


3-1-2009

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Recommended Citation

Kyndra Rotunda, *Applying Geneva Convention Principles to Guantánamo Bay*, 43 U. Rich. L. Rev. 1067 (2009).

Available at: <https://scholarship.richmond.edu/lawreview/vol43/iss3/9>

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APPLYING GENEVA CONVENTION PRINCIPLES TO GUANTÁNAMO BAY

Kyndra Rotunda *

I. INTRODUCTION

During this election year, both presidential candidates, Senators Barack Obama and John McCain, favored closing the U.S.-operated detention camp in Guantánamo Bay.¹ Support for closing the detention camp stemmed from a perceived failure of the United States to follow the rule of law with respect to detainees held there.² In fact, the Senate Judiciary Committee recently held hearings to explore ways of *Restoring the Rule of Law* in Guantánamo Bay.³ But, before the United States can explore ways to repair what is wrong with the detention camp in Guantánamo Bay, it must consider whether, and to what extent, the rule of law currently exists in Guantánamo Bay.

This article analyzes and discusses the procedures the United States follows in Guantánamo Bay and compares those procedures to the ones that prisoners of war (“POWs”) would receive in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War.⁴ It examines four particular areas: Combatant Status Review Tribunals, Annual Review Boards, re-

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1. Josh Meyer, *Candidates' Anti-Terror Views Are Largely Similar*, L.A. TIMES, Sept. 11, 2008, at A1.

2. See *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 1 (2008) (statement of Sen. Russell D. Feingold, Chairman, Subcomm. on the Constitution of the S. Comm. on the Judiciary).

3. See generally *Restoring the Rule of Law: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 1 (2008).

4. Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva Convention Relative to the Treatment of Prisoners of War*].

ligious accommodation, and camp discipline. Whether or not enemy combatants held in Guantánamo Bay are *entitled* to POW protections, they are receiving substantially the same, or in some cases greater, procedural protections than the Geneva Conventions require for POWs.

II. INTERNATIONAL LAW AND THE GENEVA CONVENTIONS

While the term “law of war” may seem like an oxymoron, it is not. The law of war, which essentially governs the battlefield, exists primarily in two forms: (1) international treaties and (2) customary international law.⁵ The United States is a party to about a dozen international treaties, including the four Geneva Conventions.⁶ Resolving disputes between nation states is much simpler when an international treaty governs the parties because parties can look to the particular terms in the particular treaty—as parties to a contract would.

Customary international law is the second principle source of the law of war and is not so straightforward. Customary international law describes generally accepted, unwritten principles, which “stem from the lessons of history,”⁷ and are followed by most nation states. It is not codified the way that treaties are, but exists by general consent from various nation states.⁸ Countries look to evidence such as diplomatic correspondence, judicial decisions in each country, and the writings of judges and academics to determine what falls within the realm of customary international law and what falls outside of that realm.⁹

5. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987); Robert A. Bailey, *Why Do States Violate the Law of War?: A Comparison of Iraqi Violations in Two Gulf Wars*, 27 SYRACUSE J. INT'L L. & COM. 103, 103, 105 (2000).

6. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

7. DEP'T OF THE ARMY, TRAINING CIRCULAR 27-10-2, PRISONERS OF WAR 3 (1991).

8. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 4 (1956) [hereinafter FIELD MANUAL].

9. *Id.* at 6.

Whether a captured enemy qualifies as a POW, and what procedural protections apply, is governed by an international treaty—The Third Geneva Convention of 1949, Relative to the Treatment of Prisoners of War.¹⁰ But, the notion of protections for POWs did not simply emerge out of nothingness. It evolved over time. The concept of a POW did not exist in ancient times.¹¹ Captors considered their captives property, and either killed or enslaved them.¹² We do not know exactly when captors began holding enemy prisoners, but experts believe that the 1785 Treaty of Friendship between the United States and Prussia was the first agreement setting forth treatment guidelines for enemy prisoners.¹³

During the American Civil War, President Lincoln issued General Order Number 100, Instructions of the Government of Armies of the United States in the Field, which was also known as the Lieber Code.¹⁴ It required Union forces to treat captured Confederate troops humanely.¹⁵ The Lieber Code influenced Europe, which adopted the 1907 Hague Regulations, affording some protections to POWs.¹⁶ But, the protections were basic and it was not until 1929 that they were supplemented by the Geneva Convention Relative to the Treatment of Prisoners of War.¹⁷ After the Nazis committed atrocities against POWs during World War II, the Geneva Conventions were revised and the four Geneva Conventions of 1949 emerged, including the Geneva Convention III, Relative to the Treatment of Prisoners of War, which is binding today.¹⁸

10. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 4(A)(2); see Kevin H. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)*, 32 *FORDHAM INT'L L.J.* 55, 69 (2008).

11. JEAN DE PREUX ET AL., COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 45 (Jean S. Pictet ed., A.P. de Heney trans. 1960) [hereinafter GENEVA III COMMENTARY]; BRIAN J. BILL ET AL., LAW OF WAR WORKSHOP DESKBOOK 69 (Brian J. Bill ed., William S. Hein & Co., Inc. 2004) (2000).

12. BILL ET AL., *supra* note 11, at 69.

13. *Id.* at 70.

14. *Id.*

15. *Id.*

16. *Id.* at 71.

17. *Id.*

18. *See id.* at 72.

