of these distinctions, the *Rasul* Court ruled that *Eisenstrager* did not bar federal court jurisdiction over Rasul's habeas corpus claims.[191]

In response to these decisions, the Department of Defense eventually created the Combatant Status Review Tribunal (CSRT) intended to be

184. MARGULIES, *supra* note 10, at 267 n.3.

185. Corn et al., *supra* note 139, at 334.

186. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (quoting *Ex Parte Quirin*, 317 U.S. at 28).

187. *Id.* at 518.

188. *Id.* at 526.

189. Rasul v. Bush, 542 U.S. 466 (2004). In reaching its decision, the Court considered its prior holding in *Johnson v. Eisenstrager*, 339 U.S. 763 (1950), where the writ of constitutional habeas corpus was denied to 21 German citizens who had been captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. *Id.* at 475. In rendering its decision, the Court ruled that the petitioners in *Rasul* differed from those in *Eisenstrager* because "[T]hey are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Id.* at 476.

190. *Id.* at 480.

191. *Rasul*, 542 U.S. at 484. Kermit Roosevelt, III, *Current Debates in the Conflict of Laws: Application of the Constitution to Guantanamo Bay: Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017 (June 2005) (Roosevelt comments that the opinion seems less satisfying as the Court avoided reversing *Eisenstrager* or announcing alien-detainees possessed any constitutional rights.).

"tribunals very much like those cited favorably by the Court to meet the unique circumstances of the Guantanamo detainees," which would "provide an expeditious opportunity for non-citizen detainees to receive notice and opportunity to be heard."[192] Providing some method of process for the detainees, vis-à-vis the CSRT, addressed only part of the problem. Prisoner release usually occurs in the IHL at the close of hostilities. However, in the GWOT, release is much more problematic when there is no telling how or when the war on terror would end. Prisoners could theoretically be held indefinitely. In fact, President Bush's address to Congress on September 20, 2001 said that the GWOT would be a long war and that the war only "begins with al Qaeda .. . It will not end until every terrorist group of global reach has been found, stopped and defeated."[193] In fact, the Supreme Court in *Hamdi* recognized that GWOT detainees could theoretically be held indefinitely according to IHL standards, but it left the issue unresolved.[194]

B. *The CSRT Procedures*

Following the decisions in *Hamdi* and *Rasul*, the Department of Defense quickly moved to establish procedures for determining prisoner status in the GWOT.[195] The CSRT procedures were initially established in a four page Order by Memorandum for the Secretary of the Navy from the Deputy Secretary of Defense Order dated July 7, 2004.[196] The Order provided that all detainees should have "the opportunity to contest [their] designation as an enemy combatant."[197] A July 14, 2006 memorandum from Deputy Secretary of Defense explains that the "purpose and function" of the CSRT is to provide a "non-adversarial proceeding to determine whether . . . the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant."[198] It also included thirteen points of procedure

192. DEPARTMENT OF DEFENSE FACT SHEET, COMBATANT STATUS REVIEW TRIBUNALS [hereinafter DOD FACT SHEET], http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf.

193. Bush's Address, *supra* note 156.

194. *See Hamdi,* 542 U.S. at 520-21.

195. Memorandum from Deputy Secretary of Defense for the Secretary of the Navy, Subject: Order Establishing Combatant Status Review Tribunal (July 7, 2004) [hereinafter ORDER], *available at* http://www.defenselink.mil/news/Jul2004/ d20040707review.pdf.

196. *Id.*

197. *Id.*

198. Memorandum from Deputy Secretary of Defense for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense for Policy (July 14, 2006) [hereinafter CSRT PROCEDURES], http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

covering approximately one page of the memorandum.[199] The procedures were supposed to be based loosely on AR 190-8.[200] The Order also included a definition for "enemy combatant."[201] This same definition was eventually incorporated into the final procedures two years later on July 14, 2006.[202]

The CSRT procedures were intended to create a streamlined proceeding before a tribunal of three commissioned military officers who determine prisoner status by a majority vote.[203] The procedures address such matters as the requirement for an oath, the keeping of a record, open proceedings, and the prohibition on compulsion to testify.[204] Evidence is admitted if it is probative.[205] The rules of evidence do not necessarily apply.[206] Instead, the government's evidence is presumed "genuine and accurate."[207] The government must present all relevant evidence, including any evidence that may negate the detainee's designation as an enemy combatant.[208] Any statements derived from coercion must be determined by the tribunal for probative value.[209] Although the detainee's personal representative (who does not represent the detainee, but merely serves as a liaison with the Tribunal) may view and comment on classified documents, he may not share that information with the detainee.[210] Instead, unclassified summaries may be provided to the detainee.[211] The tribunal makes a finding based on a preponderance of evidence.[212]

Under the CSRT, the government provides the detainee with the assistance of a personal representative (who is not a judge advocate), an interpreter, if necessary, an opportunity to review unclassified information relating to the basis for detention, the opportunity to appear personally to present reasonably available information relevant as to why he should not be classified as an enemy combatant, the opportunity to question witnesses testifying at the tribunal (to the extent that they are reasonably available),

199. ORDER, *supra* note 195.
200. DOD FACT SHEET, *supra* note 192.
201. ORDER, *supra* note 195, at 1.
202. CSRT PROCEDURES, *supra* note 198, enclosure 1.
203. *Id.* enclosure 1, at 1.
204. *Id.* enclosure 1, at 2.
205. *Id.* enclosure 1, at 6.
206. *Id.*
207. *Id.*
208. *Id.* enclosure 1, at 7.
209. *Id.* at 2.
210. *Id.* enclosure 3, at 2.
211. *Id.* enclosure 1, at 4.
212. *Id.* enclosure 1, at 6.

and the opportunity to call witnesses on his behalf.[213] If a detainee is determined by the CSRT tribunal not to be an enemy combatant, the Secretary of State is supposed to coordinate the release of the detainee.[214]

Finally, and of significant note, the CSRT may make only one determination: whether or not the detainee is an "enemy combatant."[215] The tribunal has no other authority but to decide status.[216] "Enemy combatant" is defined in the CSRT as anyone who was "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[217]

C. *Methods of Review*

1. Administrative Review Board Procedures

At the same time the CSRT Procedures were released, the Department of Defense released the Administrative Review Board (ARB) procedures which are used to "determine annually if enemy combatants detained by the Department of Defense at . . . Guantanamo . . . should be released, transferred, or continue to be detained."[218]

The ARB is not required by the Conventions. When the ARB was released, the Department of Defense commented "there's no precedent for this type of process. This is a process we instituted to assess whether an enemy combatant continues to pose a threat to our country or to our allies or whether there's other factors that might be reasons for continued detention."[219]

As of December 11, 2007, the Department of Defense has twice reviewed the status of detainees by ARB process.[220] The first round was

213. *Id.* enclosure 3, at 3.

214. *Id.* enclosure 1, at 9.

215. *Id.* enclosure 1, at 1.

216. *Id.*

217. *Id.*

218. The same day the CSRT Procedures were issued, Undersecretary England issued a memorandum, which established annual administrative review procedures to determine enemy combatant status for those held by the DOD at the Naval Base, Guantanamo Bay, Cuba. Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense for Policy (July 14, 2006) [hereinafter ARB PROCEDURES), http://www.defenselink.mil/news/Aug2006/ d20060809ARBProceduresMemo.pdf.

219. Secretary of Navy Gordon England Briefing (Dec. 20, 2004), http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2043. In fact, AR 190-8 does not discuss appeal rights.

220. News Release, Department of Defense, Guantanamo Bay Detainee Administrative

conducted between December 14, 2004 and December 23, 2005 where Deputy Secretary of Defense Gordon R. England, the "Designated Civilian Official" for the ARB process, made 463 board recommendations resulting in 14 releases, 120 transfers, and 329 continued detentions.[221] The second round was conducted from January 30, 2006 to December 6, 2006 where Deputy England made final decisions on all 328 board recommendations consisting of 55 transfers and 273 continued detentions.[222] As a matter of practice, those who had been identified for trial by a military commission would not receive an ARB.[223]

2. The Detainee Treatment Act and Military Commission Act

On December 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005 (DTA).[224] The DTA eliminates the Federal Courts' jurisdiction over all habeas claims by aliens detained at Guantanamo Bay.[225] It provides a limited means for appeal in the U.S. Court of Appeals for the District of Columbia Circuit to "determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant."[226]

The DTA also provides detainees with a means to appeal their status as enemy combatants.[227] However, the grounds for appeal are limited to considering whether the determination made by the "Designated Civilian Official" was consistent with the applicable DOD procedures, including

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Review Board Decisions Completed (Feb. 9, 2006), http://www.defenselink.mil/releases/release.aspx?releaseid=9302; News Release, Department of Defense, Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Mar. 6, 2007), http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10582 [hereinafter News Release, Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Mar. 6, 2007)].

