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**AL-QAEDA & TALIBAN UNLAWFUL COMBATANT DETAINEES, UNLAWFUL BELLIGERENCY,
AND THE INTERNATIONAL LAWS OF ARMED CONFLICT**

Lieutenant Colonel (s) Joseph P. "Dutch" Bialke^{al}

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I. INTRODUCTION

International Obligations & Responsibilities and the International Rule of Law

The United States (U.S.) is currently detaining several hundred al-Qaeda and Taliban unlawful enemy combatants from more than 40 countries at a multi-million dollar maximum-security detention facility at the U.S. Naval Base in Guantanamo Bay, Cuba. These enemy detainees were captured while engaged in hostilities against the U.S. and its allies during the post-September 11, 2001 international armed conflict centered primarily in Afghanistan. The conflict now involves an ongoing concerted international campaign in collective self-defense against a common stateless enemy dispersed throughout the world.

Domestic and international human rights organizations and other groups have criticized the U.S.,¹ arguing that al-Qaeda and Taliban detainees in Cuba should be granted Geneva Convention III prisoner of war (POW)² status. They contend broadly that pursuant to the international laws of armed conflict (LOAC), combatants captured during armed conflict must be treated equally and conferred POW status. However, no such blanket obligation exists in international law. There is no legal or moral equivalence in LOAC between lawful combatants and unlawful combatants, or between lawful belligerency *2 and unlawful belligerency (also referred to as lawful combatantry and unlawful combatantry).

The U.S. has applied well-established existing international law in holding that the al-Qaeda and Taliban detainees are presumptively unlawful combatants not entitled to POWstatus.³ Taliban and al-Qaeda enemy combatants captured without military uniforms in armed conflict are not presumptively entitled to, nor automatically granted, POWstatus. POWstatus is a privileged status given by a capturing party as an international obligation to a captured enemy combatant, if and when the enemy's previous lawful actions in armed conflict demonstrate that POWstatus is merited. In the case of captured al-Qaeda and Taliban combatants, their combined unlawful actions in armed conflict, and al-Qaeda's failure to adequately align with a state show POWstatus is not warranted.

The role of the U.S. in the international community is unique. The U.S., although relatively a young state, is the world's oldest continuing democracy and constitutional form of government. The U.S. is a permanent member of the United Nations Security Council, the world's leading economic power, and its only military superpower. The U.S. is the only country in the world capable of commencing and supporting effectively substantial international military operations with an extensive series of military alliances, and the required numbers of mission-ready expeditionary forces consisting of combat airpower, land and naval forces, intelligence, special operations, airlift, sealift, and logistics. Great influence and capabilities, however, exact great responsibility.

As a result of its unique role and influence within the international community, the U.S. has been placed at the forefront of respecting LOAC and promoting international respect for LOAC. The U.S. military has the largest, most sophisticated and comprehensive LOAC program in the world. The U.S. demonstrates respect for LOAC by devoting an extraordinary and unequalled level of resources to the development and enforcement of these laws, through an unparalleled LOAC training and education regimen for U.S. and allied *3 military members, and a conscientious and consistent requirement that its forces comply with these laws in all military operations.

Customary LOAC binds every country in the world including the U.S. International collective security and U.S. national security may be achieved only through a steadfast commitment to the Rule of Law. For the U.S. to grant POWstatus to captured members of al-Qaeda or the Taliban would be an abdication of these international legal responsibilities and obligations. It would set a dangerous precedent contrary to the Rule of Law and LOAC, and to the highest purpose of the laws of warfare, the protection of civilians during armed conflict.

This article begins by explaining how LOAC protects civilians through the enforcement of clear distinctions between lawful combatants, unlawful combatants, and protected noncombatants. It summarizes the four conditions of lawful belligerency under customary and treaty-based LOAC, and instructs why combatants who do not meet these conditions do not possess combatant's privilege; that is, the immunity provided to members

of the armed forces for acts in armed conflict that would otherwise be crimes in time of peace.

The article then reviews why LOAC does not require that captured unlawful combatants be afforded POWstatus, and addresses specifically captured al-Qaeda and Taliban fighters. The practices and behavior of these fighters *en masse* in combat deny them privileges as lawful belligerents entitled to combatant's privilege. The article argues that al-Qaeda unlawful combatants are most appropriately described as *hostes humani generis*, "the common enemies of humankind."

The article subsequently explains why al-Qaeda members, as *hostes humani generis*, are classic unlawful combatants, as part of a stateless organization that *en masse* engaged in combat unlawfully in an international armed conflict without any legitimate state or other authority. The article explicates al-Qaeda's theocratic-political hegemonic objectives and its use of global terrorism to further those objectives. The article expounds as to why international law deems a transnational act of private warfare by al-Qaeda as *malum in se*, "a wrong in itself." Related to al-Qaeda's status as *hostes humani generis*, the article describes one of the Taliban's many violations of international law; that is, willfully allowing al-Qaeda *hostes humani generis* to reside within Afghanistan's sovereign borders from where al-Qaeda could and did attack unlawfully other sovereign states. The article then details a state's inherent rights if and when attacked by such *hostes humani generis*.

Following this, the article continues by asserting that there is no doubt or ambiguity as to the unlawful combatant status of the Taliban and al-Qaeda (shown by the failure of the Taliban *en masse* to meet the four fundamental criteria of lawful belligerency, al-Qaeda's statelessness *en masse*, and both their many acts of unlawful belligerency and violations of LOAC). As a result, the article states that there is no need or requirement for proceedings under *4 Geneva Convention III, art. 5 to adjudicate their presumptive unlawful combatant status and non-entitlement to POWstatus *pro forma*.

The article subsequently illustrates that, even though captured al-Qaeda and Taliban are unlawful combatants and not POWs, the U.S. as a matter of policy has treated and continues to treat all al-Qaeda and Taliban detainees humanely in accordance with customary international law, to the extent appropriate and consistent with military necessity and in a manner consistent with the principles and spirit of the Geneva Conventions. The article discusses that, under LOAC, the detainees are captured unlawful combatants that can be interned without criminal charges or access to legal counsel until the cessation of hostilities. However, the article then points out that the U.S. has no desire to, and will not, hold any unlawful combatant indefinitely.

The article then notes that al-Qaeda and Taliban detainees, as unlawful combatants, are subject to trial by U.S.

military commissions for their acts of unlawful belligerency or other violations of LOAC and international humanitarian law. It expounds that, when an opposing force detains an unlawful combatant in time of armed conflict, the unlawful combatant's right to legal counsel or other representation only arises if criminal charges are brought against the unlawful combatant. The article illustrates the security measures, evidence procedures, and the many executive due process protections afforded to detainees subject to the jurisdiction of U.S. military commissions. The article states that, if tried and convicted in a U.S. military commission, a detainee may be required to serve the adjudged sentence, such as punitive confinement.

The article concludes that it is in the immediate and long-term national security interests of the U.S. to respect and uphold LOAC in all military operations. Ultimately, the United States has an obligation to the international community and the Rule of Law not to afford POWstatus to captured unlawful combatants such as the al-Qaeda and Taliban detainees in furtherance of both domestic and international security.

II. INTERNATIONAL LAW, THE U.S., AND TALIBAN & AL-QAEDA UNLAWFUL BELLIGERENCY

A. Lawful Combatants, Unlawful Combatants, and Noncombatants

1. Not all Captured Combatants are Entitled to POWStatus

According to both customary and treaty-based LOAC, al-Qaeda and Taliban detainees do not meet the requirements to be lawful combatants. They are unlawful enemy combatants who are not legally authorized under LOAC to engage in armed conflict, but do so without authority. Unlawful combatants also include combatants who engage in armed conflict in a manner that violates certain international laws of armed conflict. Unlawful combatants are *5 proper objects of attack during an international armed conflict, and upon capture, may be denied Geneva Convention III POWstatus.⁴ In such cases, whenever the U.S. withholds Geneva Convention III POWstatus from captured unlawful combatants, U.S. policy directs that they be treated humanely and similar to lawful combatants or POWs.⁵ Additional to the *6 Geneva Conventions of 12 August 1949 (Protocol I)⁶ also recognizes that unlawful combatants captured during an international armed conflict are not *7 required to be accorded POWstatus. Art. 75 describes unlawful combatants as individuals "who are in the power of a Party to the conflict and who do not benefit from the more favourable treatment under the Conventions or under this Protocol." Although the U.S. is not a signatory to Protocol I, the U.S. views art. 75 and its principle, that not all combatants captured in armed conflict are entitled to POWstatus, as a reiteration of existing customary international law.⁷

2. Lawful/Unlawful Combatants and Noncombatants

Armed conflict places large numbers of civilians on all sides of a conflict in grave situations where the risks of death, suffering, loss, and other depredations are extremely high. This is especially so when combatants disguise themselves unlawfully as protected noncombatant civilians.⁸ LOAC has long been designed to mitigate the risks to civilians by clearly distinguishing *lawful combatants* (such as uniformed military personnel under a responsible chain of command, who carry arms openly, and who are obliged to and do follow international law) from *unlawful combatants* (such as members of the Taliban who *en masse* do not meet the four criteria of lawful belligerency and who *en masse* have willfully and continually failed to follow LOAC, and al-Qaeda who *en masse* are stateless and whose right to take up arms is not recognized under international law).⁹

*8 Further, and perhaps more importantly, LOAC clearly distinguishes both lawful combatants and unlawful combatants from protected *noncombatants* (such as protected civilians, interned civilians, military medical personnel, military chaplains, civilian war correspondents and journalists, United Nations peacekeepers, military members who are *hors de combat*-meaning those individuals who are “out of the fight” such as sick or wounded combatants, non-aggressive aircrews descending by parachute after the destruction of their aircraft, shipwrecked combatants, interned battlefield detainees, POWs and other captured combatants).¹⁰

*9 These essential customary international law distinctions between lawful/unlawful combatants and noncombatants prevent collateral deaths and suffering of protected civilians and other noncombatants during armed conflict. LOAC serves to protect noncombatants by providing all combatants an unambiguous positive incentive to constrain their behavior as well as the potential of future punishment for failing to do so.

3. Lawful Belligerency: Combatant's Privilege & POW Status

If a combatant follows LOAC during war, “combatant’s privilege” applies and the combatant is immune from prosecution for lawful combat activities. For example, a lawful combatant may not be tried for an act (such as assault, murder, kidnapping, trespass, and destruction of property) that is a crime under a capturing party’s domestic law in time of peace, when that act is committed within the context of hostilities and does not otherwise violate LOAC.¹¹ In addition, the captured lawful combatant receives Geneva *10 Convention III POW status with its special rights, better conditions, and more extensive set of benefits.

Conversely, if a combatant ignores the criteria of lawful belligerency, the individual may be deemed an unlawful combatant. An unlawful combatant is also referred to with identical meaning as an illegal combatant, unprivileged combatant, *franc-tireur* meaning “free-shooter,” unprivileged belligerent, dishonorable belligerent

or unlawful belligerent. The unlawful combatant may then, upon capture in an international armed conflict at the discretion of the capturing party, forfeit combatant's privilege and Geneva Convention III POW status, and not be afforded full POW protections under Geneva Convention III. Further, if the unlawful combatant has committed grave breaches of LOAC, the individual may be tried in a military commission; and if convicted, be punished appropriately.

114. *Combatant Duty to Appear Visually Distinct from Noncombatant Civilians

Of paramount importance is that all combatants have an unconditional legal duty in armed conflict to protect noncombatant civilians by distinguishing themselves visually from the civilian population. Failure to do so with perfidious intent is a violation of LOAC. Geneva Convention III mandates as one of the four essential criteria of lawful belligerency that all combatants in international armed conflict must wear distinctive dress.¹² Similarly, customary international law, the practice among states over time, provides that spies, saboteurs, terrorists, resistance groups, guerrillas, irregulars, militias, insurgents, and other combatants, if captured in an international armed conflict while impersonating protected civilians perfidiously, do not necessarily share the same advantaged fate and implicit international stature as do uniformed lawful combatants.¹³ International law *12 has long recognized that combatants who hide among and attempt to blend into civilian populations during armed conflict are uniquely dangerous to protected noncombatant civilians.¹⁴

*13 If an opposing side is unable to differentiate between combatants who may legally engage in combat and protected noncombatant civilians who may not lawfully engage in combat, the opposing side might be tempted then to wrongfully and indiscriminately target everyone within an operational theater. A primary purpose of LOAC is to proactively stave off such desperate "cannot tell apart the enemy soldiers from the civilians, so shoot them all" criminal acts of reductionism. LOAC seeks to protect civilian populations by proscribing conduct that endangers such populations unreasonably, such as taking part in combat without wearing a distinctive uniform or other form of identification that is clear and visible at a distance. As stated earlier, the capturing party has the prerogative to deny such unlawful combatants POW status and some of its related benefits; and if applicable, try them for criminal acts of unlawful belligerency.¹⁵ This is a balanced, time-honored, and practical method of encouraging compliance with LOAC.

145. *Enforcement of LOAC

It is important to appreciate that all combatants captured in armed conflict are not equal and should not be treated in the same manner. To relax or merge the categories of lawful combatants and unlawful combatants is

to step backwards, diminish the effectiveness of LOAC, and begin to retrogress the difference between civilization and barbarism. It is reasonable to conclude that individual lawful combatants would be less likely to join and fight alongside rogue unlawful combatants if there is universal international illegitimacy of such aligned conduct, subsequent lack of Geneva Convention III POWstatus upon capture, and the potential for punitive sanctions. Not conferring POWstatus to captured unlawful combatants such as al-Qaeda and Taliban fighters who do not merit such status (and other armed forces who mimic protected civilians perfidiously), however, is the primary and most meaningful way of retaining, reinforcing, and not diluting the extremely vital lawful/unlawful combatant and noncombatant distinctions that are so central to LOAC and its enforcement.

The pragmatic incentives not to endanger, and deterrents against endangering, protected noncombatants (particularly the civilian population) are only useful if other parties to the armed conflict consistently comply with, and enforce strictly the requisite distinctions contained within international law. Laws that are not enforced will not deter the armed forces of countries that do not have the propensity to otherwise adhere to such laws. The U.S. is committed to conducting its military operations in accordance with LOAC and, more specifically, to protecting civilians in armed conflict by preserving and enforcing the indispensable distinctions between lawful combatants, unlawful combatants, and noncombatants.

*15During WW II, for example, in *ex parte Quirin*,¹⁶ the U.S. Supreme Court upheld the unlawful belligerency military commission convictions of eight German saboteurs, who disembarked German U-boats off the U.S. East coast, came ashore and discarded their military uniforms, and were later captured in civilian clothes in U.S. territory. Six of the unlawful combatants were then executed and the two remaining saboteurs were sentenced to and served lengthy terms of confinement.¹⁷

Admittedly, the 1949 Geneva Conventions, and other international laws of armed conflict, do not specifically envisage an armed conflict resembling the armed conflict against al-Qaeda continuing in Afghanistan and elsewhere across the globe. An asymmetric international armed conflict where one party (the Taliban, a *de facto* state) sponsors and partially incorporates members of a global stateless organization (the al-Qaeda) that directs relatively independent factions to engage in massive and worldwide suicidal terrorism against protected civilian populations, is a fairly new paradigm. Regardless of these atypical attributes of *de facto*-state sponsored international terrorism, determining the legal status of captured combatant Taliban and al-Qaeda members in accordance with existing LOAC remains a matter of relatively simple analogy.