III. DEFINING PRISONERS OF WAR

What does it mean to be a POW and who qualifies? The Geneva Convention Relative to the Treatment of Prisoners of War includes a four-part test to determine whether fighters—who are not members of the regular armed forces—qualify as POWs.¹⁹ According to that test, one must meet the following four criteria to be considered a POW: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.”²⁰ Commentary to Article 4 calls it “the key to the Convention, since it defines the people entitled to be treated as [POWs],” which makes clear that combatants not meeting the requirements contained in Article 4 are *not* entitled to POW treatment.²¹

But what does each of these prongs mean? Commentary to the Geneva Conventions describes and explains each of the four criteria that combatants must meet to be properly deemed POWs. The first prong makes clear that only troops that are “commanded by a person responsible for his subordinates” can qualify as POWs.²² The Commentary explains this requirement. It states that the “commander” can be either civilian or military, but must be “responsible for action taken on his orders.”²³ Commentators opine that this requirement provides “reasonable assurance that the other conditions . . . [of the POW test] will be observed.”²⁴

Regarding the second prong of the test—the requirement to wear fixed distinctive insignia—the Commentary states that “having a fixed distinctive sign recognizable at a distance . . . [is]

19. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 4(A)(2). Members of the regular armed forces of a party to the conflict receive POW protections under the Geneva Convention Relative to the Treatment of Prisoners of War. *Id.* art. 4(A)(1). Even persons accompanying the regular armed forces, including civilians, receive POW protections so long as they have received authorization from the armed forces that they accompany and have an identity card indicating such. *Id.* art. 4(A)(4).

20. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 4(a)(2)(a)–(d).

21. GENEVA III COMMENTARY, *supra* note 11, at 49.

22. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 4(A)(2)(a).

23. GENEVA III COMMENTARY, *supra* note 11, at 59.

24. *Id.*

an essential factor of loyalty in the struggle and must be worn constantly, in all circumstances.”²⁵ It goes on to explain that “the sign must be the same for all the members of any one resistance organization, and must be used only by that organization.”²⁶ The Commentators explain that this sign could be a cap, an arm-band, a shirt, an emblem, or any other distinctive mark that an opponent could recognize from a distance.²⁷ Thus, under the Geneva Convention, one must fight in uniform—or something like it—in order to meet the second prong of the test for POW status.

The third prong of the test requires the enemy to carry his arms openly.²⁸ The Commentary states: “The enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons. Thus, a civilian could not enter a military post on a false pretext and then open fire, having taken unfair advantage of his adversaries.”²⁹ This prong makes clear that enemy forces posing as civilians to gain a strategic advantage are not entitled to POW protections.

Finally, the fourth prong requires enemy forces to conduct their operations in accordance with the laws and customs of war.³⁰ The Commentary calls this an “essential provision” and explains that, among other things, “[t]hey may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty as they expect their enemies to do.”³¹ Thus, according to the Geneva Conventions, those who employ suicide bombs and attack innocent civilians are not POWs and are not entitled to POW protections.³²

Therefore, under the four-part test contained in the Geneva Convention Relative to the Treatment of Prisoners of War, whether a captured enemy is entitled to POW protections is a straightforward question that requires a rather simple analysis.

25. *Id.*

26. *Id.* at 60.

27. *Id.*

28. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 4(A)(2)(c).

29. GENEVA III COMMENTARY, *supra* note 11, at 61.

30. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 4(A)(2)(d).

31. GENEVA III COMMENTARY, *supra* note 11, at 61.

32. See John Yoo & James Ho, *The Status of Terrorists*, VA. J. INT'L L. 207, 215–20 (2003) (discussing the application of the four-part test contained in article 4(A)(2) of the Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4).

However, the debate does not end there. In 1977, 143 nations drafted and signed Protocol I to supplement the Geneva Conventions.³³ The United States did not sign or ratify Protocol I, but some maintain that Protocol I is customary international law and, therefore, trumps Geneva's four-part POW test.³⁴

Protocol I eviscerates the POW test articulated in the Third Geneva Convention. Specifically, Article 44 of Protocol I provides that any combatant taking part in an armed conflict "who falls into the power of an adverse Party shall be a prisoner of war."³⁵ Under this protocol, any combatant, regardless of whether he wears a uniform or attacks innocent civilians to gain a strategic advantage, receives POW protections. It thus gives POW protections to guerrillas.³⁶

Under the Geneva Convention four-part test, enemy combatants fighting against U.S. forces in Afghanistan are not entitled to POW protections because they did not wear uniforms, or any distinctive insignia. In contrast, under Protocol I, they would be entitled to POW protections. Regardless of whether the Geneva Conventions or Protocol I are a proper expression of international law, has the United States nonetheless extended POW protections to detainees held in Guantánamo Bay? Is it adhering to the Geneva Conventions?

IV. ARTICLE 5 HEARINGS AND COMBATANT STATUS REVIEW TRIBUNALS

Under the Geneva Conventions, how does the capturing power apply the POW four-part test? What procedures, if any, govern their decision? Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War allows, when doubt exists, the detaining power to hold a brief status hearing, where a "competent tribunal" will decide whether the detainee is a POW.³⁷ The draf-

33. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted on June 8, 1977*, 1125 U.N.T.S. 3 [hereinafter Protocol I].

34. For a brief discussion of the Geneva Conventions and Protocol I, see GREGORY E. MAGGS, *TERRORISM AND THE LAW: CASES AND MATERIALS* app. c, at 585-87 (2005).

35. Protocol I, *supra* note 33, art. 44.

36. BILL ET AL., *supra* note 11, at 76-77.

37. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 5. Article 5 provides:

ters initially proposed that one person acting alone—some “responsible authority”—could determine the status of an enemy prisoner.³⁸ But, at Geneva in 1949, the drafters decided to replace the term “responsible authority” with “competent tribunal” so that more than one person would decide the status of captured combatants.³⁹

Aside from requiring that a “competent tribunal” be made up of more than one person, the Commentary does not provide any guidelines to govern the hearings and it does not describe or define a “competent tribunal.” The drafters seemed satisfied that few cases would require such hearings, stating that the POW four-part test in Article 4 would “reduce the number of doubtful cases in any future conflict,” and that in any event, “this provision should not be interpreted too restrictively.”⁴⁰

Therefore, Article 5 would allow the capturing power to decide whether sufficient doubt exists to hold a status hearing and presumably, any hearing with more than one official presiding would suffice. Whether one meets the four-part POW test is, on its face, a straightforward question of fact.

