

THE GENEVA CONVENTIONS AND THEIR APPLICABILITY TO THE “WAR ON TERROR”

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INTRODUCTION

I have been asked to provide a brief introduction to the Geneva Conventions¹ and their applicability to the “War on Terror” that was declared by the United States government after the September 11, 2001 attacks against the World Trade Center in New York City.² I will do so in Part I by first discussing the situations in which the Geneva Conventions, especially the Third and Fourth Conventions apply. After the applicability of the Geneva Conventions has been established, I will then describe the various categories of persons that each convention establishes and the rights to which each such category of person is entitled. Part II will examine how, in cases of doubt, a determination of a captive’s status is made. Lastly, Part III will consider some of the specific problems that have arisen in the application of the Geneva Conventions to the “War on Terror.”

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1. There are four Geneva Conventions. They are: Geneva Convention [No. I] for the Amelioration of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114 [hereinafter First Convention]; Geneva Convention [No. II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217 [hereinafter Second Convention]; Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316 [hereinafter Third Convention]; and Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, August 12, 1946, 6 U.S.T. 3516 [hereinafter Fourth Convention].

2. Shortly after these attacks, President Bush remarked that these attacks by Al Qaeda, a terrorist organization led by Osama Bin Laden, were “act[s] of war” and that they would be responded to in kind. President George W. Bush, Morning Remarks at the White House (Sept. 12, 2001). Subsequent U.S. government actions, including the invasion of Afghanistan, have been generally described as the “War on Terror.” See Neil McDonald & Scott Sullivan, *Recent Developments: Rational Interpretation in Irrational Times: The Third Geneva Convention and the ‘War on Terror’*, 44 HARV. INT’L L.J. 301, 306 (2003) (identifying the U.S. reaction to the September 11 terrorist attacks as the “War on Terror”); Manooher Mofidi & Amy E. Eckert, *‘Unlawful Combatants’ or ‘Prisoners of War’: The Law and Politics of Labels*, 36 CORNELL INT’L L.J. 59, 60-62 (2003) (noting that President Bush promptly commenced a war on terror in self-defense to the September 11th attacks); Sean D. Murphy, *Decision not to Regard Persons Detained in Afghanistan as POWs*, 96 AM. J. INT’L LAW 475, 475 (discussing the armed conflict in Afghanistan that was a response to the terrorist attacks of September 2001).

I. THE GENEVA CONVENTION AND ITS COVERAGE

A. Conflicts to which the Convention Applies

Articles Two and Three of the Third Convention, which also appear in the Fourth Convention,³ define the types of conflicts to which they are applicable. Specifically, Common Article Two provides that the Conventions apply to all cases of declared war or to any other armed conflict which may arise between two or more of the signatories, even if the state of war is not recognized by one of them.⁴

They apply to all cases of partial or total occupation of the territory of a party, even if the occupation is not resisted.⁵ Furthermore, if one of the parties to a conflict is not a signatory to the Conventions, the remaining signatories will remain bound by its provisions.⁶

Common Article Three deals with situations where an armed conflict takes place in the territory of a signatory that is not of an international character, such as a civil war. In this situation, each party to the conflict is bound to apply, at a minimum, certain standards. These include the humane treatment of persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms, who are wounded, or otherwise rendered *hors de combat* and the collection and care of the sick and wounded by an impartial humanitarian body, such as the International Committee of the Red Cross.⁷ Furthermore, this article prohibits murder, mutilation, torture, taking hostages, outrages to personal dignity (including humiliating and degrading treatment), and passing out sentences and carrying out executions without previous judgment by a regularly constituted court.⁸

A reading and consideration of these two articles makes it clear that the specific protections of the Conventions are meant to apply to a relatively limited series of conflicts. Specifically, these conflicts involve situations where one sovereign state that has signed the Convention is involved in a conflict with *another* sovereign state which is *also* a signatory.⁹

3. They are generally known as "common articles." Murphy, *supra* note 2, at 477; Mofidi & Eckert, *supra* note 2, at 65. See also Third Convention, *supra* note 1, arts. 2, 3; Fourth Convention, *supra* note 1, arts. 2, 3.