The unconventional operations and attacks of al-Qaeda and the Taliban in armed conflict are much more dangerous and lethal to protected noncombatant civilians than has been seen historically with saboteurs, spies,

guerillas, and other typical unlawful combatants who mask themselves perfidiously as protected civilians. In contrast to merely hiding among protected civilian noncombatants illegally, al-Qaeda has squarely targeted them and has attempted to maximize civilian casualties with the apparent approval of the Taliban. Nonetheless, al-Qaeda and Taliban behavior of exploiting civilian disguise in armed conflict unlawfully is related closely to the conduct of the types of civilian-attired unlawful combatants referenced above. Neither group is entitled to POWstatus upon capture.

Moreover, the novel and illegal manner in which al-Qaeda and the Taliban wage war bears little if any similarity to how lawful combatants (who would be granted POWstatus upon capture) conduct military operations. During the global armed conflict ongoing in Afghanistan and elsewhere throughout the world, al-Qaeda and Taliban combatants are much more representative of war criminals than they are of honorable, law-abiding armed forces. It follows that members of al-Qaeda and the Taliban are unlawful combatants, rather than lawful combatants, and therefore are not entitled to POWstatus upon capture. Further, al-Qaeda and Taliban detainees should be prosecuted, when appropriate, for substantiated violations of LOAC.

***16B. The Taliban and the Four Criteria of Lawful Belligerency**

1. The Geneva Conventions Apply to the Taliban as the De Facto Government of Afghanistan

The Taliban was the primary faction fighting in a civil war within the failed state of Afghanistan from the mid to the late 1990s. Taliban militant extremists loosely controlled the majority of Afghani territory from 1996 to 2001 as a *de facto* regime. This is despite the fact that neither the United Nations nor the League of Islamic States recognized the Taliban regime as the *de jure* government of Afghanistan, nor did the rest of the world - only three regional Islamic countries diplomatically recognized the Taliban as the legitimate government of Afghanistan: Saudi Arabia, Pakistan, and the United Arab Emirates. These three countries each severed diplomatic ties with the Taliban during the weeks following al-Qaeda's terrorist attacks of September 11, 2001 and preceding the U.S.-led coalition international armed response in the exercise of their inherent right of collective self-defense.

Even though the Taliban was not the legitimate nor the predominantly recognized government of Afghanistan, the U.S. stipulated that the Geneva Conventions would apply to Taliban combatants because Afghanistan is a signatory to the Geneva Conventions and the Taliban exercised *de facto* governance over most of the failed state of Afghanistan.¹⁸ However, as the *de facto* government, the Taliban then bore responsibility for Afghanistan, the international obligations of Afghanistan to include LOAC, the Taliban's conduct, and the

conduct of the Taliban armed forces. When the U.S. subsequently applied the lawful belligerency criteria of LOAC to the collective conduct of the Taliban and its armed forces, such conduct was determined to be unlawful.

2. The Four Criteria of Lawful Belligerency: Being commanded by a person responsible for his subordinates; Having a fixed distinctive sign recognizable at a distance; Carrying arms openly; and Conducting military operations in accordance with the laws and customs of war.

After reviewing the substantiated institutional policy and practice in armed conflict of an armed force that *en masse* willfully and egregiously fails to follow the four requirements of lawful belligerency in armed conflict, an opposing party may then designate administratively the armed force *en masse* as a class of unlawful combatants. As a result, the U.S. regards captured Taliban as unprivileged combatants whose unlawful actions as a group (as *17 described below) have presumptively excluded them from Geneva Convention III POWstatus that is afforded to captured privileged lawful combatants who have subscribed to and honored the four criteria of lawful belligerency contained within LOAC.¹⁹

Because the Taliban as an entity does not meet the standards of lawful belligerency, and therefore as an entity lacks lawful combatant status and combatant's privilege, the U.S. accordingly considers captured individual Taliban members to also lack lawful combatant status and combatant's privilege, and as such has not extended to them POWstatus. Such classification of the Taliban as unlawful combatants is not "collective criminal punishment." It is, however, a factually accurate collective administrative determination. Correspondingly, nor is it "criminal guilt by association." It is, however, the lack of lawful belligerency status by association (coupled with the lack of combatant's privilege and, upon capture, POWstatus).

The term "unlawful combatant" is not mentioned in international treaties that regulate armed conflict, but it is implicit within them.²⁰ The *18 Brussels Declaration of 1874, art. IX;²¹ the 1899 Convention with Respect to the Laws and Customs of War on Land, Annex art. 1; the Hague Convention of 1907, No. IV, Annex art. 1;²² and the Geneva Convention III of 1949, art. *19 4A,²³ all list the four fundamental conditions of lawful belligerency. The immutability and stalwart enforcement of these four categorical pillars of lawful belligerency are indispensable to the prevention of war crimes and to the safety of protected civilians and other noncombatants in international armed conflict. To an armed force in armed conflict, the four requirements of lawful belligerency are not discretionary.

If an armed force *en masse* does not follow LOAC, the armed force *en masse* does not receive some of the

protections of such laws, specifically POWstatus upon capture. Otherwise, the al-Qaeda and Taliban detainees would profit from an asymmetric and unequal application of LOAC, receiving the full protections and benefits of LOAC while *en masse* denying the same to their *20 foes. Again, an accurate designation *en masse* of unlawful belligerency so made, and the attendant forfeiture of POWstatus are not considered punitive to the individual combatant. Rather, an unlawful combatant designation with its denial of POWstatus is in accordance with the fundamental principle and maxim of international law, *jus ex injuria non oritur*, “a right does not arise from a wrong.”

Such a collective administrative designation of unlawful combatant status is an adverse action that, when imposed suitably and fairly, is designed to accurately characterize *en masse* the conduct of the armed force that has acted unlawfully. More importantly, the potential for such a stigmatizing characterization with its concomitant negative consequences is to deter armed forces from failing *en masse* to follow the four requirements of lawful belligerency. Finally, the potential for lack of lawful belligerency status and POWstatus upon capture is to deter individual combatants from associating with stateless (or rogue state) armed forces that *en masse*, by institutional policies and practices in armed conflict, willfully and egregiously fail to follow the four requirements of lawful belligerency.

These four definitional criteria of lawful belligerency under Geneva Convention III, art. 4A apply *strictissimi juris*, “of the strictest right or law,” to every unit or group within a state’s regular armed forces as a matter of customary international law.²⁴ Also, these requirements specifically and *21 strictly bind volunteer forces, such as militia and other irregular forces, which form part of a state’s armed forces.²⁵ By default, then, groups of combatants *22 who do not fulfill these four specified conditions and do not fight in *23 accordance with them are engaging in unlawful belligerency, and are therefore unlawful combatants. In this way, customary and treaty-based international law is designed specifically to deter violations of LOAC by defining unequivocally the four minimum requirements of lawful combatants and thereby excluding captured unlawful combatants from POWstatus. The four combatant requirements of lawful belligerency are explained in more detail below.

*i. Have a responsible and effective military chain-of-command.*²⁶ In other words, forces must have an operative, structured hierarchical system of military good order and discipline acting under an authority that expressly subjects itself to international law. The chain-of-command must proactively train its armed forces regarding LOAC, consistently mandate strict compliance with such laws, and diligently investigate allegations of violations committed by its forces or allies. Further, when allegations are substantiated, the chain-of-command must justly prosecute alleged violators and, if convicted, punish violators appropriately. The chain-of-command must also otherwise remain answerable for the conduct of its subordinates, enough so that it is reasonably clear

that such subordinates are not acting on their own responsibility. Finally, the chain-of-command must possess sufficient military discipline over its forces to prevent violations of LOAC and be able to order effectively its forces to cease hostilities during a cease-fire, truce, armistice, or surrender.

*ii. Conspicuously distinguish themselves from the civilian population in all combat operations by wearing a fixed distinctive sign, badge, or emblem visible from a distance.*²⁷ To satisfy this requirement, forces usually should *24 have a military uniform, but at a minimum, a distinctive sign visible at a distance in daylight using un-enhanced vision, in order to minimize civilian casualties. The use of a uniform or distinctive sign is the most basic of the four *25 indicia of lawful belligerency. A lawful combatant may not endanger protected noncombatant civilians by concealing one's combatant status, with perfidious intent, by posing as a protected noncombatant civilian. An opponent attempting to gain such a tactical advantage in this manner, at the expense of protected noncombatant civilians, commits the illegal act of perfidy.

Aside from the secondary utility of preventing fratricide within one's own forces, the use of a uniform or other distinctive sign by combatants provides substantial protection to noncombatant civilians during armed conflict. The distinctive uniform or sign should be sufficiently permanent, in that the distinguishing characteristics (of military status vice civilian status) cannot be perfidiously concealed or quickly removed. A military uniform or outwardly distinctive accouterment that clearly distinguishes a combatant from the protected civilian population allows the opposing side to differentiate and then spare protected civilians, without fearing a subsequent treacherous counter-offensive by enemy forces who were illegally masquerading as protected civilians.

*iii. Carry arms openly.*²⁸ Along with a military uniform or distinctive sign in accordance with paragraph two above, forces are required to carry weapons openly, to plainly and further distinguish combatants from all protected noncombatants in order to minimize incidental casualties among protected noncombatants.

*iv. Fight and conduct their military operations in accordance with the international laws and customs of armed conflict.*²⁹ This fourth requirement is *26 both the individual responsibility of every combatant and the collective responsibility of the entire armed force. It is collectively satisfied if the leadership and manifest majority of an armed force follows and observes customary and treaty-based LOAC during military combat operations. Generally, significant LOAC violations committed by individual members result in only the applicable members being in violation of the fourth condition, and, absent an institutional policy of an armed force *en masse* to violate LOAC, do not result in the entire force being in violation.

important

LOAC constrains significantly what actions an armed force or an individual combatant may take during an armed conflict. Such limits serve to protect noncombatants and to minimize unnecessary suffering and destruction. Specifically, all combat operations must follow the 1949 Geneva Conventions and other basic principles of LOAC such as: identifying and attacking only military objectives (military necessity); preventing unnecessary suffering and destruction (humanity/chivalry); ensuring that reasonably estimated incidental civilian casualties and collateral damage are not excessive in relation to the military advantage reasonably anticipated (proportionality); and identifying and discriminating between combatants and noncombatants in combat targeting, primarily in order to protect the civilian population (discrimination).

Additional LOAC principles, for example, prohibit the use of poisons, chemical weapons, biological agents, and other specific weaponries as well as certain types of ammunition. Other laws of armed conflict provide additional safeguards to noncombatants and cultural property. Most importantly, an armed force or individual combatant may not use any of these principles or any other requirement, prohibition or protection of LOAC, perfidiously in order to gain an unfair military advantage. Otherwise, such principles would, in the course of combat, lose relevance and, ultimately, become meaningless.

3. Non-Applicability of the Additional Protocol I, art. 44(3) Exception

When the Taliban were engaged and later captured during an international armed conflict, the Taliban had failed to meet any of the above Geneva Convention III criteria of lawful belligerency. This is despite any irrelevant assertion that some individual members of the Taliban forces on some occasions might have met lawful belligerency standards as supposedly lowered in 1977 by Protocol I, art. 44(3) (apparently nullifying the distinctive *27 sign requirement when “owing to the nature of the hostilities an armed combatant cannot so distinguish himself”; in such a case, instead, requiring only the open carrying of arms while planning or engaging in an attack).

However, there is no evidence that the nature of coalition/Taliban hostilities in Afghanistan prevented the Taliban from adequately distinguishing themselves from the protected civilian population. The Taliban armed forces, well funded by al-Qaeda and being in a state of continued internal armed conflict from 1996 forward with the Northern Alliance, could have easily procured and certainly had ample time to affix some form of a distinctive mark by early 2002. The Taliban *en masse* simply tactically and illegally chose not to. Most notably, however, art. 44(3) does not apply because neither the U.S. nor Afghanistan is a party to Protocol I, and art. 44(3) does not rise to the level of customary international law.³⁰

*28 Although Protocol I, art. 44(7) says expressly that the article does not intend to “change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to a Conflict,”³¹ Protocol I is far from clear regarding this customary international legal standard. The Protocol I, art. 44(3) *29 exception could have the operative effect of swallowing a rule essential to the protection of civilians in armed conflict.

The U.S. agrees with almost all of Protocol I to the extent it embodies existing customary international law. However, given that art. 44(3) is the most controversial provision within Protocol I, the U.S. view is that it does not reflect customary international law. Art. 44(3) is highly controversial internationally because it has been construed to overly broaden the category of lawful combatants to include un-uniformed guerrillas, insurgents and similar groups. This lowers dramatically the standard of a combatant’s requirements of lawful belligerency and POWstatus, diminishes significantly combatant/noncombatant distinctions, and hence, endangers substantially protected noncombatant civilians.

In 1987 (ten years after the close of the Protocol I Diplomatic Conference), President Reagan rejected Protocol I, and specifically art. 44(3) because he was gravely concerned that it could be interpreted in a manner that would legitimize terrorists and other groups of unlawful combatants as lawful combatants. When one considers that captured al-Qaeda and Taliban enemy combatants failed to satisfy even the most basic and traditional requirements to distinguish themselves from the civilian population, and otherwise comply with LOAC, President Reagan’s opposition is highly prophetic. It would appear that President Reagan’s early doubts as to Protocol I, art. 44(3) have been completely vindicated.³²

4. Unlawful Combatants: The Taliban and Their Violations En Masse of the Four Criteria of Lawful Belligerency

The level of compliance with the four Geneva Convention III, art. 4A fundamental criteria of lawful belligerency by parties to a conflict is inversely proportionate to the number of incidental civilian noncombatant casualties and the amount of other unintended collateral damage in warfare. This is a truism. More compliance in armed conflict with the four criteria leads to fewer incidental deaths of protected civilians. Less compliance leads to more protected civilian deaths. Accordingly, LOAC instructs that a willful egregious *en masse* failure by an armed force to follow the four objective *30 Geneva Convention III requirements makes the members of that armed force unlawful combatants, and therefore declines POWstatus to those forces when captured.³³

LOAC does not allow the Taliban, or any combatant force of belligerents, any exemption. The facts in the

following paragraphs are not an attempt to disparage the Taliban, but rather the recitation is to show why captured Taliban members *en masse* were not accorded POWstatus. If the Taliban *en masse* had met the four specified obligations of lawful belligerency, they would have been lawful combatants with combatant's privilege, and, upon capture, accorded POWstatus. However, the U.S. has made an accurate determination that the Taliban as a whole did not meet any of the four compulsory requirements, based on LOAC and many of the following facts.

i. The Taliban armed forces en masse did not have a transparent, organized, identifiable, and accountable chain of command responsible for the conduct of its subordinates. Additionally, there is no evidence that Taliban leadership and subordinate armed forces subjected themselves to international law or that they observed LOAC. Regardless of the fact that Afghanistan was a state party to the 1949 Geneva Conventions, the Taliban outright rejected LOAC. Mullah Mohammed Omar, the Taliban Supreme Leader, decreeing that the laws were merely a manifestation of a false Judeo-Christian Western ideology, evidenced this contempt. The Taliban did not have a viable internal disciplinary system. It did not hold its members accountable for violations of international humanitarian law and the laws of armed conflict. Indeed, the Taliban's nebulous and clannish hierarchy approved and encouraged openly such international law breaches by Taliban members and al-Qaeda. Taliban members often operated independently of any organized command structure, autonomously committing egregious violations of international humanitarian law and LOAC. By design, the Taliban command structure was ambiguous, constantly changing among tribal and warlord alliances, with blurred lines between civilian and military authority.

ii. The Taliban armed forces en masse did not consistently wear any form of a fixed recognizable military uniform, sign, insignia, badge, or symbol identifiable from afar. As stated earlier, Taliban forces certainly had the capability and opportunity to distinguish themselves in some conspicuous *31 manner from protected civilian noncombatants. The Taliban were the *de facto* government of Afghanistan from 1996 to 2001, were well-funded by al-Qaeda, and were an experienced fighting force having been engaged in an internal armed conflict against the Northern Alliance during the Taliban's entire five-year *de facto* rule. In spite of such capability and opportunity, members of the Taliban armed forces calculatingly disguised themselves as protected civilians by wearing civilian clothes. For example, some male Taliban combatants were captured while hidden beneath traditional female burqas in mosques.

