

HEADQUARTERS  
UNITED STATES EUROPEAN COMMAND  
UNIT 30400  
APO AE 09131

DIRECTIVE  
NUMBER 45-2

1 April 2002

**LEGAL**

Determination of Eligibility for Enemy Prisoner of War Status

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1. **SUMMARY.** This regulation prescribes policies and procedures for determining whether persons who have committed belligerent acts and come into the power of the United States Forces are entitled to enemy prisoner of war (EPW) status under the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (GPW).
  2. **APPLICABILITY.** This regulation is applicable to all members of the United States Forces deployed to or operating in support of operations in the US EUCOM AOR.
  3. **INTERNAL CONTROL SYSTEMS.** This Directive does not contain internal control provisions and is not subject to the requirements of the internal management control program. For USEUCOM and subordinate joint activities, the applicable internal control directive is ED 50-8, Internal Management Control Program.
  4. **SUGGESTED IMPROVEMENTS.** The proponent of this regulation is the Office of the Staff Judge Advocate, US European Command. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to United States European Command, ECJA, Unit 30400, APO AE 09131
  5. **REFERENCES.**
    - a. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949.
    - b. DA Pamphlet 27-1, Treaties Governing Land Warfare, December 1956.
    - c. FM 27-10, the Law of Land Warfare, July 1956.
    - d. J. Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, International Committee of the Red Cross.
    - e. DoDD 5100.77, DoD Law of War Program, December 1998; and CJCSI 5810.01A, Implementation of the DoD Law of War Program, August 1999.

## 6. GENERAL.

a. Persons who have committed belligerent acts and are captured or otherwise come into the power of the United States Forces shall be treated as EPWs if they fall into any of the classes of persons described in Article 4 of the GPW (Annex A).

b. Should any doubt arise as to whether a person who has committed a belligerent act falls into one of the classes of persons entitled to EPW status under GPW Article 4, he shall be treated as an EPW until such time as his status has been determined by a Tribunal convened under this regulation.

c. No person whose status is in doubt shall be transferred from the power of the United States to another detaining power until a Tribunal convened under GPW Article 5 and this regulation has determined his status.

## 7. EXPLANATION OF TERMS.

a. **Belligerent Act.** Bearing arms against or engaging in other conduct hostile to United States' persons or property or to the persons or property of other nations participating as Friendly Forces in operations in the USEUCOM AOR.

b. **Convening Authority.** An officer designated by the Commander, U.S. European Command (EUCOM) to convene GPW Article 5 Tribunals.

c. **Detainee.** A person, not a member of the US Forces, in the custody of the United States Forces who is not free to voluntarily terminate that custody.

d. **Enemy Prisoner of War (EPW).** A detainee who has committed a belligerent act and falls within one of the classes of persons described in GPW Article 4.

e. **Interpreter.** A person competent in English and a language understood by the Detainee who assists a Tribunal and/or Detainee by translating instructions, questions, testimony, and documents.

f. **Person Whose Status is in Doubt.** A detainee who has committed a belligerent act, but whose entitlement to status as an EPW under GPW Article 4 is in doubt.

g. **President of the Tribunal.** The senior Voting member of each Tribunal. The President shall be a commissioned officer serving in the grade of O4 or above.

h. **Recorder.** A commissioned officer detailed to obtain and present evidence to a Tribunal convened under this regulation and to make a record of the proceedings thereof.

i. **Retained Persons.** Members of the medical service and chaplains accompanying the enemy armed forces who come into the custody of the US Forces who are retained in custody to administer to the needs of the personnel of their own forces.

j. **Screening Officer.** Any US military or civilian employee of the Department of Defense who conducts an initial screening or interrogation of persons coming into the power of the United States Forces.

k. **Tribunal.** A panel of three commissioned officers, at least one of whom must be a judge advocate, convened to make determinations of fact pursuant to GPW Article 5 and this regulation.

