The Real Law on Torture

A Response to the DOD Working Group Report on Detainee Interrogations in the "Global War on Terrorism"

The Defense Department Working Group Report on Detainee Interrogations in the Global War on Terrorism ("Report") is the most detailed and, in some respects, the most influential, of the many documents that have emerged detailing the Administration's view of government power to conduct coercive interrogations of those in U.S. custody. The Report, issued to Secretary of Defense Donald Rumsfeld on April 4, 2003, recommends a series of interrogation techniques for use with those "outside of the sovereign territory of the United States" who have been designated "unlawful combatants" by the Administration. Secretary Rumsfeld relied on this Report in ordering implementation of 24 specific interrogation techniques at Guantanamo Bay[1] and in Iraq.[2]

The Report and its recommendations are based on numerous errors of law. Most important among these, the Report embraces the use of certain interrogation techniques that are in fact prohibited under U.S. and international law. While the Report borrows heavily from a 2002 Justice Department memo which Administration officials have now disavowed, it is unclear what specifically in that 50-page 2002 memo the Administration intends to reject. In the meantime, the Report – and many of the policies and practices it recommends – remain in place. This bulletin aims to set the legal record straight.

The Federal Torture Statute and Other U.S. and International Law Ban a Broad Range of Conduct Amounting to Torture or Other Cruel and Inhuman Treatment

1. Report Claim: Under the federal statute banning torture,[3] an interrogator would not be guilty of torture even if he "knows that severe pain will result from his actions, if causing harm is not his objective." So, for example, if an interrogator's *intent* is to extract information, then no matter what actions he intentionally takes to accomplish that goal, he is not committing torture. (Report, page 9.)

Response: The federal torture statute prohibits any "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or control."[4] According to the statute, torture is a so-called "specific intent" crime – a crime for which a prosecutor must show that the defendant engaged in the action aware of surrounding circumstances or "with some specified purpose in mind."[5] That the interrogator's central objective is to extract information, however, and not inflict severe physical harm, does not negate a showing of specific intent. Where an interrogator seeks information and employs coercive methods that he knows will cause pain difficult to endure he has exhibited specific intent for purposes of the torture statute. Indeed, as the Report acknowledges, a jury may infer from factual circumstances the specific intent.[6]

2. Report Claim: Under the federal torture statute, the interrogator has only committed torture by causing a victim to suffer prolonged mental harm if the interrogator *specifically intended* to cause prolonged mental harm. Threats of imminent death,

infliction of physical pain, and so forth, that *happen* to cause prolong mental harm – if these outcomes were not the interrogators intent – do not constitute torture. (Report, page 12.)

Response: The torture statute defines "severe mental pain or suffering" as the prolonged mental harm caused by or resulting from a number of predicate acts including intentional infliction of severe physical pain, administration of mind-altering substances, and threats of imminent death.[7] The plain language of the statute makes clear that an interrogator need not specifically intend to inflict prolonged mental harm, only that he specifically intends to commit one of the predicate acts – threatening imminent death, for example – that *causes* prolonged mental harm.

3. Report Claim: The torture statute does not preclude the forced administration of all drugs, but rather prohibits only the use of drugs that "disrupt profoundly then senses or the personality." Such harm would be manifested by "dementia," "brief psychotic disorder[s]," "obsessive-compulsive disorder behaviors," and "pushing someone to the brink of suicide." (Report, pages 14-16.)

Response: The torture statute prohibits "the administration or application of mind-altering substances *or other procedures* calculated to disrupt profoundly the senses or the personality."[8] The plain text thus prohibits two separate categories of conduct: (1) the administration of drugs ("mind-altering substances," as the Report acknowledges, is a common synonym for drugs), and (2) other procedures calculated to disrupt profoundly the senses or personality. Reading the statute to prohibit the forced administration of mind-altering substances of any kind – whether or not they profoundly disrupt the senses – is consistent with the constitutionally protected liberty interest in avoiding unwanted administration of antipsychotic drugs.[9] And it is only by a stretched reading of the statute that the phrase "disrupt profoundly the senses or the personality" could be read to modify "mind-altering substances." Indeed, common canons of statutory interpretation hold that in understanding the definition of a term – in this case, the term "mind-altering substances" – recourse to other surrounding words is only needed where the term itself is too ambiguous to have independent meaning.[10] As the Report itself makes clear, the well-worn phrase "mind-altering substances" is not such a term. Various court cases and state statutes have employed the phrases "drugs" and "mind-altering substances" interchangeably.[11]

4. Report Claim: Little attention need be paid to other federal laws and binding international laws that ban certain interrogation techniques. (Report, pages 17-19; 45-47; 58-61.)

