

## **FAQs About: Detention of Unlawful Combatants at Guantanamo Bay**

### **1. How can the U.S. legally justify the holding of persons captured in Afghanistan without trial at Guantanamo Bay, Cuba?**

The U.S. considers itself be engaged in an international armed conflict with the Al Qaeda terrorist organization.<sup>1</sup> The murder of more than 3,000 civilians and the attempted murder of 17,000 more on September 11, 2001 was more than just a crime- it was an organized act of hostility intended as an attack against the U.S. as a nation.

The UN Security Council has confirmed that view by acknowledging that the U.S. was the victim of an armed attack on September 11, 2001 and therefore has the right to act in self-defense under the UN Charter.<sup>2</sup> As such, international law permits the United States to use not only law enforcement measures against Al Qaeda, but military force as well. Customary international law permits a nation when acting in self-defense to attack enemy combatants, and detain those who surrender or are otherwise captured.<sup>3</sup>

Those detained at Guantanamo Bay are combatants who are either Al Qaeda terrorists or their Taliban supporters. They are being held not as crime suspects, but as enemy combatants in an international armed conflict.

### **2. As enemy combatants, aren't these detainees entitled to prisoner-of-war status under the Geneva Conventions?**

No, because only lawful combatants are entitled under the Geneva Conventions to prisoner-of-war status. As defined in the Geneva Convention on prisoners-of-war, lawful combatants are members of: 1) the regular armed forces and militia of a state; and 2) other militia and volunteer corps of a state which: are under a commander, wear a fixed distinctive sign recognizable at a distance, carry their arms openly at all times, and conduct their operations in accordance with the law of war.<sup>4</sup>

Al Qaeda is a non-state terrorist organization whose members are not part of the armed forces, militia or volunteer corps of a state and therefore cannot qualify as lawful combatants. The Taliban could qualify, but failed to do so because they did not meet the requirements reflected in the Geneva Convention.<sup>5</sup>

### **3. Aren't those captured by the U.S. in Afghanistan entitled to a hearing to determine their status as lawful or unlawful combatants?**

No. The Geneva Convention on prisoner-of-war states "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 [of lawful combatants]... such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."<sup>6</sup>

The U.S., as the detaining power, has no doubt about the status of the Al Qaeda and Taliban detainees being held in Guantanamo Bay- they are not lawful combatants.<sup>7</sup> The consistent practice of states in interpreting this provision has been for the detaining power to determine whether or not a doubt exists regarding a captured person's status.

#### **4. How can the United States hold these detainees indefinitely without trial?**

The United States is not holding them "indefinitely". As permitted by the customary international law of armed conflict (as reflected in the Geneva Convention on Prisoners of War), we may lawfully detain enemy combatants until the end of active hostilities.<sup>8</sup> This is true in any international armed conflict- combatants are held until hostilities have ceased.

We believe that in the case of a conflict involving an international terrorist organization such as Al Qaeda, hostilities cease when there is no reasonable prospect of the resumption of hostilities.<sup>9</sup>

#### **5. What international law applies to the detainees at Guantanamo Bay?**

The customary law of armed conflict. The President has directed that the detainees be treated humanely. As a matter of policy, the detainees are being provided many PW privileges.

**Background:** The U.S. currently holds about 660 detainees at Camp Delta, Guantanamo Bay, Cuba. The first detainee arrived in January, 2002. Since its opening, 64 detainees have been transferred for continued custody by their home countries, 4 have been released outright. The U.S. has obtained increasing amounts of useful military intelligence from the detainees. Many of the detainees would be a danger to U.S. military personnel and civilians if released. Some have killed U.S. soldiers in battle, while others have killed civilians.<sup>10</sup>

The ICRC has had representatives continuously present at Camp Delta since the arrival of the first detainee. They have access to all detainees and meet with them in private.

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<sup>1</sup> Dworkin, Anthony, "Excerpts from Interview with Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defense", <http://www.crimesofwar.org/onnews/news-pentagon-trans.html>, December 16, 2002.

<sup>2</sup> UNSCR 1368, September 12, 2001.

<sup>3</sup> Dworkin, 3.

<sup>4</sup> 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Art. 4.

<sup>5</sup> Haynes, William (DoD General Counsel), "Enemy Combatants", <http://www.cfr.org/publication.php?id=5312>, accessed February 5, 2003.

<sup>6</sup> 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Art. 5.

<sup>7</sup> State Department Cable, February, 2002 (on file with DIILS Academic Department).

<sup>8</sup> 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Art. 118. See also Dworkin, 2.

<sup>9</sup> Dworkin, 2.

<sup>10</sup> "Fates Unsure at U.S. Base in Cuba", USA Today, September 22, 2003, 9.