The United States adopted procedures to govern status hearings because the Geneva Conventions provide only minimal guidelines for the detaining power. U.S. policy is to convene a three-member panel to decide the status of detainees.⁴¹ It specifies that a detainee “who asserts that he or she is entitled to treatment as a prisoner of war” will receive a status hearing, even when the status of that person does not appear to be in doubt.⁴² Thus, the United States allows the detainee’s request to trigger a status hearing, where the Geneva Conventions allow captors to make that decision based on the facts.

Should 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 their status has been determined by a competent tribunal.

Id.

38. GENEVA III COMMENTARY, *supra* note 11, at 77.

39. *Id.*

40. *Id.* at 77–78.

41. BILL ET AL., *supra* note 11, at 78; FIELD MANUAL, *supra* note 8, at 19 para. 71(c).

42. DEPT'S OF THE ARMY, THE NAVY, THE AIR FORCE, AND THE MARINE CORPS, ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES ch. 1, § 1-6(b) (1997) [hereinafter ARMY REGULATION 190-8].

U.S. regulations specify that a “competent tribunal” will be composed of “three commissioned officers, one of whom must be of a field grade”—at least the rank of a Major, O-4, or above.⁴³ The U.S. rules also prefer that an officer of the Judge Advocate General Corps—a lawyer—is involved.⁴⁴ The Geneva Conventions only require more than one person to decide the detainee’s status and accept that those making the decision might be of a subordinate rank.⁴⁵

The U.S. rules further require the detainee to be “advised of . . . [his] rights at the beginning of [the] hearings[;]”⁴⁶ specify that the sessions will be open and that the detainee will receive an interpreter;⁴⁷ allow the detainee to call and question reasonably available witnesses;⁴⁸ guarantee, but do not compel, the detainee a right to testify;⁴⁹ and require that the detainee’s status is decided in a closed session, by majority vote, using a preponderance of the evidence standard.⁵⁰ They also require that a Judge Advocate General Officer review the written record “for legal sufficiency.”⁵¹

Clearly, the U.S. rules put meat on the bones of Article 5 status hearings by specifying additional rights and procedures for the detainee than the Geneva Conventions require.

V. THE *HAMDI* CASE—STATUS HEARINGS FOR U.S. CITIZENS

In 2004, the Supreme Court of the United States considered the status of one detainee, Yaser Esam Hamdi, in *Hamdi v. Rumsfeld*.⁵² Before September 11, 2001, Mr. Hamdi, an American citizen, traveled to Afghanistan.⁵³ We do not know why he went to

43. *Id.* ch. 1, § 1-6(c).

44. *Id.*

45. GENEVA III COMMENTARY, *supra* note 11, at 77 (explaining that the decision to require a “competent tribunal” instead of a “responsible authority” rested, in part, on the realization that “decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank”). This suggests that the drafters did not mind leaving the decision to two persons, who might be of a subordinate rank.

46. ARMY REGULATION 190-8, *supra* note 42, ch. 1, § 1-6(e)(4).

47. *Id.* ch. 1, § 1-6(e)(5).

48. *Id.* ch. 1, § 1-6(e)(6).

49. *Id.* ch. 1, § 1-6(e)(7)–(8).

50. *Id.* ch. 1, § 1-6(e)(9).

51. *Id.* ch. 1, § 1-6(e)(10)(g).

52. 542 U.S. 507, 510 (2004).

53. *Id.*

Afghanistan in the first place. His father alleged that it was to perform “relief work,” but Hamdi never made that claim.⁵⁴ Hamdi said that he wanted to get military training so he could go to Israel and kill Israelis.⁵⁵ He wanted to join the Saudi Army, which rejected him, so he went to Afghanistan.⁵⁶

Sometime after the United States invaded Afghanistan, U.S. forces captured Mr. Hamdi fighting alongside a Taliban unit.⁵⁷ He was armed with an assault rifle.⁵⁸ As it did with many detainees captured in battle, the U.S. military eventually transferred Mr. Hamdi to Guantánamo Bay, Cuba.⁵⁹ When U.S. officials discovered that he was an American citizen, they transferred him to a naval brig in Norfolk, Virginia.⁶⁰ The United States treated him as an American citizen because he was born in the United States.⁶¹

The question of what to do with this American Al-Qaeda member caused a series of court cases that eventually reached the Supreme Court. The nine Supreme Court Justices could not reach a majority decision concerning Hamdi’s status; however, Justice O’Connor wrote a plurality opinion joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer.⁶² Justice O’Connor’s opinion first discussed the definition of “enemy combatant” and defined the term as one who the government alleges was “‘part of or supporting forces hostile to the United States or coalition partners’ [in Afghanistan] and ‘engaged in an armed conflict against

54. *Id.* at 511.

55. *Id.* at 512–13; Ronald Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1, 15 n.86 (2006).

56. *Hamdi*, 542 U.S. at 512–13; Ronald Rotunda, *supra* note 55, at 15 n.86.

57. *Hamdi*, 542 U.S. at 513; Ronald Rotunda, *supra* note 55, at 15 n.86.

58. *Hamdi*, 542 U.S. at 513; Ronald Rotunda, *supra* note 55, at 15 n.86.

59. *Hamdi*, 542 U.S. at 510.

60. *Id.*

61. *Id.* Neither of his parents were Americans, but the Fourteenth Amendment states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. The Court has interpreted the language to make all persons born in the United States U.S. citizens—except those born of foreign embassy personnel who are not subject to U.S. jurisdiction. *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898).