Response: At least 19 U.S. laws and four international treaties that the United States has signed and ratified protect individuals held in U.S. custody from torture and other cruel, inhuman and degrading treatment. Here are some of the most important examples:

- The Federal War Crimes Act, 18 U.S.C. § 2441, provides federal jurisdiction over violations of the laws of war, including the Geneva Conventions. These

violations, referred to as "grave breaches," include "willful killing, torture or inhuman treatment…willfully causing great suffering or serous injury to body or health [of protected persons]."[12]

- Federal criminal laws prohibit numerous acts by federal officials, including: assault, maiming; "conspiracy against rights;" "deprivation of rights under color of law;" murder; sexual abuse; and abusive sexual contact.[13] Any of these offenses committed outside of the United States may be prosecuted under the Military Extraterritorial Jurisdiction Act.[14]

- Under the Uniform Code of Military Justice, first enacted by Congress in 1950, military personnel may be prosecuted for conduct including cruelty and maltreatment "of any person subject to his orders;" murder; manslaughter; rape and carnal knowledge; maiming; sodomy; assault; and conduct unbecoming an officer and a gentleman.[15]

- The International Covenant on Civil and Political Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[16]

The President's Power as Commander-in-Chief Does Not Immunize Federal Officers from the Application of Criminal Law

5. Report Claim: "The President enjoys *complete discretion* in the exercise of his Commander-in-Chief authority including in conducting operations against hostile forces." (Report, page 20.)

Response: As the Supreme Court just recently made clear in *Hamdi v. Rumsfeld*, "a state of war is not a blank check for the President . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[17] In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court rejected President Truman's claims of inherent domestic authority in wartime and held unconstitutional the President's summary seizure of the steel mills. [18] Particularly where, as here, Congress has directly prohibited certain forms of torture and ill-treatment in ratifying and implementing through legislation the Convention against Torture, the President's discretion in exercising his Commander-in-Chief powers in this realm is at its minimum. As reflected in the federal torture statute, described above, and in the Convention itself as ratified, Congress has prohibited torture and other cruel treatment; such treatment may not be excused on the basis of emergency or state of war, and superior orders do not excuse it.[19] Finally, whatever powers the President has to act in the short term to repel insurrection or invasion – the subject of most of the case law cited in the Report – such powers have no application to the general practice of coercive interrogation the Report aims to address.

6. Report Claim: "If executive officials were subject to prosecution for conducting interrogations when they were carrying out the President's Commander-in-Chief powers, 'it would significantly burden and immeasurably impair the President's ability to fulfill his constitutional duties.' These constitutional principles preclude an application of [the torture statute] to punish officials for aiding the President in exercising his exclusive constitutional authorities." (Report, page 21, 24.)

Response: In addition to the false constitutional premise, addressed above, on which this claim is based, the Supreme Court has made clear that executive officials who commit unlawful acts pursuant to presidential order are not, solely on that basis, made immune from prosecution in court.[20] Indeed, criminal liability for abuses committed by federal officials against detainees attaches not only to those directly responsible for carrying out such acts, but also those who assisted, abetted, ordered or otherwise caused such offenses to occur. Thus, for example, a military or civilian superior may be held legally responsible not just for unlawful orders he may require troops under his command to carry out, but also for the failure "to take such measures as [a]re within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[21]

7. Report Claim: "Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation's history, including recent conflicts in Korea, Vietnam, and the Persian Gulf. Recognizing this authority, Congress has never attempted to restrict or interfere with the President's authority on this score." (Report, page 24.)