## 8. **BACKGROUND.**

a. The United States is a state-party to the four Geneva Conventions of 12 August 1949. One of these conventions is the Geneva Convention Relative to the Treatment of Prisoners of War. The text of this convention may be found in DA Pamphlet 27-1.

b. By its terms, the GPW would apply to an armed conflict between the United States and any country. It is the United States policy to apply the “principles and spirit” of the Law of War, to include the GPW, in military operations other than war.

c. The GPW provides that any person who has committed a belligerent act and thereafter comes into the power of the enemy will be treated as an EPW unless a competent Tribunal determines that the person does not fall within a class of persons described in GPW Article 4.

d. Some detainees are obviously entitled to EPW status, and their cases should not be referred to a Tribunal. These include personnel of enemy armed forces taken into custody on the battlefield.

e. Medical personnel and chaplains accompanying enemy armed forces are not combatants; therefore, they are not EPWs upon capture. However, they may be retained in custody to administer to EPWs.

## 9. **RESPONSIBILITIES.**

a. All US military and civilian personnel of the Department of Defense (DOD) who take or have custody of a detainee will: (1) Treat each detainee humanely and with respect. (2) Apply the protections of the GPW to each EPW and to each detainee whose status has not yet been determined by a Tribunal convened under this regulation.

b. Any US military or civilian employee of the Department of Defense who fails to treat any detainee humanely, respectfully or otherwise in accordance with the GPW, may be subject to punishment under the UCMJ or as otherwise directed by competent authority.

c. Commanders will:

(1) Ensure that personnel of their commands know and comply with the responsibilities set forth above.

(2) Ensure that all detainees in the custody of their forces are promptly evacuated from harms way, processed, and accounted for.

(3) Ensure that all sick or wounded detainees are provided prompt medical care. Only urgent medical reasons will determine the priority in the order of medical treatment to be administered.

(4) Ensure that detainees determined not to be entitled to EPW status are segregated from EPWs prior to any transfer to other authorities.

d. The Screening Officer will:

(1) Determine whether or not each detainee has committed a belligerent act as defined in this regulation.

(2) Refer the cases of detainees who have committed a belligerent act and who may not fall within one of the classes of persons entitled to EPW status under GPW Article 4 to a Tribunal convened under this regulation.

(3) Refer the cases of detainees who have not committed a belligerent act, but who may have committed an ordinary crime, to the Provost Marshal.

(4) Refer the cases of any detainees who appear to have connections with international terrorist organizations to the appropriate authorities who will make a determination on whether the Mobile Detainee Review and Screening Team is required to conduct a formal screening of the detainee.

(5) Seek the advice of the unit's servicing judge advocate when needed.

(6) Ensure that all detainees are delivered to the appropriate US authority, e.g. Provost Marshal, for evacuation, transfer or release as appropriate.

e. The USEUCOM Judge Advocate (ECJA) will:

(1) Provide legal guidance, as required, to subordinate units concerning the conduct of Article 5 Tribunals.

(2) Assign judge advocates to serve on Article 5 Tribunals as required.

(3) Determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered. This responsibility may be delegated to a service component senior legal advisor.

(4) Retain the records of all Article 5 Tribunals conducted. Ensure the promulgation of a Tribunal Appointment Order IAW Annex B of this regulation.

f. Tribunals will:

(1) Following substantially the procedures set forth at Annex C of this regulation, determine whether each detainee referred to that Tribunal:

(a) Did or did not commit a belligerent act as defined in this regulations and, if so, whether the detainee;

(b) Falls or does not fall within one of the classes of persons entitled to EPW status under Article 4 of the GPW.

(2) When a competent Tribunal determines that a detained person has committed a belligerent act as defined in this regulation, but that the person does not fall into one of the classes of persons described in GPW Article 4, that person will be delivered to the Provost Marshal for disposition as follows:

(a) If captured in enemy territory. In accordance with the rights and obligations of an occupying power under the Law of Armed Conflict.

(b) If captured in territory of another friendly state. For delivery to the civil authorities unless otherwise directed by competent US authority.

(3) Promptly report their decisions to the convening authority in writing.

g. The command judge advocate for each unit capturing or otherwise coming into the possession of new detainees will provide legal guidance to Screening Officers and others concerning the determination of EPW status as required.