62. *See Hamdi*, 542 U.S. at 509.

the United States.”⁶³ Alternatively, Justice Thomas indicated that he would defer to the military for all battlefield captures.⁶⁴

The Court affirmed its earlier decision in the World War II case of *Ex parte Quirin*⁶⁵ and concluded that the United States may detain enemy combatants during war time without charging them with any crimes.⁶⁶ However, regarding U.S. citizens like Hamdi, the Court required the military to apply some procedures that ensure the detainee is an enemy combatant.⁶⁷ The procedures could be basic and the government can assume that the detainee is an enemy combatant. That is, unless the detainee presents compelling evidence otherwise, the United States can hold him, so long as it affords the detainee a fair opportunity to present his view of things.⁶⁸ The plurality specified that the purpose for such a hearing is to protect “the errant tourist, embedded journalist, or local aid worker” by giving detainees a fair opportunity to be heard, but leaves the burden of proof on the detainee.⁶⁹

The plurality did not say that detainees were entitled to lawyers. This is not surprising. After all, when a grand jury decides whether probable cause exists to indict a person, the grand jury can question that person without a lawyer present.⁷⁰ If that person has a lawyer, the lawyer can sit in the next room and wait.⁷¹ Neither Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War nor ARMY REGULATION 190-8 require lawyers to represent detainees at their status hearings.⁷²

63. *Id.* at 526 (quoting Brief for the Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)).

64. *See id.* at 579 (Thomas, J., dissenting).

65. 317 U.S. 1 (1942).

66. *See Hamdi*, 542 U.S. at 516–19.

67. *Id.* at 509 (plurality opinion) (“We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”). Detainee Hamdi had not received an Article 5 hearing or a hearing consistent with Army Regulation 190-8. *Id.* at 510.

68. *See id.* at 533–34.

69. *Id.* at 534.

70. *See* FED. R. CRIM. P. 6(d)(1).

71. *See, e.g.*, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL, tit. 9, § 11.151 (1997), available at http://www.usdoj.gov/usao/foia_reading_room/usam/title9/title9.htm.

72. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 5; ARMY REGULATION 190-8, *supra* note 42, ch. 1, 1–6.

The Supreme Court plurality opinion emphasized that the procedures could be simple and should not interfere with an ongoing war.⁷³ Along these lines, the hearing would occur sometime after capture and it could consider documents drawn up by soldiers who captured the detainee on the battlefield.⁷⁴ The plurality suggested that the proceedings outlined in an existing ARMY REGULATION 190-8, section 1-6, would satisfy this minimal process due.⁷⁵ Therefore, the United States can hold a U.S. citizen captured on the battlefield so long as the government affords him an opportunity to rebut the presumption that he is an enemy combatant.⁷⁶

The plurality did not reach a conclusion about what procedures the government should afford detainees held in Guantánamo Bay—i.e., non-U.S. citizen enemy combatants. Are the Taliban members that fought alongside Hamdi entitled to similar hearings? Perhaps not. If the Supreme Court intended the approximately 600 detainees to receive a Hamdi-like hearing, presumably it would have said so. Additionally, the plurality would not have cautioned that its holding was narrow.⁷⁷

Although *Hamdi* did not require status hearings for non-U.S. citizens, the Department of Defense (“DoD”) nonetheless decided to grant such hearings to *all detainees* held in Guantánamo Bay.⁷⁸ Within one week of the Supreme Court’s decision in *Hamdi*, Paul Wolfowitz, Deputy Secretary of Defense, created the Office of Administrative Review for Detained Enemy Combatants (“OARDEC”), under the supervision of the Secretary of the Navy, Gordon England.⁷⁹

73. See *Hamdi*, 542 U.S. at 533–35.

74. See *id.* at 533–34.

75. *Id.* at 538 (citing ARMY REGULATION 190-8, *supra* note 42, ch. 1, § 1-6) (“There 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.”).

76. See *id.* at 533–34.

77. *Id.* at 516 (“We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.”).

78. Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) [hereinafter Memorandum from Paul Wolfowitz], available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

79. See *id.*

OARDEC held hearings for every detainee, called Combatant Status Review Tribunals (“CSRTs”), that were based on Justice O’Connor’s plurality opinion, the Geneva Convention Relative to the Treatment of Prisoners of War, Article 5 procedures, and ARMY REGULATION 190-8.⁸⁰ However, the CSRT proceedings went further than the Supreme Court required in *Hamdi*, and further than the Geneva Conventions or ARMY REGULATION 190-8 require, by appointing each detainee a personal representative to assist with the hearing.⁸¹ This is unprecedented and not required by any law.

In July of 2004, the U.S. military began holding CSRT hearings for the approximately 600 detainees held in Guantánamo Bay.⁸² However, unilaterally adopting an untested process came with risks and wrinkles and, ironically, resulted in greater procedural protections for *non-citizen* detainees than the Supreme Court required for *citizen* detainees like Hamdi and greater protections than ARMY REGULATION 190-8 ordinarily affords to captured enemies.

VI. ANNUAL REVIEW BOARDS—PAROLE BOARD PRECEDENT

The U.S. government went one step further and created yet another layer of review, a super-CSRT for all detainees called Annual Review Boards (“ARBs”), also under the direction of OARDEC.⁸³ Essentially, ARBs are annual parole board hearings for every detainee. If the board decides a detainee no longer poses

80. See Press Briefing, U.S. Dep’t of Def., Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2504>.

81. Memorandum from Paul Wolfowitz, *supra* note 78, at (c) (“Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein.”).

82. Kathleen T. Rhem, *Annual Reviews of Detainee Cases to Begin at Guantanamo*, AM. FORCES PRESS SERVICE, Oct. 1, 2004, <http://www.defenselink.mil/news/newsarticle.aspx?id=25164>.

83. Memorandum from Gordon England, Designated Civilian Official, Dep’t of Def., Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba, (Sept. 14, 2004), available at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>.

a threat, it can release him.⁸⁴ Ironically, the procedures governing the ARBs are significantly more complicated than CSRT procedures.

