Internment / Detention

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ROADMAP

• Historical development of the law
• Who is a POW?
• Primary protections afforded to POWs
• POW Camp administration and discipline
• Detention Operations in Iraq and Afghanistan
• Article 5 Tribunal Exercise
History of laws relating to POWs

- Ancient times
- U.S. Civil War
- WWI
- WWII
U.S. Civil War & the Lieber Code

- Francis Lieber
- Instructions for the Government of the Armies of the United States in the Field (1863)
WWI & The Hague Conventions

- The Hague Conventions of 1907
  - Hague IV, Ch. 2 – Prisoners of War (16 Articles)

- WWI (1914-1918)
  - Hague only applies to parties to the Convention
WWII & The Geneva Conventions

• The Geneva Convention of 1929 (POWs)
  – 97 Articles for POWs; 57 countries ratified

• WWII (1939-1945)
  – Did the 1929 Convention have an impact?

• The 1949 Geneva Conventions
  – GC III (Prisoners of War)
Treatment of POWs in WWI & WWII

• WWI
  – 8 million POWs
  – Est. 3 million+ died

• WWII
  – 21 million POWs
  – Est. 6-10 million died
Who gets POW Status?

&

What is the Treatment?

• The Right Type of Person in the Right Type of Conflict

• Will get the protections of the Third Geneva Convention (PW); Additional Protocol I and other protections under CIL
POW Status?
Type of Conflict

• International Armed Conflict = CA2 conflict
  – Triggers the full body of LOW and all 4 GCs

• Non-International Armed Conflict = CA3 conflict
  – Only CA3 and Domestic Law applicable
  – GC III (PW) is not applicable
POW Status?
Type of Person

In order to have the status of a POW:

– CA2 International Armed Conflict
  and
– Right type of person

Need both
Type of Conflict

• Common Article 2, all GC
  – Declared war;
  – Armed conflict between two or more parties; or
  – Occupation

• Additional Protocol I (1977)
  – Expands type of conflict to colonial domination, alien occupation & racist regimes (Art. 1, para. 4)
Type of Conflict

• Common Article 3, all GC
  – Non-international armed conflict
  – Internal armed conflict
  – NO COMBATANT IMMUNITY

• Additional Protocol II (1977)
  – Limits scope of application of CA 3 to those groups that exercise control over territory (Art.1, para.1)
# Right Type of Conflict for PW Status

<table>
<thead>
<tr>
<th>International Armed Conflict (IAC)</th>
<th>Non-International Armed Conflict (NIAC)</th>
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<tr>
<td>• The right type of conflict triggers CA2 and AP I</td>
<td>• Internal armed conflict only triggers CA3 and AP II</td>
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<tr>
<td>• The right type of person will get protections of GC III (PW) and AP I</td>
<td>• The right type of person will only get protections of CA3 and AP II (not the full body of protections of GC III)</td>
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**YES**

**NO**
POW Status?
Type of Group/Person

• GCIII, Art. 4(A)(1)-(2)
  1. Members of armed forces of a Party to conflict
  2. Militia or other volunteer groups... belonging to a Party to the conflict...
     ☐ Responsible command
     ☐ Fixed and distinctive insignia
     ☐ Carry arms openly
     ☐ Conduct operations IAW laws and customs of war
Criteria for lawful combatant status for militia or other groups

• From 1907 Hague IV (cumulative)
  1. Responsible command
  2. Fixed and distinctive insignia
  3. Carry arms openly
  4. Conduct operations IAW laws and customs of war

• From CG III, Article 4(A)(2) (adds)
  5. Organized
  6. Belong to a Party to the conflict

• From case law
  7. No allegiance to Detaining Power
POW Status?
Additional Protocol I (1977)

• AP I, Art. 43 (Confirms 4 of 7 criteria)
  #1 (Command)
  #4 (Comply with LOW)
  #5 (Organized/Disciplined)
  #6 (Belong to Party to Conflict)

• AP I, Art. 44 (long, confusing?)
  – US objects – relaxes standard for irregular forces to get POW status and reduces conditions between lawful and unlawful combatants
Type of Person