Response: There is no question that Presidents have – as is appropriate – captured, detained, and questioned combatants in past armed conflicts. But Congress' very passage of the torture statute indicates that the President's discretion is limited. The United States has also officially observed Geneva Convention protections relating to capture, detention and questioning of combatants in every conflict in which it has engaged since World War II, including the Vietnam War and the first Gulf War.[22] In contrast, in detention practices in Afghanistan and Iraq, the current administration has stated at times that either the Geneva Conventions do not apply or that the status of certain prisoners was undetermined and hence the prisoners would not be afforded convention protections.[23] Photographs and accounts of interrogations indicate numerous violations of the Geneva Conventions ranging from homicide to mock executions to humiliating and degrading treatment. And when U.S. personnel have violated U.S. and international law obligations in the past, the U.S. government has sought to apply criminal and other appropriate sanctions to check this unlawful exercise of authority.[24]

Claims of Emergency, Necessity, and Self-Defense Do Not Protect Interrogators or their Superiors from Criminal Prosecution for Acts of Torture

8. Report Claim: It is a defense to criminal prosecution for torture that interrogators were acting out of "necessity" to protect the United States against terrorist activities. (Report, pages 25-27.)

Response: The Report acknowledges that "[t]he [necessity] defense is available 'only in situations wherein the legislature has not itself, in its criminal statute[s], made a determination of values." The Report claims that "Congress has not explicitly made a determination of values vis-à-vis torture." But of course Congress hade such a determination of values; Congress ratified the Convention against Torture and passed the federal statute banning torture. Significantly, article 2 of the Convention against Torture states, in relevant part: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[25] The Convention against Torture is the supreme law of the land, and as such should be viewed as explicitly precluding any recourse to a necessity defense. Indeed, the Report acknowledges the Nuremberg Tribunal's holding that the "rights of the innocent population … must be respected even if military necessity or expediency decree otherwise."[26]

9. Report Claim: It is a defense to criminal prosecution for torture that interrogators were acting in "self-defense" to protect the United States against terrorist activities. (Report, pages 27-31.)

Response: Case law and legislation on self-defense require that a person show he was confronted by a serious threat of bodily harm or death, the threat was imminent, and his response was both necessary and proportionate.[27] The general practice of coercive interrogation contemplated by the Report – motivated by a generalized concern of potential terrorist attacks against the nation instead of against the person himself – does not come close to constituting the kind of imminent threat required to justify the use of self-defense. The Report does not cite any cases suggesting that the government might immunize an entire policy by virtue of a self-defense rationale.

10. Report Claim: Coercive interrogations involving torture by U.S. military and personnel regarding potential terrorist attacks are justified and do not constitute "cruel and unusual punishment" under the Eighth Amendment. (Report, page 39.)

Response: "The unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."[28] Where the risk of harm to a prisoner is obvious, the custodian has acted with the sufficient state of mind so as to have violated the prohibition.[29] Exposing prisoners to extreme temperatures coupled with deprivations of proper clothing and numerous other interrogation techniques proposed in the Report present such obvious risks of harm. The exigencies of war do not excuse such cruel treatment. Even in an emergency situation, "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated."[30] Torture must be viewed as such an act. Torture and cruel, inhuman, or degrading treatment or punishment must be seen as "those deprivations denying the minimal civilized measure of life's necessities . . . sufficiently grave to form the basis of an Eight Amendment violation."[31] Indeed, the Supreme Court has often stated that "'[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of

decency that mark the progress of a maturing society.'"[32] These standards of decency must derive in large measure from the world consensus, as expressed in the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and Congress' implementation of the prohibition in statutes and regulations, which provide no exceptions for torture.[33]

Binding International Treaties Constrain U.S. Detention and Interrogation in the "War on Terror"

11. Report Claim: The Convention against Torture "prohibits torture only as defined in the U.S. understanding, and prohibits 'cruel, inhuman or degrading treatment or punishment' only to the extent of the U.S. Reservation relating the U.S. Constitution." (Report, pages 4-6).