The Taliban purposely infiltrated and actively hid its members among the protected civilian population to achieve unfair surprise in armed conflict. When operating among the civilian population, Taliban combatants would illegally use noncombatant civilians as their shields. Additionally, Taliban leaders and armed forces

almost exclusively used unmarked civilian vehicles such as white sports utility vehicles for transportation. When the Taliban's perfidious tactics directly brought about Afghani civilian deaths and injuries, the Taliban tried to capitalize on the tragedies they caused by distorting them to the rest of the world in their attempts to garner international sympathy and manipulate global opinion. It is noteworthy that the vast majority of noncombatant civilians who have died in the Afghanistan conflict died because the Taliban and al-Qaeda forces were camouflaged unlawfully as protected civilians while hiding and fighting among civilian populated areas.

iii. Generally, the Taliban armed forces en masse did not carry arms openly, choosing instead, at times, to conceal weapons and explosives inside common civilian clothing to unlawfully feign protected civilian status and blend into the noncombatant civilian population. In further violation of LOAC, the Taliban deliberately hid military armaments and equipment among the Afghanistan civilian population centers, settlements, and even within schools, historic cultural sites, hospitals, and mosques in an effort to prevent the targeting and destruction of such military equipment by coalition forces.

However, it must be noted that in Afghanistan, the LOAC requirement (that combatants in armed conflict must carry their arms openly to distinguish them from protected noncombatant civilians) was of significantly limited value. The frequent carrying of firearms and other weapons openly by civilians is an Afghani cultural/societal norm. As a result, the previously mentioned combatant requirement, of wearing a common distinctive mark or military uniform in order to distinguish combatants from protected noncombatant civilians, became even more paramount, and, concomitantly, the *en masse* failure of Taliban combatant forces to do so became even more egregious.

iv. The Taliban armed forces en masse ignored LOAC consistently and openly as exemplified by the above three paragraphs. To achieve its goal of a fundamentalist "pure Islamist state" and to maintain power, Taliban radicals ruled over the Afghani people in a repressive ultra-draconian fashion. The Taliban adopted and perpetuated an unrestrained, institutionally declared *32 policy and practice of total disregard for LOAC and international humanitarian law. During active hostilities against coalition forces, the Taliban oftentimes perfidiously feigned acts of surrender.

Before and during active hostilities, the Taliban showed its contempt for evolving perceptions of international humanitarian law by taking over Afghanistan by force, maintaining control with intimidation and force, denying the Afghani people the most basic of human rights, providing sanctuary to international terrorists, torturing and summarily executing dissidents, raping and subjugating girls and women, abducting and using women of defeated Afghani ethnic minorities as "sex slaves" for Taliban and al-Qaeda armed forces, and massacring

thousands of civilians. In stark contrast to the U.S. treatment of enemy combatants detained in Cuba, evidence indicates that the Taliban and al-Qaeda severely beat and murdered the only U.S. service-member they captured during the Afghanistan armed conflict.

Furthermore, the Taliban failed to exercise any responsible measure of control over al-Qaeda, permitting al-Qaeda to operate freely within Afghanistan. The Taliban was highly sympathetic to, sanctioned, and supported the terrorist actions of al-Qaeda. The Taliban aided and abetted al-Qaeda terrorists by providing them safe harbor, combining supply lines, and sharing communication and intelligence networks. The Taliban allowed al-Qaeda to use Afghanistan as its headquarters and base from which al-Qaeda exported its scourge of terrorism.

The Taliban further colluded with al-Qaeda by allowing al-Qaeda under guise to make up portions of the Taliban's loose-knit cellular forces. In fact, a few elite Taliban military units were comprised mostly of al-Qaeda personnel. Such units provided personal security for professed Taliban leadership taking the form of a *praetorian guard*. The Taliban even placed some al-Qaeda members in senior positions within the Taliban's defense forces and *de facto* government. The Taliban acted in concert with foreign al-Qaeda terrorists, was financed by them, sheltered them, and trained with them in terrorist training camps.

Such allied Taliban and al-Qaeda interdependence, mingling, and entwining made it increasingly difficult to distinguish between them. Because of the Taliban's symbiotic association with and direct support of the al-Qaeda terrorist network, the Taliban surrendered any legitimate claim to *de jure* nation-state status within the larger international community. Finally, the Taliban knowingly protected al-Qaeda and did not seize and expel them from Afghanistan. In so doing, the Taliban ignored numerous resolutions adopted by the United Nations General Assembly. More significantly, the Taliban continually flouted the many explicit orders and willfully defied the strong condemnations of the United Nations Security Council, the body responsible for international peace and security. Through the Taliban's collusive actions and omissions related to al-Qaeda, the Taliban ratified the actions of al-Qaeda. In essence, the Taliban allowed al-Qaeda to act as an extension of the Taliban *33 and the *de facto* Taliban state of Afghanistan, resulting in the Taliban becoming vicariously responsible for the acts of al-Qaeda.³⁴

As evidenced by the above facts, the Taliban *en masse* willfully and egregiously did not meet any of the four criteria of lawful belligerency under LOAC. As a result, the Taliban and al-Qaeda blurred into one, the atrocities of al-Qaeda became imputed to the Taliban,³⁵ the Taliban surrendered any *34 legitimate claim to nation-state status as recognized by the wider international community, and Taliban armed forces *en masse* relinquished all rights to lawful combatant status, combatant's privilege, and upon capture, Geneva Convention

III POWstatus.³⁶ Consistent with the above facts and LOAC, the U.S. has designated the Taliban as a class of unlawful combatants and captured Taliban as detainees rather than POWs.

C. Al-Qaeda: Classic (Stateless) Unlawful Combatants & Hostes Humani Generis

1. International Law Reserves Solely to States the Authority to Engage in International Armed Conflict

Members of al-Qaeda, as quintessential non-state actors, are classic unlawful combatants. Customary LOAC characterizes classic unlawful combatants as a subcategory within the grouping of unlawful combatants who do not possess combatant's privilege, and also, when captured, does not provide them POWstatus.³⁷ Classic unlawful combatants are combatants who, *35 amongst other failings, are not authorized by a state or under international law to take a direct part in an international armed conflict, but do so anyway. Since the time of the Romans to the present, *jus gentium*, the customary "Law of Nations," has categorized illegitimate stateless piratical forces like al-Qaeda as *hostes humani generis*, "the common enemies of humankind."

Because the conduct in armed conflict of such stateless freelance forces is not regulated and controlled effectively by a sovereign country (given that no country is directly responsible for such forces), *hostes humani generis* are prohibited universally from participating in armed conflicts. Any such participation is unlawful as a matter of international law. Punishment for those captured while engaging in such illegal participation historically has been very severe, no quarter.³⁸ In short, these *per se* unlawful combatants (such as stateless pirates, bandits, and terrorists who act internationally) are under no sovereign with the power to grant them combatant's privilege, and, therefore, have no legal authority to engage in combat, to attack opposing combatants, or to destroy property in international armed conflict. As just stated, such stateless classic unlawful combatants are *hostes humani generis*, the "common enemies of humankind" (historically, also referred to as *latrunculi* meaning "robber-soldiers," brigands, bandits, *praedones* meaning "robbers," scalawags, buccaneers, outlaws, pillagers, and marauders among other diminutives).

The hostile international acts of such stateless combatant forces in international armed conflict are deemed to be "*bellum crinosum contra omnes gentes et terras*," "criminal acts of war against all peoples and all states." Simply put, international law does not allow private warfare.³⁹*37 International law deems an act of private international warfare as *malum in se*, a "wrong in itself." International law reserves solely to states the authority to engage in international armed conflict, and then, in certain limited circumstances only such as individual or collective self-defense, anticipatory self-defense, humanitarian intervention, under the express authority of the United Nations Security Council, or, as is oftentimes the case, any combination of these recognized legal

justifications viewed in the totality of circumstances.

2. Al-Qaeda Hostes Humani Generis Classic (Stateless) Unlawful Combatants: Al-Qaeda Objectives, Islam, and Al-Qaeda Global Terrorism

In addition to failing to meet the four Geneva Convention III basic criteria required of lawful combatants, al-Qaeda *en masse* engaged in open hostilities in an international armed conflict without authorization from any legitimate sovereign authority or the laws of armed conflict. Because al-Qaeda *hostes humani generis* are not soldiers of any state, the Geneva Conventions do not provide to al-Qaeda all the protections accorded to the lawful combatant soldiers of Geneva Convention party states. International treaties may only be entered into by and between state parties. Al-Qaeda is not, and is ineligible to be, a signatory or party to the Geneva Conventions. Al-Qaeda leaders and followers do not pledge allegiance to any state, nor do they serve under any national flag. Therefore, al-Qaeda and its followers have no combatant immunity or right under international law to take up arms.

Al-Qaeda is not a state, and has no comparable state authority or international legal personality. This self-appointed transnational terrorist network operates absent defined borders. When individuals voluntarily join and support such an unlawful organization and then engage in international armed conflict, they are unlawful combatants and, when captured, are outside the POW status rampart of Geneva Convention III. As a clandestine lawless globally-dispersed band of international terrorists, al-Qaeda are unlawful combatants and are the common enemies of the civilized world. Nevertheless, an attacked state may respond with military force against the military threat of such a stateless organization, even though LOAC generally only applies to armed conflicts between states.

A fundamental threshold requirement of lawful belligerency is that combatants in an international armed conflict must act on behalf of, and be subordinate to a politically organized sovereign state or other authoritative entity that expressly subjects itself to LOAC. As with the Taliban, there is no evidence that al-Qaeda has ever declared that it is subject to international law. *38 Nor is there any evidence that al-Qaeda, by action, has ever subscribed to LOAC.

Al-Qaeda does not fight for a state or for any acceptable pursuit of self-determination, but rather for an ideology contrary to the principled and humanistic theology, tenets, and traditions of Islam. Al-Qaeda's dogma and *raison d'être*, its "reason for existence," as a self-anointed "Army of *Allah* against all Jews and Crusaders" edify al-Qaeda operatives to murder non-Muslims to further al-Qaeda's militant global objectives and

apparently, albeit secondarily, as a means to enter heaven. For instance, Usama Muhammad bin Awad Laden, al-Qaeda's titular *Emir* (prince or first-in-command), ordered a *fatwa* (an Islamic religious dictate) that it is the holy duty of all Muslims to kill all Americans and all their allies, military and civilian, wherever they can be found, especially Zionist Jews.⁴⁰

"Al-Qaeda" literally translates to "The Base." Essentially, al-Qaeda is the inspiration and rallying point for most forms of militant Islamist terrorism. Al-Qaeda is an amorphous organization of global reach, composed of members from numerous nationalities, engaging in the intentional murders of protected noncombatants to achieve al-Qaeda's long-term hegemonic Islamist theocratic-political objectives. As far as can be determined, al-Qaeda demands that the state of Israel must be eliminated and replaced in its entirety by Palestine, that all "non-Muslim" countries must cease to exist, and all of their *infidel*, nonbeliever citizens be converted to Islam, that geographical borders separating Muslim countries be erased, and that all democratic governments in Muslim countries be replaced by a unified Islamist government similar to a Talibanesque theocracy.⁴¹

*39 Put another way, al-Qaeda and similar stateless aligned Islamist groups seek apparently to recreate the world and transform it into a borderless unified Islamic totalitarian nation, an *ummah*, under the law of the *shari'ah* (the canonical laws of Islam). Al-Qaeda views any government that does not fully implement *shari'ah* Islamic law as *jahiliyya*, paganism in the form of people governing and controlling people (rather than the people being governed by Islamist clerics who professedly follow the dictates of *Allah*). Al-Qaeda has shown that it is ready and willing to use all means necessary through *jihad*, an Islamic holy war, to achieve its stated theocratic-political Islamist vision. In addition, al-Qaeda views its ongoing *jihad* waged against all they view as *infidels* as an unwavering spiritual duty. Al-Qaeda followers view individual death in their self-declared *jihad* as *shahada*, glorious martyrdom. Al-Qaeda Islamists supposedly claim that such martyrdom in this *jihad* gains the deceased "martyred" al-Qaeda member, the *shahid*, immediate entry into heaven, with added status and avails. In reality, however, al-Qaeda's war is an unholy *hirabah*, an illegal furtive war of indiscriminate terrorism.

Al-Qaeda misrepresents the Muslim faith to justify its acts of terrorism, to incite its cohorts, and to further its intolerant expansionist Islamist theocratic-political goals. That al-Qaeda militants choose unilaterally to do so does not make this an armed conflict directed against Islam or its adherents. To the contrary, the majority of Muslim countries throughout the world have allied themselves with the U.S. in this ongoing conflict. It must be said however, because acts of terrorism are always antithetical to the tenets of any legitimate theology, Islam is unfortunately slandered because al-Qaeda exploits it as an impetus for al-Qaeda acts of terrorism. Moreover, when the leaders and believers of Islam do not strongly and universally condemn such exploitation by al-Qaeda, such lack of condemnation has the operative relative effects of the further tainting of Islam as well as the

maligning of Islam followers.

