The following analysis would apply to enemy combatants, whether citizens or non-citizens. This is an excerpt of a larger paper, "An Assessment of the Recommendations of the American Bar Association Regarding the Use of Military Commissions in the War on Terror," by Lee A. Casey, David B. Rivkin, Jr., & Darin R. Bartram.

The Question of Indefinite Detention.

May individuals captured during the United States' war on terror may be held, without trial, for protracted periods of time?[15] Secretary of Defense Donald Rumsfeld has, in fact, suggested that at least some of the al Qaeda and Taliban members, now housed at Guantanomo Bay, may be held indefinitely. The answer to this question is far from clear. It is impossible to identify a rule of international law that would conclusively prohibit the detention of captured al Qaeda and Taliban members on an indefinite basis. Moreover, it can be argued -- with some force -- that the unique circumstances involved in the conflict between the United States and al Qaeda would justify indefinite detention for certain individuals, even if this required derogation from an established international law norm.

At the same time, even if the indefinite detention of certain al Qaeda and Taliban members is legally supportable, to hold such individuals for protracted periods beyond the close of hostilities without some form of judicial process would represent a dramatic departure from ancient Anglo-American legal traditions. The decision whether to hold individual detainees on an indefinite basis will be one of the most difficult to face a President in the past sixty years. Before a determination is made to hold any detainee "indefinitely," all other options should be fully explored, and the issue should be the subject of a vigorous public debate.

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[15] To date, no member of either organization, captured in the United States, has been subjected to the November 13 Military Order. Therefore, we limit our analysis to those individuals captured and held overseas to whom, under the Supreme Court's precedents, the Constitution's protections do not apply. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Constitutional guarantees do not extend to non-U.S. citizens who are not present on U.S. territory).

A. The Status of "Unlawful Combatant" in International Law.

The detainees now in custody at Guantanomo Bay are not ordinary criminal suspects, such as the individuals responsible for the original World Trade Center bombing in 1993 or the Oklahoma City bombing in 1995, who must be charged and brought to trial, or released, in accordance with rigorous constitutional and statutory requirements guaranteeing a speedy trial. These individuals were captured in the context of an international armed conflict, and fall into the category of "unlawful belligerents" or "unlawful combatants." Their legal rights and liabilities must be determined with reference to that status, in accordance with the Laws of War.[16]

In this regard, despite the assertions of "human rights" activists, such as South African Judge Richard Goldstone, that international law does not recognize the category of unlawful combatant (which he claims was "invented" by the United States Supreme Court in *Ex parte Quirin*), this classification has a hoary pedigree.[17] It is firmly rooted in both international law and the Law of War. As early as 1582, the Judge Advocate General of the Spanish Army in the Netherlands wrote with respect to those with no lawful right to engage in warfare:

> The laws of war, therefore, and of captivity and of postliminy [the restoration of rights or status after release], which only apply in the case of enemies, can not apply in the case of brigands . . . . Since then those alone who are "just" enemies [*i.e.,* those enjoying the sanction of a state under the laws of war] can invoke to their profit the law of war, those who are not reckoned as "hostes," and who therefore have no part or lot in the law of war are not qualified to bargain about matters that only inure to the benefit of "just" enemies.[18]

Similarly, the 18th Century international law publicist Emmerich de Vattel recognized the category of unlawful combatant, and described it thus:

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[16] *See generally* Lee A. Casey, David B. Rivkin, Jr., Darin R. Bartram, *Detention and Treatment of Combatants in the War on Terrorism* (The Federalist Society for Law & Public Policy Studies 2002) [hereinafter *Detention and Treatment of Combatants*].