Response: This claim is just right, on its face. But even under the Torture Convention as limited by U.S. law – as reflected in the U.S. Reservation to the Convention and in the torture statute itself – a number of incidents already documented as part of the interrogation techniques employed by U.S. personnel violate the Convention against Torture. For example, subjecting a person to mock execution violates the federal torture statute under all U.S. reservations and understandings.[34] Similarly, exposure to low temperatures in conjunction with denial of adequate warmth violates the Eighth Amendment, thereby constituting cruel, inhuman or degrading treatment or punishment under the U.S. reservation.[35]

12. Report Claim: The Geneva Convention (III) Relative to the Treatment of Prisoners of War and the Geneva Convention (IV) Relative to the Protection of Civilian Personnel in time of War do not apply to al Qaida and Taliban detainees and therefore the Conventions' restrictions on cruel treatment do not protect the detainees. (Report, pages, 4, 58.)

Response: Under the laws of war, one is "either a prisoner of war and as such covered by the Third Convention, [or] a civilian covered by the Fourth Convention. There is no intermediate status; nobody in enemy hands can be outside the law."[36] Detainees should have received a review as to their status as unlawful combatants or prisoners of war under Article 5 of Geneva Convention III. [37] The President's unilateral determination does not satisfy the requirements of Article 5 in determining a prisoner's status. The military has codified this principle in its own manual, stating that those determined not to be prisoners of war are to be treated as "protected persons" under the Fourth Convention.[38] The Fourth Convention explicitly prohibits torture, corporal punishment, or physical suffering of protected persons.[39]

13. Report Claim: "The United States has maintained consistently that the [International Covenant on Civil and Political Rights] does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict," and therefore its

prohibition against torture and cruel, inhuman or degrading treatment or punishment should not apply to most of the captured detainees. (Report, page 8.)

Response: The International Covenant on Civil and Political Rights (ICCPR), signed and ratified by the United States, requires that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Report offers no support for its characterization of the U.S.'s view as to the limited scope of the ICCPR. As to any arguments that the ICCPR does not apply extraterritorially, the ICCPR Human Rights Committee ruled that "it would be unconscionable . . . to permit a State party to perpetrate violations . . . on the territory of another State, which violations it could not perpetrate on its own territory."[40]

14. Report Claim: Customary international law does not bind the Executive because it is not federal law. Any presidential decision regarding detention of al-Qaida or Taliban prisoners would override customary international law and therefore its prohibitions against torture and degrading treatment would not apply to detainees. (Report, pages 6, 60.)

Response: The customary law of armed conflict prohibits, in pertinent part, "violence to the life, health, or physical or mental well-being of persons, [including] . . . torture of all kinds, whether physical or mental . . . corporal punishment; . . . outrages upon personal dignity, in particular humiliating and degrading treatment . . . and threats to commit any of the foregoing acts."[41] The U.S. military has codified this understanding in its rules of engagement: "U.S. forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations."[42] The Supreme Court has made clear that customary international law is part of the law of the United States.[43] Indeed, these "customs and usages of civilized nations" formed much of the basis of American law.[44] As William H. Taft, IV, legal adviser to the U.S. Department of State wrote in 2003, "[t]he law of armed conflict reflect moral principles, but more than that it is *binding law*. . . The United States . . . does regard the provisions of Article 75 [prohibiting torture and humiliation] as an articulation of safeguards to which all persons in the hands of an enemy are entitled."[45]

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[1] DOD Memorandum for the Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism, April 16, 2003, TAB A. The U.S. Southern Command does not cover military activities in Iraq and Afghanistan but does encompass those at Guantanamo Bay. US Southern Command Profile, available at http://www.southcom.mil/home/ (accessed June 27, 2004). The 24 authorized techniques are: "Direct," "Incentive/Removal of Incentive," "Emotional Love," "Emotional Hate," "Fear Up Harsh," "Fear Up Mild," "Reduced Fear," "Pride and Ego Up," "Pride and Ego Down," "Futility," "We Know All," "Establish Your Identity," "Repetition Approach," "File and Dossier," "Mutt and Jeff," "Rapid Fire," "Silence," "Change of Scenery Up," "Change of Scenery Down," Dietary Manipulation," "Environmental Manipulation," "Sleep Adjustment," "False Flag," and "Isolation." The same 24 techniques were apparently authorized for use at Abu Ghraib prison as well. Scott Higham, Joe Stephens and Josh White, "Dates on Prison Photos Show Two Phases of Abuse," Washington Post, June 1, 2004; see also "Interrogation Rules of Engagement," available at http://www.humanrightsfirst.org/us_law/PDF/abuse/iraq-interrogation-rules1.pdf (accessed June 2, 2004).