FOR THE COMMANDER:

OFFICIAL:

JOHN B. SYLVESTER  
Lieutenant General, USA  
Chief of Staff

RICKY WILLIAMS  
LTC, USA  
Adjutant General

#### APPENDIXES

A – Excerpt from the Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949

B – Sample Appointment of Tribunal

APPENDIXES (Cont)

C – Tribunal Procedures

D – Sample Report of Tribunal Decision

- E - Form of Oath for a Muslim
- F - Article 5 Tribunal Hearing Guide

DISTRIBUTION:

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## APPENDIX A

### EXCERPT FROM THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 12 AUGUST 1949

#### 1. Article 4

a. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfills the following conditions:

(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.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

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(6) Inhabitants of a non-occupied territory, who on the approach of the enemy

spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units provided they carry arms openly and respect the laws and customs of war.

b. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or nonbelligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

c. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

2. **Article 5.** The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. 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.

**APPENDIX B**

**APPOINTMENT OF TRIBUNAL**

A Tribunal under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War is hereby convened. It will hear such cases as shall be brought before it pursuant to USEUCOM Directive 45-2 without further action of referral or otherwise. The following commissioned officers shall serve as members of the Tribunal:

**MEMBERS:**

Major A. B. Doe, USA, 999-99-9999; President  
Captain R. C. Shaw, JAGC, USA, 999-99-9999; Judge  
Advocate, Member  
1st Lt C. Logan, USA, 999-99-9999; Member

**FOR THE COMMANDER:**

**JUDGE ADVOCATE**



## APPENDIX C

### TRIBUNAL PROCEDURES

1. **JURISDICTION.** Tribunals convened pursuant to this regulation shall be limited in their deliberations to the determination of whether detained persons ordered to appear before it are entitled to EPW status under the GPW.

2. **APPLICABLE LAW.** In making its determination of entitlement to EPW status the Tribunal should apply the following:

a. Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Thereto Embodying Regulations Respecting the Laws and Customs of Warfare on Land, 18 October 1907; 36 Stat. 2277; TS 539; 1 Bevans 631.

b. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949; 6 UST 3114; TIAS 3362; 75 UNTS 31.

c. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces, 12 August 1949; 6 UST 3217; TIAS 3363; 75 UNTS 85.

d. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949; 6 UST 3316; TIAS 3364; 75 UNTS 135.

e. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; 6 UST 3516; TIAS 3365; 75 UNTS 287.

3. **COMPOSITION.**

a. Interpreter. Each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the Detainee. The interpreter shall have no vote.

b. Recorder. Each Tribunal shall have a commissioned officer appointed by the President of the Tribunal to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of- the proceedings. The recorder shall have no vote.

c. Tribunal. A panel of three commissioned officers, at least one of whom must be a judge advocate, convened to make determinations of fact pursuant to GPW Article 5 and this regulation. The senior member of each Tribunal shall be an officer serving in the grade of O-4 or above and shall be its President.

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4. **POWERS OF THE TRIBUNAL.** The Tribunal shall have the power to:

- a. Determine the mental and physical capacity of the detainee to participate in the hearing.
- b. Order U.S. military witnesses to appear and to request the appearance of civilian witnesses.
- c. Require the production of documents and real evidence in the custody of the United States and to request host nation assistance in the production of documents and evidence not in the custody of the United States.
- d. Require each witness to testify under oath. A form of oath for Muslim witnesses is attached (Annex E). The judge advocate member of the Tribunal will administer the oath.

## **5. RIGHTS OF THE DETAINEE.**

- a. The detainee shall have the right to be present at all open sessions of the Tribunal.
- b. The detainee may not be compelled to testify.
- c. The detainee shall not have the right to legal counsel; however, the detainee may have a personal representative assist him at the hearing if that personal representative is immediately available.
- d. The detainee shall be informed, in a language understood by the detainee of the purpose of the Tribunal, the provisions of GPW Articles 4 and 5, and of the procedure to be followed by the Tribunal.
- e. The detainee shall have the right to present evidence to the Tribunal, including the testimony of witnesses who are immediately available.
- f. The detainee may examine and cross-examine witnesses, and examine evidence. Documentary evidence may be masked, as necessary, to protect sensitive sources and methods of obtaining information.
- g. The detainee shall be advised of the foregoing rights at the beginning of the hearing.

