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Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations under the Geneva Conventions

by Erin Chlopak*

Controversy has surrounded the United States' detention and treatment of nearly two hundred alleged members of the Taliban and *al-Qaeda* at the U.S. naval base in Guantanamo Bay, Cuba. At issue is the scope of applicability of the Geneva Conventions, a series of treaties that provide international humanitarian legal standards for states parties during armed conflicts. In particular, the Third Geneva Convention relative to the Treatment of Prisoners of War and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War extend a variety of procedural and substantive legal rights to prisoners of war and other victims of armed conflicts. As states parties to the Conventions, both the United States and Afghanistan are legally bound to afford the protections guaranteed in the treaties to prisoners detained as a result of the present conflict between the two countries.

In January 2002, shortly after their detention, U.S. Secretary of Defense Donald Rumsfeld labeled the Guantanamo Bay prisoners "unlawful combatants" who "do not have any rights under the Geneva Convention[s]," indicating that the prisoners would be treated "for the most part . . . in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate." In response to this and similar statements, as well as footage of the detainees incarcerated in metal cages and wearing shackles, blacked-out goggles, surgical face masks, and sound-blocking earmuffs, other governments and human rights groups have condemned the U.S. for failing to respect human rights and humanitarian law. Perhaps in acquiescence to this international pressure, the U.S. has modified its position on the application of the Geneva Conventions, announcing in early February that prisoners who fought for the Taliban in Afghanistan would be covered by the Conventions. In spite of U.S. efforts to allay international criticism, human rights groups and international legal scholars continue to charge that this latest decision fails to conform fully to the duties of the U.S. under the Geneva Conventions. Specifically, while the U.S. accurately acknowledged the general applicability of the Conventions to Taliban detainees, the government's unilateral decision to deny all detainees prisoner of war (POW) status, and its decision categorically to except *al-Qaeda*

detainees from any coverage by the Conventions, suggest the U.S. government has improperly interpreted its legal obligations under the Conventions.

The Geneva Conventions and the Scope of Their Protection

There are four Geneva Conventions, signed in 1949 and supplemented by two additional Protocols, signed in 1977. Convention I, For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and Convention II, For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, enumerate protections guaranteed to members of the armed forces who fall ill or are injured during an armed conflict. Convention III, Relative to the Treatment of Prisoners of War, and Convention IV, Relative to the Protection of Civilian Persons in Time of War, describe protections guaranteed to persons who are taken into enemy custody during an armed conflict. Protocol I, relating to the Protection of Victims of International Armed Conflicts, and Protocol II, relating to the Protection of Victims of Non-International Armed Conflicts, extend protections of the Geneva Conventions to persons combating foreign occupation or internally racist regimes, as well as to victims of internal conflicts.

Most relevant to the Guantanamo Bay detainees are the Third and Fourth Conventions. The Third Convention defines categories of persons entitled to POW classification, articulates the procedure for classifying a prisoner whose status is unclear, and enumerates the rights of detainees classified as POWs. Article 4 of the Third Convention defines several categories of persons entitled to classification as prisoners of war, including persons "who have fallen into the power of the enemy" and who are (1) members of armed forces of a party to the conflict; or (2) members of other militias or volunteer corps, which are commanded by a person responsible for subordinates; have a fixed and distinctive symbol, recognizable at a distance; carry arms openly; and conduct operations in accordance with the laws of war. Article 5 explains that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as



Credit: AP Photo/Shane T. McCoy, U.S. Navy

Taliban and *al-Qaeda* detainees sit in a holding area under the watchful eyes of military police at Camp X-Ray at Naval Base Guantanamo Bay, Cuba, during in-processing to the temporary detention facility on January 11, 2002.

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their status has been determined by a competent tribunal.” The U.S. government is therefore obliged to recognize the POW status of detainees who clearly fit into an Article 4 category, and must allow a competent tribunal to determine the status of those whose status is ambiguous.

Defining the Status of the Detainees

The U.S. government’s classification of the Guantanamo Bay detainees as “unlawful combatants” has generated confusion and controversy. Secretary Rumsfeld’s early statement that all of the detainees were “unlawful combatants” who lacked any rights under the Geneva Conventions seemed to imply that “unlawful combatants” inherently are not protected by the Geneva Conventions. “Unlawful combatants,” often referred to as “unprivileged combatants” are those fighters who are not entitled to the privileges of POW status. Unlawful combatants, however, are not persons lacking all rights under the Conventions. Indeed, rather than suggest that certain categories of aggressors may be excepted from the protection of the Conventions, Article 4 of the Fourth Convention professes a broad protection of persons “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” The only caveat to this encompassing protection is that the prisoners must be nationals of a state bound by the Convention.