The U.S. government spent over fifteen million dollars the first year to hold ARBs for every detainee and reviewed over 300,000 documents during these hearings.⁸⁵ Despite the effort and cost of ARBs, there is no legal authority or requirement for them. The leader of OARDEC acknowledges this fact, calling ARBs “unprecedented, historic, and discretionary.”⁸⁶

International law, including the Geneva Conventions governing treatment of POWs, does not require these blanket parole board hearings. Indeed, the Geneva Conventions of 1929 did not provide for parole in any instance. In the 1949 revisions to the Conventions, the option of granting parole at the discretion of the detaining power was included, “particularly in cases where this may contribute to the improvement of their state of health.”⁸⁷ Those who are paroled are “bound on their personal honour scrupulously to fulfil . . . the engagements of their paroles or promises.”⁸⁸ *On their personal honor?* It is hard to imagine how that term could be applied to anyone who has been captured fighting with the Taliban or Al-Qaeda, or any other organization that routinely refuses to follow the laws of war.

Parole opportunities under the Geneva Conventions are limited and failing to pose a threat is not a justification for release. Similarly, the army regulation governing detained personnel allows repatriation, but only of the sick and wounded, and only in limited circumstances.⁸⁹ Under that regulation, only those suffering from “disabilities as a result of injury” equivalent to losing a limb, or those with chronic conditions and a prognosis that precludes recovery within a year, are eligible for direct repatriation.⁹⁰

84. *Id.* at enclosure (3).

85. KYNDRA MILLER ROTUNDA, *HONOR BOUND: INSIDE THE GUANTANAMO TRIALS* 139 (2008).

86. *Id.* (quoting Rear Admiral James M. McGarrah, Commander of OARDEC, Public Forum at George Mason Univ. (Feb. 16, 2006)).

87. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 21.

88. *Id.*

89. ARMY REGULATION 190-8, *supra* note 42, ch. 3, § 3-12(l).

90. *Id.* The regulation goes on to state: “Prisoners who are not sick or wounded will be repatriated or released at the cessation of hostilities as directed by OSD [The Office of the Secretary of Defense].” *Id.*, ch. 3, § 3-13.

The ARB process that paroles our enemies back to the battlefield is not grounded in international law, the Geneva Conventions, or army regulations governing retained personnel.

Not only are the ARBs a voluntary and unprecedented creation of the DoD, but the decision to return an enemy combatant to the battlefield endangers U.S. soldiers. Several detainees released under the ARB process have rejoined the battle against U.S. and coalition forces.⁹¹ The military has recaptured some detainees and killed others on the battlefield. Some remain at large. The numbers are not precise because until soldiers either capture or kill a paroled detainee, it is impossible to discern whether he has taken up arms against the United States. Additionally, there is no way to determine if, or how many, U.S. soldiers were injured or killed at his hands before being killed or recaptured. However, we know that approximately 5–10% of detainees released in the ARB process have rejoined the battle—a fact acknowledged by the DoD.⁹² In fact, the Deputy Secretary of Defense, Detainee Affairs Division, declared in a public briefing that “some of those released to date have already returned to the fight.”⁹³

Some say that the detainees are harmless, and if they join Al-Qaeda after the United States releases them, it is only because their experience in Guantánamo Bay made them want to join Al-Qaeda.⁹⁴ The facts do not support this assumption. Detainees whom the United States releases claim they have always been committed members of Al-Qaeda and brag about this to reporters.⁹⁵

91. *City on the Hill or Prison on the Bay? The Mistakes of Guantanamo and the Decline of America's Image, Part II: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 92 (2008) (statement of Mark P. Denbeaux, Professor of Law, Seton Hall University School of Law).

92. KYNDRA MILLER ROTUNDA, *supra* note 85, at 140; see Editorial, *Terrorist 'Rehab'* CHI. TRIB., Feb. 14, 2009, at C30.

93. KYNDRA MILLER ROTUNDA, *supra* note 85, at 140 (quoting Deputy Secretary of Defense, Detainee Affairs Policy Division, slides presented at a Feb. 16, 2006, public forum at George Mason University).

94. See William Glaberson, *Pentagon Study Sees Threat in Guantanamo Detainees*, N.Y. TIMES, July 26, 2007, at A16 (discussing and responding to claims that detainees do not pose a threat).

95. See NBC Nightly News, *Obama Closes Guantanamo, Authorizes Strike into Pakistan* (NBC television broadcast Jan. 23, 2009).

One released detainee killed a judge leaving a mosque in Afghanistan,⁹⁶ and another assumed leadership of an Al-Qaeda-aligned militant faction in Pakistan, bragging to reporters “that he tricked his U.S. interrogators into believing he was someone else.”⁹⁷ Another Pakistani, Abdullah Mehsud, threatened violence against U.S. forces only days after the United States released him.⁹⁸ He said, “We would fight America and its allies’ . . . ‘until the very end.’”⁹⁹ Mehsud backed his claim with action, claiming responsibility for the kidnapping of two innocent Chinese engineers.¹⁰⁰ He eventually freed one and killed the other.¹⁰¹ Considering that two known Pakistanis have reentered the battle, it is curious that the DoD characterizes detainee releases to Pakistan as “successful,” insisting that coordination with local villagers ensures that detainees will not return to the battlefield.¹⁰²

The military has released even high-level members of Al-Qaeda. In 2004, the United States released a known Al-Qaeda loyalist known as “Tabarak” from Guantánamo Bay into Moroccan custody, where he was set free four months later.¹⁰³ Tabarak was a chief aid to Osama bin Laden and helped plan and execute bin Laden’s escape from Tora Bora during December 2001.¹⁰⁴ During the escape, he made phone calls from bin Laden’s satellite telephone, while Al-Qaeda leaders fled in the opposite direction.¹⁰⁵ Neither U.S. nor Moroccan authorities will comment about the specifics of Tabarak’s release; therefore, we cannot verify whether the ARB played a role in Tabarak’s release. However, in either case, the United States released a dangerous Al-Qaeda operative from custody without any explanation. Recently, one detainee

96. *Ex-Gitmo Detainees Return to Terror*, WASH. TIMES, Oct. 18, 2004, <http://washingtontimes.com/news/2004/oct/18/20041018-124854-2279r/>.