## **6. APPLICABLE PROCEDURE.**

- a. Admissibility of Evidence. All evidence, including hearsay evidence is admissible. The Tribunal will determine the weight to be given to evidence considered.

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- b. Control of Case. The hearing is not adversarial, but rather is a fact-finding procedure. The President of the Tribunal, and other members of the Tribunal with the President's consent, will

interrogate the detainee, witnesses, etc. Additionally, the President of the Tribunal may direct the Recorder to obtain evidence in addition to that presented.

c. Burden of Proof.

(1) Under this regulation, a matter shall be proven as fact if the fact-finder is persuaded of the truth of the matter by a *preponderance of the evidence*.

(2) Unless it is established by a preponderance of the evidence that the detainee is not entitled to EPW status, the detainee will be granted EPW status.

d. Voting. The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal.

e. Legal Review. ECJA or the designated component Staff Judge Advocate shall determine the legal sufficiency of each hearing in which a detainee who committed a belligerent act was not granted EPW status. In such cases, the detainees shall be entitled to continued EPW treatment pending completion of the legal review. Where a Tribunal's decision is determined not to be legally sufficient, a new hearing will be ordered.

7. **CONDUCT OF HEARING**. The Tribunal's hearing shall be substantially as follows:

a. The President upon calling the Tribunal to order should first announce the order appointing the Tribunal (See Annex B). An Article 5 Hearing Guide is provided at Annex F for use by the President of the Tribunal.

b. The Recorder will cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants.

c. The President should advise the detainee of his rights, the purpose of the hearing and of the consequences of the Tribunal's decision.

d. The Recorder will read the report of the Screening Officer or other interrogating officer summarizing the facts upon which the interrogating officer's referral was based and will present all other relevant evidence available.

e. The Recorder will call the witnesses, if any. Witnesses will be excluded from the hearing except while testifying. The judge advocate member of the Tribunal will administer an oath or affirmation to each witness.

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f. The Detainee shall be permitted to present evidence. The Recorder will assist the Detainee in obtaining the production of documents and the presence of witnesses immediately available.

g. The Tribunal will deliberate in closed session. Only voting members will be present. The Tribunal will make its determination of status by a majority vote. The junior voting member will summarize the Tribunal's decision on the Report of Tribunal Decision (Annex D). Each voting member will sign the Decision.

h. The President will announce the decision of the Tribunal in open session.

**8. POST HEARING PROCEDURES.**

a. The Recorder will prepare the record of the hearing.

b. In cases in which the detainee has been determined not to be entitled to EPW status, the following items will be attached to the decision:

(1) A statement of the time and place of the hearing, persons present, and their qualifications.

(2) A brief resume of the facts and circumstances upon which the decision was based.

(3) A summary or copies of all evidence presented to the Tribunal.

c. In cases in which the detainee has been determined to be entitled to EPW status, no record of the proceedings is required.

d. The original and one copy of the Tribunal's decision and all supporting documents will be forwarded by the President to the convening authority within one week of the date of the announcement of the decision.

**APPENDIX D**

**REPORT OF TRIBUNAL DECISION**

TRIBUNAL CONVENED BY:

APPOINTING ORDER NUMBER/HEADQUARTERS/DATE:

CASE NO AND DATE

LOCATION: UNIT'S GEOGRAPHIC LOCATION

In Relation to Detainee \_\_\_\_\_

This Tribunal, having been directed to make a determination as to the legal status of the above-named respondent under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, who came into the power of 1 UNIT 1 of the Armed Forces of (NATION) at (GEOGRAPHIC LOCATION) on or about (DATE) and having examined all available evidence, has determined that he (is) (is not) an Enemy Prisoner of War as defined in Article 4 of the Convention.

Additional identifying information concerning the detainee is follows:

Rank:

Service Number:

Date of Birth:

Unit:

Place of Birth:

Father's name:

Mother's name:

Spouse's name:

Home Town:

Aliases, if any:

IT IS ORDERED that the Respondent: (Here include the Tribunal's direction as to the disposition of the Detainee, e.g., "Delivered to the Provost Marshal for Transfer to an EPW camp" or "Delivered to Civil Authorities" or Released from Custody.")