221. News Release, Department of Defense, Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Feb. 9, 2006), http://www.defenselink.mil/releases/release.aspx?releaseid=9302.

222. News Release, Guantanamo Bay Detainee Administrative Review Board Decisions Completed (Mar. 6, 2007), *supra* note 220.

223. News Release, Department of Defense, Guantanamo Bay Detainee Administrative Review Results Announced (Mar. 6, 2007), http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10582.Abdul Zahir never received an ARB because he had once been designated for trial before a military commission. He may never receive an ARB regardless if he is ever charged.

224. Detainee Treatment Act of 2005 § 1005(e)(2)(A), Pub. L. 109-148 [hereinafter DTA], *available at* http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php. The elimination of habeas corpus to detainees by the DTA was recently litigated on December 5, 2007, before the U.S. Supreme Court in the consolidated matters of *Boumediene v. Bush* (06-1195) and *Al Odah v. United States* (06-1196).

225. *Id.* § 1005(e)(1).

226. *Id.* § 1005(e)(2)(A).

227. *Id.* § 1005(e)(2)(c)(i).

whether the decision was supported by a preponderance of the evidence (allowing for the rebuttable presumption in favor of the governments evidence).[228] Detainees may also appeal on the grounds that "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States."[229]

After the U.S. Supreme Court struck the previous version of the military commission in *Hamdan*, the President signed into law the Military Commissions Act of 2006 (MCA).[230] The MCA expands the DTA by making CSRT review the detainee's exclusive remedy.[231] Essentially, the MCA reinforces the DTA provision revoking the Federal Court's habeas jurisdiction over alien combatants in U.S. custody.[232]

Under the MCA, the military commissions have personal jurisdiction over aliens determined to be unlawful enemy combatants.[233] An unlawful enemy combatant is "a person who, before, on, or after the date of the enactment of [the MCA], has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal."[234] An unlawful enemy combatant is also a person who has engaged in "hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)."[235] However, the CSRT may only determine whether or not the prisoner is an "enemy combatant," and not whether he is an "unlawful enemy combatant."

228. *Id.* § 1005(a)(2).

229. *See id.* § 1005(e)(2)(c)(ii).

230. Review and analysis of the Military Commission Act of 2006 or the subsequent Rules for Military Commissions is beyond the scope of this Article. *See* Military Commissions Act of 2006, Pub. L. No. 109-366 (2006) [hereinafter MCA].

231. *Id.* § 10.

232. *Id.* § 7.

233. *Id.* § 948d(a).

234. *Id.* § 948(a)(1) (emphasis added).

235. *Id.* Subsequent to the submission of this article, the Supreme Court ruled in *Boumediene v. Bush* that aliens held at GTMO and designated as enemy combatants have the constitutional privilege of *habeas corpus*. The Court also ruled that § 7 of the MCA limited judicial review of a detainee's status as an enemy combatant through the DTA was not an adequate substitute for *habeas*. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The Court noted that it made "no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards," and emphasized that "both the DTA and the CSRT process remain intact." *Id.* at 2275.

D. *Comparative Analysis*

Prior to 9/11, many U.S. allies had adopted procedures for determining status of prisoners captured during armed conflict. This part reviews procedures of a select few U.S. allies in the GWOT.

1. Canadian Approach

Canada's regulations for determining prisoner status in armed conflict directs unit commanders initially to screen prisoners for determining prisoner of war status.[236] If the Commanding Officer doubts a prisoner's status as a prisoner of war, then he may direct a tribunal to determine such status.[237] The reasons for doubt must be part of the record requesting a tribunal.[238] This information is then forwarded to a higher authority (Minister of Defense, Chief of Defense Staff, a commanding officer of a command or formation, or any authority directed by the Chief of Defense Staff) who then reviews the information and determines whether there is doubt as to status.[239] If that authority questions the status, then a tribunal is convened.[240]

The tribunal consists of one officer who is a member of the Legal Branch of Canadian Forces.[241] The Tribunal may order witnesses to appear and order evidence be produced.[242] The prisoner has the right to representation (but not necessarily by an attorney), who helps prepare for the hearing, represent the prisoner during the hearing, assist in preparing any written representations, and to present evidence.[243] The prisoner has the right to an interpreter, and the right to a determination within 24 hours.[244] The tribunal may take evidence *in camera* if the interests of national security so require.[245] The prisoner may be given a non-classified summary if national security would not be affected.[246] Relevant evidence may be admitted without regard to whether it tends to prove or disprove

236. PRISONER OF WAR STATUS DETERMINATION REGULATIONS, SOR/91-134, DEPARTMENT OF JUSTICE CANADA, art. 7 (Feb. 1, 1991), *available at* http://www.canlii.org/ca/regu/sor91-134/.

237. *Id.* art. 8.

238. *Id.* art. 8(2).

239. *Id.* arts. 8(3) & 3.

240. *Id.* art. 8.

241. *Id.* art. 4.

242. *Id.* arts. 6 & 17.

243. *Id.* art. 10.

244. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS, 571, 589 (Sept. 2002), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5FLBZK/$File/irrc_847_Naqvi.pdf.

245. PRISONER OF WAR STATUS DETERMINATION REGULATIONS, *supra* note 236, art. 15.

246. *Id.*

status.[247] The tribunal renders a determination if the "evidence establishes on a balance of probabilities that the detainee is not entitled to prisoner-of-war status."[248]

Unlike in the U.S. procedures for AR 190-8, the detainee is entitled to a limited review of the tribunal finding.[249] However, the review is made by the Commanding Officer with custody over the detainee.[250]

2. UK Approach

Prisoner of war status hearings in the United Kingdom are guided by three sources: (i) Prisoner of War Determination of Status Regulations (1958);[251] (ii) S.135 Army Act of 1955;[252] and, (iii) Boards of Inquiry (Army) Rules, 1956.[253] In the United Kingdom, if there is any doubt as to status, prisoners are deemed prisoners of war until such status is clarified by a hearing.[254]

At the hearing, the board may receive any evidence it considers relevant, whether it be written or oral and regardless of whether it would be admissible in civil court.[255]

Like AR 190-8, witnesses are examined under oath,[256] and the proceedings are recorded in writing and with detail sufficient to enable an authority to follow the proceedings.[257] There is no reference to legal representation or rights of review.

Although status may not be contested, a board may still be convened when questions arise as to status. In fact, during the First Gulf War, 35 Iraqis claimed they were not members of the Iraqi armed forces and were not alleged to have committed hostile acts, yet a board of inquiry was convened because the commander doubted their status.[258]

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247. *Id.* art. 13.

248. *Id.* The standard of proof requiring a detainee to show he is not entitled to POW status indicates that a lesser burden may be needed to show POW status. Naqvi, *supra* note 244, at 589.

249. PRISONER OF WAR STATUS DETERMINATION REGULATIONS, *supra* note 236, art. 17.

250. *Id.*

251. PRISONER OF WAR DETERMINATION OF STATUS REGULATIONS, ¶ 1 (1958), http://www.icrc.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/c5ccc00a3c05ea6ec1256ba000374115!OpenDocument.

252. Army Act, 1955, c. 18, § 135 (U.K.).

253. Board of Inquiry (Army) Rules, 1956, S.I. 1956/630 (U.K.), *available at* http://geocities.com/aspals_legal_pages/boi.pdf.

254. PRISONER OF WAR DETERMINATION OF STATUS REGULATIONS, *supra* note 236, ¶ 1.

255. Board of Inquiry (Army) Rules, *supra* note 253, ¶ 12.

256. *Id.* ¶ 15.

257. *Id.*

258. Naqvi, *supra* note 244, at 588.

3. Israeli Approach

Israel's Article 5 procedures are found in the "Incarceration of Unlawful Combatants Law, 5762-2002" and are intended to regulate "the incarceration of unlawful combatants not entitled to prisoner-of-war status."[259] Unlike AR 190-8, the Israeli approach incorporates the term "combatant" and distinguishes the lawful combatant, or "prisoner," from "unlawful combatant."[260]

For Israel, an "unlawful combatant" is:

> a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him.[261]

Under the Israeli approach, if the Chief of General Staff has reasonable cause to believe that someone is an unlawful combatant and that his release will harm State security, then he may order the person incarcerated.[262] The prisoner is entitled to be notified of the reasons for detention as soon as possible and may make a formal protest.[263]

Unlike AR 190-8, the Israeli system allows for civilian judicial review within 14 days of the initial incarceration order.[264] Failure to comply with the procedures to this point is cause to quash the incarceration order.[265] A civilian District Court will review the incarceration decision initially and then every six months thereafter to ensure release will not harm the State.[266] Decisions by the civilian court may be appealed to the Supreme Court.[267]

Like AR 190-8, the procedural rules are relaxed at the District Court level. The rules of evidence do not apply and evidence may be withheld

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259. INCARCERATION OF UNLAWFUL COMBATANTS LAW 5762-2002 § 1 [hereinafter INCARCERATION OF UNLAWFUL COMBATANTS LAW], *available at* http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AEBE770BDE6/0/IncarcerationLawedited140302.doc.