97. John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A1.

98. *See id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. KYNDRA MILLER ROTUNDA, *supra* note 85, at 140 (referring to statements made by the Deputy Secretary of Defense, Detainee Affairs Policy Division, at a Public Forum at George Mason Univ. (Feb. 16, 2006)).

103. Craig Whitlock, *Al Qaeda Detainee’s Mysterious Release; Moroccan Spoke of Aiding Bin Laden During 2001 Escape*, WASH. POST, Jan. 30, 2006, at A1.

104. *Id.*

105. *Id.*

whom the military released from Guantánamo Bay has returned to the battlefield and has assumed leadership of Al-Qaeda in Yemen.¹⁰⁶

It makes sense that released detainees would reenter the fight, and research supports their propensity to do just that. Canadian authorities have extensively documented recidivism of radical Muslims.¹⁰⁷ In January 2006, a senior Middle East Analyst for the Canadian Security Intelligence Service, identified only as “P.G.,” testified in an open court hearing about his agency’s belief that members of Al-Qaeda or other related militant Islamic groups

“maintain their ties, and their relationships to those networks, for very long periods of time. These ties are forged in environments where relationships mean a great deal, and it is our belief that the dedication to the ideology, if you will, is very strong, and is virtually impossible to break.”¹⁰⁸

He further opined that militants “who have attended terrorist training camps or . . . opted for radical Islam must be considered threats to Canadian public safety for the indefinite future.”¹⁰⁹

P.G. also opined that incarceration tends to harden, not soften, their radical Islamic beliefs.¹¹⁰ He cited several examples where radical Islamists emerged from prison more dangerous and committed to principles of radical Islam than they were going in.¹¹¹ For instance, Ayman al-Zawahiri served a prison term in Egypt for his role in the assassination of Anwar Sadat; after Egypt released him, Al-Qaeda elevated al-Zawahiri to become Osama bin Laden’s principal deputy.¹¹² Abu Mussab al-Zarqawi, leader of Al-Qaeda’s affiliate in Iraq, previously spent seven years in a Jordanian prison for extremist activities.¹¹³ Essentially, P.G. concludes that it is categorically unsafe to ever release a jihadi militant.¹¹⁴

106. Robert F. Worth, *Freed by U.S., Saudi Becomes a Qaeda Chief*, N.Y. TIMES, Jan. 23, 2009, at A1.

107. Mark Hosenball, *Once a Terrorist, Always a Terrorist? A Top Canadian Intelligence Official Says There’s Little Hope of Rehabilitating Suspected Islamic Terrorists*, NEWSWEEK WEB EXCLUSIVE, Jan. 18, 2006.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

Some U.S. officials share this position.¹¹⁵ A former special assistant for detainee policy in the DoD stated, “You can’t trust them when they say they’re not terrorists.”¹¹⁶

Despite the lack of legal authority or historical precedent for releasing able-bodied enemy combatants during wartime, and their proven propensity for recidivism, Rear Admiral McGarrah nonetheless supports the ARB parole process because “[w]e have no desire to be the world’s jailer.”¹¹⁷ By February 2006, the U.S. government had released 270 detainees from Guantánamo Bay.¹¹⁸ By March 2007, the total number of detainees released or transferred from Guantánamo Bay had climbed to 390.¹¹⁹ By January of 2009, the number of detainees either released or transferred from Guantánamo Bay exceeded 500.¹²⁰ Therefore, the story of Yaser Esam Hamdi, one captured American Al-Qaeda member, was the first gossamer strand of what became a colossal bureaucratic web. The U.S. government reacted to the Supreme Court’s narrow holding in *Hamdi* by adopting layer upon confusing layer of procedures that the Court did not contemplate and the Geneva Conventions do not require.

VII. RELIGIOUS ACCOMMODATION AND THE GENEVA CONVENTIONS

People criticize the United States for supposedly failing to adhere to the Geneva Conventions. This section compares requirements in the Geneva Conventions to existing procedures in Guantánamo Bay in the realm of religious accommodation.

Under the Geneva Conventions, detaining powers must afford detainees the right to practice their religion and attend religious services.¹²¹ The Conventions condition these rights on detainees

115. See Mintz, *supra* note 97.

116. See *id.*

117. KYNDRA MILLER ROTUNDA, *supra* note 85, at 142 (quoting Rear Admiral McGarrah, Commander of OARDEC, Public Forum at George Mason University (Feb. 16, 2006)).

118. *Id.* (citing data provided by the DoD at a Feb. 16, 2006 public forum at George Mason University).

119. News Release, U.S. Dep’t of Defense, Guantanamo Bay 2006 Administrative Review Board Results Announced (Mar. 6, 2007), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10582>.

120. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

121. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 34.

complying with disciplinary rules.¹²² The Conventions also explain that relief societies like the Salvation Army or the Red Cross, and specifically the International Committee of the Red Cross, may provide prisoners with religious items like Bibles and prayer books.¹²³ Prisoners can also receive “articles of a religious . . . character” through the mail.¹²⁴ The Geneva Conventions *do not require* a detaining power to provide religious articles to its prisoners.¹²⁵

No law or treaty, including the Geneva Conventions, *obligates* the United States to provide religious articles to the detainees. However, the U.S. military does this anyway. In Guantánamo Bay, the U.S. military provides each detainee with a Koran, a prayer cap, prayer beads, and prayer oil “as part of their basic-issue items.”¹²⁶ It even distributes traditional Islamic prayer rugs to those who are the best behaved.¹²⁷ Another U.S.-run detention camp in Iraq hosted a mural painting contest for the detainees and awarded large editions of the Koran to the first and second prize winners.¹²⁸ The U.S. government purchases Korans to give detainees with taxpayers’ dollars.