For these reasons, all links between this armed conflict and Islam, and any related disparagement of Islam, result solely from the actions and statements of al-Qaeda, as well as from the overt and tacit supporters of al-Qaeda. The U.S. and its allies do not illegitimately make such links, nor do the U.S. and its allies disparage Islam. Simply put, the U.S. and its allies do not engage in armed conflict against religions or followers of religions. Despite al-Qaeda's calculated stratagem to professedly commit its acts of terrorism in the name, defense, and furtherance of the Islamic faith, the global armed conflict of the U.S. and the civilized world against al-Qaeda is not, and has never been, a conflict against Muslims or Islam. It is an armed conflict in collective self-defense directed against al-Qaeda *hostes humani generis* and any rogue state supporters of al-Qaeda as perpetrators of global terrorism. International terrorists are the military targets, not Muslims or Islam.

Al-Qaeda and aligned factions *en masse* have chosen to target, terrorize, and murder civilians unlawfully and deliberately. They have flown *40 hijacked civilian airliners into two of the world's largest civilian office buildings, kidnapped and then either shot or decapitated their civilian hostages, attacked and then murdered noncombatant United Nations peacekeeping forces in Somalia and Afghanistan, bombed a civilian oil tanker, and bombed the diplomatic embassies and consulates of numerous countries. They have also bombed, throughout the globe, numerous, synagogues, churches, civilian airports, civilian oil-drilling, pipeline and storage tank infrastructure, civilian train stations, civilian residential areas, hotels, restaurants, office buildings, markets, and nightclubs.

Al-Qaeda has claimed responsibility for firing anti-aircraft missiles against large civilian passenger aircraft. Al-Qaeda terrorists, as unprivileged combatants with no legal authority to engage in international armed conflict, have also targeted U.S. military sites unlawfully. Al-Qaeda bombed a U.S. office building and a U.S. service-member housing complex in Saudi Arabia, bombed a U.S. naval vessel in Yemen, and used an illegal means, a hijacked civilian airliner, to attack the Pentagon. Additionally, al-Qaeda has unlawfully mounted, and continues to unlawfully launch, armed assaults against the U.S.-led coalition within Iraq, as well as the interim Iraqi government.⁴²

Additionally, al-Qaeda terrorists have plotted unsuccessfully to assassinate world leaders such as the Pope, the U.S. President, and the President of Egypt. Over the past decade, al-Qaeda members have conspired to perpetuate a multitude of terrorist schemes. Some of these more recent plots have been successfully foiled through information gathered from detainees at *41 Guantanamo Bay.⁴³ Such thwarted designs include numerous attempted bombings and other acts of terrorism against protected civilians.

*42 Upon capture during international armed conflict of al-Qaeda stateless members responsible for these grave breaches of LOAC and international humanitarian law and al-Qaeda especially trained to inflict future unlawful carnage, the U.S. in accordance with LOAC classified them *en masse*. The U.S. classified al-Qaeda not only as common international criminals, but also as stateless unlawful combatants engaged in international armed conflict in the forms of international aggression and terrorism. Therefore, the U.S. considers captured members of al-Qaeda *en masse* as classic unlawful combatants, and subsequently, as battlefield detainees rather than as POWs.

3. *Al-Qaeda Hostes Humani Generis, the Taliban, and Host-State Obligations*

Customary international law grants universal jurisdiction over criminal acts of war and the *hostes humani generis* who commit them. Any state may capture and try *hostes humani generis*. Generally, however, states that are attacked by them have a more direct interest, and hence principal jurisdiction. Armed conflicts by states against *hostes humani generis* are exceptional, however not unprecedented.⁴⁴ Customary international law mandates that all states not harbor or otherwise support *hostes humani generis* and encourages *43 all states to join and cooperate together in an alliance against their stateless common enemies whenever such common enemies commit such international crimes or engage in international armed conflict against a state.

Just as one state alone is incapable of combating effectively international piracy, one state alone cannot respond adequately to international terrorism. Just as the international community has a common enemy, that of the stateless international pirate, so the international community has a common enemy, that of the stateless international terrorist. Whenever *hostes humani generis* attack one state internationally from a rogue state safe-haven, it may be deemed to have attacked all states.

Because acts of terrorism are inherently indiscriminate, disproportionate, and beyond the boundaries of military necessity, such acts can never be lawful nor justified. No cause can ever justify terrorism. It is incumbent upon all states, therefore, as a matter of collective security and the international Rule of Law, to not provide any support to terrorist *hostes humani generis*, and to proactively seek out, fight, and capture those who engage in international crimes of violence or international armed conflict. When such *hostes humani generis* are captured, states have a universal customary legal obligation to detain *hostes humani generis*, and if applicable, prosecute or extradite them; and if convicted, to punish them appropriately.⁴⁵ No evidence exists that the Taliban ever attempted to meet these international obligations.

A state burdened with *hostes humani generis* has an international obligation to use all reasonable resources to contain and neutralize the threat. If such a state has carried out its best efforts and is genuinely incapable of containing such *hostes humani generis* within its borders and the *hostes humani generis* continue to attack or pose a threat to other sovereign states, the *44 state has an obligation to request and accept assistance from the community of nations. Failure of a state to do so could then make such a state a rogue state, complicit tacitly with the *hostes humani generis* within its territories. The Taliban was unwilling to do so and never made any such request. Instead, the Taliban willfully obstructed the international community by deliberately providing al-Qaeda safe haven.

Should an incapable state request such reasonable assistance and the community of nations does not act upon the request to excise *hostes humani generis*, an incapable state may not be deemed to be complicit with its *hostes humani generis*. In such a case, the failure of states within the international community to act upon the reasonable request of an incapable state and render necessary assistance within the capabilities of such states, would be repugnant to the collective cooperation essential to combating the common enemies of humankind. The Taliban never afforded the international community an opportunity to assist.

4. Al-Qaeda Hostes Humani Generis, “Armed Attack,” and Global “Armed Conflict”

When *hostes humani generis* commit acts of international aggression from a rogue state safe haven against the territory of other states, their acts of criminal international aggression may become more than a mere matter of international law enforcement involving an organized international crime force. When such an international attack of *hostes humani generis* is of the scope that it amounts to an “armed attack,”^{*46} the attacked state may also *45 concurrently deem the aggression of such a stateless organization and non-state actor as an act of war and accordingly respond with military force in individual self-defense or in collective self-defense with allies. Similarly, if such *hostes humani generis* attackers continue to possess sufficient capabilities to mount further attacks, the attacked state and its allies may regard the *hostes humani generis* as a continuing military threat and accordingly respond with military force to neutralize that military threat.

*46 Additionally, if substantiated, the complicity of the rogue state would then also be actionable in individual self-defense by the attacked state or in collective self-defense by the attacked state and its allies.⁴⁷ When a rogue state knowingly and willfully harbors *hostes humani generis*, the sovereign borders of the rogue state are no longer inviolable. It follows that an attacked state and its allies may then breach the sovereign territorial integrity of the rogue state and attack the rogue state and the *hostes humani generis* within it.

The customary international law requirement that armed forces must fight under the authority of a sovereign state or other authority that expressly subjects itself to LOAC always applies. Moreover, when an armed attack against a state hosting *hostes humani generis* reaches sufficient magnitude, causing active military hostilities among the parties to cross the Geneva Conventions Common art. Two⁴⁸ threshold definition of an international *47 “armed conflict,”⁴⁹ the Geneva Conventions apply and all parties to the conflict must adhere to them (most importantly, the four requirements of lawful belligerency).

*48 Few would argue that the extensive, protracted campaign of al-Qaeda against the U.S. culminating with the Sep. 11, 2001 attacks of the Pentagon and World Trade Center and the U.S.-led coalition response in individual and collective self-defense against al-Qaeda and the Taliban, did not cross the Common art. Two threshold of international armed conflict. However, the veritable crossing of the Common art. Two threshold in this case does not provide legitimacy to stateless al-Qaeda *hostes humani generis* or accord them lawful belligerency status. The crossing means simply that the Geneva Conventions apply.

An armed conflict and the concomitant application of the Geneva Conventions result in the affording of combatant’s privilege to lawful combatants and require the granting of POW status only to lawful combatants when captured. In regards to targeting, there is no distinction in customary LOAC between *hostes humani generis* and the armed forces of a rogue sovereign state that has been tacitly approving of the activities of *hostes humani generis* by purposeful and unlawful harboring.

Otherwise, a rogue state could support illegitimate stateless forces as its underground surrogates by extending sanctuary through omission, and also through indirectly and covertly providing funding, training, or intelligence. Then the rogue state could simply avoid international consequences that would otherwise result from the tacit permitting of *hostes humani generis* to operate from its territory by the simple plausible denial of any direct sponsorship or express approval. Illegitimate stateless forces who are provided safe harbor in a rogue state could continue to act with violence and impunity by emerging from their unlawful rogue state safe haven, committing acts of international aggression, and then retreating back to their unlawful rogue state safe haven. This would be intolerable.

In essence, the Taliban (a rogue *de facto* state) knowingly and willfully gave al-Qaeda (*hostes humani generis* terrorists) a permanent address. Accordingly, during Operations Noble Eagle and Enduring Freedom, the U.S. and its allies in the exercise of their inherent right of collective self-defense, attacked lawfully both al-Qaeda and Taliban military targets. Targets included al-Qaeda command and control infrastructure, lines of communication and logistics, training camps and facilities, and al-Qaeda members. In the case of *49 the

Taliban, targets included governing, command and control infrastructure, Taliban military forces and facilities, military and governmental communications, and other governmental facilities that were associated with support for al-Qaeda.

III. POST-CAPTURE: AL-QAEDA & TALIBAN UNLAWFUL COMBATANTS

A. Non-Applicability of Geneva Convention III, art. 5 POWstatus Tribunals

1. Purpose of art. 5 POWstatus Tribunals

A capturing party convenes a “competent tribunal” under Geneva Convention III art. 5⁵⁰ when it is necessary to resolve a material factual issue *50 of doubt as to the legal status of captured combatants. Geneva Convention III art. 5 does not purport to dictate the nature of a POWstatus tribunal, deferring to the detaining power as to tribunal procedures and composition. Art. 5 does not specify how tribunals are to be structured or organized. Neither does art. 5 instruct whether the tribunals are executive or judicial in nature.⁵¹ Art. 5 does not instruct that the detaining power establish a separate tribunal for each detainee who has “fallen into the hands of the enemy.” Art. 5 merely directs that doubt as to a captured combatant’s status should be considered and settled by a “competent tribunal.”

Such individual art. 5 tribunals were designed to provide *ad hoc* on-the-scene minimal due process to rectify expediently the battleground front-line factual errors of combatant status. For example, individual art. 5 tribunals are meant to ensure that a few displaced civilians or other individual noncombatant captives rounded up by mistake and who are in the proximity of belligerent activity taking place in a combat zone, are then released promptly. Art. 5 tribunals are also meant to provide POWstatus to a deserter of an opposing armed force who has discarded his or her uniform, to confer timely POWstatus to a captured lawful combatant who lost an identification card or to a lawful combatant captured off-duty (or otherwise legitimately out-of- *51 uniform).⁵² As stated earlier, art. 5 defers to the detaining power and does not indicate how individual competent tribunals should be organized or structured. Generally, however, an individual art. 5 tribunal would be non-adversarial and limited in scope.

2. Non-Applicability of Individual art. 5 POWstatus Tribunals to Captured Al-Qaeda & Taliban Enemy Combatants

In regards to captured al-Qaeda and Taliban irregular combatants captured out-of-uniform in armed conflict, there is no question, doubt, or ambiguity that they failed *en masse* to meet any of the four criteria of lawful belligerency and, subsequently then, equally no doubt as to their status as unlawful combatants. Generally, both the al-Qaeda and Taliban detainees now in Cuba were captured without responsible chains of command, without uniforms, with concealed weapons, and without any commitment to or history of compliance with international humanitarian law and LOAC. As a result of the lack of doubt as to both al-Qaeda and the Taliban's unlawful combatant status, art. 5 tribunals, in regards to individual captured al-Qaeda and Taliban combatants, would not be applicable.

A party to a conflict has never been expected to provide a summary art. 5 hearing to determine lawful or unlawful combatant status for every combatant it captures and holds. It would not be realistic or reasonable to do so. Further, individual art. 5 tribunals were never intended to contemplate complex interpretations of, and render consequent overarching legal and *52 national policy decisions regarding LOAC. Such broad and weighty presumptive determinations at the political and strategic levels are quite properly reserved to, and may only be promulgated competently and uniformly by, the highest levels of military and civilian authority.⁵³

As stated earlier, particularized art. 5 tribunals are only convened in extraordinary legitimate battlefield cases that involve specific questions of fact. When there is no doubt as to unlawful combatant status, when a competent authority has further legitimately established the presumption of unlawful combatant status, and when there is no further factual uncertainty or ambiguity of combatant status existing, any individual tribunal then convened gratuitously would be a waste of time and resources. It would provide Taliban and al-Qaeda detainees unnecessary and noncompulsory due process in the face of overwhelming evidence of their unlawful belligerency.

As stated earlier, art. 5 tribunals are designed to resolve individual cases of factual doubt as to combatant status. Yet, there is no doubt as to the following facts: that both al-Qaeda and the Taliban *en masse* systematically and willfully failed to meet the four criteria of lawful belligerency; and, that al-Qaeda members *en masse* are stateless. As a result, art. 5 tribunals are unnecessary. Such individualized art. 5 tribunals in the case of the detained Taliban and al-Qaeda enemy combatants would yield little if any additional probative or relevant evidence as to the detainees' lawful/unlawful combatant status.

Instead, art. 5 tribunals would only serve to provide the detainees and their advocates with opportunities to misuse art. 5. The detainees and their appointed advocates would likely use art. 5 tribunals, not for any appropriate purpose of providing relevant factual testimony or other direct evidence exonerating the detainees

from unlawful combatant status, but rather for illegitimate political and self-rationalizing theological pageantry. The same detainee advocates would then criticize the pre-determined outcomes of the *53 tribunals, such pre-determined outcomes solidly based upon the manifest blatant misconduct of Taliban and al-Qaeda forces in armed conflict and al-Qaeda's classic unlawful combatant status. Ultimately, detainee advocates would describe the tribunals as gestures intended merely to allay the U.S.-perceived misdirected international concern surrounding the lawful preventive internment of Taliban and al-Qaeda detainees.