4. Third Convention, *supra* note 1, art. 2; Fourth Convention, *supra* note 1, art. 2.

5. *Id.*

6. *Id.*

7. Third Convention, *supra* note 1, art. 3; Fourth Convention, *supra* note 1, art. 3.

8. *Id.* This court must have afforded the defendant "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*

9. Additional Protocol I to the Conventions, adopted in 1977, does change this concept somewhat. Article 1(3) of Additional Protocol I expands the coverage of the conventions to "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights of self-determination" the so called "wars of national liberation." Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 25, at art. 193 [hereinafter Additional Protocol I] (emphasis added). The United States has not ratified Additional Protocol I. See ICRC, *States Party to the Geneva Conventions and their Additional Protocols, Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977*, Feb. 6, 2004, available at

The Conventions appear to follow a territorial, nation-state oriented model, with great concern for their maintenance and protection.¹⁰ That does not mean that conflicts that do not fall within this model are completely bereft of protections. The provisions of Common Article Three provide some minimum standards for conflicts which do not meet the requirements of Common Article Two. Moreover, the so called "Martens Clause," incorporated into Article 142 of the Third Convention,¹¹ seems to indicate that, notwithstanding any other provisions, its signatories remain bound to the "usages established among civilized peoples, the laws of humanity and the dictates of the public conscience."¹² In other words, the customary law of armed conflict, and the "usages of civilized peoples," remain applicable even in situations where the Conventions themselves do not apply.¹³

B. Persons to Which the Conventions Apply

Once a determination is made that the Conventions apply to a particular conflict, the next questions are to consider who is covered thereby and what protections these individuals are entitled to? Several categories of persons are identified in the Conventions. These include: protected persons (chiefly medical personnel),¹⁴ innocent nonbelligerent civilians,¹⁵ prisoners of war ("POW"), and other combatants.¹⁶ Protected persons (chiefly chaplains and medical personnel) are not prisoners of war, but can be retained by a detaining party to care for PW of their own nationality.¹⁷ Nonbelligerent civilians (including citizens of occupied territories) are generally (with some limited exceptions) entitled to be left alone and must be protected, fed, and given other assistance.¹⁸

A POW, according to Article Four of the Third Convention is one of four categories of individuals. The first includes members of the armed forces of a party, including the militias and volunteer corps forming part of their armed

http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc?OpenDocument&View=defaultBody&style=custo_print [hereinafter *Ratifications*].

10. Laura Lopez, *Uncivil War: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 929-30 (1994).

11. Ruth Wedgwood, *Breaking the Code: Did Churchill have a Duty to Warn?*, 20 CARDOZO L. REV. 569, 573 (1998).

12. Third Convention, *supra* note 1, art. 142.

13. *Id.*; McDonald & Sullivan, *supra* note 2, at 304-06.

14. See First Convention, *supra* note 1, art. 4 (listing medical personnel within the categories of individuals protected by the Convention's provisions); Second Convention, *supra* note 1, art. 5 (listing medical personnel within the categories of individuals protected by the Convention's provisions).

15. See Fourth Convention, *supra* note 1, art. 15 (listing civilian persons who take no part in hostilities within the categories of individuals protected from the Convention's provisions).

16. See Third Convention, *supra* note 1, arts. 4 and 5 (guaranteeing prisoners of war the protections of the Convention).

17. See Third Convention, *supra* note 1, art. 33 (permitting medical personnel and chaplains to be retained by the Detaining Party, though not be considered prisoners of war and requiring such individuals to continue to exercise their medical and spiritual functions for the benefit of prisoners of war).

18. See, e.g., Fourth Convention, *supra* note 1, arts. 27-78 (guaranteeing protected persons food and medical supplies and protection against all acts of violence or threats thereof and against insults and public curiosity).

forces.¹⁹ This category also includes the members of regular armed forces who profess allegiance to a government or authority not recognized by the detaining power,²⁰ or the members of the armed forces of an occupied country.²¹ The second category includes persons accompanying the forces, such as the crews of civil aircraft and contractors.²² Thirdly, members of other militias and members of other volunteer corps, including those of organized resistance movements, are also recognized as POWs, provided that they are commanded by a person responsible for his subordinates, wear a distinctive sign recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war.²³ Lastly, inhabitants of a non-occupied territory who, on the approach of an enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units (the so-called "levee en masse"), are also recognized as POWs, provided they carry arms openly and respect the laws of war.²⁴

Anyone else who has committed a belligerent act but who is not entitled to the status of POW, (such as, a spy or saboteur)²⁵ is an "unlawful combatant" and is subject to the criminal norms of the detaining power without any limitations or rights other than those given them by the law of the detaining power.²⁶ An example of this situation is set forth in *Ex Parte Quirin*.²⁷ In *Quirin*, seven German nationals (the "petitioners") who were trained as saboteurs, landed from a submarine on Long Island and Ponte Vedra Beach, Florida in June of 1942.²⁸ They carried with them a supply of explosives, fuses and timing devices.²⁹