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The International Committee of the Red Cross (ICRC) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have interpreted the Third and Fourth Conventions jointly to embrace all persons who fall into enemy custody during an armed conflict, and neither has recognized an exception for so-called unlawful combatants. Quoting both sources, Human Rights Watch (HRW) explained that “nobody in enemy hands can fall outside the law,” and prisoners detained by an enemy in an armed conflict either are protected by the Third Convention as prisoners of war, or by the Fourth Convention as civilians.

The United States’ Application of the Geneva Conventions

After initially refusing to guarantee full application of the Geneva Conventions to any of the detainees, the U.S. has recently compromised, and conceded that the Conventions apply to Taliban detainees. Nevertheless, the U.S. continues to deny the application of the Geneva Conventions to *al-Qaeda* prisoners, has refused to grant any of the detainees POW status, and has denied the prisoners the right to a determination of such status by a competent tribunal. The U.S. government’s basis for distinguishing between Taliban and *al-Qaeda* detainees was its recognition of Afghanistan’s status as a signatory to the Conventions in contrast to *al-Qaeda*, which, as a non-state actor, has not and could not have signed the treaties. Such a categorical exception of *al-Qaeda* detainees results from a flawed interpretation of the express language of Article 4 of the Fourth Convention, and con-

tradicts customary interpretations of the broad scope of the Conventions. Similarly, the executive decision categorically to deny all detainees POW status directly violates Article 5 of the Third Convention, which provides for the determination of such status by competent tribunals.

Refusal of the U.S. Government to Apply the Geneva Conventions to al-Qaeda Detainees

In early February, White House Press Secretary Ari Fleischer commented that *al-Qaeda* fighters “do not qualify [for protection under the Geneva Conventions] because they do not represent any country that is party to the treaty.” Article 4 of the Fourth Convention does not except combatants on the basis of their representation of a state not party to the Conventions, but rather it excludes persons who are nationals of a state not bound by the Conventions. Thus, the language of the Conventions seems to indicate that persons who fought on behalf of *al-Qaeda*, and who are nationals of a state party to the Conventions, would be within the scope of their protections.

According to HRW, the detainees encompass a variety of nationalities, including Afghans, Pakistanis, and, in lesser numbers, Saudis, Yemenis, Uzbeks, Chechens from Russia, Chinese, and others. Each of these nations has both signed and ratified the Conventions, or joined the Conventions by accession. The United States ratified the Conventions in 1955. Although China, Pakistan, the Russian Federation, Yemen, and the U.S. entered reservations and/or declarations upon signing the Conventions, none of the reservations or declarations provides a

basis for excluding their nationals from the general protections afforded by the Conventions, or from the benefits of POW status in particular. In addition, these reservations and declarations do not provide a basis for denying such protections. Thus, the U.S. government’s current policy of categorically refusing to apply the Geneva Conventions to non-Taliban detainees contradicts customary legal interpretations of the scope of the Conventions, as well as the explicit language of the Fourth Convention. Members of either the Taliban or *al-Qaeda*, who are nationals of a country that has signed the Geneva Conventions, expressly are within the scope of the treaties. Current U.S. policy at best misinterprets, and at worst ignores, this legal reality and potentially renders the U.S. in breach of its treaty obligations for any actions against detainees which contradict the Conventions’ guarantees.

Denying All Detainees Prisoner of War Status

Although the U.S. has correctly recognized that the Geneva Conventions apply to Taliban fighters captured during the present conflict in Afghanistan, its unilateral decision to deny such detainees POW status violates the procedures established by the Conventions for determining the status of prisoners captured by an enemy in an armed conflict. Moreover, the refusal of the U.S. even to recognize the Geneva Conventions with respect to *al-Qaeda* detainees precludes a proper determination of their legal status.

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Article 4 of the Third Convention confers POW status on persons who fall into enemy power and who are members of armed forces of a party to the conflict. Alternatively, Article 4 characterizes as POWs members of irregular forces, such as militias or volunteer corps who: (1) adhere to an established chain of command; (2) wear a uniform or otherwise have some fixed and distinctive symbol, which is recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws of war.