[2] The very same 24 interrogation techniques were authorized at the very least for use by the 205th Military Intelligence Brigade at Abu Ghraib. However it appears that none of the interrogation methods required approval from the Secretary of Defense. Thus there appears to have been more leeway given to subordinates in authorizing the techniques in Iraq than at Guantanamo Bay. See "Interrogation Rules of Engagement," available at http://www.humanrightsfirst.org/us_law/PDF/abuse/iraq-interrogation-rules1.pdf (accessed June 26, 2004). The "Interrogation Rules of Engagement" were handed over to members of Congress during the second week of May in conjunction with hearings related to the Taguba Report. The Army Inspector General Paul T. Mikolashek issued a report on detainee operations, finding that U.S. armed forces in both Iraq and Afghanistan had relied on the DOD Memorandum for the Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism, April 16, 2003, in crafting interrogation policies there, even though these interrogation techniques were authorized for use only at Guantanamo Bay. Department of the Army, The Inspector General, "Detainee Operations Inspection," at 39-41, July 21, 2004, available at http://globalsecurity.org/military/library/report/2004/daig_detainee-ops_21jul2004.pdf (accessed on August 10, 2004).

[3] 18 U.S.C. § 2340.

[4] 18 U.S.C. §§ 2340(1); 2340A.

[5] Sanford Kadish and Stephen Schulhofer, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 218-20 (6th ed. 1995); Joshua Dressler, UNDERSTANDING CRIMINAL LAW 96 n. 8, 109 (2d ed. 1995).

[6] Report, page 9 (citing cases upholding jury inferences of specific intent based upon factual circumstances).

[7] 18 U.S.C. § 2340(2).

[8] 18 U.S.C.(2)(B) (emphasis added).

[9] See United States v. Sell, 539 U.S. 166, 177-79 (2003); Washington v. Harper, 494 U.S. 210. 221 (1990).

[10] See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 702 (1995).

[11] See, e.g., Cal. Penal Code § 3500(c) (West Supp. 2000) ("Psychotropic also include mind-altering . . . drugs . . ."); Minn. Stat. § 260B.20(b) (2003) (" . . . the risk of the use of alcohol, drugs, or other mind-altering substances . . ."); United States v. Kingsley, 241 F.3d 828, 834 (6th Cir. 2001) (referring to controlled substances as "mind-altering substance[s]").

[12] Third Geneva Convention, Art. 130, available at http://www.unhchr.ch/html/menu3/b/91.htm (accessed on July 1, 2004); Fourth Geneva Convention, Art. 147, available at http://www.unhchr.ch/html/menu3/b/91.htm (accessed on July 1, 2004).

[13] 18 U.S.C. §§ 113; 114; 241; 242; 1111; 2242; 2244.

[14] 18 U.S.C. §§ 3261-3267 (2000).

[15] 10 U.S.C. §§ 893; 918; 919; 920; 924; 925; 928; 933.

[16] International Covenant on Civil and Political Rights, Art. 7, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (accessed July 1, 2004).

[17] Hamdi v. Rumsfeld, 542 U.S. ___ (2004). Slip Op. at 29.

[18] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[19] See U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture."); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (holding President's order to naval officer could not legalize what would otherwise have been a trespass).

[20] Cf. United States v. Nixon, 418 U.S. 683 (1974).

[21] In re Application of Yamashita, 357 U.S. 1, 16 (1946).