• GC III (PW), Article 4(A)(3)-(6)
  3. Members of armed forces for authority not recognized by the Detaining Power
  4. Persons accompanying armed forces
  5. Merchant marine and crew of civil aircraft
  6. Levee en masse

• 4(B)(1) - Military personnel in occupied territory
• 4(B)(2) - Military internees in neutral countries
• Retained Personnel (GC III (PW), Articles 33, 35)
Type of Person

• Persons whose status is questionable
  – Mercenaries (AP I, art. 47)
  – Saboteurs (See Ex parte Quirin)
  – UN personnel in peace enforcement operations

• Persons *not* entitled to POW status
  – Spies (HR, art. 29-31 & API, art. 46)
Right Type of Conflict?
Right Type of Person?

United States Army Soldiers on UN Peacekeeping Mission in Kosovo
Right Type of Conflict?
Right Type of Person?

United States Military v. Taliban in Afghanistan in 2001
The Taliban?

- CA2 conflict
- Right type of person?
- What did the Bybee Memo say?

### STATUS OF TALIBAN FORCES UNDER ARTICLE 4 OF THE THIRD GENEVA CONVENTION OF 1949

The President has reasonable factual grounds to determine that no members of the Taliban militia are entitled to prisoner of war status under Article 4 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.

February 7, 2002
Right Type of Conflict? Right Type of Person?

United States Military v. Al Qaeda in Afghanistan in 2001
Right Type of Conflict?
Right Type of Person?

- United States Military v. Al Qaeda in Iraq in 2003
- United States Military v. Madhi Army in Iraq in 2003
What if Status is in Doubt?

• GC III (PW), Article 5
  – “Should any doubt arise as to whether persons ...”
  – “… belong to any of the categories ... in Article 4 ...”
  – treat as PW until status determined by competent tribunal

• Article 5 Tribunal
  – Army Regulation 190-8, para. 1-6
  – Personnel
  – Procedures
  – Status determinations
POW PROTECTIONS
Primary Protections afforded by GC III

• Article 13
  – Humane Treatment
  – No medical experiments
  – No violence, intimidation, insults, or public curiosity
  – No reprisals

• Article 14
  – Respect for person and honor

• Article 16
  – Equality of treatment
POW Camp Administration

- Location (22, 23)
- Quarters – size and conditions (25, 29)
- Food and Water (26)
- Religion, Recreation and Physical Activity (34-38)
- Labor and Pay
- Letters
- Representatives
Camp Discipline

- Disciplinary Sanctions (Articles 86-90)
- Escape (Articles 91-94)
Repatriation

• Before cessation of hostilities
  – Seriously sick and wounded (Art. 109)
  – Incurably sick and wounded (Art. 110)
  – Permanently disabled (Art. 110)
• After cessation of hostilities (Art. 118)
• During cease fire or armistice
DETENTION OPERATIONS
What About Detainees in US Custody?

• Policy is to:
  – Comply with LOW in all conflicts / armed conflicts
  – Prohibit cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the USG
  – All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee’s legal status, at a minimum the standards articulated in Common Article 3 to the Geneva Conventions of 1949
  – U.S. policy to “treat detainees IAW the Geneva Conventions”

• Sources:
  – Department of Defense Directives 2311.01E (Law of War Policy) and 2310.01E (Detainee Treatment) and Detainee Treatment Act of 2005
Detainee Treatment Act of 2005

• §1002: Army FM 2-22.3 Human Intelligence Collector Operations establishes authorized interrogation techniques; all must follow (separate directive)
• §1003: No cruel, inhuman, or degrading treatment or punishment
• § 1004: Provides a defense if prosecuted for abuse
• § 1005: Established a requirement and dictates procedures for status review boards
• § 1006: Requirement to train Iraqi military to standard
Bottom Line – Humane Treatment

• Humane treatment is the standard

• If the treatment were used by an enemy against a US Soldiers, would we consider it to be abuse?