Aside from providing religious items, the U.S. military paints arrows pointing to Mecca in each detainee’s cell so detainees can pray in the right direction, and it broadcasts the Islamic call to prayer over loudspeakers five times each day.¹²⁹ It also assigns U.S. Muslim chaplains—there were fourteen in the military shortly after September 11, 2001¹³⁰—to Guantánamo Bay who ensure that camp commanders follow the rules of Islam and fully

122. *Id.*

123. *Id.* art. 125.

124. *Id.* art. 72.

125. See GENEVA III COMMENTARY, *supra* note 11, at 229.

126. Donna Miles, *Joint Task Force Respects Detainees’ Religious Practices*, AM. FORCES PRESS SERVICE, June 29, 2005, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=16267>.

127. *Id.*

128. Lynne Steely, *Abu Ghraib Detainees Enter Art Contest*, ARMY NEWS SERVICE, Oct. 6, 2005, available at http://www4.army.mil/ocpa/rend.php?story_id_key=8024.

129. Miles, *supra* note 126.

130. In 1993 the U.S. Military had no Muslim Chaplains to minister to its 3,150 Muslims. Since that time, the number of Muslims in the U.S. military has increased and the military allows Muslim Chaplains. One month after September 11, 2001, there were more than 4,000 Muslims in uniform and fourteen Islamic chaplains ministering to them. Laurie Goodstein, *A Nation Challenged: The Clergy; Military Clerics Balance Arms and Allah*, N.Y. TIMES, Oct. 7, 2001, at B1.

accommodate detainees. Following advice from these chaplains, the United States acknowledges Islamic holidays by providing special meals that include imported seasonal fruits and nuts.¹³¹

The first year, at the end of Ramadan—the holiest time of year for Muslims—the U.S. military even contemplated sacrificing a goat for the detainees.¹³² Ultimately, it decided not to do that to avoid upsetting animal rights groups, such as People for the Ethical of Animals (PETA).¹³³ But in November 2006, the United States hosted two holiday meals on two consecutive days because detainees could not agree on the appropriate day to celebrate. To avoid conflict, the U.S. military honored both days and paid for two celebrations.¹³⁴

In at least one incident, in Camp Bucca, Iraq, detainees turned our generosity on us.¹³⁵ Few people know about this incident because the military kept it quiet, and when the story finally broke, it was only reported in one newspaper, the *Washington Post*, and for only one day.¹³⁶ Camp Bucca is home of another U.S.-run detention camp, located in southern Iraq, just a few miles from the Kuwait border.¹³⁷ The United States accommodated detainees even more at Camp Bucca than in Guantánamo Bay. Detainees lived in tan-colored tents or air-conditioned huts with approximately twenty people per unit.¹³⁸ They were free to roam into the courtyards or stay inside.¹³⁹ During downtime, the detainees attended religious lessons organized by the inmates.¹⁴⁰ Inside the confines of the prison, the U.S. military erected a tent for detainees to practice their religion.¹⁴¹ However, the U.S. military only allowed detainees inside the makeshift mosque.¹⁴² The command

131. KYNDRA MILLER ROTUNDR, *supra* note 85, at 61.

132. *Id.*

133. *Id.*

134. *Id.*

135. Steve Fainaru & Anthony Shadid, *In Iraq Jail, Resistance Goes Underground*, WASH. POST, Aug. 24, 2005, at A1.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

er ordered the soldiers in charge of the camp not to go into the tent.¹⁴³ It was *specifically off-limits* to U.S. personnel.¹⁴⁴

In fact, detainees were not devoting all of their time to religious studies.¹⁴⁵ For months, more than 600 detainees worked in shifts, undetected, digging an escape tunnel that continued under the camp and led to a concealed trench just outside the gates.¹⁴⁶ They dug at night, and then gradually distributed the tunnel dirt over the soccer field during the day, one bag at a time.¹⁴⁷ Interestingly, satellite imagery revealed fresh dirt covering the area, but the United States overlooked its significance.¹⁴⁸ Additionally, soldiers reported loose floorboards in several areas of the camp and small piles of dirt, as if the ground was rising beneath them, and noted that the showers and portable toilets were clogging, but did not grasp the significance of these telling clues.¹⁴⁹

Detainees fortified the tunnel walls with a paste they made from water and milk provided by the U.S. military in their rations.¹⁵⁰ Remarkably, at the last minute, before what would have been one of the largest prison-breaks from any U.S.-run facility in history, one of the detainees lost his gumption and reported the plan to security guards on March 24, 2005.¹⁵¹ Using bulldozers, the guards leveled areas of the camp, destroying the tunnel underneath.¹⁵²

Days after U.S. forces destroyed the tunnel, Camp Bucca suffered another blow from its inmates when a violent riot erupted.¹⁵³ Inside the “off-limits” mosque, prisoners had created a primitive but effective weapons cache, where they had stashed concrete shards dug from the concrete around tent poles and bombs made from feces, socks, and flammable hand-sanitizer.¹⁵⁴

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* Colonel James B. Brown, Commander of the 18th Military Police Brigade that oversaw the three detention facilities in Iraq, said “[T]he escape would have been one of the largest from any U.S.-run facility in history.” *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

For four days, the prisoners rioted.¹⁵⁵ They did not kill any U.S. soldiers, but their impressive aim seriously injured several, including one officer who was hit in the eye by a chunk of cinder-block, fracturing his cheek in three places and breaking his teeth.¹⁵⁶ One soldier called the violence “absolutely incredible,” due to the sheer number of rocks and the accuracy with which they were thrown.¹⁵⁷

The detainees managed to hold off U.S. forces for almost four days.¹⁵⁸ Finally, the United States called for backup.¹⁵⁹ A Black Hawk helicopter arrived at the scene, and hundreds of soldiers encircled the compound.¹⁶⁰ Eventually, the detainees gave up their efforts, and the United States restored order at Camp Bucca.¹⁶¹

The United States had foolishly excluded guards from an area where prisoners congregated privately, thereby inviting this disastrous situation. The United States exceeded the Geneva Conventions’ requirements, but these actions backfired.