260. *Id.* § 2.

261. *Id.*

262. *Id.* § 3(a).

263. *Id.* § 3(c).

264. *Id.* § 5(a).

265. INCARCERATION OF UNLAWFUL COMBATANTS LAW, *supra* note 259, § 6.

266. *Id.*§ 5(c).

267. *Id.* § 5(d).

if disclosure would harm State security.[268] The hearings are *in camera*.[269] But unlike AR 190-8, the prisoner is entitled to legal counsel.[270]

There is a rebuttable presumption in favor of the government that release of members of a particular force (which are engaged in hostilities against the State) would cause harm to State security.[271] Finally, and consistent with the IHL, the Israeli model anticipates criminal prosecution against unlawful combatants.[272]

IV. ANALYSIS

Like many decisions made by the United States during the GWOT, the CSRT has generated an impassioned level of critical discourse over the applicability of Article 5 verses the legality of the CSRT. This section is not intended to persuade the reader towards any one position. Rather, it is intended to briefly summarize the basic claims made by proponents (and critics) for each system, and let the reader decide for himself which is most persuasive. Regardless of which side the reader takes, it is anticipated the reader will concede that each side makes compelling arguments. Because they do, neither Article 5 nor the CSRT may be the best systems for determining prisoner status in the GWOT, and therefore a different model approach is needed.

A. *Introduction*

Before September 11, 2001, terrorists were prosecuted as ordinary criminals.[273] But the attacks on the World Trade Center and the Pentagon changed the way America views terrorism and terrorists. Before 9/11, terrorism was considered a law enforcement issue, and terrorists as criminals.[274] Since then, terrorism abroad is considered a military matter and terrorists as enemy combatants to be detained as such or prosecuted before military commissions.[275]

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268. *Id.* § 5(e).
269. *Id.* § 5(f).
270. *Id.* § 6.
271. *Id.* ¶¶ 7 & 8.
272. *Id.* ¶ 9.
273. *See* Peal, *supra* note 29, at 1668.
274. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT, 9/11 REPORT, *supra* note 3, at 73 ("Legal processes were the primary method for responding to these early manifestations of a new type of terrorism.").
275. MCA, *supra* note 230; MARGULIES, *supra* note 10, at 267 n.3.

Before 9/11, combatants captured in international armed conflict were entitled under IHL to an Article 5 tribunal to determine prisoner status.[276] Since then the lines amongst civilians, combatants and criminals have become blurred so now combatants receive a CSRT to determine whether the prisoner is an enemy combatant.[277]

Although the CSRT and the AR 190-8 procedures may look alike, the purposes and the permitted tribunal findings differ. Advocates of the CSRT claim IHL and the Conventions do not apply in the GWOT. In the alternative they claim the CSRT is the best means for determining status of prisoners captured in the GWOT while complying with international legal norms. Opponents to the CSRT claim otherwise. They argue that IHL and the Conventions apply and that the CSRT is a poor alternative for determining prisoner status in the GWOT.

Through academic writings and other sources, this section reviews the positions taken and arguments made by proponents (and critics) for each side of the debate. For reasons that should become clear, both sides make compelling cases why their preferred system is correct and the other is not. Yet both systems are flawed and neither may be the right system for resolving prisoner status particularly when considering due process concerns, appeals, and an objective means for determining release of combatants who are not prosecuted. Therefore, a different system or model is needed; one that incorporates pre-existing IHL and practices but is modified accordingly for the GWOT to provide for the principle reasons prisoners are detained in the GWOT. Those principle reasons for detaining prisoners in the GWOT, as articulated by the United States, are as follows: (1) to identify and prevent those individuals from returning to the "battlefield,"[278] (2) to identify and detain those individuals for interrogation and intelligence,[279] and (3) to identify and detain those individuals for criminal prosecution before a military commission or domestic court.[280]

As to the first reason for detention in the GWOT, just as in IHL, captured enemies are detained to keep them from returning to the battlefield. By doing so, the detaining power and its soldiers are protected

276. *See* FM 27-10, *supra* note 116.

277. *See* CSRT PROCEDURES, *supra* note 198.

278. BOB WOODWARD, STATE OF DENIAL 486-87 (2006) (In reference to those held at Guantanamo Bay following the Supreme Court decision in *Hamdan*, Bob Woodward writes, "Rumsfeld felt they should be interrogated and kept in detention to keep them off the battlefield.").

279. The Supreme Court has recognized that detainees may not be subject to indefinite detention for purposes of interrogation. Hamdi v. Rumsfeld, 542 U.S. 507, 520-21 (2004).

280. *See* William Glaberson, *Court Advances Military Trials for Detainees*, N.Y. TIMES, Sept. 25, 2007, *available at* http://www.nytimes.com/2007/09/25/washington/25gitmo.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1190749600-3dvjLrfvbGElQsPMtH2zCw.

from further attack by the captured enemy.[281] The detention usually lasts a definitive term, or at least until hostilities end, at which point prisoner release is negotiated between the warring states. Once active hostilities end, prisoners should "be released and repatriated without delay."[282] In the GWOT however, the reasons for detaining combatants is the same as in IHL except for one key difference: no one can say for certain when hostilities will end, and if they do end, with whom should the United States negotiate prisoner release. Negotiations for prisoner exchanges could be particularly difficult when no states, *per se*, are parties to the GWOT. Even if the United States could or would negotiate with al Qaeda or any other terrorist organization, the GWOT is distinct from traditional armed conflict because it is a conceptual conflict with terrorism which in and of itself may never end, potentially lasting in perpetuity as new organizations replace former organizations.[283] Just as the Supreme Court noted in *Hamdi*, the Government may "not consider this unconventional war won for two generations . . . (and so) Hamdi's detention could last for the rest of his life . . ."[284] The potential for indefinite detention in a conflict such as the GWOT is not addressed by the Conventions, and so for this reason, amongst others, Article 5 and the AR 190-8 procedure is flawed.

But unlike Article 5, the CSRT process provides a review process through the ARB. However, for reasons discussed later, the CSRT/ARB system remains flawed for its failure to provide sufficient due process.

The second reason for detention in the GWOT is for intelligence collection vis-à-vis interrogation. At GTMO, Government interrogators systematically questioned detainees for military intelligence.[285] Intelligence analysts used this information to assimilate data from hundreds of sessions.[286] Based on the connections or relationships, intelligence analysts supposedly distinguished which prisoner was al

281. Yin, *supra* note 106, at 166 n.76 (citing *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946)); *see also* FM 27-10, *supra* note 116, ¶ 198.

282. *See* GCIII, *supra* note 20, art. 118.

283. Joseph Blocher, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 670 (2006).

284. *Hamdi*, 542 U.S. at 520-21.

285. ROBERT POPP & JOHN POINDEXTER, COUNTERING TERRORISM THROUGH INFORMATION AND PRIVACY PROTECTION TECHNOLOGIES, IEEE SECURITY & PRIVACY, Vol. 4, no. 6, 18-27 (Nov./Dec. 2006), *available at* http://www.computer.org/portal/site/security/menuitem.6f7b2414551cb84651286b108bcd45f3/index.jsp?&pName=security_level1_article&TheCat=1015&path=security/2006/v4n6&file=popp.xml&.

286. *Id.*

Qaeda or which was Taliban.[287] However, the Conventions prohibit prolonged detention for this purpose,[288] and for this reason the Conventions and Article 5 could not apply to the GWOT.

The third reason for detention is to identify those who will be prosecuted before a military commission. Neither Article 5 nor AR 190-8 consider a process comparable to an indictment which provides defendants with minimum due process guaranteed under the Conventions, ICCPR and other IHL. The CSRT similarly fails in this regard. In fact, this issue was raised in the CMCR matter of *United States v. Khadr* where the court commented that at the time each detainee was given a CSRT, the MCA had not been drafted and so no detainee could have possibly known that a determination as an enemy combatant determination could possibly subject them to criminal prosecution before a military commission.[289] The CMCR agreed that designation as an enemy combatant is insufficient to provide jurisdiction in a military commission.[290]

In sum, neither the Article 5 tribunal nor the CSRT are sufficient for determining prisoner status in the GWOT. For Common Article 3 conflicts (such as in Afghanistan since June 2002 and in the GWOT against al Qaeda elsewhere), Article 5 tribunals are not required under the Conventions.[291] But even if Common Article 2 were to apply to the GWOT, Article 5 still does not resolve these critical issues relevant to

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287. *Id.*; *see also* Ellen Nakashima & Alec Klein, *New Profiling Program Raises Privacy Concerns*, WASH. POST, Feb. 28, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/27/AR2007022701542.html.