[17] Judge Goldstone's remarks were reported, among other places, in Clare Dyer, "POWs or criminals, they're entitled to protection," Manchester Guardian Weekly, p. 24 (Feb. 13, 2002). The category of unlawful combatant has, of course, been called by other names over the years, including "unlawful belligerent," "unprivileged belligerent," and "franc-tireur." Judge Goldstone's argument that this status of belligerent does not exist because the Supreme Court may have been the first to use the term "unlawful combatant" is similar to claiming that "trucks" do not exist because in other English-speaking countries large, heavy-duty motorized vehicles are called "lorries."

[18] Balthazar Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* 60 (John Pawley Bate, Trans. 1912).

> When a nation or a sovereign has declared war against another sovereign by reason of a difference arising between them, their war is what among nations is called a lawful war, and in form; and as we shall more particularly shew the effects by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers.[19]

In the mid-19th Century, the Instructions for the Government of Armies of the United States in the Field, provided that "[m]en, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army, and without sharing continuously in the war, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."[20]

Thus, the classification of unlawful combatant was well established by the beginning of the 20th Century, when the minimum requirements necessary for recognition as a lawful belligerent (membership in a group with a recognized command structure, uniform or other distinguishing insignia, that carried arms openly and that conducted its operation in accordance with the laws of war), were incorporated into Article I of the 1907 Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land.[21] The 1914 Manual of Military Law published by the British War Office explained both the distinction, and its purpose, as follows:

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[19] Emmerich de Vattel, *The Law of Nations* 481 (Luke White ed. Dublin 1792).

[20] *See* Instructions for the Government of Armies of the United States in the Field General Orders, No. 100, April 24, 1863, *reprinted in* 7 John Moore, *A Digest of International Law* §174 (1906).

[21] Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) [hereinafter "Hague Convention" or "Hague Regulations"]. The conditions that must be satisfied before lawful belligerency is established are as follows:

> Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:--
>
> > (1) To be commanded by a person responsible for his subordinates;
> > (2) To have a fixed distinctive emblem recognizable at a distance;
> > (3) To carry arms openly; and

> The division of the enemy population into two classes, the armed forces and the peaceful population, has already been mentioned. Both these classes have distinct privileges duties, and disabilities. *It is one of the purposes of the laws of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both. In particular, that an individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, to pretend to be a peaceful citizen. . . .*
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> Peaceful inhabitants . . . may not be killed or wounded, nor as a rule taken prisoners . . . . *If, however, they make an attempt to commit hostile acts, they are not entitled to the rights of armed forces, and are liable to execution as war criminals.*[22]

The classification of unlawful combatant remains fully applicable today, and was not eliminated by the various agreements entered after World War II, in particular the Geneva Conventions of 1949, as some have claimed.[23] In 1977, during the negotiations that resulted in Protocol I and Protocol II to the Geneva Conventions of 1949, a number of developing countries *attempted* to achieve a rule that would have been more protective of unlawful combatants, entitling them to protection "equivalent" to those of POWs.[24]

> (4) To conduct their operations in accordance with the laws and customs of war.

[22] War Office, *Manual of Military Law* 238 (1914). Although it was fully recognized that "irregular" combatants could achieve the status of lawful belligerents, this was *only* if they complied with the basic requirements of the Hague Regulations. Anyone not complying with those requirements, constituted an unlawful belligerent who was not entitled to prisoner of war status, and would could be punished for his unlawful belligerency. A point confirmed in the current U.S. Field Manual on The Law of Land Warfare: "[p]ersons, such as guerrillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." *See* Department of the Army*, Field Manual on The Law of Land Warfare* 34 (July 1956).

Significantly, this included the regular forces of a state if they also failed to meet the minimum requirements: "[i]t is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces. *See Manual of Military Law,* at 240.

[23] *See Detention and Treatment of Combatants, supra* note 16, at 2-7.