[22] Jennifer Elsea, "Treatment of 'Battlefield' Detainees' in the War on Terrorism," Congressional research Service Report for Congress, RL31367, April 11, 2002, p. 28, available at http://fpc.state.gov/documents/organization/9655.pdf (accessed July 19, 2004); Department of Defense, "Title V Report to Congress on the Conduct of Hostilities in the Persian Gulf," Appendix L, pp. 577-588 (2002), available at http://www.ndu.edu/library/epubs/cpgw.pdf (accessed July 19, 2004).

[23] Memo Signed by President Bush, "Humane Treatment of al Qaeda and Taliban Detainees," Feb. 7, 2002; "U.S. Holding 4,000 Extra Detainees," Agence France-Presse, Sept. 16, 2003, available at http://dawn.com/2003/09/17/int6.htm (accessed July 19, 2004).

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[24] See, e.g., U.S. v. Calley, 46 C.M.R. 1131 (1973) (reviewing General Court-Martial of Lieutenant for his role in massacre at My Lai); United States Army, I Report of the Department of the Army Review of the Preliminary Investigations Into the My Lai Incident 8-14 ("Peers Report") (1970), available at http://www.law.umkc.edu/faculty/projects/ftrials/mylai/MYL_Peers.htm (accessed July 20, 2004)

[25] U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2.2, available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm (accessed July 19, 2004).

[26] United States v. Wilhelm List, available at http://real-ale.wcl.american.edu/etp/MilitaryTribunals/NMT/HostageCase.html.

[27] WAYNE R. LAFAVE ET AL., CRIMINAL LAW 495 (3d ed. 2000) (footnote omitted).

[28] Whitely v. Albers, 475 U.S. 312, 319 (1986) (citations omitted).

[29] Hope v. Pelzer, 536 U.S. 730, 738 (2002).

[30] Hudson v. McMillan, 503 U.S. 1, 9 (1992).

[31] Id.

[32] Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (holding denial of citizenship as wartime measure "cruel and unusual punishment")).

[33] Atkins, 536 U.S. at 316 n. 21 (relying in part on international community's views opposing execution of mentally retarded).

[34] The Report itself acknowledges mock executions could satisfy its narrow definition of 18 U.S.C. § 2340. Report, page 16. The press has reported on mock executions conducted by U.S. personnel. See, e.g., Justin Huggler, "Boy, 16, Was Subjected to Mock executions by US Interrogators," The Independent (London), May 10, 2004.

[35] See Report, page 37; Human Rights Watch, "Enduring Freedom: Abuse by U.S. Forces in Afghanistan," at 35-36, http://hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf (accessed June 27, 2004).

[36] ICRC Commentary to the IV Geneva Convention, p. 51 (Jean S. Pictet ed., 1958), available at http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/18e3ccde8be7e2f8c12563cd0042a50b?OpenDocument (accessed June 23, 2004).

[37] Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, §§1-5, 1-6).

[38] Department of the Army Field Manual FM 27-10, *The Law of Land Warfare* (1956) (Army Field Manual), ¶ 73 ("If a person is determined by a competent tribunal, acting in conformity with Article 5 [of the Third Geneva Convention], not to fall within any of the categories listed in Article 4, he is not entitled to be treated as a prisoner of war. He is, however, a protected person within the meaning of Article 4 [of the Fourth Geneva Convention].").

[39] Geneva Convention (IV) Relative to the Protection of Civilian Personnel in time of War, art. 32.

[40] Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at para. 12.3 (1981), available at http://www1.umn.edu/humanrts/undocs/session36/12-52.htm (accessed on June 23, 2004).

[41] 1977 Protocol I, art. 75(2), available at http://www.icrc.org/IHL.nsf/4e473c7bc8854f2ec12563f60039c738/086f4bb140c53655c12563cd0051e027?OpenDocument (accessed on June 23, 2004).

[42] CJCSI 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, encl. A., para. 1g (Jan 2000).

[43] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[44] The Declaration of Independence, para. 1 (U.S. 1776).

[45] William H. Taft, IV, *Symposium: Current Pressure on International Humanitarian Law: The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003) (emphasis added).