288. *See* Jinks, *supra* note 102, at 380; *see also* GCIII, *supra* note 20, art. 17.

289. United States v. Khadr, No. CMCR07-001 (C.M.C.R. Sept. 24, 2007), *available at* http://www.scotusblog.com/ movabletype/archives/CMCR%20ruling%209-24-07.pdf. The Court stated:

> We need not speculate how Mr. Khadr's personal participation in his 2004 CSRT evaluation may have been impacted had he been on notice of the potential criminal liability the CSRTs finding could impose upon him. Such lack of notice offends our most basic and fundamental notions of due process; therefore, it also violates Common Article 3.

Id. at 15. Khadr claimed the military commission lacked jurisdiction over him since jurisdiction in the MCA is over anyone who has been determined to be an "unlawful enemy combatant" as determined by the CSRT. Yet, the CSRT cannot make such a determination, and never did. The CSRT could only determine whether Khadr was an "enemy combatant" and not an "unlawful enemy combatant." These are two distinct things. The CMCR agreed on this point.

290. *Id.*

291. *See* ICRC Paper, *International Humanitarian Law and Terrorism: Questions and Answers* (May 5, 2004), http://www.icrc.org/web/eng/siteeng0.nsf/html/5YNLEV [hereinafter ICRC Paper]; GCIII, *supra* note 20, art. 3. GCIII, *supra* note 20, art. 5. *See generally* Hamdan v. Rumsfeld, 548 U.S. ___ (quoting Common Article 3).

prisoner release. Without some means for release, identification as a combatant in the GWOT could subject the prisoner to a life sentence. Such serious consequences are starker when considering that status determinations under AR 190-8 are determined without the assistance of legal counsel, by military officers with little or no legal experience, based on evidence presumed reliable admitted by a preponderance standard. Status is decided by a simple majority of the tribunal, whose decisions are not subject to review. Likewise, the CSRT fails to provide sufficient due process and therefore fails its initial task for identifying the correct status. Failing this criterion, there is no reliability that the CSRT panel correctly distinguished the innocent civilian from the unlawful combatant. Because the CSRT only allows one finding that is based on unreliable evidence, presumed reliable, and in most instances can never be examined, the CSRT is fundamentally flawed. Therefore, a different system is needed.

B. *Analysis and Critique of the Article 5 and the CSRT*

1. Arguments For and Against Application of the Geneva Conventions

a. Whether the GWOT is the Right Kind of Conflict

Before determining whether a prisoner is entitled to an Article 5 tribunal, two questions must first be answered: (1) whether this is the right kind of conflict and if so, (2) whether this prisoner is the right kind of person.[292] In this section, the first question to address is whether the GWOT is the "Right Kind of Conflict" to which the Conventions apply. Focusing on Afghanistan as the *situs* of the GWOT conflict for the moment,[293] let us agree that the conflict with the Taliban and with al Qaeda is an "armed conflict" particularly when considering the intensity of the hostilities and the capacity and willingness of al Qaeda to coordinate sustained hostilities.[294]

In addition to the armed conflict element, the methodology requires an inquiry into whether the conflict is international or internal in character. As to whether the GWOT itself is international (and thus one that qualifies

292. OPERATIONAL LAW HANDBOOK, *supra* note 25.

293. Though some consider military operations in Iraq as part of the GWOT, most do not, and as such, Iraq is not considered part of the GWOT for this Article. For anyone captured outside Afghanistan or Iraq, Common Article 2 would not apply since Article 5 does not apply in such conflicts. Peal, *supra* note 29, at 1643. But the underlying issue for this Article remains as to what process is available for determining prisoner status.

294. Jinks, *supra* note 29, at 187.

for Common Article 2 considerations) or internal (and is thereby limited to Common Article 3 consideration), legal scholars have split.

One perspective includes those who support the U.S. position that the GWOT is not a Common Article 2 conflict regarding al Qaeda because "non-governmental organizations cannot be parties to any of the international agreements here governing the laws of war."[295] This is the position the President took when he denied status and Common Article 3 to conflict with al Qaeda.[296] As to the GWOT conflict with the Taliban, the United States initially claimed that this conflict was not covered by Common Article 2 or 3 and thus the Conventions did not apply because Afghanistan was a failed State,[297] and as such, the President constitutionally suspended U.S. obligations under the Conventions because Afghanistan had no operating government capable of fulfilling its international obligations.[298] However, this position changed following the U.S. Supreme Court decision in *Hamdan* which declared that Common Article 3 protections will apply at a minimum to the conflict with al Qaeda. The United States soon chose to apply the Conventions to the Taliban and to al Qaeda.[299] A third perspective views the conflict in Afghanistan as mixed: it is partly international as between the United States and Taliban and partly internal as between the United States and al Qaeda.[300]

The ICRC takes a different position in support of application of Common Article 2 protections to the conflict in Afghanistan. According

295. Bybee Memo, *supra* note 166, at 89-90.

296. Bush Memo, *supra* note 181, at 134-35.

297. The "failed state" argument collapses since the Taliban effectively controlled Afghanistan, and was at the time the effective government. Afghanistan could arguably be deemed an international armed conflict when a State Party is invaded by another State Party, even if a de facto government rules the invaded State. *See* Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d Cir. 1995) ("[A] state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities . . ."); *see also* MURPHY, *supra* note 29, at 35-36. The fact that the Taliban controlled 90% of the territory in Afghanistan, but were not politically recognized by most of the international community, does not erode the privileges of the combatants or the application of the IHL. DINSTEIN, *supra* note 30, at 47.

298. Whether and to what extent this position is correct, will not be addressed in this Article. *See* Bybee Memo, *supra* note 166, at 90-91, & 95-111.

299. Babington & Abramowitz, *supra* note 183.

300. Armed conflict may incorporate elements of both international and non-international elements and may occur simultaneously such as in Afghanistan where before U.S. intervention, the Taliban were engaged in internal armed conflict with the Northern Alliance, yet remained so engaged, even after the United States intervened against the Taliban. In this instance, the conflicts did not merge, but rather the hostilities continued on two different planes: one was non-international between Taliban and the Northern Alliance, and the other was international between the United States and the Taliban. DINSTEIN, *supra* note 30, at 15.

to the ICRC, the U.S. conflict in Afghanistan was initially one to which Common Article 2 applied.[301] As such, every combatant, whether Taliban or al Qaeda, would receive the full protection of the Conventions as an international armed conflict. Contrary to the U.S. position, it need not matter whether al Qaeda was a signatory or a State for the purposes of the Conventions. Its members would still receive the protections of Common Article 2 (but not necessarily GCIII, discussed later). But after June 2002 when the Loya Jirga appointed Hamid Karzai head of the transitional government, the nature of the conflict changed to one which Common Article 3 applied.[302] From this point forward, combatants should have been entitled, just as the Supreme Court opined in *Hamdan*, to the minimal protections of Common Article 3.[303]

As one could see, such disparity could lead to disproportionate results for managing prisoners depending upon where or when the prisoner was captured. As a result, two sets of norms could apply to the GWOT depending on whether the armed conflict occurred in Afghanistan before or after June 2002, or occurred against al Qaeda in some other sovereign. In those instances of internal armed conflict governed by Common Article 3, Article 5 tribunals are not required, and as such, no process is mandated under the Conventions for determining prisoner status during internal armed conflict.

b. Whether the GWOT Detainees are the Right Kind of Persons

The second part of the Judge Advocate methodology, whether the GWOT detainees are the "Right Kind of Person," may not be necessary because, if Common Article 3 applies to the GWOT in Afghanistan after June 2002, Article 5 tribunals are not required by the Conventions. Logically, and consistent with IHL, in particular the ICCPR, some form of process should still be provided to determine status.

Nevertheless, to best follow the intellectual discourse that eventually led to the eventual implementation of the CSRT following *Rasul* and *Hamdi*, this part continues the analysis by examining whether the Conventions apply to members of the Taliban and al Qaeda as the "Right Kind of Persons."

301. *See* ICRC Paper, *supra* note 291.

302. *Id.*

303. *See id.* Whether or not the GWOT is a Common Article 2 conflict is outside the scope of this Article.