3. *Executive Affirmation of Unlawful Combatant Status En Masse*

In the circumstances in which an entire military organization as a matter of institutional policy and practice incessantly, egregiously, and openly fails *en masse* to comply with the four requirements of lawful belligerency, there is no requirement under LOAC to convene individual art. 5 tribunals. In such cases where there is no doubt or ambiguity as to the entire military organization's unlawful combatant status, LOAC does not prohibit a competent authority from also making a presumptive unlawful combatant status determination as a pertinent statement of fact that would be inclusive of all members of that military organization, thereby formally eliminating any need for individual art. 5 tribunals.⁵⁴ An informed, comprehensive, presumptive *en masse* determination as to the status of a group of captured, non-uniformed combatants, made by a competent authority who is the democratically elected and accountable civilian Chief Executive of the detaining power and the Commander-in-Chief of its armed forces, would be consistent with the principles and intent of customary LOAC.⁵⁵

Notwithstanding the non-application of art. 5 to al-Qaeda and Taliban unlawful combatants, the President of the U.S., in orderly circumspection, exercised his discretion and personally reviewed *in toto* the evidence *54 surrounding the unlawful belligerency of al-Qaeda and the Taliban. The President, acting within his inherent authority as Commander-in-Chief, reviewed and weighed the wealth of relevant evidence including both classified and unclassified information, and considered the totality of circumstances surrounding the organizational stateless structure of al-Qaeda, the highly collusive relationship between al-Qaeda and the Taliban, and the Taliban and al-Qaeda's unlawful conduct in international armed conflict. After considerable review, the President made a pertinent statement of fact that the forces of al-Qaeda and the Taliban are presumptively unlawful combatants and, upon capture, are not entitled to POWstatus.⁵⁶

It is important to note, however, that the President did not act as a "supreme art. 5 tribunal." As explained above, art. 5 tribunals were unnecessary. Rather, after examining the conclusive evidence of al-Qaeda and the Taliban's unlawful belligerency, the President simply confirmed that there existed no factual or legal doubt as

to their presumptive unlawful combatant status. Concomitantly, the President decided that POWstatus would not be afforded to detained al-Qaeda and Taliban unlawful combatants. Because of the President's competent *en masse* determination and subsequent discretionary decision to not privilege captured Taliban and al-Qaeda members with combatant immunity and POWstatus, it was formally and uniformly affirmed that individual art. 5 tribunals were not applicable or necessary.

Some have claimed that these Presidential discretionary *en masse* determinations were improperly based upon al-Qaeda and the Taliban's amoral motives for attacking the U.S., and, hence, such determinations followed inappropriately a *ius ad bellum* (sovereign legal authority to use force in *55 international armed conflict or more literally "just war") analysis. However, the factually-supported Presidential findings and conclusions were based not upon *ius ad bellum* or any other analogous international legal theory. The virulent motives of al-Qaeda and the Taliban as to why they waged armed conflict were not important when reaching the President's conclusions.

Instead, the President's finding that al-Qaeda and Taliban members are unlawful combatants and the decision not to grant them POWstatus followed a *ius in bello* (laws of conduct during international armed conflict) analysis. These executive military decisions were based upon al-Qaeda's stateless classic unlawful combatant status, the interdependent relationship between al-Qaeda and the Taliban; and, ultimately, the illegal belligerent conduct by al-Qaeda and the Taliban in international armed conflict; that is, how al-Qaeda and the Taliban waged armed conflict unlawfully.

Despite al-Qaeda and the Taliban's egregious unlawful conduct during armed conflict and al-Qaeda's classic unlawful combatant status, some have commented that the U.S. as the detaining power should have convened individual tribunals under Geneva Convention III, art. 5, to make case-by-case determinations as to "lawful combatant versus unlawful combatant" status and, subsequently, "POW versus battlefield detainee" status.⁵⁷ However, as a result of al-Qaeda and the Taliban's substantiated *en masse* unlawful belligerency, the President's formal presumptive factual affirmation and legal holding, and the absence of sufficient evidence to overcome the established presumption of unlawful belligerency, there is no legal requirement for the U.S. to convene any individualized administrative tribunals to reconsider *pro forma* what has already been determined accurately and lawfully.

B. Humane Treatment of al-Qaeda and Taliban Unlawful Combatant Detainees

Because al-Qaeda and Taliban members were acting as unlawful combatants when they were captured during

international armed conflict, the *56 U.S. classifies them as such and is then only required to provide them humane treatment in accordance with the minimum standards of customary international law.⁵⁸ Nevertheless, as a matter of policy, the U.S. has exercised its discretion by caring for captured al-Qaeda and Taliban detainees, *ex gratia*, “as a matter of grace,” in a manner beyond the minimal standards of humane treatment required by customary international law.

The U.S. has granted captured Taliban and al-Qaeda unlawful combatants numerous POW protections, but not Geneva Convention III POW status. The U.S. has provided, and continues to provide, all detainees with humane treatment and protections exceeding that required by customary international law, to the extent appropriate to and consistent with military necessity, and in a manner that conforms to the spirit and principles of the Geneva Conventions.

More specifically, the detainees held in Guantanamo are provided *inter alia* with adequate shelter in a mild climate with the ability to communicate among themselves, metal bed frames/bunks with foam mattresses, sheets, blankets, hot showers, sinks, running water, and clean new clothes and shoes.

Dietary and religious privileges include three nutritious *halal* (culturally-appropriate and conforming to Islamic dietary laws) meals a day with assorted condiments (or, should a detainee elect, as a few have, a detainee may have the same food as the detention facility guards), special meals at special times during traditional Muslim holy periods such as *Ramadan* (a holy month in Islam, celebrating when the *Q’uran*, the holy scripture of Islam, was revealed to the prophet Muhammad in 610 A.D.), hot tea, unrestricted access to Muslim *Imam* military chaplains, a *Quibla* (a huge green and white sign that points toward Mecca, Saudi Arabia, the holiest city in Islam — the city revered by Islam as being the first place created on earth), an arrow in each cell *57 pointing to Mecca, a recorded loudspeaker call to prayer five times a day, regular opportunities to worship, copies of the *Q’uran* in the detainees’ native languages as well as other religious reading materials in numerous languages, prayer caps, prayer rugs, prayer beads, and holy oil (provided by Muslim military chaplains).

Personal hygiene products include toiletries, towels, washcloths, and toilets. Detainees are also provided letter writing materials, secular reading materials in numerous languages, the ability to send and receive mail and packages subject to security screening, regular exercise, initial medical examinations, continuing modern medical care to include rehabilitative surgery, dental care, eye examinations & glasses, medications (ultimately, the same medical care afforded to the detention facility guards), counseling, and access to Arabic translators as needed. Further, although POWs can lawfully be required to work for the detaining power (work that has no direct connection to armed conflict operations), the U.S. does not require al-Qaeda and Taliban detainees to

work.

Additionally, since January 2002, the International Committee of the Red Cross (ICRC) has maintained a permanent mission at the Guantanamo Bay installation, and its delegates continually assess the confinement facilities and the treatment the U.S. provides the detainees. ICRC delegates also conduct regular private visits with the detainees, personally speaking with each detainee in the detainee's native language.⁵⁹

Further, the U.S. has constructed a medium-security detention facility in Guantanamo Bay, consisting of several 20-member unit communal dormitories. A large number of select detainees who have exhibited acceptable *58 behavior, adhered to facility rules, and cooperated during interviews have been admitted to the new medium-security facility and are able to spend more time outdoors, have considerably more exercise time, and may participate in group recreation. Further, they are allowed to eat together at outdoor picnic tables, interact, sleep, pray, and worship together.⁶⁰ Detainees, whose intelligence *59 worth is exhausted, and who no longer pose a security risk to the U.S. or its allies, and are not facing criminal charges, will be released when it is appropriate to do so.

The U.S. has decided, for reasons of security and other legitimate concerns, that the detainees will not be accorded certain Geneva Convention III POW privileges. The detainees are not able to run their own camp, do not have the means to prepare meals, nor are they provided musical instruments, scientific equipment, or sports outfits. Additionally, the detainees do not have POW privileges to monthly pay advances, a personal financial account, or to be able to work for pay. Further, the detainees do not have access to a store to purchase such items as food, soap, or tobacco.⁶¹ Most importantly, though, because al-Qaeda and Taliban detainees are unlawful combatants and do not possess POW status, they do not have combatant's privilege and, therefore, are not judicially immune for their pre-capture combat activities.⁶²

C. Length of Taliban and Al-Qaeda Unlawful Combatant Preventive Detention

*60 According to well-settled LOAC, the historical practice among nations, and the spirit and principles contained within Geneva Convention III, art. 118,⁶³ the U.S. may continue to hold both lawful and unlawful combatant detainees for the entire duration of the present international armed conflict; that is, until the cessation of hostilities. Unless a captured combatant has been justly tried, convicted and sentenced to confinement, the lawful internment of any captured combatant in time of international armed conflict is not punitive, nor is it a form of pre-trial custody or confinement. It is mere preventive detainment that is fully authorized under LOAC.⁶⁴

*61 LOAC is unambiguous in this regard, authorizing throughout history the long-term preventive detention of combatants in an international armed conflict by the capturing party until the cessation of hostilities. Al-Qaeda and Taliban detainees are being interned as enemy combatants in an ongoing international armed conflict. Such long-standing, clear international authority to detain subdued enemy combatants is provided to a capturing party because of the understandable and compelling rejection of the unpalatable alternatives.

While captured combatants are detained during active hostilities, there is no requirement under international law to charge such detainees with a crime or, before they are charged, to provide them legal counsel to challenge their detention.⁶⁵ No nation at war has ever done so. Nor, during ongoing hostilities, has any nation ever allowed captured and detained enemy combatants to access its civilian court system in order to challenge their detention. Mere detention of captured combatants during time of hostilities is not a criminal judicial process. It is a military action to disarm enemy combatants, as well as a means to facilitate the gathering of military intelligence. Most importantly, however, it supports the ongoing war effort and avoids prolonging the conflict by removing hostile combatants from the battlefield. Through the preventive quarantine of unlawful combatant *62 detainees in Guantanamo - Bay, they are curtailed from again taking up arms illegally and fighting, or otherwise supporting the fight, against the U.S. and its coalition allies during the current ongoing global armed conflict.

Al-Qaeda and the Taliban are in a self-professed Islamist *jihad* - a nihilistic holy war without end against all people who do not believe as they do, including fellow Muslims who hold different views. It is therefore al-Qaeda and the Taliban, not the U.S., who have made the duration of the detention of captured al-Qaeda and Taliban unlawful combatant detainees seemingly open-ended. Releasing prematurely such detainees would have the operative effect of reinforcing the enemy's combat forces. The repatriated forces likely then would simply return to their *jihad* arena of battle, re-engage U.S. and allied forces, and perpetrate more acts of terrorism against protected civilians.⁶⁶

As stated earlier, captured enemy combatants may be held for the duration of an armed conflict. Subsequent to the cessation of hostilities through defeat and surrender, or a mutually agreed armistice, captured combatants who are not facing criminal charges are then repatriated. However, an armed conflict against a terrorist organization of *hostes humani generis* like al-Qaeda, that is ideologically implacable, well funded, effectively structured, and globally-dispersed, requires a somewhat modified definition of the cessation of hostilities.

A fixed-date definition of what constitutes the cessation of hostilities in an armed conflict of a state against

hostes humani generis akin to al-Qaeda *63 is different from that of an armed conflict solely between states. Under the international laws of armed conflict, it is the state parties to the conflict who determine the end of hostilities, usually through a mutual armistice or an unconditional surrender. Al-Qaeda, on the other hand, is a stateless terrorist organization. There can never be a truce or an armistice with such an organization. Sound and prudent judgment combined with the international Rule of Law proscribe states from negotiating with and granting concessions to such *hostes humani generis*. To do so only would serve to embolden these *hostes humani generis* and beget more global terrorism. Instead, al-Qaeda *hostes humani generis* must be absolutely defeated. Such an unqualified defeat would mark the cessation of hostilities.

At this point in time, however, al-Qaeda has not yet been defeated. Consequently, this armed conflict is not over and there is not a future date-certain in which the conflict may be declared over. Given that neither the Taliban nor al-Qaeda as *hostes humani generis* could or would sign a peace treaty, or has given or would honor an order to demobilize and end hostilities, an appropriate definition of the end of this armed conflict is when there are no longer effective al-Qaeda, al-Qaeda affiliated, or al-Qaeda progeny terrorist networks functioning in the world which the detainees upon release reasonably would be likely to rejoin and then resume terrorist activities.⁶⁷

*64 The definitive military and national security objectives of this international armed conflict, the Global War against Terrorism, or more precisely the Global War against al-Qaeda, are the universal illegitimization of state-sponsored international terrorism attacks, the dismantling of all al-Qaeda international terrorist networks and their infrastructures, and, in the end, the defeat and eradication of al-Qaeda international terrorism. Through their international aggression and terrorism, al-Qaeda and the Taliban initiated this global armed conflict. The U.S. and its allies remain committed to its victory.

An idealistic position is that this global armed conflict against al-Qaeda and the Taliban is all but over or that it will soon end. Additionally, there exists a position that international terrorism is only a matter of civilian law enforcement. Generally, those that hold such views follow such assertions with calls for the release of the al-Qaeda and Taliban detainees. However, credulous hope, unarmed idealism, and intellectual denial are not, and have never been, coherent geopolitical and military strategies. Al-Qaeda continues to exist as a significant international military threat against the U.S. and its allies. Continued military force is the primary means and, at present, in combination with all elements of national and international power, the most visible and capable instrumentality to neutralize this military threat. Unfortunately, it is quite clear that this global armed conflict against al-Qaeda will not soon end. An acceptable end-state is unlikely to be realized in the near future.

Rogue states continue to sponsor al-Qaeda international terrorism. Al-Qaeda as an international terrorist

organization continues to operate and target civilians. Neither Mullah Omar nor Usama bin Laden has surrendered or been captured. Numerous other Taliban and al-Qaeda lieutenants and high-level operatives remain at large. Usama bin Laden and his senior lieutenants and followers continue to regularly release lengthy audiotape messages calling for further and more severe acts of violence against the U.S. and its allies. Repeated al-Qaeda and Taliban terrorist attacks and attempted attacks since September 11, 2001, against the U.S., its allies, and recurring declarations by al-Qaeda accepting responsibility for these attacks, and threats of future international terrorism demonstrate plainly the unfortunate, ongoing nature of this international armed conflict.

Irrespective of how long it may take to achieve total victory in the Global War against Terrorism, however, the U.S. has made it apparent that it *65 has no desire to, and will not hold any detainee indefinitely.⁶⁸ The U.S. regularly reviews on a case-by-case basis whether continued detention is necessary.⁶⁹ The U.S. and Afghanistan have already screened and released *66 thousands of lower-ranking Taliban unlawful combatant battlefield detainees in Afghanistan.⁷⁰ Enemy unlawful combatants in Guantanamo Bay, in contrast, comprise Taliban and al-Qaeda senior leaders and their most zealous followers from over 40 countries, who were transported out of Afghanistan and away from the battlefield to assist in gaining military intelligence, and to assist in the pacification of Afghanistan and its democratization.

Even so, in a substantial departure from the common practice of previous armed conflicts, a significant number of Guantanamo Bay detainees has been vetted, paroled, and transferred back to their home countries prior to the cessation of hostilities. However, the gratuitous release of such individual enemy combatant detainees does not mean that such detainees were not lawfully captured and lawfully detained as enemy combatants under LOAC during time of armed conflict. Additional detainees eventually could be repatriated to their countries of citizenship for possible local prosecution, or transferred for continued detention by authorities of their own countries. Other detainees, who will not face criminal charges, have no further intelligence value, and who no longer present a significant security threat, in time also may be outright released and repatriated presuming their individual countries of origin are willing to accept them.⁷¹ Except for tried and convicted unlawful *67 combatants serving adjudged sentences of confinement, the U.S. will continue to hold Taliban and al-Qaeda detainees only as long as is necessary to prevent future threats and attacks against the U.S. and its allies.