Commentary to the Geneva Conventions explains that while POWs should have an “adequate” place to practice their religion, the detaining power can use that place for other purposes too.¹⁶² It is not required to set aside a place devoted exclusively to religious practices. Therefore, under the Geneva Conventions, it would be sufficient if the tent were both a mosque and a dining facility, or served some other dual purpose. The Conventions do not contemplate a situation where the detention camp commanders only allow its prisoners, and no others, access to certain locations.

The Geneva Conventions state that POWs must follow the military disciplinary routine of their captors in order to preserve their right to religious latitude.¹⁶³ This is similar to the standard

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. GENEVA III COMMENTARY, *supra* note 11, at 225.

163. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 34.

applied in U.S. prisons. In *O'Lone v. Estate of Shabazz*, the Supreme Court said that prison officials could impinge on prisoners' right to exercise their religion for reasons related to legitimate prison management.¹⁶⁴ The Court upheld a regulation regarding prisoner work duties that precluded Muslim prisoners from attending religious services on Friday afternoons, as their faith required.¹⁶⁵

However, despite the problems at Camp Bucca and the Geneva Conventions' relatively modest requirements for religious accommodation, the United States continues to exceed these requirements. In June 2005, three months after the Camp Bucca riot, senior officials testified before Congress and explained that at Guantánamo Bay, religious practices are incorporated into "nearly every aspect of camp life."¹⁶⁶

Army Command Sergeant Major Anthony Mendez explained that during the "call to prayer" the United States guarantees Guantánamo Bay detainees twenty minutes of "uninterrupted time."¹⁶⁷ Despite the problems in Camp Bucca, Sergeant Major Mendez made clear that certain items remain "off-limits" to guards in Guantánamo Bay. He stated, "The rule of thumb for the guards is that you will not touch the Koran' . . . That's the bottom line."¹⁶⁸ Neither the U.S. military nor anyone else who testified mentioned Camp Bucca.

VIII. CAMP DISCIPLINE AND THE GENEVA CONVENTIONS

At the prison camp in Guantánamo Bay, the military does not have a disciplinary system to hold detainees accountable for crimes they commit while detained. The Geneva Conventions recognize that maintaining order in a prison camp is very important. The Geneva Convention Relative to the Treatment of Prisoners of War devotes an entire chapter to camp discipline. The Commentary to the Convention explains:

164. 482 U.S. 342, 351-53 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-41, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

165. *O'Lone*, 482 U.S. at 353.

166. Miles, *supra* note 126.

167. *Id.*

168. *Id.*

The prime purpose of measures of discipline is to ensure that the prisoner of war remains in the hands of the Detaining Power, so that he can neither do any harm to that Power within the camp, nor by escaping be enabled to take up arms again. It must not be forgotten that his life has been spared only on condition that he is no longer a danger to the enemy.¹⁶⁹

The Commentary further states that it is “essential for the implementation of the Convention that prisoners of war should be subject to military discipline.”¹⁷⁰ Under the Geneva Conventions, detainees are even required to salute the detaining powers.¹⁷¹ But that never happens in Guantánamo Bay—detainees do not salute their captors.

Articles 82 through 98 of the Geneva Convention Relative to the Treatment of Prisoners of War discuss disciplinary systems within POW camps. Article 82 states,

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders.¹⁷²

Therefore, under the Geneva Conventions, the United States should bring detainees to trial and sentence them for their crimes committed against U.S. prison guards in Guantánamo Bay. Under the Conventions, the United States could apply several different disciplinary sanctions including fines, discontinuance of privileges, fatigue duties, and confinement.¹⁷³ But, there is no disciplinary system in Guantánamo Bay, and the United States does not hold detainees accountable for their crimes and offenses. For this reason, the problems continue and U.S. prison guards are at risk.

IX. CONCLUSION

The United States has been criticized for failing to follow the rule of law in Guantánamo Bay. But, the “rule of law” that ap-

169. GENEVA III COMMENTARY, *supra* note 11, at 238.

170. *Id.*

171. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, art. 39.

172. *Id.* art. 82.

173. *Id.* art. 89.

plies to detainees held during a time of war is the Geneva Conventions, which guarantee only basic procedural rights, even for POWs. In many respects, operations in Guantánamo Bay actually *exceed* what the Geneva Conventions require. The U.S. military has adopted more robust procedures for Article 5 tribunals than the Geneva Conventions require and has applied the *Hamdi* decision in a way that provides greater procedural protections for detainees. In addition, the U.S. military has established unprecedented CSRTs and ARBs; allows more religious accommodation than the Geneva Conventions require; and has not instituted disciplinary proceedings in Guantánamo Bay for detainees who fail to follow camp rules.

Therefore, although the U.S. military has been widely criticized for failing to adhere to the rule of law, a careful examination of the Geneva Convention Relative to the Treatment of Prisoners of War and its commentary reveals the opposite. The United States adheres to,¹⁷⁴ and even exceeds, Geneva Convention principles in Guantánamo Bay.

174. Soon after taking office, President Obama required the Pentagon to examine the conditions at Guantánamo Bay to determine whether they complied with the Geneva Conventions. The Pentagon recently completed its study and concluded that conditions in Guantánamo Bay comply with the Geneva Conventions. Josh Meyer, *Pentagon Calls Guantanamo Humane*, L.A. TIMES, at A13. A Pentagon official stated: "The bottom line is that the report found that Guantánamo is in compliance with the Geneva conventions, which we have maintained for several years. So the report essentially validated our procedures and process." *Id.*