(1) The Taliban

On the one hand, those proponents supporting the U.S. position claim the Taliban do not qualify as prisoners of war because they failed to comply with the rules of law and had aligned themselves with a terrorist organization.[304] By doing so, the Taliban were like a terrorist organization and therefore should not be considered prisoners of war.[305] Besides, they claim, the Taliban failed to comply with the requirements for GCIII, Article 4 for collectively failing to wear uniforms or display fixed or distinctive emblems.[306] It was for this failure to comply with Article 4 that President Bush declared no Taliban would be considered a prisoner of war.[307]

On the other hand, a compelling argument has been made that captured Taliban should not be denied prisoner of war status for failing to wear uniforms.[308] Although the argument could be based on API Article 44, which does not require the wearing of uniforms, neither the United States nor Afghanistan ratified that Protocol.[309] Instead, those maintaining the Taliban as prisoners of war argue that Article 4 (A)(2) only applies to militias and other volunteer corps and not to members of the armed forces.[310] The Taliban fighters, they claim, represented the Afghan government prior to June 2002 and as such represent the Afghan armed

304. *See* Bybee Memo, *supra* note 166, at 90-91 & 95-111.

305. *See id.*

306. *See* Bybee Memo 2, *supra* note 180, at 136-43;*see also* Bybee Memo, *supra* note 166, at 83.

307. Bybee Memo 2, *supra* note 180, at 136-43;*see also* Bybee Memo, *supra* note 166, at 83. For a summation of the U.S. position, see Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F.L. REV. 1, 17-35 (2004) (conceding that the Taliban were the de facto government of Afghanistan, Air Force Lieutenant Colonel Joseph P. Bialke makes the point, nonetheless, that the Taliban are not entitled to POW status. Going into great detail, Lt. Col. Bialke denies status to Taliban, *en masse*, because they failed to comply with Article 4 criteria. Failure of any of the four (A)(2) criteria is reason enough, Biakle claims, to deny POW status. He details the atrocities committed by al Qaeda with Taliban acquiescence claiming that as a result of their relationship, the Taliban allowed al Qaeda to act as a de facto extension of the Taliban government so the Taliban are vicariously liable for the acts of al Qaeda).

308. *See* G.H. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002). For a more detailed analysis of this issue regarding the requirement for uniforms, see Toni Pfanner, *Military Uniforms and the Law of War*, 86 IRRC 93 (2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5ZBE5X/$File/IRRC_853_Pfanner.pdf. *See also* W. Hays Parks, *Special Forces' Wear of the Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003).

309. Bialke, *supra* note 307, at 26-27, 29.

310. Aldrich, *supra* note 308, at 894.

forces that are not required to wear uniforms.[311] Support for this argument can be found by comparison with U.S. Special Forces during the early days of the GWOT when those regular U.S. forces fought alongside the Northern Alliance dressed as local tribesman wearing no distinctive sign or insignia, thus failing the uniform criteria of Article 4.[312] Besides, neither Taliban fighters nor Northern Alliance fighters wore uniforms.[313] As such, both groups failed the distinctive sign criteria and thus neither group should qualify for prisoner of war status. Failing to wear uniforms or a distinctive emblem by both groups was not intended to disguise themselves amongst the civilian populous, and commit perfidy, but rather because they lacked supplies.[314] An alterative position claims that Taliban may qualify as prisoners of war under Article 4 (A)(1) as members of the militia or voluntary corps because that section is independent of (A)(2).[315] However, there may be a consensus that all four criteria must apply, including to members of the regular armed forces, but this issue remains subject to debate.[316]

(2) al Qaeda

In addition to the Taliban, proponents supporting the U.S. position against application of the Conventions in the GWOT claim the Conventions should not apply to al Qaeda because its members collectively failed to distinguish themselves from the civilian population and failed to comply with the laws of war by attacking civilian targets, hijacking civilian planes, taking hostages and killing hostages.[317] These were, in fact, the determinative reasons al Qaeda was denied prisoner of war status.[318]

On the other hand, those advocating for application of the Conventions to the GWOT submit that al Qaeda are entitled to prisoner of war status

311. *Id.*

312. *See* Aldrich, *supra* note 308; Pfanner, *supra* note 308, at 93; *see also* Parks, *supra* note 308.

313. *See* Aldrich, *supra* note 308; Pfanner, *supra* note 308, at 93; *see also* Parks, *supra* note 308.

314. *See* Aryeh Neier, *The Military Tribunals on Trial*, N.Y. TIMES REV. OF BOOKS (2002), http://www.nybooks.com/articles/15122.

315. Michael Petrusic, *Enemy Combatants in the War on Terror and the Implications for the U.S. Armed Forces*, 85 N.C. L. REV. 636, 656 (2007).

316. *Id.*; *see also* Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209, 222 (2005).

317. Bybee Memo, *supra* note 166, at 89-90.

318. *Id.*; *see also* Bialke, *supra* note 307, at 39-42.

because of their position with Taliban.[319] Adopting the reasoning for denying the Conventions to the Taliban (that the Taliban loses Article 4 status because of its relationship with al Qaeda), these proponents claim al Qaeda should be entitled to prisoner of war status because they fought alongside the Taliban in international armed conflict as members of militia, volunteer corps, or organized resistance movements.[320] It need not matter whether al Qaeda are part of the Afghanistan "armed forces."[321] So long as the Taliban qualify for prisoner of war status, members of al Qaeda fighting with them should also qualify under Article 4(A)(4).[322] Regardless, nothing is lost by giving al Qaeda prisoner of war status since they would still not get combat immunity for war crimes or crimes associated with international terrorism.[323] Instead, those detained for their association with terrorist activities could still be prosecuted for engaging in illegal combat as unlawful combatants.[324]

But even if Common Article 2 were to apply because the GWOT is the right kind of conflict and GCIII applies to the GWOT detainee as the right kind of person, Article 5 tribunals may not necessarily be given if there is no question or doubt as to prisoner status.

2. Whether Article 5 Applies to the GWOT

Even if the Conventions applied, advocates supporting the U.S. position against application of the Conventions rejected Article 5 tribunals because the status of Taliban and al Qaeda was never in doubt when it was well known that "al-Qaeda and the Taliban *en masse* systematically and willfully failed to meet the four criteria of lawful belligerency."[325] As such, neither group received prisoner of war status, or an Article 5 tribunal.[326] Article 5 tribunals were intended to provide "*ad hoc* on-the-scene minimal due process . . . [and] to ensure that a few displaced civilians or other individual non combatant captives"[327] who may have been inadvertently detained at or around the battlefield can be identified and promptly released.[328]

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319. Blocher, *supra* note 283, at 672.
320. *Id.*
321. Jinks, *supra* note 29, at 181-82.
322. Blocher, *supra* note 283, at 672.
323. Peal, *supra* note 29, at 1647.
324. *Id.*
325. Bialke, *supra* note 307, at 52.
326. *Id.*
327. *Id.*
328. *Id.* at 50.

The tribunals were intended to provide a means for identifying prisoners of war when status was uncertain either because they were deserters with no uniform, had lost their identification card, or were lawful combatants.[329] But when a prisoner's status is known, just as when the President declared all members of al Qaeda and Taliban as unlawful combatants, no Article 5 tribunal is required.[330] The presidential declaration, the United States justified, was not unlike that made in traditional armed conflict by combatant commanders when issues of status are resolved based on intelligence from the field.[331]

Only when the combatant commander questions the intelligence does he convene an Article 5 tribunal.[332] Because the prisoners at GTMO were presumptively declared unlawful combatants as members of either Taliban or al Qaeda, none of them received Article 5 tribunals because "their status as POWs under Article 4 [was never] in doubt."[333] The United States claimed this unified declaration by the Commander-in-Chief was needed to provide consistency throughout the theater by avoiding inconsistent rulings from separate tribunals.[334]

On the other hand, and in response, a system providing some minimum due process consistent with existing international legal norms is needed to distinguish civilians from combatants, and lawful from unlawful combatants. Whether Common Article 2 applies or not, without some form of process, there is no method to distinguish al Qaeda, or Taliban, or Northern Alliance, or civilians when none of those groups wear uniforms, carry identification cards or bear a distinctive emblem. At the least, a hearing is needed to distinguish those who will be released from those who will be detained and prosecuted.[335] Consistent with past practices, the

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329. *Id.* at 49-51.

330. *Id.* at 54.

331. Biakle, *supra* note 307, at 53.

332. Miles P. Fischer, *Applicability of the Geneva Conventions to "Armed Conflict" in the War on Terror*, 30 FORDHAM INT'L L.J. 509, 529 (2007).

333. Corn et al., *supra* note 139, at 334.

334. Fischer, *supra* note 332, at 528-29.

335. Human Rights Watch raised this concern to former Secretary Rumsfeld stating that the United States may be holding civilians who are "protected persons" under GCIV. In a letter to Donald Rumsfeld, Kenneth Roth, the Executive Director of Human Rights Watch, stated:

> The decision regarding the necessity of internment cannot be made collectively; "each case must be decided separately." The United States is also obliged to periodically review the necessity of continued internment and to release each interned person "as soon as the reasons which necessitated his internment no longer exist." In any case, unless the person is serving a prison sentence, internment shall "cease as soon as possible after the close of hostilities."