[24] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), Art. 44(2) [hereinafter Protocol I]. Thus, under the language of Protocol I, the status of unlawful

The United States, however, rejected this effort to undermine the traditional laws of war, and repudiated Protocol I for this very reason. In his note transmitting Protocol II (dealing with armed conflicts within a single country) to the Senate for its advice and consent, President Reagan explained the American rejection of Protocol I as follows:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form . . .
>
> It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.[25]

Thus, overall, the status of unlawful combatant is firmly grounded in international law, and the rules applicable to such individuals may be applied by the United States to members of al Qaeda and the Taliban fully in accordance with recognized and accepted international norms.[26]

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combatant would not have been eliminated (and such individuals could still have been punished as having violated the laws and customs of war), but groups operating in violation of the Hague Regulations would have been given more protection than hitherto required. Accordingly, the United States took a very strong position rejecting even these changes, which it feared would undermine the traditional Hague Regulations in any case.

[25] Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (Jan. 29, 1987), 1977 U.S.T. LEXIS 465.

[26] For an analysis of the failure of either al Qaeda or the Taliban to qualify as "lawful" belligerents, *see Detention and Treatment of Combatants, supra* note 16, at 9-13.

B. The Detention of Captured Unlawful Combatants.

The legal regime applicable to unlawful combatants is very harsh.[27] Traditionally, unlawful combatancy was punishable by death, often with little or no formal "process" beforehand. By the beginning of the 20th Century, it was recognized, by at least some states, that unlawful combatants could not be killed out of hand by officers in the field, but that some process was required before such individuals could be executed.[28] This rule was applied by the military tribunals established by the Allies after World War II to try Axis nationals accused of war crimes and crimes against humanity, and is now firmly established as a requirement of customary international law.[29]

However, the precedents in this area are largely limited to cases where the defendants (German or Japanese officers) had, indeed, put individuals accused of being "unlawful combatants" (either resistance fighters, downed Allied airmen, or civilians) *to death* without trial or process of any kind.[30] As a result, they are not obviously controlling (even by analogy) with respect to the question whether unlawful combatants may be held in "detention" (even for protracted periods) without trial.[31] Moreover, although unlawful combatants may not be punished without some form of judicial process, albeit a military one, detention does not necessarily constitute "punishment."

1. Detention of Unlawful Combatants During the Conflict.

There seems to be little doubt that unlawful combatants, although they are not entitled to the status and privileges of legitimate prisoners of war ("POWs") under the

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[27] ABCNY Report, *supra* note 1, at 13.

[28] *See e.g., Manual of Military Law*, *supra* note 22, at 242 ("It is not . . . for officers or soldiers in determining their conduct towards a disarmed enemy to occupy themselves with his qualifications as a belligerent. Whether he belongs to the regular army or to an irregular corps, is an inhabitant or a deserter, their duty is the same: they are responsible for his person and must leave the decision of his fate to competent authority. No law authorizes them to have him shot without trial, and international law forbids summary execution absolutely.").

[29] *See Detention and Treatment of Combatants, supra* note 16, at 7-9.

[30] *See, e.g., The German High Command Trial: Trial of Wilhelm von Leeb and Thirteen Others*, (Case No.72), 12 L.Rpts. of Trials of War Criminals 1, 85 (U.N. War Crimes Comm. 1949); *The Hostages Trial: Trial of Wilhelm List and Others (Case No. 47)*, 8 L.Rpts. of Trials of War Criminals 34, 57 (U.N. War Crimes Comm. 1948); *Trial of General Tanaka Hisakasu and Five Others (Case No. 33)*, 5 L.Rpts. of Trials of War Criminals 66 (U.N. War Crimes Comm. 1948); *Trial of Carl Bruner, Ernst Schrameck and Herbert Falten (Case No. 45),* 8 L.Rpts. of Trials of War Criminals 15, 16-19 (U.N. War Crimes Comm. 1948); *Trial of Josef Altstotter and Others (Case No. 35)*, 6 L.Rpts. of Trials of War Criminals 1 (U.N. War Crimes Comm. 1948).

