

Terror & International Justice

The U.S.'s treatment and plans for eventual legal trial and punishment of captured terror suspects have provoked firestorms of controversy.

In 2005, Congress passed the **Detainee Treatment Act**, which eliminated writs of *habeas corpus* [you have the body] for all detainees at Guantánamo Bay.



June 12, 2008: In *Boumediene v. Bush* Supreme Court ruled that the Military Commissions Act of 2006 unconstitutionally limited detainees' access to judicial review and that detainees have the right to challenge their detention in conventional civilian courts.

What treaties and conventions govern the laws of war?

Why did the Bush Administration label Guantánamo detainees as “unlawful enemy combatants”?

How valid are its claims to be exempt from international humanitarian laws applicable to “protected persons”?

What are military tribunals? What are the controversies about their legality for trying the Guantánamo detainees?



Laws of War

International humanitarian law is codified in treaties – Hague and Geneva Conventions, United Nations Charter – that directly affect the laws of war, and are binding on signatory nations including the U.S.



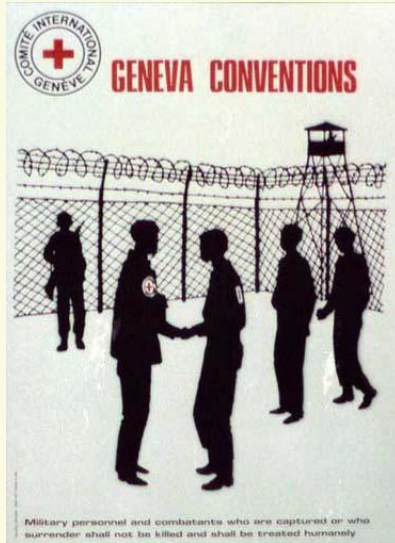
Customary laws of war define both permissive rights of states and prohibitions on their conduct when they deal with irregular forces and non-signatory nations. The Nürnberg war crimes trials of top Nazi leaders (1945-46) established precedents for punishing violators of war laws.

Major principles recognized under laws of war include:

- ✓ Wars should be brought to an end a.s.a.p.
- ✓ Wars should be limited to political goals, such as territorial control, and should not involve unnecessary destruction
- ✓ People and property that are not contributing to a war effort should be protected against unnecessary destruction and hardship
- ✓ Combatants and noncombatants should be protected from unnecessary suffering
- ✓ Human rights of persons captured by their enemies – e.g., prisoners of war, wounded and sick, and civilians – should be safeguarded

Geneva Conventions

The **Geneva Conventions** are four treaties that set standards of international law for humanitarian concerns. They focus on the humane treatment of noncombatants and prisoners of war.

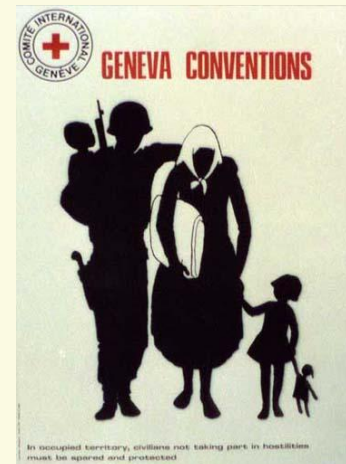


Article 3 of Third Geneva Convention (1949)

“Noncombatants, combatants who have laid down their arms, and combatants who are *hors de combat* [out of the fight] due to wounds, detention, or any other cause shall in all circumstances be treated humanely, including prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment.”

Article 4 defines **prisoners of war** as uniformed military personnel or civilians in support roles with valid IDs.

International Court judgment on Serbian war crimes stated that every held person must be either a war prisoner (covered by Third GC) or a civilian (covered by Fourth GC): “**There is no intermediate status; nobody in enemy hands can be outside the law.**”



Enemy Combatants

Historically, **enemy combatants** are members of the armed forces of a state with which another state is at war. If captured in uniform, their treatment is covered under the Geneva Conventions and other laws.



“The Geneva Conventions are so outdated and are written so broadly that they have become a sword used by terrorists to kill civilians, rather than a shield to protect civilians from terrorists.”

Harvard Law Prof. Alan Dershowitz*

In 1942, Supreme Court ruled: “**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.”

Bush Admin. defined an **enemy combatant** as “an individual who was part of or supporting the Taliban or Al-Qaida forces, or associated forces that are engaged in hostilities against the U.S. or its coalition partners. This includes any person who committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”

* <http://www.challenging-islam.org/articles/dershowitz.htm>

Rethinking Guantánamo*

Could detention of Taliban & Al-Qaida prisoners at Guantánamo Bay be considered **unlawful confinement** under international criminal law?