United States could have provided some form of Article 5 tribunal to make this distinction regardless of Common Article 2, just as it had in Vietnam, Grenada,[336] and in the Iraq War.[337]

3. Whether the CSRT Procedures are Sufficient for the GWOT

a. Whether the CSRT Provides Sufficient Process

The CSRT was supposed to satisfy the Supreme Court's requirements following *Hamdi* and *Rasul*.[338] Proponents of the system claim the CSRT supports U.S. obligations under international law by providing a means to determine the status of detainees, thus satisfying the requirement for a "competent tribunal."[339]

In *Hamdi,* Justice O'Connor discussed, in dicta, procedures that might be used to satisfy Hamdi's right to challenge his detention. She noted that

> [t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, ch. 1, §§ 1-6 (1997)."[340]

However, as CSRT critics claim, the CSRT procedures do not quite meet Justice O'Connor's minimum standards.

Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Donald Rumsfeld, Secretary of Defense, U.S. Government, (Mar. 6, 2003), http://www.hrw.org/press/2003/03/us030603-ltr.htm (internal citations and quotations omitted).

336. *See* ELSEA, *supra* note 138, at 36. *But see* Corn et al., *supra* note 139, at 332.

337. CLAMO, LEGAL LESSONS: VOLUME I, *supra* note 140, at 43-46; *see also* CLAMO, LEGAL LESSONS: VOLUME II, *supra* note 140.

338. DOD FACT SHEET, *supra* note 192.

339. Douglas W. Kmiec, *Constitutional Law Symposium: Constitutionalism and the War on Terror: Article: Observing the Separation of Powers: The President's War Power Necessarily Remains "the Power to Wage War Successfully"*, 53 DRAKE L. REV. 851, 888 (2005); *see also* Paul Rosenzweig, *Response: On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky*, 45 WASHBURN L.J. 29, 38 (2005).

340. Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004).

(1) Burden of Proof

Unlike the presumption that each prisoner is a prisoner of war and the government (or detaining power) has the burden to prove otherwise, the CSRT gives the government a rebuttable presumption that evidence against the detainee is true.[341] In other words, the prisoner must prove he is not an enemy combatant and must rebut all of the government evidence to the contrary.

(2) Classified Evidence

Similarly, classified evidence may be viewed by the tribunal and used against the detainee, but the detainee may not review the evidence or know of its source for purposes of cross examination, even if the evidence is mitigating to his favor.[342] Evidence obtained through torture or other coercive means that would otherwise be considered unreliable could still be used at the CSRT, provided such evidence is "relevant and helpful."[343] The use of such coerced evidence is even more problematic when the method for obtaining such coerced statements is classified. In such instances, the detainee, let alone the *pro se* detainee, will have a difficult time suppressing the evidence.[344]

At the same time, the tribunal must presume that all evidence presented by the military, including classified evidence, even if it is uncorroborated or un-sourced, is genuine and accurate.[345] In evaluating the evidence, the tribunal may rely upon "any information it deems relevant and helpful," which may include hearsay, or evidence obtained through cruel, inhuman, or coercive means.[346]

(3) Minimal Discovery

Prisoners in the CSRT are entitled to minimal discovery. However, military witnesses are only deemed "reasonably available" to testify at the hearings "if, as determined by their commanders, their presence at a hearing would [not] adversely affect combat . . . operations."[347] Witnesses will not be determined "reasonably available" if "they decline properly

341. CSRT PROCEDURES, *supra* note 198, enclosure 1, at 6.
342. *Id.* enclosure 1, at 4.
343. *Id.* enclosure 1, at 6.
344. *See id.*
345. *Id.*
346. *Id.*
347. *Id.*

made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT staff, or if security considerations preclude their presence at a hearing."[348] This may conveniently keep interrogators from appearing if they had obtained statements through torture or some other questionable means. Furthermore, "[n]on-U.S. Government witnesses will appear before the Tribunal at their own expense."[349] Clearly the ability to obtain witnesses is limited. It is highly unlikely that a poor Afghan would be willing or able to pay for the cost of a flight to Cuba, particularly when he can never be sure he will ever return.

(4) Delay in Proceedings

The CSRT fails to comply with the "meaningful time and manner" standard described by Justice O'Connor. An Article 5 hearing is intended to be conducted very near in time and in place to the point of capture where witnesses are available and evidence is readily obtainable.[350] The CSRT hearings, by contrast, were held in Guantanamo Bay, Cuba, after several years since, and thousands of miles from, the point of capture.[351] Any witnesses who could testify might be unavailable either because they are in Afghanistan, or they could not be located (as is often the case with indigenous Afghans), or the Government may decide that it cannot obtain such witnesses because doing so would be cost-prohibitive. Besides, removing an Afghan non-combatant from Afghanistan, particularly against his will, to testify in Cuba may be considered a grave breach of the Conventions and a war crime.[352]

In addition, evidence taken and held for more than three years by the military (and by soldiers without legal training for seizing legal evidence) may be unreliable, becoming stale or lost over time. This is particularly important since the government's evidence is presumed reliable and the detainee must bear the burden to rebut evidence by his own proffer.[353] There is no option to challenge the chain of custody, or to question the reliability of the methods for obtaining and preserving evidence.[354] All of this weighs to the credibility and reliability of evidence. Even if the detainee could examine the evidence against him, the availability of

348. *Id.*

349. *Id.*

350. Peal, *supra* note 29, at 1660.

351. *See generally* Combatant Status Review Tribunals/Administrative Review Boards, *available at* http://www.defenselink.mil/news/combatant_tribunalsarchive.html.

352. *See* GCIV, *supra* note 30, arts. 49 & 147.

353. CSRT PROCEDURES, *supra* note 198, enclosure 1, at 6.

354. *Id.* § (F)4.

resources for obtaining witnesses in his favor is slight, particularly when he is unrepresented by legal counsel. [355]

(5) Unlawful Command Influence

It is hard to imagine how a tribunal comprised of military officers could be impartial when its task is to challenge the decision to designate a prisoner as an enemy combatant, particularly when that designation has come from the officer's superiors, including the Secretary of Defense and the President of the United States. Such kinds of statements have been grounds for dismissing charges under the Uniform Code of Military Justice as unlawful command influence.[356]

Along those same lines, the tribunal may only confirm or reject a determination that a prisoner is an enemy combatant.[357] The tribunal may not challenge the President's February 7, 2002 determination that al Qaeda or Taliban members are per se unlawful combatants.[358] Once the prisoner is ruled an enemy combatant, he is by implication an unlawful combatant with no prisoner of war status.[359] Essentially, there is little leeway for the tribunal upon which to adjudicate. By contrast, no such institutional prejudice exists in an AR 190-8 hearing because the prisoner is presumed to be a prisoner of war, unless the government proves he is an unlawful combatant, a civilian or a civilian who should be retained.[360]

b. Whether the CSRT Identifies the Right Person

Unlike the Article 5 tribunal (and AR 190-8) where the tribunal may determine whether a prisoner is a prisoner of war (and retained), a civilian (and released), or a civilian accused of crimes (who should be retained), the CSRT tribunal can make only one determination: whether or not the prisoner is an enemy combatant.[361]

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355. *Id.* enclosure 1, at 9.

356. In fact, two officers who sat on CSRT Tribunals have sworn that in cases where the panel ruled a detainee not an enemy combatant, commanders subsequently reconvened the panel to hear more evidence or just reversed the panel's decision. Michael Milia, *U.S. Reviews GITMO Combatant Hearings,* AP, Oct. 12, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/ article/2007/10/11/AR2007101101462.html.

357. CSRT PROCEDURES, *supra* note 198, enclosure 9.

358. *Id.* enclosure 1, at 1.

359. Even though a prisoner may be an enemy combatant, GCIII Article 5 and AR 190-8 provides that the prisoner may be considered a prisoner of war entitled to all of guarantees of his status. GCIII, *supra* note 20, art. 5; AR 190-8, *supra* note 21.

360. AR 190-8, *supra* note 21.

361. Peal, *supra* note 29, at 1654.

In *Hamdi*, an enemy combatant was defined as someone who has taken "'part of or supported forces hostile to the United States or coalition partners,' . . . and who [has] 'engaged in . . . armed conflict against the United States. . . .'"[362] However, the CSRT expands the definition to include those who support Taliban or al Qaeda, including anyone who has committed a belligerent act or directly supported hostilities of the enemy.[363] This new category of prisoner is "significantly broader than the definition considered in *Hamdi*," as Judge Green of the U.S. District Court noted.[364] Clearly, by expanding the definition, more prisoners will be (and have been), retained as enemy combatants.[365]

The customary understanding for "combatant," which the *Hamdi* Court initially seemed to embrace for defining "enemy combatant," has since morphed into something much broader. On close examination the definition provided by the CSRT regulations no longer require the unlawful conduct to occur during the course of armed conflict.[366] Neither does the definition require a showing of dangerousness.[367] This is particularly troubling since restraint of dangerous persons is one of the objectives for detention.[368] Without either armed conflict or restraint, the CSRT has essentially removed status from the context of IHL and into a hybrid of criminal law and armed conflict.