Although they wore German Marine infantry uniforms when they landed, they immediately discarded their uniforms and assumed civilian clothing.³⁰ Their mission was to destroy war industries and war facilities in the United States.³¹ The petitioners were captured shortly thereafter, and tried by a military commission in accordance with two orders issued by the President of the United States as Commander in Chief of the armed forces.³² The Supreme Court decided that these individuals were unlawful combatants who were not entitled to POW status and who could therefore be tried by a military commission "for acts which render their

19. Third Convention, *supra* note 1, art. 4A(1).

20. *Id.*, art. 4A(3).

21. *Id.*, art. 4B(1).

22. *Id.*, art. 4A(4)-(5).

23. *Id.*, art. 4A(2).

24. *Id.*, art. 4A(6).

25. Fourth Convention, *supra* note 1, at art. 5.

26. See Mofidi & Eckert, *supra* note 2, at 69-70.

27. 317 U.S. 1 (1942).

28. *Id.* at 21.

29. *Id.*

30. *Id.* The petitioners in *Quirin* did not allege that they were members of the German armed forces. Therefore, it must be assumed that they were civilians.

31. *Quirin*, 317 U.S. at 21-22.

32. *Id.* at 22-24. These orders provided that persons who were charged with sabotage, espionage, or other hostile or warlike acts were to be tried by military commissions and were to be denied access to the courts. *Id.*

belligerency unlawful.”³³ Accordingly, it appears that any combatant who is not entitled to POW status under the Third Convention may be tried, convicted, and sentenced in accordance with the detaining power’s norms.

C. Rights of POWs

An individual who is classified as a POW under the Third Convention is entitled to a series of rights. These include: the right to humane treatment;³⁴ adequate food, clothing, and quarters;³⁵ adequate hygiene and medical attention;³⁶ religious freedom;³⁷ and the right to communicate with the exterior and receive packages.³⁸ POWs are required to give only their name, rank, service number, and date of birth in response to interrogation by their captors.³⁹ The detaining power may not inflict mistreatment or physical or mental torture on a POW in order to gain information.⁴⁰ The Third Convention also limits the types of labor that POWs may be required to engage in⁴¹ and, most importantly, provides that all POWs must be repatriated upon termination of the conflict.⁴²

POWs generally cannot be tried for belligerent actions committed prior to captivity. They can, however, be punished for breaches of discipline,⁴³ attempts to escape,⁴⁴ actions that they committed after captivity, and violations of the law of war that occurred prior to captivity.⁴⁵ In such cases, the individual is entitled to a trial before a military court in accordance with the process and substantive norms which are applicable to members of the detaining power’s armed forces.⁴⁶ As part of this process, the individual is entitled to notice of the charges, the opportunity to present a defense, and assistance of counsel.⁴⁷ At the hearing, he may call witnesses in his defense and, if he deems necessary, request the services of an interpreter.⁴⁸ The prisoner also has the right of appeal from a sentence handed

33. *Id.* at 30-31.

34. Third Convention, *supra* note 1, at art. 13.

35. *Id.*, arts. 25-28.

36. *Id.*, art. 29.

37. *Id.*, arts. 34-38.

38. *Id.*, arts. 70-72.

39. *Id.*, art. 17.

40. *Id.* Some scholars have interpreted this Article as prohibiting any interrogation regarding any topics other than those enumerated therein. McDonald & Sullivan, *supra* note 2, at 307. Another interpretation of Article 17 asserted by some scholars is that the detaining power is not prevented from asking questions beyond the scope of the information noted therein. *Id.* at 308. Under this interpretation, Article 17 does not prohibit the interrogation of prisoners, but merely asserts the nature of the questions that the POW *must* answer as opposed to those which he or she *may* answer. *Id.* Under either of these interpretations, physical or mental torture in interrogations of POWs is prohibited. *Id.* at 309.

41. Third Convention, *supra* note 1, arts. 49-50, 52.

42. *Id.*, art. 118.

43. *Id.*, art. 95.

44. *Id.*, arts. 92-93.

45. *Id.*, art. 4.

46. *Id.*, arts. 84, 87.

47. *Id.*, arts. 99, 100, 105.