***68IV. UNLAWFUL BELLIGERENCY AND MILITARY COMMISSIONS: REASONABLE AND JUST CONSEQUENCES**

A. Background

Regardless of how well or how long the U.S. treats and safeguards the detainees, the U.S. is highly unlikely to grant POW status and all its benefits to either al-Qaeda or Taliban detainees. In the past, the U.S. has prosecuted some al-Qaeda and other captured international terrorists in U.S. Federal courts. Given that the unlawful combatant detainees in Guantanamo Bay were captured in an international armed conflict, however, the U.S. may also, in the interests of U.S. national security and the pursuit of justice, try them before U.S. military commissions for unlawful belligerency, crimes against humanity, and other violations of LOAC and international humanitarian law.

There can never be a lasting peace without justice. Just as important, opposing forces are not deterred when LOAC is not enforced and violators held accountable during conflict and post-conflict. Accordingly, customary international law imposes on every country the universal resolute duties of preventing, investigating, and prosecuting LOAC violations. An unlawful combatant captured in an international armed conflict is subject to be tried for unlawful belligerency and other crimes of war by the unlawful combatant's own country (presuming the unlawful combatant's country of origin is willing to do so and adequate jurisdiction exists). An unlawful combatant may also be tried by the country whose nationals were victimized by the unlawful combatant's crimes of war; the International Criminal Court (if specific jurisdictional criteria are met); an *ad hoc* international war crimes court (because, in the Taliban/al-Qaeda detainee cases, no existing international tribunal has any form of jurisdiction over them); or within the criminal justice system of the country where the unlawful belligerency occurred.

However, this is not to say that an unlawful combatant is entitled access to such domestic civilian courts, foreign civilian courts, or international tribunals. The laws of armed conflict also recognize pragmatically that military necessity, the realities of combat, and the complexities of the battlefield during armed conflict and post-conflict do not usually allow for such comprehensive judicial due process.⁷²

*69 The laws of armed conflict instruct that a captured unlawful combatant is not necessarily a mere common criminal suspect who always would be entitled to the entire breadth of peacetime domestic criminal legal rights and all the associated trappings of civilian judicial due process. An unlawful combatant captured in an international armed conflict does not have a right to choose a civilian forum over a military one. In particular, a violation of LOAC, such as a combatant wearing civilian attire in combat with perfidious intent, does not generate a right to a civilian criminal trial. It disentitles it.

B. Unlawful Combatants: Civilian Criminal Courts vs. U.S. Military Commissions

Strict comparisons between civilian criminal judicial courts and military commissions are misplaced. Military commissions are not in any way a usurpation of civilian criminal judicial courts. The former, generally, is for trying particular captured enemy combatants in time of war or immediately following a war, the latter is for trying alleged civilian criminals in time of peace for acts not related to war. Civilian judicial courts try alleged common criminals. Military commissions try certain alleged war criminals.

U.S. military commissions are not a form of *legal action* in time of peace within the U.S. domestic civilian criminal justice system by the U.S. federal courts, the Judiciary branch. Rather, U.S. military commissions are a lawful form of *military action* in a time of war within the U.S. Department of Defense by the U.S. President as the Commander-in-Chief of the U.S. armed forces, the Executive branch. In time of war, the powers of the unitary Executive as Commander-in-Chief necessarily are at their absolute peak. Military commissions are established via Executive military orders, exist only *70 in time of armed conflict or subsequent to armed conflict, and are limited in subject-matter jurisdiction to crimes of war and crimes related to war.

Civilian law enforcement organizations and civilian criminal courts are ill-equipped generally to investigate, assume jurisdiction over, and adjudicate criminal acts of war alleged to have occurred abroad by enemy combatants during an international armed conflict. In extraordinary circumstances involving national security, this is also true in regard to war crimes occurring on domestic soil. Indeed, a domestic civilian criminal justice system simply is not designed to render justice adequately to captured enemy soldiers accused of violations of LOAC that are alleged to have occurred in a theater of war many thousands of miles away. It follows that crimes committed by unlawful combatants within the context of an international armed conflict may remove such combatants from a domestic civilian criminal justice system and place them into a military forum authorized under LOAC.

The jurisdiction of the United States Uniform Code of Military Justice (UCMJ), however, is limited in regards to captured enemy forces. A court-martial convened under the UCMJ has jurisdiction to try a captured enemy combatant only if the combatant has been granted POWstatus.⁷³ Accordingly, the U.S. military as a capturing party may only try an unlawful combatant who lacks POWstatus in a military commission, military tribunal, or other proper military venue it has established. If subsequently convicted, an unlawful combatant may be punished appropriately for unlawful acts as the U.S. military forum directs.

Combatants who are accused of committing crimes during armed conflict are usually best and most fairly judged in military forums by their peers, fellow combatants who are knowledgeable about the profession of arms, martial honor, military culture and ethos, educated in the science and art of war, who have command or

other military leadership experience, and who have military acumen and practical experience regarding LOAC, battlefield conditions, operations, and customs. Given such specialized expertise, combatant peers can sensibly and more adequately evaluate and weigh armed conflict-related evidence of war crimes, defenses, aggravation, mitigation, and extenuation.

*71 Because of this, state practice and custom over time has been to convene military commissions to try unlawful combatants captured during armed conflict. For example, the U.S. convened military commissions in its Revolutionary War, the War of 1812, the Spanish-American War, and during its Civil War. Also, during WW II and immediately after its conclusion, the U.S. and its allies used military judicial forums (primarily military commissions) regularly to assume criminal jurisdiction over and try captured foreign-national combatants accused of violations of LOAC and other international laws.⁷⁴ The armed conflict ongoing against al-Qaeda is the first *72 conflict since WW II that has necessitated the convening of U.S. military commissions.

Military commissions arise out of LOAC, are subject to these laws, and in full compliance with them. Military commissions recognize the concerns specific to trying unlawful combatants captured in international armed conflict. Military commissions have universal jurisdiction as to crimes occurring within an international armed conflict. The jurisdiction of a military commission is based upon the alleged criminal act and is not necessarily dependent upon where the act occurred or whether the defendant's status is military or civilian. Moreover, as stated earlier, military commissions possess highly specialized competence and institutional expertise regarding military operations and are thus uniquely suited to trying crimes alleged to have occurred during a time of war.

As a result, military commissions are essential to the enforcement of the Rule of Law within the construct of LOAC. Such military forums are designed to fairly balance the inherent individual liberties of those unlawful combatants who are alleged to have violated LOAC with the captor's bona fide ongoing war efforts and national security interests. Military commissions are convened in time of armed conflict or post-conflict, rather than civilian judicial forums, in order to more capably and expediently dispense justice abroad to unlawful combatants whose alleged crimes have occurred in the context of hostilities.

C. U.S. Military Commissions: Appropriate Security Measures and Evidence Procedures

*73 A military commission convened in the course of ongoing hostilities can provide better security and protection to the accused, judges, prosecutors, juries, witnesses, defense counsel, court-room observers and other participants⁷⁵ than could a parallel civilian criminal justice forum. Given that any courtroom in which an unlawful combatant is tried could itself become a terrorist target, additional security may be provided and the

risk to the physical safety of court participants minimized when a U.S. military commission is convened on a U.S. military installation with sophisticated security measures, limited access, and one that is isolated from major civilian population centers. Additionally, a U.S. military commission would be better able to protect the identities of court participants in order to reduce the potential of post-trial Taliban and al-Qaeda retaliation.

Similarly, when necessary, a U.S. military commission can more adequately protect classified evidence involving on-going military operations and investigations which involve continuing threats to U.S. national security, and can better protect classified U.S. intelligence communications, sources, identities, capabilities, and gathering methods. U.S. military personnel are well trained in protecting such sensitive operational information from compromise. Additionally, U.S. military commission members and other commission participants would already have undergone extensive background security investigations and, as a result, possess the applicable information security clearances, to include Secret, Top Secret, and, if necessary, higher clearances.

The safeguarding of sensitive information received gratuitously from foreign intelligence agencies of allied countries (including intelligence agencies of mideastern allied countries), as well as the protection of the ⁷⁴ identities of foreign intelligence sources, is indispensable if the U.S. wishes to rely on their continued cooperation. The protection of such information from enemy espionage and other enemy strategic intelligence collection efforts would be extremely difficult, if not impossible, in an “open and public” civilian criminal trial.

Safeguarding and preserving such highly sensitive information from compromise, and ensuring that unlawful combatants cannot abuse the criminal justice system evidence discovery process for illicit purposes, are imperatives to U.S. national security. This is because al-Qaeda followers still at large could possibly exploit such classified information to adapt their methods, protect themselves from capture, attack the U.S. and its allies, retaliate against court/commission participants, or carry out additional acts of terrorism against protected civilians.⁷⁶

The rules of evidence in a U.S. military commission also address the practicality that standard common law evidence procedures and principles cannot be applied strictly to crimes that are alleged to have occurred in a zone of active combat. Accordingly, U.S. military commission rules of evidence, in limited circumstances, are crafted with more flexibility and less procedural formality. They are somewhat similar to the models of European civil law jurisdictions, and UN-sponsored war crimes tribunals such as the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Cambodia, as well as the recently established International Criminal Court.⁷⁷⁷⁵ Hence, in reaching an informed and just verdict, members of a U.S. military commission may admit and

consider a broader range of probative evidence and give such evidence whatever weight is appropriate.⁷⁸

***76** A U.S. military commission's latitude to admit and consider a more comprehensive gamut of both prosecutorial and defense evidence, that being evidence that has probative value to a reasonable person, is in practical acknowledgement of the character of war. The U.S. military commission "probative to a reasonable person" standard of evidence applies equally to both the prosecution and to the defense. The military commission evidence standard and rules pragmatically take into consideration that acquiring evidence in the battlefield environment is completely different from traditional peacetime law enforcement evidence gathering.

More specifically, the military commission evidence standard and rules recognize the diaspora, deaths, or incapacitation of material witnesses, the destruction or loss of evidence buried under rubble on the field of battle, the distinction that military intelligence is gathered primarily to aid the current war effort rather than for any conjectural subsequent use as prosecutorial evidence, the availability of military-affiliated witnesses who are still engaged in ***77** ongoing combat operations, the high operational tempo and speed of maneuver in modern warfare, the constant flux and changing of battle lines and positions, and the location of relevant evidence in distant battlefields halfway around the globe. The difficulty in evidence retrieval, maintenance of a proper chain-of-custody, the continued safeguarding during ongoing military operations, and the general chaos and mayhem associated with international armed conflict and the battlefield amplify the problem.

D. U.S. Military Commissions: Executive Due Process Protections

The U.S. military commission system established by the U.S. President in his Military Order of November 13, 2001, and implemented by the U.S. Secretary of Defense in his Military Commission Order No. 1, March 21, 2002, provides an unlawful combatant defendant extensive due process protection in compliance with U.S. domestic law and with customary international law. Unlawful combatant detainees tried by U.S. military commissions under such executive orders will receive more favorable judicial proceedings and legal protections than historically have been provided in military commissions of unlawful combatants during previous conflicts. The U.S. President exercised his discretion to foster impartial, full, and fair trials, providing unlawful combatants tried in U.S. military commissions more procedural protections than what is required by international law.⁷⁹

***78** The defendant in a U.S. military commission is presumed innocent and the conviction standard is proof beyond a reasonable doubt. Furthermore, a defendant receives full notice of all charges in the defendant's native language in advance of trial, adequate time to prepare for trial, a military defense ***79** attorney at no cost, the

ability to be represented by a civilian defense attorney at the defendant's expense, a public trial subject to security requirements (open to the media to the maximum extent practicable), the ability to be present throughout the entire trial subject to security concerns, interpreters, the ability to review all the evidence the prosecution will use during the trial subject to security concerns, the protection that the prosecution is required to provide the defense all exculpatory evidence, the protection against self-incrimination, the protection that the military commission may not draw an adverse inference from the defendant's silence, the protection that nothing said by a defendant to defense counsel, or anything derived from such statements, may be used against the defendant at trial; the ability to obtain witnesses, documents, and other reasonable resources for use in defense, the ability to call defense witnesses and cross-examine prosecution witnesses, the ability to enter into a plea agreement in order to limit the severity of punishment, and many additional procedural protections.⁸⁰

A special independent review panel (composed of members serving fixed nonrenewable two-year terms) automatically will review every *80 conviction and sentence for material errors of law (to include sufficiency of the evidence). Review panel decisions will be in writing and publicly released (subject to security concerns). A review panel decision to return the case to the Secretary of Defense or his delegate, a civilian Appointing Authority, for dismissal of charges is binding. If a U.S. military commission renders a not guilty verdict, the protection against double jeopardy does not allow the not guilty verdict to be overturned. A conviction with its corresponding sentence is only final if approved by the U.S. President or, if the U.S. President so delegates, the U.S. Secretary of Defense.⁸¹ Upon receipt from the Appointing Authority, the U.S. President, or, if the U.S. President so delegates, the U.S. Secretary of Defense, may grant clemency and "disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense; or ... mitigate, commute, defer, or suspend the sentence imposed or any portion thereof."⁸²

The detainees interned at Guantanamo Bay, Cuba are not protected noncombatant civilians being held without charge. They are unlawful combatants, captured in time of armed conflict and interned during an ongoing armed conflict. Should the U.S. try a detainee by military commission for *81 crimes of war or crimes related to war, the detainee will be guaranteed full and fair due process in complete compliance with U.S. law. Such due process will meet or exceed international standards of justice. The military commission process, although different from a domestic civilian criminal court, will be fair. To uphold the international Rule of Law, the U.S. must remain stalwart in holding responsible those who would willfully violate international humanitarian law and the international laws of armed conflict. Convening U.S. military commissions in such cases is lawful, and is a pragmatic and just means to the furtherance of this very necessary end.

V. CONCLUSION

U.S. International Obligations & Responsibilities and the International Rule of Law

The U.S. is in compliance with its international obligations and responsibilities. Al-Qaeda and Taliban combatants willfully engaged in unlawful belligerency *en masse* in violation of LOAC. Taliban combatants *en masse* willfully failed to meet the four criteria of lawful belligerency. Al-Qaeda combatants are stateless *hostes humani generis*, and also *en masse* willfully failed to meet the four criteria. As a matter of international law, both the Taliban and al-Qaeda are unlawful combatants. The U.S. has no requirement under international law to bestow POWstatus to such enemy al-Qaeda and Taliban unlawful combatants upon capture. No requirement exists to hold individual Geneva Convention art. 5 POWstatus tribunals to reaffirm gratuitously the unlawful combatant status of either the Taliban or al-Qaeda, nor, upon capture, their lack of POWstatus.

The U.S. is treating humanely, beyond what is required by international standards, all al-Qaeda and Taliban unlawful combatant detainees interned at Guantanamo Bay. In accordance with customary international law, the U.S. is authorized to continue to hold these detainees until the end of armed conflict. At present, however, Taliban remnants and al-Qaeda remain a viable military threat against the national security interests of the U.S. and its allies. Unfortunately, the international armed conflict against al-Qaeda is highly likely to be long and sustained. The U.S. and its allies, through their militaries and other instruments of national power, in the exercise of their inherent right of collective self-defense, may continue to use armed force until the threat posed by al-Qaeda and its affiliates no longer exists.