Because the definition is so broad and because the CSRT tribunal is limited to determining whether or not the prisoner is an enemy combatant, any prisoner claiming to be a prisoner of war because he fought for the Taliban would be, by definition, an enemy combatant.[369] Likewise, any prisoner trying to avoid enemy combatant status by denying aid or involvement with the Taliban would foreclose his ability to show he was a valid prisoner of war.[370] As a result of the definition, prisoners are caught in a catch-22 and are left with little recourse at the CSRT.[371]

362. Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004).

363. *See* ORDER, *supra* note 195, at 1.

364. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).

365. This is supported by the evidence since only 38 of the 558 prisoners held at Guantanamo Bay were not considered enemy combatants. SGT Sara Wood, *Administrative Tribunals to Begin for High-Value Guantanamo Detainees*, AM. Forces Press Serv. News Art. (Mar. 6, 2007), http://www.defenselink.mil/news/newsarticle.aspx?id=3283.

366. CSRT PROCEDURES, *supra* note 198, encl. 1, at 1.

367. *Id.*

368. Secretary of the Navy Gordon England Briefing, *supra* note 219.

369. CSRT PROCEDURES, *supra* note 198, at 1; *e.g.* Blocher, *supra* note 283, at 673-74.

370. Blocher, *supra* note 283, at 674.

371. *Id.* at 673.

By making their belligerent conduct criminal, combatants have no incentive to comply with the rules of war on capture.[372] Similarly, and for many of the reasons articulated by Secretary Powell, these combatants, knowing they will be prosecuted as criminals on capture, will have less incentive to surrender and more motivation to continue to fight ferociously.[373]

In sum, neither Article 5 tribunals nor the CSRT are sufficient for determining prisoner status in the GWOT. Article 5 is not applicable in Common Article 3 conflicts and even if it were, it does not provide a review process when considering the potential for indefinite detention in the GWOT. The stakes for a perpetual detention as a combatant are higher when considering prisoners are not represented by counsel in the tribunals, evidence is admissible if probative, and the final status decision is not made by a judge but by a simple majority of non-legally trained military officers.[374] Likewise, the CSRT fails to provide any due process. It only allows one finding based on a very broad definition for enemy combatant that essentially does not even require the prisoner to have engaged in hostilities against the United States or its coalition forces. Therefore, a different system is needed for the GWOT.

C. *Recommendations*

Recognizing the relevance of the Conventions and the inherent problems with the CSRT (which include reliance on unsubstantiated evidence and coerced statements), this Article proposes that the current system for distinguishing lawful and unlawful combatants in the GWOT should be modified to include IHL and incorporation of pre-existing systems, *inter alia*, the AR 190-8, Israeli and UK Tribunals, and the CSRT and the ARB.[375]

Common Article 3 will be the baseline for the new approach or system. In fact, the Supreme Court in *Hamdan* so provided.[376] Besides Common Article 3, the proposed model should derive its legal basis from IHL, the substantive rights in GCIII Articles 99 and 103, API Article 75, and ICCPR Article 9. These legal sources would provide minimum due process guarantees that should be included in the proposed model.

372. Jinks, *supra* note 102, at 438.

373. Jensen, *supra* note 316, at 232.

374. CSRT PROCEDURES, *supra* note 198, at 1-2, 6.

375. Many commentators have written on suggested changes to the current CSRT system. One such commentator deserves mention in regard to the following section. *See* Peal, *supra* note 29, at 1633-34.

376. Hamdan v. Rumsfeld, 548 U.S. 557, 628-29 (2006).

The definitions for the kinds of persons in armed conflict would be derived from IHL while the norms and procedures would come from comparative systems. For instance, from the UK model, a status hearing would be given to prisoners regardless of doubt.[377] In fact, a status hearing would be given to all prisoners, just as in the CSRT, whether or not Common Article 2 applies. Additionally, the proposed model should satisfy reasons previously enumerated for detention. Finally, the new model should address some means for review of the initial status determination by the judiciary, much like in the Israeli model.[378] Judicial review is critical considering detention in the GWOT could last *ad infinitum*.

1. Substantive Rights

Consistent with the Conventions, API and ICCPR, prisoners captured in the GWOT should be immediately informed, in a language they understand, of the reasons and process for their detention and potential prosecution. Also, there must be a legitimate reason for arrest and detention. In other words, prisoners should not be held and detained indefinitely for no other reason than speculation. As such, prisoners could be detained because they are combatants and they will be criminally prosecuted. They may be arrested and detained initially for interrogation, but just as Justice O'Connor noted in *Hamdi*, prisoners may not be held indefinitely for interrogation purposes only.[379]

To address these concerns, all prisoners should receive a status hearing as soon as practical from the point of arrest and detention. The hearing shall determine status as one of the following: an innocent civilian who should be released; a civilian who may be criminally prosecuted for war crimes or domestic crimes; a lawful combatant who is a prisoner of war and will be accorded all of the protections as such under GCIII; a lawful combatant who may be prosecuted as a war criminal; an unlawful combatant who will be held as such and not prosecuted; or, an unlawful combatant who will be prosecuted before a domestic court or military commission for violation of war crimes, violations of IHL, or violations of domestic criminal law. Just as in the Israeli system, the initial status hearing should be held within fourteen days from the date and place of capture.[380] Classified material may be synopsized as in the Canadian

377. The Tribunal Procedure *Upper Tribunal) Rules, 2008 No. 2698 (L.15), art. 2, ¶ 8 (U.K.).

378. *Israel's Example*, WASH. POST, Sept. 4, 2007, at A16, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/03/AR2007090301085.html

379. Hamdi v. Rumsfeld, 542 U.S. 507, 519-20 (2004).

380. *Israel's Example*, *supra* note 378, at A16.

system and given to counsel under a protective order. Delays, provided they are justified and founded on reason, may be granted at the discretion of the tribunal.

Prisoners identified as potential combatants not subject to prosecution will receive minimal guarantees set forth below. Those identified for criminal prosecution will be entitled to increased due process rights, above these minimal guarantees, consistent with the Conventions, API Article 75 and the ICCPR.

2. Procedural Changes

a. Minimum Rights

The minimum procedural safeguards available to all prisoners should include the following:

First, the burden of proof should change from the existing presumption in favor of the government. Instead, the initial burden of persuasion should be upon the government to produce evidence with sufficient specificity worth justifying a potential lifetime sentence of any particular detainee. Once that burden is satisfied, the burden shifts to the prisoner, as in any pre-trial detention hearing. Evidence may be admitted if it is relevant (rather than simply probative).

Second, possible tribunal findings should be expanded for the GWOT to include any of the following: innocent civilian; civilian held for possible criminal prosecution; a lawful combatant and prisoner of war; a lawful combatant to be prosecuted; an unlawful combatant held but not prosecuted; or, an unlawful combatant who will be prosecuted. These terms must be well defined for the tribunal. For instance, "combatants" must be defined as in IHL. There must be a nexus with a combatant's conduct and armed conflict (unlike the "enemy combatant" which does not require conduct associated with armed conflict). The armed conflict must be against the United States or one of its allies subsequent to 9/11. This distinction is critical since many at Guantanamo are held as "enemy combatants" but whose conduct is scarcely associated with hostilities or armed conflict. Instead, these prisoners are more likely than not civilians subject to prosecution for war crimes or domestic criminal law (i.e., terrorism).

Third, detainees should be provided with attorneys to represent them throughout the proceedings. By doing so, not only would this improve the U.S. global image, but more importantly, the weight and reliability of evidence will be critically examined to ensure fundamental fairness to the

process. Similarly, the tribunal should consist of legally trained military judges to ensure evidence is given its due accord. Prisoners should be determined as unlawful combatants only if the majority of the judges agree the evidence shows, at a minimum, by a clear and convincing standard, the prisoner is a combatant. Considering the potential for detention, a heightened standard is necessary.

Fourth, under a protective order, the detainee or his attorney should be permitted to review classified information, particularly if it is exculpatory. In the alternative, classified evidence may be handled in a manner similar to Military Rule of Evidence 505 (or as in the U.S. Classified Information Protection Act, MCA, Israeli or Canadian systems) which provides Judges with options for handling classified information.[381] This is a system that has worked within the context of the military, and should do so again, particularly when military judges familiar with the process and system are incorporated.