48. *Id.*, art. 96.

down by the military court in the same manner as the members of the armed services of the detaining power.⁴⁹

A key point to also remember in these circumstances is that POWs who are prosecuted under the laws of the detaining power for acts committed prior to capture retain their rights under the Third Convention, even if convicted.⁵⁰

II. DETERMINATION OF COMBATANT STATUS IN CASES OF DOUBT

Although it is relatively easy to classify captured uniformed members of the armed forces as POWs, distinguishing a non-uniformed lawful combatant (entitled to POW status) from an innocent civilian (entitled to the protections of the Fourth Convention) or from an unlawful combatant can become problematic. Article Five of the Third Convention⁵¹ provides a process for use in cases where doubts arise regarding the entitlement to POW status of captured persons who committed belligerent acts. The Article states that such persons shall enjoy the protections of the Third Convention "until such time as their status has been determined by a competent tribunal."⁵² There is no definition of what constitutes a "competent tribunal" in the Convention. The International Committee of the Red Cross Commentary to the Third Convention notes that the term "competent tribunal" was chosen over the terms "responsible authority" and "military tribunal."⁵³ The latter term was rejected because "it was felt that to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention."⁵⁴ U.S. federal district courts have held that, in the appropriate situation, these courts constitute "competent tribunals" to determine the applicability of the Conventions to an individual.⁵⁵ There appears to be little authority dealing with the ability of other courts or tribunals to serve as "competent tribunals" under Article Five.⁵⁶

The United States Army has enacted a regulation that creates a process for making these determinations. Army Regulation 190-8⁵⁷ provides that, in cases of doubt about the status of a detainee who has committed a belligerent act and has been captured by U.S. armed forces, each such detainee will appear before a

49. *Id.*, arts. 99-108.

50. *Id.*, at art. 85.

51. *Id.*, art. 5.

52. *Id.*

53. International Committee of the Red Cross, Commentary on the Third Geneva Convention, art. 5, para. 2, available at <http://www.icrc.org/IHL.nsf/0/645ffef194956c48c12563cd0042535c?OpenDocument> (last visited on Oct. 5, 2005) [hereinafter Commentary].

54. *Id.*; See Elizabeth Dahlstrom, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L L. 662, 665-66 (2003).

55. Dahlstrom, *supra* note 54, at 666.

56. *Id.*

57. U.S. Army, Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Oct. 1, 1997), available at http://www.army.mil/usapa/epubs/pdf/r190_8.pdf [hereinafter AR 190-8]. This regulation has also been adopted by the other services as OPNAVINST 3461.6 (Navy), AFJI 31-304 (Air Force) and MCO 3461.1 (Marines). *Id.*

tribunal who will determine his status.⁵⁸ This tribunal will be composed of three commissioned officers assisted, if possible, by a military lawyer (Judge Advocate).⁵⁹ This proceeding to determine the detainee's status is meant to be an open proceeding.⁶⁰ The detainee is given prior notice of the tribunal, advised of his right to appear, present and cross examine witnesses, and to be assisted by an interpreter, if necessary.⁶¹ After the tribunal has heard all of the evidence regarding the individual, it will vote and then issue a written decision.⁶² This tribunal can decide that the individual is either a POW (entitled to POW rights), a medical or religious professional known as a retained person (retained to care for POWs of his nationality), an innocent civilian who committed no belligerent acts (to be released immediately), or a "bad civilian" who has committed belligerent acts but is not a POW.⁶³ This individual can then be either detained or transferred to other authorities for trial.⁶⁴ Persons determined ineligible for POW status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what act they have committed and what penalty shall be imposed therefor.⁶⁵

III. SPECIFIC PROBLEMS ARISING OUT OF THE "WAR ON TERROR"

"War on Terror" operations against the Taliban and Al Qaeda in Afghanistan and Iraq have produced large numbers of prisoners.⁶⁶ A number of these individuals, chiefly captured in Afghanistan, have been transferred to a detention facility at the Guantanamo Bay Naval Base in Cuba, where they remain detained.⁶⁷ Many of these detainees were individuals that had been combatants with the Taliban, some appeared to be Al Qaeda militants, the status of others was unclear.⁶⁸

The immediate question that arose was whether either captured Taliban fighters or Al Qaeda militants were "combatants" under Article Four of the Third Convention, and were therefore entitled to POW status?⁶⁹ The United States government initially took the position that neither Taliban fighters nor Al Qaeda militants were entitled to POW status because they were unlawful "enemy combatants" falling outside the Third Convention.⁷⁰

58. *Id.* § 1-6(b).