[31] Although, it should be noted, international practice permits the detention for lengthy periods even of ordinary criminal suspects. *See e.g., W. v. Switzerland*, No. 14379/88 (ECHR 1993) (period of pre-trial detention lasting four years found not to be unreasonable.).

Geneva Conventions,[32] can nevertheless, like POWs, be detained until the conclusion of hostilities. In this regard, although unlawful combatants *may* be punished for their unlawful belligerency, there is no rule of international law *requiring* that they be punished, with death or otherwise, and their detention at least until the close of hostilities would be fully supported by the same rationale that underpins the rule permitting POWs to be held -- to prevent their return to the fight.[33]

This, of course, may well involve a very significant length of time. Even hostilities between states may last for protracted periods. For example, taking just the wars in which the United States was involved (at least for some portion of the conflict) over the past century, the First World War lasted four years (1914-1918), the Second World War lasted six years (1939-1945),[34] the Korean War lasted three years (1950-1953), and the Vietnam War lasted sixteen years (1959-1975), with significant U.S. involvement lasting from 1963-1973. Some U.S. POWs were held by North Vietnam for nearly a decade. Only the 1991 Gulf War was concluded in less than one year. In the case of an undeclared war, particularly one where at least some of the parties are not state actors, the precise point at which the conflict ends must be determined based on all of the facts and circumstances at the time. As Secretary of State William Seward explained in 1868:

> It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.[35]

Therefore, the United States can lawfully hold captured al Qaeda and Taliban members during the conflict, even though this may involve a considerable period of detention.

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[32] *See Detention and Treatment of Combatants, supra* note 16, at 7-9.

[33] Under the Geneva Conventions, the recognized purpose and justification of confinement during the conflict is the "legitimate concern -- to prevent military personnel from taking up arms once more against the captor State." International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War* 546-47 (1960) [hereinafter *ICRC Commentary on Geneva Convention III*].

[34] In fact, the Second World War can be dated from 1931-1945 if Japan's invasion of China, rather than Hitler's attack on Poland in 1939, is considered as the conflict's actual beginning.

[35] Letter of Secretary of State Seward to Mr. Goni, Spanish Minister, July 22, 1868, *reprinted in* 7 John Moore, *A Digest of International Law* §1163 (1906). Indeed, even in the case of a declared war, the Supreme Court has ruled that the state of war does not "cease with a cease-fire order." *Ludecke v. Watkins*, 335 U.S. 160, 167 (1948).

2. Detention After Hostilities Have Concluded.

Whether unlawful combatants may be held after hostilities have concluded, *i.e.*, after both the Taliban in Afghanistan, and al Qaeda globally can no longer undertake hostile action against the United States, is a more difficult question. Unlike POWs, who are specifically entitled to repatriation at the close of hostilities under the Geneva Convention III Relative to the Treatment of Prisoners of War, there is no clearly applicable rule requiring the release of captured unlawful belligerents.[36] The provisions of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949), which require the repatriation of civilian "internees" at the close of a conflict,[37] also are inapplicable since that convention benefits civilians, and not combatants.[38] Moreover, the proper application of internationally recognized rules

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[36] *See* Geneva Convention III Relative to the Treatment of Prisoners of War (1949), Art. 118. Circumstances permitting, very seriously injured or sick POWs, those not likely to survive for instance, must be repatriated immediately. Art. 109, 110. At the same time, POWs who have been convicted of criminal (as opposed to mere disciplinary) offenses may be held in custody until the completion of these proceedings and any criminal sentence. Art. 119.

[37] Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), Arts.

[38] According to the ICRC commentary, the treaty does contemplate some protected status for individuals, principally civilian in character, who undertake acts of unlawful belligerency – such as sabotage, espionage, or membership in a "partisan" movement or the *levee en masse*. Such individuals, in the ICRC's view, cannot be treated as "outside the law." *See ICRC Commentary on Geneva Convention IV, supra* note 33, at 50-51 (notably, this point was expressed as a "satisfactory solution" for the ICRC, rather than the clear requirements of the treaty).