The Crimes of War Project, a collaborative organization of journalists, lawyers, and scholars formed in 1999 and headquartered at American University in Washington, D.C., seeks to educate the public about international humanitarian legal issues. The Project recently surveyed international legal and humanitarian experts on their opinions about the applicability of the Geneva Conventions to the Guantanamo Bay detainees. Most of the survey's respondents believed Taliban detainees, and possibly *al-Qaeda* detainees, should be accorded POW status. Most of the experts characterized the Taliban detainees as members of Afghanistan's armed forces, entitling them to POW status under Article 4(1) of the Third Convention. Among such experts, Washington College of Law Professor Robert Goldman criticized the Bush Administration's classification of the Taliban as irregular forces under Article 4(2), which requires them to meet the four criteria enumerated under that category. Similarly, during a recent interview on National Public Radio, David Scheffer, Senior Fellow at the U.S. Institute of Peace, emphasized the importance of recognizing that captured Taliban fighters are part of the organized, armed force of Afghanistan, and thus entitled to POW status. Nevertheless, even under the four criteria enumerated for irregular forces, most of the experts surveyed by the Crimes of War Project believed that the Taliban detainees would be entitled to POW status. Curtis Doebbler, Professor of Human Rights Law at the American University in Cairo, asserted that the Taliban do meet the four criteria mandated for irregular forces, although he, like many others, was less confident about the ability of *al-Qaeda* detainees to satisfy the criteria.

Indeed, there is less support for classifying *al-Qaeda* fighters as POWs under the Geneva Conventions. Even HRW has suggested that "ultimately the *al-Qaeda* fighters would likely not be accorded POW status." However, as HRW, the Crimes of War Project, and other experts have highlighted, the principal criticism of the U.S. position is not the government's improper categorization of the detainees under Article 4 of the Third Convention. Rather, critics emphasize the government's failure to make individualized determinations about the status of each prisoner, and its outright neglect of Article 5, which requires that a competent tribunal resolve such controversial determinations. Article 5 further provides that detainees whose legal status is in doubt "shall enjoy the protection of the present Convention" until a tribunal makes the final determination. Thus, even if, as the U.S.

presently claims, none of the detainees ultimately would be entitled to POW status, Article 5 requires that each detainee whose status is in doubt be treated as a POW until a competent tribunal makes a final determination.

Under U.S. military regulations, a "competent tribunal" pursuant to Article 5 of the Third Convention consists of three commissioned officers. As HRW explained, the regulations require that persons whose status is to be determined be advised of their rights; be permitted to attend all open sessions, call witnesses, question witnesses called by the tribunal; be permitted, but not compelled, to testify or otherwise address the tribunal; and be provided with an interpreter, if necessary. The regulations provide for the tribunal's determination of the detainee's status in closed session by a majority vote and require a preponderance of evidence to support the tribunal's finding.

The clear purpose of Article 5, and the corresponding procedures set forth in U.S. military law, is to ensure that the assessment of a prisoner's status is a fair and objective determination. Beyond violating its explicit, legal obligations under Article 5, the executive branch's unilateral determination of the prisoners' collective status, absent a finding by an objective tribunal, renders

the U.S. susceptible to charges of unfairness, corruption, and dishonesty.

The Significance of Recognizing the Geneva Conventions

The Geneva Conventions confer a variety of protections to prisoners detained during an international conflict. Among them are protections relating to humane treatment (Convention III, Article 3; Convention IV, Article 3), interrogation (Convention III, Article 17; Convention IV, Article 31), and prosecution (Convention III, Articles 87, 99-108; Convention IV, Articles 146-47). The legal status of individual prisoners dictates the scope of their protections under the Conventions. Nevertheless, all persons detained in an armed conflict may be prosecuted for war crimes, crimes against humanity, and other crimes unrelated to armed conflict. Similarly, all detainees must be treated humanely, in accordance with international human rights norms, and as recommended by the ICRC.

Humane Treatment in the Context of International Human Rights Law

To provide a context for the Conventions' requirement of "humane treatment," HRW explained that torture and ill-treatment of prisoners are prohibited by customary law and international human rights treaties. Article 7 of the International Covenant on Civil and Political Rights, ratified by the United States in 1992, sets forth the non-derogable principle that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Similarly, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which the U.S. became a party in 1994, prohibits, under all circumstances, the

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use of torture and other excessive forms of punishment.