Fifth, some form of review process is needed as in the Israeli approach where incarceration decisions are reviewed every six months.[382] A review should be made initially and then semi-annually thereafter. But instead of review by a civilian court, a military appellate court should be tasked with the review. At this phase, review of classified information relevant to any adverse determination may be made *in camera* with fewer concerns for public disclosure. The standard for review may be two fold: one for those held as combatants and another for those held for prosecution.[383] The detaining power must present a compelling reason for continued incarceration, particularly as detention continues for years. The court will also have jurisdiction over matters relating to the detaining power's jailers. Any issues regarding the manner or mode of incarceration may be raised by the reviewing authority.

b. Additional Rights for Prisoners Subject to Prosecution

Once a prisoner is identified to be criminally prosecuted, he should be given additional substantive and procedural rights. Since jurisdiction for the military commission is based, in part, on the status hearing, a greater level of process is required. Additionally, if a prisoner is not a combatant, but simply an accused terrorist or criminal, then he should be given additional rights.

Identification as an accused may occur at any phase of detention: the prisoner may be initially determined an accused; the prisoner may be

381. MILITARY R. EVID. 505.

382. *Israel's Example*, *supra* note 378, at A16.

383. Discussed in greater detail in the next subsection.

initially considered a combatant but the tribunal rules he should be subject to prosecution; or, the prisoner may be initially determined and held as a combatant and then subsequently deemed subject to prosecution either by the detaining authority or the reviewing court. Once identified for prosecution, the prisoner will be afforded a tribunal with additional rights. For instance, added rights as an accused would be triggered when the prisoner is suddenly questioned by a criminal investigator instead of by a military intelligence interrogator. At this point, additional rights would apply. The government will have the initial burden to show why the prisoner was not identified previously as an accused, thus preventing bad faith interrogations by the government.

The moment a prisoner is considered an accused, those rights provided by GCIII, Articles 84, 99, 103, and 105, API Article 75 and ICCPR Article 9 apply. These rights should include, at least, the right against self-incrimination, the right to an attorney, the right to examine witnesses, credit for pre-trial detention and most important, a right to a speedy trial. Compliance with these basic rights must be reviewable by the court.

In addition, the traditional rules of evidence and procedure as promulgated under the UCMJ should apply at the proceedings. Because prisoners will be given the right to a speedy trial at which point the burden will be greater, the initial burden at the tribunal phase may remain.

Finally, the review process should include both review of the procedural safeguards and a review of when the prisoner became an accused. Otherwise, a detaining power could hold a prisoner indefinitely as a combatant while at the same time, develop a criminal case against him. Because of the potential for abuse, the basis for detention, justification for detention, or delayed referral of criminal charges must be issues subject to review by the court.

V. CONCLUSION

After twenty-eight months of incarceration, Marwan Jabour, an accused al-Qaeda paymaster once described by a U.S. counterterrorism official as "a committed jihadist and a hard-core terrorist who was intent on doing harm to innocent people, including Americans"—was released eight months ago.[384] U.S. intelligence and counterterrorism officials confirmed his incarceration in Pakistan and Afghanistan.[385]

384. Dafner Linzer & Julie Tate, *New Light Shed on CIA's "Black Site" Prisons*, WASH. POST, Feb. 28, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/27/AR2007022702214.html.

385. *Id.*

This case is just one of the many which show the inherent flaws in the CSRT procedures. Such other notable examples include the cases of Moazzam Begg, Feroz Abbasi, Martin Mubanga, Richard Belmar, Murat Kurnaz.[386] "Washington had claimed all four were 'enemy combatants' who trained at camps run by al Qaida. But they were released after UK police concluded there was not enough evidence to charge them with any offence."[387]

In *Kurnaz*, the *Washington Post* reviewed approximately 100 pages of documents and reports used against him as evidence at his CSRT.[388] However, reporters found no evidence that Kurnaz had any ties to terrorism.[389] Shortly before his tribunal an unsigned memo had been added to his file which concluded he was an al Qaeda member.[390]

In another instance, Federal Judge Green noted that the military relied heavily on reported confessions of detainees to determine enemy combatant status.[391] She expressed skepticism about the reliability of confessions considering widespread allegations including some evidence of abuse during interrogations.[392] Unfortunately, these were very typical examples of the kind of unreliable, uncorroborated, unsubstantiated allegations that have been used as evidence to hold or arrest detainees as enemy combatants.

Professor Mark P. Denbeaux has prepared a series of reports based on 517 Combatant Status Report Tribunal reports data released by the Department of Defense. What Denbeaux found was astonishing: less than 55% of those detained were accused of committing a hostile act against the United States or its coalition; 8% were considered al Qaeda fighters by DOD; 40% have no connection with al Qaeda and 18% have no connection to al Qaeda or Taliban.[393] Denbeaux testified before the Senate Armed Services Committee in April 2007, and cited as a typical example

386. Ian Herbert & Ben Russell, *The Americans are breaking international Law . . . it is a Society heading towards Animal Farm*, INDEPENDENT, Feb. 18, 2006, *available at* http://news.independent.co.uk/world/americas/article346214.ece.

387. *Id.*

388. Carol D. Leonnig, *Panel Ignored Evidence on Detainee*, WASH. POST, Mar. 27, 2005, at AOL, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A3868-2005Mar26?language=printer.

389. *Id.*

390. *Id.*

391. Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, WASH. POST, Feb. 1, 2005, at AOL, *available at* http://www.washingtonpost.com/wp-dyn/articles/A51007-2005Jan31.html.

392. *Id.*

393. MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006), at 2, *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

a detainee who was conscripted by the Taliban and forced to be a cook's assistant.[394] The detainee fled during an attack in Narim and surrendered to the Northern Alliance.[395] However, this particular detainee was considered an enemy combatant because he provided material support for the Taliban.[396] According to the DOD records, 60% of those held at Guantanamo are not alleged to be fighters for the Taliban or al Qaeda.[397] To the contrary, they are held because of their association with those groups.[398] In fact, according to Denbeaux, as many as 92% of those held in Guantanamo were not even captured on the battlefield.[399]

In addition to the initial capture and identification, issues have recently surfaced with regards to the actual CSRT process and the potential for unlawful command influence. Recently, two military officers assigned to the CSRT claim that in instances when a tribunal determined a detainee was not an enemy combatant, senior commanders ordered the panel to reverse the decision.[400]

The many men released from Guantanamo can now tell their stories how they were once classified as hardened al Qaeda terrorists or "jihadists" but subsequently released without explanation or apology. Clearly, there is a flaw in the system when hundreds of men spend years imprisoned without cause and are subjected to endless accusation, humiliation and interrogation, and then one day are deemed to no longer enemy combatants. As more proceedings are declassified and summary transcripts are released, the inherent problems with the CSRT may become more prevalent.

Both the CSRT and the Article 5 tribunals are inadequate processes for determining status in the GWOT. Neither the United States implementing regulations under Article 5 nor the CSRT procedures provide the sufficient means for determining status of prisoners in the GWOT. The Conventions do not consider a conflict such as the GWOT which may never end, and

394. MARK P. DENBEAUX, THE 14 MYTHS OF GUANTANAMO, SENATE ARMED SERVICES COMMITTEE STATEMENT, (Apr. 26, 2007), at 2, *available at* http://law.shu.edu/media/fourteen_myths_of_gtmo_final.pdf.

395. *Id.*

396. *Id.*

397. *Id.* at 2, 7.

398. *Id.*

399. *Id.* at 7.

400. *See also* Abraham Declaration, *available at* http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf. The substance of the declaration is available in the Teesdale Declaration, *available at* http://www.scotusblog.com/wp/wp-content/uploads/2007/10/hamad-declaration-10-5-07.pdf. Leonard Doyle, *Guantanamo Military Lawyer Breaks Ranks to Condemn "Unconscionable" Detention*, INDEPENDENT, Oct. 27, 2007, *available at* http://news.independent.co.uk/world/americas/article3101949.ece.

if it does, how to objectively determine when it would end. Without an end of hostilities, there are no means for releasing prisoners at the end of the GWOT. Without a means for release, identification as a combatant in the GWOT could possibly subject the prisoner to a life sentence. Such consequences are graver when considering that status determinations under AR 190-8 are made without the assistance of legal counsel by military officers with no legal experience based on evidence that is simply probative and admitted by a preponderance standard. The tribunal's decision under Article 5 and AR 190-8 are not even subject to review. The CSRT similarly fails its intended purposes in the GWOT because it fails to provide sufficient due process and therefore does not properly identify correct prisoner status. The CSRT designation of enemy combatant is so broadly defined, allowing the admission of unreliable evidence presumed reliable, the basis of which cannot be contested, and that most anyone standing before that body would most certainly be considered an enemy combatant.

Because of all these inadequacies, it is time to change the current means for determining status of prisoners in the Global War on Terror. A new model is needed for the twenty-first century.