At the same time, a treaty must be interpreted in accordance with its historical context, *see e.g.*, Ian Brownlie, *Principles of Public International Law* 628-29 (4th ed. 1990), and the Geneva Conventions were negotiated and agreed with reference to traditional armed conflicts between nation-states like World War II. An individual's status under the treaties is inextricably linked to his or her status as a national of either a belligerent state (one engaged in the conflict), or of a neutral state. For example, in defining the status of "protected person," Article 4 of the treaty provides that:

> [n]ationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

Geneva Convention IV, Art. 4. No provision is made for individuals who, as in the case of al Qaeda, are neither the nationals of a belligerent state (one actively engaged in the conflict), but who have themselves (without reference to their own countries of origin) made war. This same is true of the Taliban, which has been ousted from power in

against arbitrary imprisonment (*e.g.,* Article 9 of the International Covenant on Civil and Political Rights), are unclear.

As noted above, it has long been recognized that "detention" does not necessarily constitute punishment. As the ICRC explained in discussing the internment of civilians during wartime, a practice still permitted under the Geneva Conventions, "[i]nternment is simply a precautionary measure and should not be confused with the penalty of imprisonment."[39] The indefinite detention of suspected terrorists has been approved by at least one "international" court, the European Court of Human Rights, in the form of "internment" in *Ireland v. United Kingdom* (1978).[40] Similarly, the United States Supreme Court has noted:

> [T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.
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> * * *
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> We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.[41]

Afghanistan, but which continues the conflict on its own account. (Of course, to the extent that the treaty were considered to be applicable, nationals of states maintaining diplomatic relations with the United States -- such as Saudi Arabia and Afghanistan -- also would not be considered "protected persons.")

Indeed, again and again the ICRC commentary notes the importance of the specific experiences of World War II to the treaty's provisions. *See e.g., ICRC Commentary on Geneva Convention IV, supra* note 33, at 21, 38, 83, 118, 249, 273, 278, 345, 380, 423, 491, 499. The circumstances now faced by the United States, which is confronted with groups that are entirely belligerent in character, are comparable to the armed forces of a state, but that fail to meet (indeed, have rejected) the requirements of lawful belligerency. Neither the Geneva Convention, nor the ICRC commentary, contemplated this situation. It was, however, recognized that "[t]here could be no question of obliging a State to observe the Convention in its dealings with an adverse Party which deliberately refused to accept its provisions." *Id.* at 19.

[39] *ICRC Commentary on Geneva Convention IV, supra* note 33, at 384.

[40] The United States Supreme Court's opinion in *Ex parte Quirin*, the only case in which it dealt specifically with unlawful belligerents, such as al Qaeda and the Taliban, did not address this question. However, the Court has made clear that the Constitution's guarantees do not extend to non-U.S. citizens who, like the detainees held in Cuba, are not present on U.S. territory. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[41] *United States v. Salerno*, 481 U.S. 739, 746 & 748 (1987).

In determining whether any particular form of detention is punitive, requiring due process before its imposition, the key question is the purpose of the incarceration. The Supreme Court, for example, has looked to whether the detention in question has a punitive purpose, either in the form of retribution or deterrence -- the "primary objectives of criminal punishment."[42] In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court upheld the Kansas Sexually Violent Predator Act, which permitted the civil commitment of individuals, previously convicted of sexually violent offenses, who were likely to engage in "predatory acts of sexual violence." It rejected the petitioner's argument that the act involved a "criminal" proceeding, and concluded that the statute involved a form of administrative detention. The Court reasoned that the statute was not "retributive because it does not affix culpability for prior criminal conduct," 521 U.S. at 361-62, and that it was not intended as a deterrent because the individuals involved, because of a mental or personality disorder, were "unlikely to be deterred by the threat of confinement." *Id.* at 362-63.