59. *Id.* § 1-6 (c).

60. *Id.* § 1-6 (e)(1)-(8).

61. *Id.*

62. *Id.* § 1-6 (e)(9).

63. AR 190-8, § 1-6(e)(10)(a-d).

64. *Id.*

65. *Id.* § 1-6 (g).

66. *See, e.g.,* Murphy, *supra* note 2, at 475 (estimating by the end of February 2002 having almost five hundred detainees in Guantanamo Bay and Afghanistan). *See also* U.S. Dep't of Def., *Guantanamo Detainees*, (Apr. 6, 2004), at <http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf> (giving description of different types of detainees at Guantanamo Bay) [hereinafter *DOD Detainees*].

67. Murphy, *supra* note 2, at 475.

68. *Id.* *See also* McDonald & Sullivan, *supra* note 2, at 301-02 (describing detainees as "suspected Al Qaeda and Taliban fighters").

69. Murphy, *supra* note 2, at 476.

70. *Id.* *See* Def. Inst. of Int'l Legal Studies, *FAQ's About: Detention of Unlawful Combatants at*

A. *Enemy Combatant Determination Processes*

In order to determine whether a captured individual was an “enemy combatant” who was to be transferred to the Guantanamo detention facility, the Department of Defense created an administrative process.⁷¹ According to this process, after an “assessment in the field” based on available information at the time of capture, a military screening team at a central holding area will review all available information and make a determination whether the individual should be released, continue to be detained, or be transferred to Guantanamo.⁷² After that, a general officer designated by the combatant commander in charge of the operational theater reviews these recommendations and makes an assessment of whether the individual should be transferred to Guantanamo.⁷³ In making this assessment, this general officer is required to consider “the threat posed by the detainee, his seniority within hostile forces, the possible intelligence value of information that may be gained through questioning, and any other relevant factors.”⁷⁴ After that review, an internal Department of Defense review panel reviews the transfer recommendation.⁷⁵ The detainee is transferred to Guantanamo only after all of these reviews are completed.⁷⁶

As a result of the Supreme Court’s decision in *Hamdi v. Rumsfeld*,⁷⁷ the Department of Defense on July 7, 2004 issued an order establishing combatant status review tribunals “to provide detainees at Guantanamo Bay Naval Base with notice of the basis for their detention and review of their detention as enemy combatants.”⁷⁸ This review takes place before a panel of three military officers,

Guantanamo Bay, at <http://www.disam.dsca.mil/itm/IMSO/FAQS/02-GuantanDetainees.pdf> (last visited Nov. 17, 2005) (noting that even without POW status, the detainees are to be treated humanely under customary international law).

71. *DOD Detainees*, *supra* note 66, at 5.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 5-6.

77. 542 U.S. 507 (2004). In this case, the petitioner, Hamdi, was captured in 2001 by forces of the Northern Alliance, a coalition of military groups opposed to the Taliban government, who was turned over to U. S. military forces shortly thereafter. *Id.* at 587. He was detained and interrogated by U.S. forces in Afghanistan and sent to the Guantanamo Bay Naval Base in January of 2002. *Id.* The government’s allegation was that he was an “enemy combatant” because he had been a Taliban fighter and had committed belligerent acts against the United States. *Id.* In *Hamdi*, the petitioner appears to have been subjected to the administrative process described above. *Id.* at 587-591. The Court held “that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut these assertions before a neutral decisionmaker.” *Id.* at 601.

78. U.S. Dep’t of Def., Fact Sheet, *Combatant Status Review Tribunals Update* (Jul. 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf> [hereinafter DOD Fact Sheet]; Memorandum from the Deputy Secretary of Defense, for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (Jul. 7, 2004), available at <http://www.defenselink.mil/news/jul2004/d20040707review.pdf> [hereinafter DOD Order]. See also Memorandum from the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (Jul. 29, 2004), available at <http://www.defenselink.mil/news/jul2004/d20040730comb.pdf> (providing implementation

none of whom were previously involved with the detainee, and affords the detainee a number of rights.⁷⁹ The intent of this Order is to create a process that would resemble that of AR 190-8 and that will therefore clearly be compliant with Article Four of the Third Convention.⁸⁰

These combatant status review tribunals were first held in August of 2004.⁸¹ Through January 19, 2005, 550 tribunals were held and 330 received “convening authority final action” (approval of the recommendation of the tribunal by the designated convening authority, RADM James M. McGarrah).⁸² Of those tribunals which had been concluded, 327 individuals were found to be enemy combatants and three were found not to be enemy combatants.⁸³