The Ramifications of POW Status: Humane Treatment and Interrogation

Although all of the Guantanamo Bay detainees are entitled to humane treatment under the broad provisions of the Geneva Conventions and the more specific provisions of international human rights treaties, those entitled to POW status are guaranteed further protections. Regarding interrogation and prosecution, for example, the Third Convention extends additional protections to POWs. Under Article 17, POWs are required only to disclose their last names, first names, rank, birth dates, and military serial numbers. Although both POWs and unprivileged combatants are protected by the Conventions' general prohibitions against torture, Article 17 provides that POWs who refuse to answer interrogations "may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." Article 21 prohibits holding POWs in close confinement except as necessary to safeguard their health, and in such circumstances, the nature and duration of confinement also must be limited to what is necessary. Similarly, Article 25 requires that POWs be accommodated in conditions as favorable as those provided for the forces of the detaining power stationed in the same area. Such conditions must allow for the habits and customs of the prisoners, and may not be prejudicial to their health. Article 34 guarantees POWs "complete latitude" in the enjoyment and exercise of their religious duties. Prisoners who are properly determined not to be POWs are not entitled to these and other guarantees enumerated in the Third Convention.

In the absence of a proper determination of the status of each detainee at Guantanamo Bay, and in light of the ICRC's inability to disclose its findings publicly, it is difficult to analyze whether any of the detainees are entitled to these specific POW privileges, let alone whether their rights have been violated. Foreign governments and media, and international human rights groups, have articulated a general concern regarding the apparent nature of the prisoners' detention. Their critiques have suggested that depriving the detainees of their senses of sight and hearing by requiring them to wear blacked-out goggles and sound-blocking earmuffs constitutes inhumane treatment, in violation of the general human rights principles embodied in the Geneva Conventions.

The U.S. government has defended its detention practices as necessary security measures. On January 18, 2002, delegates of the ICRC visited the Guantanamo Bay detainees, but ICRC standard procedures prohibit public comment on the treatment or conditions of prisoners. Rather, ICRC delegates submit recommendations to detaining authorities and encourage such authorities to take measures necessary to resolve any humanitarian problems.

The Ramifications of POW Status: Prosecution and Punishment

Perhaps the most significant rights accorded to prisoners of war are in the context of prosecution and punishment.

Generally speaking, POWs may not be prosecuted or punished for mere participation in the armed conflict, although they may be tried for war crimes, crimes against humanity, and crimes unrelated to the conflict. Article 83 of the Third Convention requires that a detaining power exercise "the greatest leniency" in determining whether an offense alleged to have been committed by a POW be adjudged by judicial or disciplinary proceedings and provides that "wherever possible, disciplinary rather than judicial measures" shall be taken. Article 84 enunciates that "[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and in particular, the procedure of which does not afford the accused

the rights and means of defence provided for in Article 105." Article 105 correspondingly guarantees POWs the assistance of a legal defense by a qualified advocate or counsel of his choice. It further requires that the detaining power deliver to the protecting power a list of persons qualified to present the POW's defense, and ultimately obliges the detaining

power to appoint a competent advocate or counsel if the POW does not choose his own. Article 86 guarantees POWs the right against double jeopardy. Article 87 limits the penalties to which POWs may be subjected to those that would be imposed upon members of the armed forces of the detaining power who have committed the same acts. Article 106 provides that every POW shall have the same rights of appeal or petition of a sentence as are guaranteed to the members of the armed forces of the detaining power. Moreover, POWs must be fully informed of such rights, as well as the time limit within which they may appeal.

In light of these and the numerous other rights guaranteed to prisoners of war, it is clear that the Guantanamo Bay detainees are not being treated in accordance with the Third Convention. Moreover, absent an objective determination of their legal status by a competent tribunal, the nature of their detention violates the requirement in Article 5 that detainees whose status is uncertain be treated in accordance with the Third Convention until such status is determined.