In the case of al Qaeda and Taliban members, it may be argued that the purpose of their detention is not to "affix culpability" for criminal acts (although they could be criminally prosecuted), but to ensure that they do not rejoin the battle against the United States. This would be merely an extension of the rationale for holding such individuals, like legitimate POWs, for the duration of the armed conflict. Detention beyond the close hostilities would be required because, unlike in the case of POWs, there is no recognized authority, in the form of a state, with which the United States can conclude a peace agreement, and that can guarantee the "demobilization" of these individuals once they are repatriated.

Similarly, there is little doubt that the individuals involved would not be deterred by the threat of detention. It is clear that they do not believe that they have, in any sense, been engaged in criminal conduct, and even the prospect of certain death has not deterred the actions of some in their efforts to attack the United States. Indeed, most significantly, their determination to continue the war against the United States is not obviously subject to the sort of cost/benefit reasoning that ordinary criminals (including other terrorists like the Provisional Irish Republican Army), can be expected to perform. The evidence strongly suggests that many al Qaedas and Talibs believe that they are engaged in a "holy war," sanctioned by God, and that they will be rewarded in heaven for acts which carry the severest penalties on earth. Because of these beliefs, the ordinary calculation necessary for imprisonment to have a deterrent effect are not present, and they can fairly be described as simply being beyond deterrence.

Obviously, this analysis has some highly troubling aspects. For some, it may bring to mind the Soviet practice of using a mental health "diagnosis" as a means of justifying the imprisonment or commitment of dissidents. The situations are, however, fundamentally different. The key question would not be whether the members of al Qaeda or the Taliban can be said to suffer from some form of mental illness or disorder. Such disorders are certainly one reason, as the Supreme Court held in *Hendricks*, why an individual may not be subject to deterrence, suggesting that incarceration is not imposed

[42] *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997).

for purposes of punishment. It is the individual's susceptibility to deterrence, however, that is the critical inquiry.

A sincerely held religious belief can undermine the assumptions on which the principle of deterrence, or the normal instinct for self-preservation, is based just as effectively as any psychological disorder, real or imagined. Historic examples of this phenomenon include the American Indian "Ghost Dancers" in the 1880s and 1890s, who believed that wearing magical articles of clothing would protect them from bullets, and the Chinese Boxers, who held similar beliefs a few years later. Here, the justification for holding certain members of al Qaeda and the Taliban in preventative detention would be that, because they are not subject to the normal calculations that make deterrence effective -- regardless of the reason why that is the case -- the purpose of their detention is not punitive.

As a second alternative, the United States could take the position that the emergence of widespread terrorism by groups who are not tied to any one nation-state -- a state that could be held accountable for their actions and expected to control them -- presents circumstances that have not been confronted by the community of nations for several centuries. The fact that many of these individuals are suicidal, as well as homicidal, also suggests that the case is *sui generis*. Consequently, the current international norms -- both customary and treaty-based -- would simply be inapplicable because they were developed to address fundamentally different circumstances.

Indeed, perhaps the most comparable precedents to al Qaeda, and similar international terrorist groups, date from the 17th and early 18th centuries, when international law was in its infancy, in the form of the pirate companies operating on the high seas. The international legal status of such individuals was described as follows by one 18th Century judge:

> As to the heinousness or wickedness of the offence, it needs no aggravation, it being evident to the reason of all men. Therefore a pirate is called "hostis humani generis," with whom neither faith nor oath is to be kept. And in our law they are termed "brutes," and "beasts of prey" and that it is lawful for any one that takes them, if they cannot with safety to themselves bring them under some government to be tried, to put them to death.[43]

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[43] *See The Trials of Major Stede Bonnet, and Thirty-three others, at the Court of Vice-Admiralty, at Charles-Town, in South Carolina, for Piracy, 5 George I A.D. 1718*, 15 How. St. Tr. 1231, 1235 (1816); *see also* Sir Leoline Jenkins, Charge given to an Admiralty Session within the Cinque Ports (Sept. 2, 1668), quoted in Alfred Rubin, *The Law of Piracy* 87 (1988) ("[t[hey are outlawed, as I may say by the Laws of all Nations; that is, out of the Protection of all Princes and of all Laws whatsoever. Every body is commissioned and is to be armed agaisnt them, as against Rebels and Traytors, to subdue and to root them out.").