(Rank, Name), President, (Unit, Social Security No.)

(Rank, Name, Member (Unit, Social Security No.

(Rank, Name), Member, ((Unit, Social Security No.)

The decision of the foregoing Tribunal in which the detainee was determined not to be entitled to EPW status has been determined to be legally sufficient/insufficient.

FOR THE USEUCOM Judge Advocate: Rank, Name, Title

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## APPENDIX E

### FORM OF OATH FOR A MUSLIM

In the Name of Allah, the Most Compassionate, the Most Merciful, who gave us Muhammad His Prophet and the Holy Koran, I, (NAME), swear that my testimony before this Tribunal will be the truth.

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**APPENDIX F**

**Article Five Hearing Guide**

**RECORDER:** All Rise (The Tribunal enters)

**PRESIDENT:** (NAME OF DETAINEE), this Tribunal is convened by order of under the provisions of Article Five of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. It will determine whether you have committed a belligerent act against the United States Armed Forces or Other Friendly Forces acting pursuant to [if applicable, insert basis for operation, e.g., UNSCR] and, if so, whether you fall within one of the classes of persons entitled to treatment as a prisoner of war.

**INTERPRETER:** (TRANSLATION OF ABOVE).

**PRESIDENT:** “(NAME OF DETAINEE), you have the following rights during this hearing: You have the right to be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence. You may not be compelled to testify. However, you may testify if you wish to do so. You may have a personal representative assist you at the hearing if that personal representative is immediately available. You have the right to present evidence to this Tribunal, including the testimony of witnesses who are immediately available. You may ask questions of witnesses and examine documents offered in evidence. However, certain documents may be partially masked for security reasons.”

**INTERPRETER:** (TRANSLATION OF ABOVE)

**PRESIDENT:** Do you understand these rights?

**INTERPRETER:** (TRANSLATION OF ABOVE)

**PRESIDENT:** Do you have any questions concerning these rights?

**INTERPRETER:** (TRANSLATION OF ABOVE)

**PRESIDENT:** Is there someone who is available whom you wish to have assist you as your personal’ representative? (If so, the Detainee’s personal representative will be permitted to assist him.)

**INTERPRETER:** (TRANSLATION OF ABOVE)

(recorder) please present your evidence.

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(The judge advocate on the Tribunal will administer an oath to each witness. A standard oath will be used for non-Muslim witnesses; the Muslim form of oath will be used for Muslim witnesses. The testimony of witnesses will be translated for the Detainee.)(Documentary evidence will be shown to the detainee and explained to him by the interpreter.)

(DETAINEE), you may now testify or offer other evidence. The Recorder will assist you in obtaining the presence of witnesses who are immediately available and in obtaining documents that are immediately available.

(TRANSLATION OF ABOVE)

(DETAINEE), do you wish to have any witnesses called to testify?

(TRANSLATION OF ABOVE)

Do you wish to present any documents or other evidence?

(TRANSLATION OF ABOVE)

Do you wish to make a statement to the Tribunal?

(TRANSLATION OF ABOVE)

(The detainee may now present evidence; the recorder will assist the detainee in obtaining evidence.)

(RECORDER), Do you have any additional evidence to present in response to the detainee's evidence?

(TRANSLATION OF ABOVE)

The Tribunal will now close to consider the evidence.

(The Tribunal considers the evidence and votes.)

**RECORDER:** All rise.

**PRESIDENT:** (DETAINEE), this Tribunal has determined:

(That you have not committed a belligerent act; therefore, you will be released.) (That you have committed a belligerent act, but you are entitled to Prisoner of War status. You will be delivered to the Provost Marshal for evacuation to a Prisoner of War camp.) (That you have committed a belligerent act, but that you are not entitled to Prisoner of War status. Higher authority will review this decision. Until then, you will remain in American custody. If this decision is confirmed upon review by higher authority, you will be transferred to the appropriate authorities for further legal proceedings.)

**INTERPRETER:** (TRANSLATION OF ABOVE)

**PRESIDENT:** This hearing is adjourned.