The Consequences of Selectively Applying the Geneva Conventions

Beyond noting the sheer illegality of selectively applying the Geneva Conventions, some experts question why the U.S. would violate its duties in the absence of any apparent gain. Most of the experts surveyed by the Crimes of War Project believe that the U.S. has little to gain from denying POW status to qualified prisoners. Such experts noted that POWs and unprivileged combatants are equally subject to prosecution for fundamental human rights violations. Perhaps the government's primary concern is the apparent conflict between its noted intention to try those detained in military tribunals, where procedural rights are limited and the rules of evidence are more indulgent, and the provisions in the Third Convention requiring that POWs be prose-

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with the gravest concern the practice of forced gynaecological examinations of women in the investigation of allegations of sexual assault, including of women prisoners while in custody. The Committee emphasized that such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women.” The Committee also expressed concern about the categorization of violence against women as a “crime against public decency and public order,” and stated that such categorization contradicted the spirit of CEDAW. Further, the Committee noted its deep concern that greater penalties were imposed for the rape of a woman who was a virgin.

Although Turkey has taken initial steps in meeting its obligations under CEDAW by abolishing certain discriminatory laws, Turkey remains obligated to eliminate all discriminatory customs and practices, and take all measures necessary to end discrimination against women. CEDAW requires parties not only to refrain from discriminating against women, but also to ensure compliance by authorities and institutions, and to take all necessary measures against any person, organization, or enterprise that engages in discriminatory practices. The recent decree banning virginity testing will be insufficient if sanctions are not levied against those who violate the decree.

Conclusion

Turkey’s human rights record has been cited consistently as grounds for denying Turkey admission into the European Union. Repealing the virginity testing law is a step in the right direction, but more needs to be done to eradicate the practice. The government must initiate a nationwide campaign

to inform women that the practice has been banned and that they have the right to refuse to comply with virginity testing. Further, doctors must be notified regarding the new law. To fully comply with international human rights standards, Turkey should adhere to the following measures, as recommended by HRW: stop detaining women for illegal prostitution without objective evidence; prohibit police from forcing women suspected of prostitution to undergo gynecological exams without their consent; stop discriminating against women by holding them to subjective standards of modesty to which men are not held; publicly denounce the forced imposition of virginity exams under any circumstances as a grave and intolerable human rights abuse and a violation of domestic and international law; direct state-employed doctors not to perform virginity exams on girls and women; train law enforcement personnel, health care providers, public officials, and others involved in the custody, interrogation, and treatment of detainees that compulsory virginity exams are prohibited, and will result in punishment; and examine rape victims only with their informed consent, the authorization of a prosecutor or judge, and only for the purpose of gathering forensic evidence.

Turkey’s actions in the near future will indicate whether officially banning virginity testing constitutes a real commitment to eradicating this egregious practice or an empty promise designed to improve its reputation. To meet its obligations under international law and truly improve its standing in the international community, Turkey must demonstrate respect for women’s human rights not just on paper, but in practice. 🌍

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cuted and punished in a manner consistent with the treatment of members of the armed forces of the detaining country who violate similar laws.

Regardless of the government’s underlying objectives, setting a standard for selectively applying the provisions of an international treaty poses serious consequences to citizens of all states parties to the agreement. In particular, some have expressed concern over the future treatment of U.S. special forces, who usually do not wear uniforms and therefore could be denied POW status for failing to meet the conditions enumerated in Article (4) (2) of the Third Convention.

Conclusion

The Geneva Conventions set forth legal standards and procedures for the treatment of all nationals of states parties who fall into enemy custody during an armed conflict. In particular, the Third Convention articulates a duty of a detaining power to convene a competent tribunal to determine the legal status of persons detained in such a conflict. Moreover, where the status of detainees is in doubt, a detaining power is required to accord them the rights and privileges enumerated in the Third Convention until such status is

determined by an objective tribunal. The circumstances of the detention and treatment by the United States of the prisoners currently detained at Guantanamo Bay fail to conform to the Geneva Conventions in several respects. The refusal to recognize the Conventions with respect to prisoners classified as members of *al-Qaeda* violates the text and customary interpretations of the Fourth Convention. The unilateral determination that no prisoner is entitled to POW status violates the Third Convention’s guarantee that such determinations are to be made by competent tribunals. Finally, in light of the likelihood that at least some of the prisoners should be entitled to POW status, the nature of their detention violates the various provisions of the Third Convention, which guarantee privileged treatment to POWs.

As one of the most powerful nations in the world, the U.S. is setting a dangerous precedent for the future application and interpretation of the Geneva Conventions. In the interest of its own credibility, as well as the future safety of its own armed forces, the U.S. government would be well advised to reconsider its position and comply with all of its obligations under the Conventions. 🌍

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