Whether today's international terrorist organizations could be treated as "outlaws" is debatable.[44] However, the very severe treatment formerly accorded to individuals engaged in analogous activity suggests that the United States would be justified in exploring a new framework for dealing with groups having the characteristics of outlaw bands. A form of indefinite detention may well constitute a supportable part of this framework. And, as a means of addressing concerns that this form of incarceration not approximate some later day Bastille, a series of procedures could be adopted to ensure that the detention would last only so long as the circumstances which originally justified it continue to obtain. A model for such a system can, in fact, we found in the internment provisions of the Geneva Convention IV.

As noted above, this treaty applies only to civilians, and does not benefit either al Qaeda or Taliban members as unlawful combatants. However, it may serve as an appropriate source of reasonable (indeed, highly protective) procedures governing internment. Under Geneva Convention IV, internment (or assigned residences) may be ordered "only if the security of the Detaining Power makes it absolutely necessary."[45] In addition, interned individuals are entitled to have their internment periodically reconsidered "by an appropriate court or administrative board."[46] This review process must take place at least twice yearly, "with a view to the favourable amendment of the initial decision, if circumstances permit."[47] A similar, if not identical, system (which would involve administrative proceedings rather than a criminal trial before a military commission or civilian court) could be adopted by the United States to review the cases of individual al Qaeda or Taliban members. These proceedings would ensure that their detention does not last longer than "absolutely necessary."

Finally, there is a third approach open to the United States in dealing with individual al Qaedas and Talibs who cannot safely be released once their organizations are crushed. Each of these individuals remains an unlawful combatant and, as such, each has violated the laws and customs of war, and is subject to criminal prosecution and punishment. As the Supreme Court explained in *Ex parte Quirin*, "[u]nlawful combatants . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[48] The President's November 13, 2002 Military Order, and Secretary Rumsfeld's Department of Defense Military Commission Order No. 1 (Mar. 21, 2002), established a process for such prosecutions which, as discussed below, fully complies with relevant due process requirements. Military commissions can impose lengthy sentences of imprisonment, which would give the United States the legal right to

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[44] As noted above, even in 1914 the British Manual of Military Law categorically stated that "international law forbids summary execution absolutely." *See supra* note 22. Moreover, even in the years when piratical depredations where at their height in the late 17th and early 18th centuries, captured pirates were almost invariably (at least in the Anglo-American experience) brought to trial before punishment was inflicted.

[45] Geneva Convention IV, Art. 42.

[46] Geneva Convention IV, Art. 43.

[47] *Id.*

[48] 317 U.S. at 30.

hold convicted al Qaeda and Taliban members after the close of hostilities. Indeed, this would be the case even if they were entitled to the rights and privileges of POWs.[49]

There is no doubt that simply prosecuting the Guantanomo Bay detainees for having violated the laws and customs of war, by being unlawful combatants, would be the surest means of vindicating the requirements of due process. This approach is firmly grounded in both international, and domestic U.S. law, and would neither involve the development of new international norms, nor derogation from existing norms. Ironically, this would also be the harshest of the options available to the United States for dealing with these individuals. It would involve criminal prosecution and the imposition of a term of imprisonment, perhaps life, or even the death penalty in appropriate cases. By contrast, a form of preventative detention would not involve criminal prosecution, and *might* ultimately result in a shorter period of incarceration for the affected individuals.

[49] *See* Geneva Convention III, Art. 119.