Al-Qaeda should not be underestimated in the wake of continuing international progress in the Global War against Terrorism. Considering al-Qaeda's declared hegemonic theocratic-political ideology, and the proven terrorist capabilities it continues to possess, al-Qaeda remains a clear and present danger to the national security interests of the U.S. and its allies. Nevertheless, the U.S. has no desire to, and will not, hold any unlawful *82 combatant indefinitely. When individual detainees no longer pose a significant security threat to the international community, no longer possess any intelligence value, and are not facing criminal charges, the U.S. will release them. However, an unlawful combatant detainee accused of war crimes may be tried before a U.S. military commission.⁸³ Beginning in November 2001, the U.S. has spent over two and one half years updating its military commission procedures, and developing a military commission system that is just, in complete compliance with contemporary U.S. and international law, and one that is consistent with U.S. national security interests and its ongoing war efforts against al-Qaeda. If convicted in such a U.S. military commission, the detainee may be further confined to serve the term of imprisonment adjudged by the military commission.

However, adherence to the international Rule of Law is at the crux of this entire matter. As an influential member in the international community and full supporter of the international Rule of Law, U.S. actions in regards to al-Qaeda and Taliban detainees could not be anything less than what is noted above. The U.S. and every nation in the world have the cardinal international duty, indeed the moral imperative, to encourage compliance with, and to discourage violations of international humanitarian law and LOAC regardless of domestic or international political objections and criticisms, ensuing controversies, or the difficulties of doing so. Casually affording Geneva Convention III POWstatus with its greater privileges and attendant implicit legitimacy to either al-Qaeda or the Taliban would turn a blind eye to this foundational duty.⁸⁴ To grant POWstatus to al-Qaeda or Taliban detainees *83 would be to acknowledge that they are privileged combatants, and convey that they and these groups have a right to associate together and wage war in the manner that they do.

It would be incorrect, irresponsible, and unwise for the U.S. to afford POWstatus to captured members of al-Qaeda and the Taliban as they are not entitled to, and are undeserving of this status.⁸⁵ International terrorists, and civilian-dressed combatants of a collapsed state ruled by a *de facto* government that willfully provides the terrorists safe haven, have never before been granted POWstatus upon capture in an international armed conflict. For a permanent member of the United Nations Security Council, who also is the world's premier military superpower and its leading global economic power, to do so would set a highly injudicious international legal precedent inconsistent with the Rule of Law and the long-term interests of the international community. It would recklessly foster future abuses in armed conflict by undermining directly long-standing rules of war crafted carefully to protect noncombatants *84 by deterring combatants in armed conflicts from pretending to be protected civilians and hiding among them.

All nations and their armed forces are subject to LOAC. Combatants in armed conflict who blatantly disregard these laws are outside of them and do not, upon capture at the discretion of the capturing party, receive several of their benefits. LOAC is only effective, and civilians protected in armed conflict, when the parties to a conflict comport their belligerency to such laws, and enforce consistently strict compliance with all the provisions of such laws.

Parties to a conflict are significantly more likely to observe such laws if they have both affirmative incentives for complying with them and if appreciable negative consequences follow when such laws are disregarded or violated. Designating captured members of al-Qaeda or the Taliban as POWs would consequently place protected civilians and other noncombatants into much greater peril during future armed conflicts, because

unlawful combatants would no longer experience sufficient negative consequences from endangering protected noncombatants by egregiously violating international law and customs. This eventuality is not attractive.

A *carte blanche* designation of Geneva Convention III POWstatus by the U.S. to Taliban and al-Qaeda unlawful combatants certainly would be politically expedient internationally. By letting captured Taliban and al-Qaeda reap and enjoy every benefit of POWstatus, the U.S. would mollify temporarily some U.S. detractors. But, such U.S. action would be wrong. Just as protected noncombatant civilians have borne the consequences of the Taliban and al-Qaeda's previous perfidies and patent violations of international law, protected noncombatant civilians would also then be relegated to shoulder and suffer all the concomitant burdens and costs of the Taliban and al-Qaeda being accorded POWstatus. Shortsighted action to placate U.S. critics and dissentients momentarily would lastingly reward, rather than penalize, all unlawful combatants who contravene international humanitarian law and LOAC intentionally, continually, and abhorrently. LOAC should never be utilized, construed, or developed in such a way that would benefit terrorists and rogue states that provide aegis to terrorists, or in such a way that would otherwise serve the ends of terrorism.

The negative prices that combatants who engage in armed conflict without meeting the requirements of lawful belligerency pay, that *hostes humani generis* pay, and that rogue states pay for unlawfully hosting or otherwise willfully supporting *hostes humani generis*, must remain high. Endorsing captured al-Qaeda, the Taliban, or other agents of global terror as POWs would be inapposite, as it may be viewed as symbolically elevating their international status. It would be tantamount to bestowing tacit international recognition and credibility to their reprehensible objectives, appalling atrocities, and insidious terrorist tactics.⁸⁶

*85 The U.S. does not take lightly its international role, influence, obligations, and responsibilities. Classifying al-Qaeda or the Taliban captured enemy combatants as POWs under Geneva Convention III would have broad, and most undesirable ramifications. It would erode significantly a combatant's considerable, at times primary, incentive to comply with LOAC and thereby would increase substantially and unnecessarily the risks to civilians and other protected noncombatants in future armed conflicts.⁸⁷ Ultimately, woefully undercutting customary LOAC and international humanitarian law by granting POWstatus arbitrarily to unworthy, unlawful combatants would simply lead to an added loss of international respect for, and future observance of, long-established international armed conflict norms, customs, and laws. This would be unacceptable.

Footnotes

⁸¹ Lieutenant Colonel (s) Bialke (B.S.C.J.S., M.A., & J.D. with distinction, University of North Dakota, LL.M.

International and Comparative Law, University of Iowa) is presently assigned as Staff Judge Advocate, Pacific Air Forces-Australia, U.S. Embassy, Canberra, Australia.

¹ See, e.g., Human Rights Watch: *Background Paper on Geneva Conventions and Persons Held by U.S. Forces - Human Rights Watch Press Backgrounder* (Jan. 29, 2002), at <http://www.hrw.org/backgrounder/usa/pow-bck.htm> (last visited Dec. 3, 2002); see also generally e.g., George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127 (2003); Joshua S. Clover, Comment, *Remember, We're The Good Guys": The Classification and Trial of the Guantanamo Bay Detainees*, 25 S. TEX. L. REV. 351 (2004).

² Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GPW].

³ See, e.g., David B. Rivkin, Jr., et al., *It's Not Torture, and They Aren't Lawful Combatants*, WASH. POST, Jan. 11, 2003, at A 19:

The United States has not granted the rights of honorable prisoners of war to the Guantanamo Bay detainees because they are neither legally nor morally entitled to those rights. Only lawful combatants, those who at a minimum conduct their operations in accordance with the laws of war, are entitled to POW status under the Geneva Convention. By repudiating the most basic requirements of the laws of war -- first and foremost the prohibition on deliberately attacking civilians -- al Qaeda and the Taliban put themselves beyond Geneva's protections.

Id.

⁴ GPW, *supra* note 2, art. 4(A)(specifying categories of combatants entitled to POW status); U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW-THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31 (1976) [hereinafter AFP 110-31], at 3-3a:

An unlawful combatant is an individual who is unauthorized to take a direct part in hostilities but does. The term is frequently used also to refer to otherwise privileged combatants who do not comply with requirements as to mode of dress, or noncombatants in the armed forces who improperly use their protected status as a shield to engage in hostilities. "Unlawful combatants" is a term used to describe only their lack of standing to engage in hostilities, not whether a violation of the law of armed conflict occurred or criminal responsibility accrued.

Id. See also, e.g., R.R. Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 328 (1951)(defining unlawful belligerents as "[a] category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949..."); A. ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR 419 (1976) ("persons who are not entitled

to prisoner-of-war status are as a rule regarded as unlawful combatants.”); INGRID DETTER, *THE LAW OF WAR* 148 (2d ed. 2000):

The main effect of being a lawful combatant is entitlement to prisoner of war status. Unlawful combatants, on the other hand, though they are a legitimate target for any belligerent action, are not, if captured, entitled to prisoner of war status. They are also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier. They are often summarily tried and enjoy no protection under international law.

Id. See also JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 549 (1954) (The difference between “privileged”/“lawful” combatants and “unprivileged”/“unlawful” combatants is the difference “between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection.”).

⁵ Part of waging armed conflict includes the capture and detention of combatants from opposing forces. Captured *lawful combatants* receive “POWstatus.” As a matter of policy, the U.S. affords captured *unlawful combatants* “POW treatment and protections.” “POWstatus” is legally distinct from “POW treatment and protections.” POWstatus is a legal term denoting the legal status that entitles captured lawful combatants to numerous rights under GPW. A capturing party is legally required to provide captured lawful combatants all such rights. In contrast, *POW treatment and protections* is descriptive generally of how a capturing party, at its discretion, opts to care for captured unlawful combatants or, temporarily, for captured combatants whose lawful or unlawful combatant status is not yet clear. Whenever there is no doubt as to the legal status of captured unlawful combatants, the U.S. continues to provide them POW treatment and protections. OPERATIONAL LAW HANDBOOK JA 422, U.S. ARMY 23 (2003); see also Marc L. Warren, *Operational Law — A Concept Matures*, 152 MIL. L.REV. 33, 58 n. 105 (1996) (“[T]he difference between the two terms [of ‘POWstatus’ and ‘POW treatment’] is not merely semantic; similarly, the distinction between ‘treatment’ and ‘status’ as a prisoner of war can be legally, practically, and politically profound.”); cf., DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, para. 5.3.1 (Dec. 8, 1998) saying that it is U.S. DoD policy to comply with LOAC “in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized”).

⁶ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, U.N. Doc A/32/144 [hereinafter Protocol I], [reprinted in 16 I.L.M. 1391](#). Protocol I, art. 75, prohibits *inter alia* torture, hostage-taking, collective punishments, and respective threats to do such acts. Art. 75 requires, *inter alia*, that detainees be informed as to the reasons of their detention and that detainees be released when the circumstances of, and reasons for their detention no longer exist. Art. 75 requires that judicial proceedings, *inter alia*, afford an accused detainee the right to a speedy trial, proper notification of charges, the presumption of innocence, the right against self-incrimination, the right of confrontation, the right against double jeopardy, and the right of public announcement of any conviction. Art. 75 prohibits, *inter alia*, *ex post facto* charges

and collective punishment. Protocol I, art. 75 further says in pertinent part:

Fundamental guarantees:

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, *persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances* and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons...

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) *any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol. ... (emphasis added).*

Id. See also Protocol I, at art. 45(c), *supra* note 6, also implicitly recognizing the category of unlawful combatants in LOAC (“*Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of the Protocol.*”)(emphasis added).

⁷ See, e.g., Adam Roberts, *The Prisoner Question: If the U.S. has acted lawfully, what's all the furor about?*, WASH. POST, Feb. 3, 2002, at B 01 (“The United States is not a party to Protocol I but has long viewed Article 75 as customary law, binding on all states.”); see also Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L. & POL’Y 419, 427-28 (1987); JORDAN J. PAUST, ET AL., INTERNATIONAL CRIMINAL LAW 817 (2d ed. 2000).

⁸ See J.L. Whitson, *The Laws of Land Warfare: The Privileged Guerilla and the Deprived Soldier* (1984), at <http://www.globalsecurity.org/military/library/report/1984/WJL.htm> (last visited Jun. 16, 2004):

Consistently failing to abide by the rules established in 1949, ... unconventional forces have ... conduct[ed] treacherous attacks against uniformed soldiers, and as an assurance of self protection by hiding amongst the immune civilian population. The dilution of [LOAC], as a result of inevitable civilian casualties, is an abomination which has accorded a special measure of protection to these forces while, at the same time, placing the conventional soldier in a

situation of unacceptable risk.

Id.

⁹ See Rivkin, *supra* note 3, at A 19:

The fundamental distinction between lawful armed forces, such as those of the United States, and unlawful combatants, such as al Qaeda and the Taliban, and the harsh treatment reserved for the latter, is not some legal technicality invented by the Bush administration. It is, in fact, part of the centuries-long effort by civilized states to eliminate private warfare and to ensure that civilian populations are protected. It is, in fact, at the core of ... humanitarian law...

Id. See also Charles C. Hyde, 2 *International Law: Chiefly as Interpreted and Applied by the United States* § 652 (Little, Brown 1922):

The law of nations, apart from the Hague Regulations ... denies belligerent qualifications to guerrilla bands. Such forces wage a warfare which is irregular in point of origin and authority, of discipline, of purpose and procedure. They may be constituted at the beck of a single individual; they lack uniforms; they are given to pillage and destruction; they take few prisoners and are hence disposed to show slight quarter.

Id. See also generally Secretary to the Military Board, Australian Edition of Manual of Military Law 200 (1941)[hereinafter Australian Military Law]:

[A]n 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...Peaceful inhabitants ... [i]f...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.

Id. See also BRITISH MANUAL OF MILITARY LAW: WAR OFFICE [hereinafter BRITISH MILITARY LAW] 238 (1914).

¹⁰ See *ex parte Quirin* [hereinafter *Quirin*], 317 U.S. 1 (1942):

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations (n. 7) and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. (n. 8). The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. Winthrop, Military Law, 2d Ed., pp. 1196-1197, 1219-1221; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V (emphasis added).

Id. at 31-32.

- 11 See Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U. L.REV. 53, 59 (1983); see also Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc., 5 rev. 1 corr., (Oct. 22, 2002), at <http://www.cidh.oas.org/Terrorism/Eng/toc.htm> (last visited Dec. 9, 2003) (“the combatant’s privilege ... is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives.”). *Id.* at para. 68. See also Robert K. Goldman, *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflict*, 9 AM. U. J. INT’L L. & POL’Y 49, 58-59; see also Geoffrey S. Corn, et al., “To Be or Not to Be, That is the Question”: *Contemporary Military Operations and the Status of Captured Personnel*, DA-PAM 27-50-319 ARMY LAW at 1 & 14 (Jun., 1999):

[B]efore capture, many prisoners of war participate in activities that are, during times of peace, generally considered criminal. For example, it is foreseeable that soldiers will be directed to kill, maim, assault, kidnap, sabotage, and steal in furtherance of their nation state’s objectives. In international armed conflicts, the law of war provides prisoners of war with a blanket of immunity for their pre-capture warlike acts.

Id. The combatant’s privilege entitles a lawful combatant to kill or wound enemy forces, and to destroy property while in the pursuit of lawful military objectives. Additionally, “[a] lawful combatant possessing the privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic laws of his captor for his hostile acts which do not violate the laws and customs of war” (emphasis added). *Id.* See also MICHAEL BOTHE, ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY OF THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 243 (1982):

[Combatant’s privilege] provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflicts. The essence of prisoner of war status under the Third Convention is the obligation imposed on the Detaining Power to respect the privilege of combatants who have fallen into its power.