On November 8, 2004, the United States District Court for the District of Columbia held that a determination by a combatant status review tribunal that a Guantanamo detainee was an “enemy combatant” is not the “decision of a competent tribunal” for Third Convention Article Five purposes.⁸⁴ The United States Court of Appeals for the District of Columbia, reversing the district court, held that a military commission was a “competent tribunal” for purposes of determining whether a detainee was an “enemy combatant.”⁸⁵ The United States Supreme Court agreed to hear this case on November 7, 2005.⁸⁶

B. *The Status of the Taliban and Al Qaeda*

The decision to consider Taliban fighters as “enemy combatants” not covered by the Third Convention was subsequently reversed by the United States government and these individuals (the Taliban fighters) were recognized as falling under the Third Convention.⁸⁷

The “War on Terror” against Al Qaeda and other similar organizations presents a different situation, however. Unlike the Taliban, Al Qaeda is not a state, has not signed any of the Conventions, and appears to have no particular nationality. Its activists include individuals of many nationalities. Al Qaeda does not even have the semblance of any state authority, command, or control. It is a

guidance of the combatant status review tribunal).

79. DOD Order, *supra* note 78, at (e).

80. DOD Fact Sheet, *supra* note 78, at 1.

81. Human Rights First, *Human Rights First Analyzes DOD's Combatant Status Review Tribunals*, at http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (last visited Nov. 17, 2005).

82. U.S. Dep't of Def., News Release No. 057-05, *Combatant Status Review Tribunals Update*, (Jan. 19, 2005), available at <http://www.defenselink.mil/releases/2005/mr20050119-1996.html>.

83. *Id.* See also U.S. Dep't of Def., *Combatant Status Review Tribunal Summary*, (Jan. 19, 2005), available at <http://www.defenselink.mil/news/Jan2005/d20050119csrt.pdf> (providing summary of tribunals and outcome by date).

84. *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 173 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, No. 05-184, 2005 WL 2922488 (U.S. Nov. 07, 2005).

85. *Hamdan v. Rumsfeld*, No. 04-5393, United States Court of Appeals, District Court of Columbia Circuit (July 15, 2005), available at <http://pacer.cadc.uscourts.gov/docs/common/opinion/200507/04-5393a.pdf>.

86. *Hamdan*, *cert. granted*, No. 05-184, (Order List: 546 U.S.) Monday, Nov. 7, 2005, p. 3, available at <http://www.supremecourtus.gov/orders/courtorders/110705pzor.pdf>.

87. *Murphy*, *supra* note 2, at 475-477; *McDonald & Sullivan*, *supra* note 2, at 301-303.

non-state actor and its fighters lack any resemblance to an organized armed force. As noted above, the Geneva Conventions are clearly designed to deal with sovereign state entities and their armed forces and militias. An argument can therefore be made that, because Al Qaeda is not a state actor, its members are not protected by the benefits of POW status under the Third Convention.⁸⁸ This was precisely the government's argument in *Hamdan v. Rumsfeld*.⁸⁹ The court in that case concluded differently, however. There, Judge Robertson held that because application of the Geneva Conventions is triggered by the place of the conflict and not by the particular faction a fighter is associated with, the Third Convention applies to all persons detained in Afghanistan.⁹⁰ In reversing the district court's decision in *Hamdan*, the Court of Appeals for the District of Columbia Circuit noted that the 1949 Convention did not apply to Al Qaeda.⁹¹ As noted above,⁹² the United States Supreme Court granted certiorari in November of 2005, and this precedent is therefore uncertain.

CONCLUSION

I have attempted in this presentation to give you a brief introduction to the Geneva Conventions and to their coverage. Furthermore, I meant to illustrate the complexities surrounding the application of norms designed for sovereign state actors to the non-state actors who are participating in terrorist activities against the United States.

88. *Hamdan*, 344 F. Supp. 2d at 161-62.

89. *Id.*

90. *Id.* at 161. The Court's exact language was: "Thus at some level—whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3 the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there." *Id.*

91. *Hamdan*, *supra* note 85, at 14-15. Judge Randolph noted that Common Article 2 (applying to international conflicts) was not applicable to Al Qaeda because it was not a state. Common Article 3 (dealing with conflicts not of an international character) did not apply either, because the conflict against Al Qaeda was separate and distinct from the conflict against the Taliban in Afghanistan. *Id.*

92. *See supra* note 86 and accompanying text.