• If so, then it is probably “inhumane.”
PROCESSING
Point of Capture Treatment

• 5 S’s and T
  – Search, Silence, Segregate, Safeguard, Speed & Tag

• Property
  – State v. Personal
  – Protective v. Personal

• Interrogations v. Tactical Questioning
  – What can you ask POWs?
  – What answer do they have to provide? (GC III, Art. 17)
Detention Operations in Iraq and Afghanistan
Comparative Law

• **Common Law System**
  – Primarily in Anglo countries
  – Precedent
  – Adversarial
    • Trial
    • Prosecution v Defense
    • Judge is referee
    • Record is witness testimony and physical evidence
  – Crime committed against the State

• **Civil Law Systems**
  – World’s predominant legal system
  – Statutory or Codified law is paramount
  – Inquisitorial
    • Investigative Hearing
    • Judge controls / leads inquisition
    • No written record of trial; no precedent
    • Eyewitness testimony
  – Crime committed against the individual
The Detention Process in Iraq (after 1 Jan 09)

• Warrantless Arrest
  – Must catch in act of crime or combat activity
  – Still need Detention Order

• Arrest Warrant (issued by Investigative Judge (IJ))
  – Unit builds case (Joint missions)
  – Present case to Iraqi Police Investigator (IP)
  – IP presents evidence to IJ
  – IJ decides what witnesses wants to hear from
  – Statements reduced to writing (swear on Koran)
  – Issues warrant
Evidence

• Unit must produce evidence, not intelligence
• Evidence can include:
  – Evidence proving identity of accused
  – Eyewitness testimony
  – Witness affidavits (taken by Iraqi Investigator)
  – Physical evidence (chain of custody?)
  – Documentary evidence (photos, charts/maps are best)
  – Testimony/Statements from the Iraqi Army/Police, CF
  – Expert testimony (gaining prominence)
Investigative Hearing

- To get Warrant or Detention Order (after arrest)
- When – arrange meeting with IJ
- Where – at court? At IP Station?
  - Safety of all participants
  - Who provides transportation?
- Who
  - Police Investigators
  - Judicial Investigator
  - Defense Counsel (if accused is present)
- How – the process
- Warrant or Detention Order issued (or not)
- Where is the Detainee held?
- What is the rest of the process?
Detention Operations in Afghanistan

- ISAF or OEF
- International Security Assistance Force
  - Joint Operations
  - “Impeding Mission”
  - Detainee to immediate custody of Afghan Forces
- Operation Enduring Freedom – Classified
- Detainee Review Boards
  - for all detainees in Bagram
  - Humane Treatment
Conclusion

• How does a detainee get POW status?
• Is it the Right Type of Conflict?
  – CA 2 – International Armed Conflict
• Is it the Right Type of Person?
  – GC III, Article 4 criteria
• What if Status is in Doubt - Article 5 tribunal
• POW Treatment
• POW Camp Administration & Discipline
• Brief look at Detention Operations
Questions?
References

International Treaties & U.S. Law
• 1949 GC Relative to the Treatment of Prisoners of War (GC III (PW))
• 1949 GC Relative to the Protection of Civilian Persons in Time of War (GC IV (Civ))
• 1977 Protocols Additional to the Geneva Conventions (Protocols I & II)
• UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1994)
• UNSCR 1546 (2004) renewed by UNSCR 1637 (2005); UNSCR 1723 (2006); UNSCR 1790 (2007)
• UNSCR 1368 (2001); UNSCR 1510 (2003) and UNSCR 1833 (2008)
• European Human Rights Convention
• International Covenant on Civil and Political Rights (ICCPR)
References

DoD/Joint/DA Policy & Regulatory Guidance

• AR 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997)
• DoDD 2311.01E, DoD Law of War Program (2006)
• DoDD 2310.01E, DoD Detainee Program (2006)
• FM 27-10, Law of Land Warfare (1956)
• CJCSI 3290.01C, Program for Detention Operations (2008)
• CJCSI 5810.01C, Implementation of the DoD Law of War Program (2007)
Article 5 Tribunal Exercise
Roadmap

• Brief overview of exercise
  – Review of materials
  – Review Tribunal Procedures (AR 190-8)