Comparing the Yugoslav and Guantánamo cases, James Stewart argued that “international criminal precedents **unanimously disagree**” with U.S. assertion that persons it deems as enemy combatants fall into a legal vacuum & that international humanitarian law doesn’t apply to them.

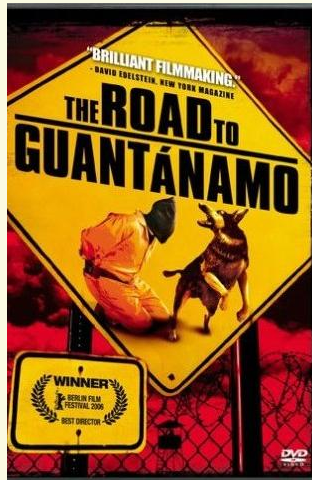
- ❑ Fourth Geneva Convention’s Articles 42 & 43 define unlawful confinement
- ❑ Only basis for U.S. exemption is the weak claim they’re “unlawful combatants”
- ❑ If Taliban & Al-Qaida detainees aren’t POWs, then they’re **protected persons**
- ❑ For many/most Guantánamo prisoners, the U.S. has “no reasonable grounds to believe that detainees pose a real risk to the security of the state”
- ❑ Protected persons must have their detention “reconsidered as soon as possible by an appropriate court,” with twice-yearly reviews of their cases
- ❑ Indefinitely detaining protected persons only for intelligence value is not lawful

Do U.S. officials risk serious criminal liability for unlawful confinement?

What international court could bring such charges & make them stick?

The Road to Guantánamo

Of 800+ detained at Guantánamo Bay, all but about 220 were released. Many were considered harmless, but Pentagon says 60 may have resumed terrorism.



The Road to Guantánamo, is a 2006 documentary by Michael Winterbottom about the “Tipton Three,” British men of Pakistani & Bangladeshi origins, who decided to travel to Afghanistan in the days after the 9/11 attacks.

They were captured in the company of Taliban fighters, turned over to the U.S. military, and sent to Guantánamo as enemy combatants. They were allegedly tortured but were released without charge or compensation in 2004.

Do you think these detainees’ treatment violated the Geneva Conventions?

Are the harsh interrogation techniques, as shown in re-enactments, torture?

What are the U.S. military guards’ views about whether the Taliban and Al-Qaida prisoners deserve prisoner-of-war status? Do you agree with them?

Does the belief that the detainees had acted illegally justify the refusal to give them any protections or special treatments under any international laws?

Military Commissions

Military tribunals – courts that try members of enemy forces in wartime. They use military officers in the roles of prosecutors, judges, and jurors.

Claiming both U.S. civil law and military law do not apply to enemy combatants, Pres. Bush ordered detainees be tried by military commissions in Guantánamo .



6/29/06: In *Hamdan v. Rumsfeld* Supreme Court ruled tribunals violate both U.S. military law & Geneva Conventions. Justice O'Connor : “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens.”

Faced with potential criminal liability under the War Crimes Act of 1996, the Bush Admin sought Congressional authorization, as required by the Supreme Court ruling.

9/29/06: Congress passed the **Military Commissions Act** allowing the president to subject “unlawful enemy combatants” to military tribunals where:

- **Accused are not allowed access to all evidence, such as “state secrets”**
- **Commission may consider evidence obtained by coercion, not by torture**
- **Proceedings can be closed, so commission can consider secret info**
- **Accused can use only military lawyers or civilians with security clearance**
- **Only two-thirds of a jury needs to agree in order to convict**

Obama Tries Federal Courts

Obama Admin was criticized for moving some detainee trials into federal courts, citing hundreds of convictions versus only 3 by military tribunals. New Yorkers protested Atty Gen Holder's effort to try five 9/11 conspirators in Manhattan.



Ahmed Ghailani, tried in federal court for 1998 U.S. embassy bombings, found guilty on just 1 of 285 counts. He could be sentenced 20 years-to-life in January 2011. Critics say outcome demonstrates the weakness of civilian courts in obtaining convictions:

Michael Wildes, ex-fed prosecutor, on Ghailani verdict:
http://www.youtube.com/watch?v=Rc-1tN0CX_g

Kenneth Jost's article asks key legal policy questions for students to debate:

Should suspected terrorists be tried in civilian courts? Are they more likely to protect legal rights of the accused while also resulting in convictions?

Should suspected terrorists be tried in military tribunals? Are they necessary to protect state secrets and result in convictions where evidence against the accused is weaker or is tainted by coercion or torture?

Should some Guantánamo detainees be held indefinitely without trial (or until the U.S. wins the War on Terror)? What to do with 50+ prisoners too dangerous for release but whose convictions are doubtful due to improperly obtained evidence?