• Break into 6 Groups (6-7 per group)
  – Review Packet (15 minutes)
  – Tribunal (30 minutes)

• Discussion of Results (30 minutes)
  – 6 groups (5 minutes each)
Handouts

• GC III, Articles 2-5 (reprinted excerpt)
• Army Regulation 190-8, para. 1-6 (Tribunals)
  – One page excerpt
  – Captured Persons Determination of Eligibility for Enemy Prisoner of War Status w/ Appendix A-F
• Status of Taliban Forces under GC III, Article 4
  – Bybee Memo (February 2002)
AR 190-8 Tribunals

• Tribunal shall determine status of person not appearing to be entitled to PW status who has committed a belligerent act and who asserts he is entitled to POW status

• Tribunal consists of 3 Commissioned Officers
• Recorder (non-voting Member)
• Personal Representative
  – Based on CENTCOM Memo, para. 5c
Article 5 Tribunal Procedures

• Recorder is sworn by President, then Recorder swears Board
• Written Record
• Open Hearing, except deliberations/vote (or security reasons)
• Standard of Proof
  – Preponderance of the Evidence
Article 5 Tribunal Procedures

• Detainee Rights
  – Be advised of rights
  – Attend all open sessions (get interpreter)
  – Call witnesses (or have alternative forms of evidence, such as statements, if witnesses not available)
  – Can testify or address tribunal (unsworn)
  – Cannot be compelled to testify
Article 5 Tribunal Procedures

• Board Decision
  – Closed session deliberation; Majority vote (2 of 3)
  – Written report of determination
    • EPW
    • Recommended Retained Person (entitled to PW status)
    • Innocent Civilian – immediate release
    • Civilian Internee – detained for operational security or probable cause to start criminal investigation

• Final Report (due in 3 days)
  – All cases w/ EPW Status denied must have SJA legal review
Exercise

• Personnel - 6 Teams of 7
  – 3 Tribunal Board members
  – One Recorder
  – One Personal Representative
  – One Detainee (for EPW status or release)
  – One Witness for Unit
    • for continued detention (Civilian Internee)

• 3 Separate Detainee Packets
  – Two teams will have same packet
  – Come back and discuss results with entire group
Tribunal Process

- All members have been sworn
- President convenes board
- Recorder makes brief opening statement
- Personal Rep makes brief opening statement
- President calls witnesses
  - Board members; recorder; personal rep can conduct brief “direct” / “cross”
- Detainee makes statement
- Recorder & Personal Rep make briefing closing
- Board Deliberates / Votes / Announces decision
What are you looking for?

• Facts that either support or negate the factors required for get PW status under GC III, Art. 4

• Remember what Tribunal can decide
  – EPW
  – Innocent Civilian – immediate release
  – Detain as security threat or other criminal activity

• Embellishment by witnesses to add relevant facts is encouraged
Questions?
Tribunal Results

• Tribunal #1 – Khalif

• Tribunal #2 – Nafie

• Tribunal #3 - Ali
Khalif

Tribunal #1

- Detained in Afghanistan on 20 October 2007
- Improvised Explosive Devise (IED) detonated and unit conducted sweep of area
- Detained at house in vicinity of IED
  - Acting suspicious
  - Fake ID
  - Cell-phone (denied, but then admitted ownership)
  - Positive X-spray test (for explosives)
  - Weapons possession
- Suspected insurgent
- Claims to be innocent civilian who was working construction on house at time of explosion
Tribunal #2

Nafie

- Detained in Afghanistan on 5 July 2007
- During a patrol, unit received intelligence about a weapons cache at a mosque
- During search of mosque, unit found weapons and detained Nafie
- During tactical questioning, Nafie made statement through interpreter that he was a member of the Taliban insurgency and his cell had attacked Americans on numerous occasions
Tribunal #3

Ali

- Detained in Afghanistan on 3 December 2002
- A convoy was ambushed and there was subsequent small arms engagement
- Ali was captured in a house that the insurgents were firing from
- Detainee gave name, but had no ID
- Detainee was found next to weapon
- During tactical questioning, he said he was member of the local Taliban militia