Id. at 243-44. *Accord.* Telford Taylor describes combatant’s privilege as follows:

War consists largely of acts that would be criminal if performed in time of peace — killing, wounding, kidnapping, and destroying or carrying off other people’s property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over its warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.

Cited in NATIONAL SECURITY LAW 359 (John Norton Moore et al. eds., 1990); see also John C. Yoo & James C. Ho, *International Law and the War on Terrorism*, 13-14 (Aug. 1, 2003), at <http://www.law.berkeley.edu/cenpro/ils/papers/yoonyucombatants.pdf> (last visited May 27, 2004) (“The customary laws of war immunize only lawful combatants from prosecution from committing acts that would otherwise be criminal under domestic or international law. And only those combatants who comply with the four conditions are entitled to

the protections afforded to captured prisoners of war....”). Combatant’s privilege is also referred to as “combatant’s immunity” or “belligerent’s immunity.”

¹² See GPW, *supra* note 2, at art. 4(A)(2)(b); but see W. Hays Parks, [Special Forces Wear of Non-Standard Uniforms](#), 4 CHI. J. INT’L L. 493 (2003) (arguing that wide-spread state practice over time has created customary international law that allows certain state armed forces to wear civilian clothes, “non-traditional uniforms,” in armed conflict in certain circumstances and that therefore such specialized civilian-attired forces would not be in violation of international law, but acknowledges the increased risks of such conduct if captured in enemy-controlled territory because the capturing party could prosecute them as spies under the domestic criminal espionage laws of the capturing party).

¹³ See GPW, *supra* note 2, at art. 4(A) (specifying categories of combatants entitled to POWstatus); See also e.g., DEP’T OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 31 para. 74 (Jul. 1956): Necessity of Uniform. *Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.* (emphasis added). *Id. cf.*: Human Rights: Guantanamo European Parliament Resolution On the Detainees In Guantanamo Bay, PARL. EUR. DOC. 90/PE 313.865 (2002), at [http:// www.europarl.eu.int/meetdocs/delegations/usam/20020219/004EN.pdf](http://www.europarl.eu.int/meetdocs/delegations/usam/20020219/004EN.pdf) (last visited Jun. 16, 2004) (“*The European Parliament ... Reaffirms its unwavering solidarity with the United States in combating terrorism with full regard for individual rights and freedom; 2. Agrees that the prisoners currently held in the US base in Guantanamo do not fall precisely within the definitions of the Geneva Convention*”) (emphasis in original); see also Protocol I, *supra* note 6, at art. 46 (explaining that spies do not have the right to POWstatus); *cf.*, Protocol I, art. 47 (another type of unlawful combatant, a mercenary, a soldier who is not a national of a party to the conflict and who is paid more than a local soldier, is similarly unprotected internationally; i.e., when captured in armed conflict, mercenaries are not entitled to POWstatus). *Id.* See also generally *The Hostages Trial: Trial of Wilhelm List and Others* (Case No. 47) [hereinafter WWII War Crimes Trial], 8 L.Rpts. of Trials of War Criminals 34, 57-58 (U.N. War Crimes Comm. 1948) at [http:// www.ess.uwe.ac.uk/WCC/List3.htm #Yugoslavia](http://www.ess.uwe.ac.uk/WCC/List3.htm#Yugoslavia) (last visited Jun. 19, 2004). The WWII war crimes court held that partisan bands and other irregulars who do not comply with the conditions of lawful belligerency may be prosecuted as war criminals, and, upon capture, are not entitled to POWstatus:
[T]he greater portion of the [Yugoslavian and Greek] partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents. ... They ... had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian

uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. ...The bands ... with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. *This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs ...*

Guerilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applied to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, *members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured.* (emphasis added).

Id.

¹⁴ See F. KALSHOVEN, THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS AND CONCLUSIONS 202 (2000) (“A clear distinction between combatants and civilians is essential if the latter are to receive the protection which the law requires.”); see also generally FRANCIS LIEBER, THE LIEBER CODE OF 1863, GENERAL ORDERS NO. 100, art. 83 (Apr. 24, 1863) (“Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.”) (emphasis added), at <http://fletcher.tufts.edu/multi/texts/historical/LIEBER-CODE.txt> (last visited Jun. 16, 2004); see also BOTHE, ET AL., *supra* note 11, at 256:

Under the practice of States and customary international law, members of the regular armed forces of a Party to the conflict were deemed to have lost their right to be treated as prisoners of war whenever they deliberately concealed their status in order to pass behind enemy lines of the adversary for the purposes of: (a) gathering military information, or (b) engaging in acts of violence against persons or property.

Id. See also Andrew Apostolou, et al., The Geneva Convention is Not a Suicide Pact, at http://www.defenddemocracy.org/publications/publications_show.htm?doc_id=155712&attrib_id=7696 (last visited

Jun. 16, 2004):

If we want soldiers to respect the lives of civilians and POWs, soldiers must be confident that civilians and prisoners will not attempt to kill them. Civilians who abuse their noncombatant status are a threat not only to soldiers who abide by the rules, they endanger innocents everywhere by drastically eroding the legal and customary restraints on killing civilians. Restricting the use of arms to lawful combatants has been a way of limiting war's savagery since at least the Middle Ages.

Id.

¹⁵ See, e.g., Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 I.R.R.C. 45, 46 (Mar., 2003) ("It is generally accepted that unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law...If unlawful combatants furthermore commit serious violations of international humanitarian law, they may be prosecuted for war crimes."); DETTER, *supra* note 4, at 148 ("[Unlawful combatants] are also personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier."); Lisa L. Turner, et al., *Civilians at the Tip of the Spear*, 51 A.F.L.REV. 1, 32 (2001) ("Unlawful combatants may be criminally prosecuted by the capturing state for their participation in hostilities, even when that participation would otherwise be lawful for a combatant.") citing L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 105 (1993); ROSAS, *supra* note 4, at 305 ("[a] person ... who is not entitled to the status of a lawful combatant may be punished under the internal criminal legislation of the adversary for having committed hostile acts in violation of its provision (e.g., for murder), even if these acts do not constitute war crimes under international law."); BOTHE, ET AL., *supra* note 11, at 244 ("Civilians who participate directly in hostilities, as well as spies and members of the armed forces who forfeit their combatant status, do not enjoy [combatant's] privilege, and may be tried, under appropriate safeguards, for direct participation in hostilities as well as for any crime under municipal law which they might have committed."); see also WWII War Crimes Trial, *supra* note 13, at 58:

[T]he rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war. *Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender ...* (emphasis added).

Id.

¹⁶ Quirin, *supra* note 10, at 1.

¹⁷ George Lardner Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal: 1942 Precedent Invoked by Bush Against al Qaeda*, WASH. POST, Jan. 13, 2002, at W 12.

¹⁸ See e.g., White House: *Fact Sheet: Status of Detainees at Guantanamo, United States Policy* (Feb. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html> (last visited Jun. 16, 2004).

¹⁹ *Id.* (“Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the [Geneva] Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.”); see also Ambassador Pierre-Richard Prosper, *Status and Treatment of Taliban and al-Qaida Detainees*, at <http://www.state.gov/s/wci/rm/2002/8491pf.htm> (last visited Jun. 16, 2004):

[T]he Geneva Conventions do apply ... to the Taliban leaders who sponsored terrorism. But, a careful analysis through the lens of the Geneva Convention leads us to the conclusion that the Taliban detainees do not meet the legal criteria under Article 4 of the convention which would have entitled them to POW status. They are not under a responsible command. They do not conduct their operations in accordance with the laws and customs of war. They do not have a fixed distinctive sign recognizable from a distance. And they do not carry their arms openly. Their conduct and history of attacking civilian populations, disregarding human life and conventional norms, and promoting barbaric philosophies represents firm proof of their denied status. But regardless of their inhumanity, they too have the right to be treated humanely.

Id.

²⁰ See Dormann, *supra* note 15, at 46 (“[T]he terms ‘unlawful combatant,’ ‘unprivileged combatant/belligerent’ do not appear in [the treaties of the international laws of armed conflict and international humanitarian law],” but these terms have “been frequently used at least since the beginning of the last century in legal literature, military manuals and case law.”); see also THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 302 (Dieter Fleck ed., 1985)[hereinafter FLECK, HANDBOOK] (“If ... persons who do not have combatant status participate directly in hostilities then they are treated as unlawful combatants”); Yoo & Ho, *supra* note 11, at 9 (“Although ‘illegal combatant’ is nowhere mentioned in the Geneva Conventions, it is a concept that has long been recognized by state practice in the law of war area.”); James B. Steinberg, *Brookings Speakers Forum, Counterterrorism and the Laws of War: A Critique of the U.S. Approach* (Mar. 11, 2002), at <http://www.brookings.edu/dybdocroot/comm/transcripts/20020311.htm> (last visited Jun. 16, 2004); quoting Adam Roberts, Professor of International Relations, Oxford University, regarding the issue as to whether there exists in the customary international laws of armed conflict the category of unlawful combatants:

There’s been, as you know, a huge debate and in my view a huge debate on an issue on which there didn’t need to be much debate. There is a long record of certain people coming into the category of unlawful combatants — pirates, spies, saboteurs, and so on. It has been absurd that there should have been a debate about whether or not that category exists.

Id. See also L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 189 (1998):

Not all those falling into the hands of a belligerent become prisoners of war or are entitled to prisoner of war status.

Enemy civilians, for example, when taken into custody or interned do not fall into this category, and if captured are entitled to treatment in accordance with Geneva Convention IV, 1949, unless they have taken part in hostile activities when they may be regarded as unlawful combatants and treated accordingly.

Id.

²¹ The Brussels Declaration of 1874, art. IX says:

Who should be recognized as belligerents combatants and non-combatants: Art. 9. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: That they be commanded by a person responsible for his subordinates; That they have a fixed distinctive emblem recognizable at a distance; That they carry arms openly; and, That they conduct their operations in accordance with the laws and customs of war. In countries where militia constitute the army, or form part of it, they are included under the denomination 'army.'

The Brussels Declaration, July 27, 1874, *available in* BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS NO. 1, 1875, C. 1128, at 157-82. The U.S. did not ratify the 1874 Brussels Declaration.

²² The 1899 Convention with Respect to the Laws and Customs of War on Land, Annex art. 1, and The Hague Convention IV, 1907, Annex art. 1 both identically affirm the four requirements of lawful belligerency:

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

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Hague Convention IV of 18 October 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2227, T.S. 539, and the annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295. *See also* the Convention Between the United States of America and Other Powers, Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 342 (entered into force June 19, 1931), signed by 47 countries ("Article 1. The present Convention shall apply ... (1) To all persons referred to in Articles 1, 2, and 3 of the Regulations annexed to the Hague Convention (IV) of 18 October 1907, concerning the Laws and Customs of War on Land, who are captured by the enemy...").

²³ GPW art. 4A (common to all four Geneva Conventions of 1949) says in pertinent part:

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 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 militias or volunteer corps, including such organized resistance movements, fulfill 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; and
- d. that of conducting their operations in accordance with the laws and customs of war.

GPW, *supra* note 2, at art. 4A; Although GPW art. 4A is worded slightly different from the applicable wording of the 1899 Convention with Respect to the Laws and Customs of War on Land, Annex art. 1, and The Hague Convention IV, 1907, Annex art. 1, GPW 4A did not modify the meaning. *See generally* ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 61 (J. Pictet ed., 1960)[hereinafter ICRC, COMMENTARY] (“[T]he present Convention (GPW) is not limited by the Hague Regulations nor does it abrogate them, and cases which are not covered by the text of this Convention are nevertheless protected by the general principles declared in 1907”); *cf.*, citations in note 24, *infra*.

²⁴ Even though the specific text of Geneva Convention III, art. 4A(1), *supra* note 23, alone does not appear to require members of a state’s armed forces to meet the four conditions of lawful belligerency, numerous previous treaties and customary international law require them to do so. *See also, e.g.*, BOTHE, ET AL., *supra* note 11, at 234-35:

Other than the reference to the “armed forces to the Party to the conflict” in Article 4A(1), the Geneva Conventions do not explicitly prescribe the same qualifications for regular armed forces. It is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered unnecessary and redundant to spell them out. It seems clear that regular armed forces are inherently organized, that they are commanded by a person responsible for his subordinates and that they are obliged under international law to conduct their operations in accordance with the laws and customs of war.

Id. *See also* Protocol I, *supra* note 6, at art. 44 (7) (“[Article 44] is not intended to change the generally accepted practice of States with respect to wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”)(emphasis added); *see also* ICRC, COMMENTARY, *supra* note 23, at 63 (explaining that GPW does not specifically state that GPW 4A(2) requirements of a responsible chain of command, a uniform, carrying arms openly, and fighting in accordance with LOAC apply to a state’s regular forces because such requirements are the “material characteristics and all the attributes” of regular forces. Consequently, “[t]he delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for

such armed forces the requirements stated in sub-paragraph [art. 4A](2)(a), (b), (c), and (d).”); *see also* Yoo & Ho, *supra* note 11, at 12 (“It has long been understood ... that regular, professional ‘armed forces’ must comply with the four traditional conditions of lawful combat under the customary laws of war, and that the terms of article 4(A)(1) and (3) of GPW do not abrogate customary law.”); JOSEPH BAKER & HENRY CROCKER, *THE LAWS OF LAND WARFARE CONCERNING THE RIGHTS AND DUTIES OF BELLIGERENTS* 24 (Gov’t Printing Office 1919) (“It 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.”); Mohamed Ali and Another v. Public Prosecutor, 3 All E.R. 488 (P.C. 1968), *reprinted in* HOWARD LEVIE, ED., *DOCUMENTS ON PRISONERS OF WAR* 757, 763 (U.S. Naval War College 1979) (“It would be anomalous if the requirements for recognition of a belligerent with its accompanying right to treatment a prisoner of war, only existed in relations to members of [militia and volunteer corps] and there was no such requirement in relation to members of the armed forces.”); *see also* Corn, *supra* note 11, at 14, n. 127:

The GPW does not specifically state that members of the regular forces must wear a fixed insignia recognizable from a distance. However, as with the requirement to be commanded by a person responsible, this requirement is arguably part and parcel of the definition of a regular armed force. It is unreasonable to believe that a member of a regular armed force could conduct military operations in civilian clothing, while a member of the militia or resistance groups cannot. *Should a member of the regular armed forces do so, it is likely that he would lose this claim to immunity and be charged as a spy or as an illegal combatant.* (emphasis added).

Id. *See also* AUSTRALIAN MILITARY LAW, *supra* note 9, at 203:

It 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* (fn. 2: “For example, by concealing their uniform under civilian clothes, or using civilian clothes without a distinctive mark owing to their uniforms having worn out”) *they are liable to lose their special privileges of armed forces.* (emphasis added).

Id. *See also* BRITISH MILITARY LAW, *supra* note 9, at 240. *See also* FLECK, *HANDBOOK*, *supra* note 20, at 76: Art. 44 para. 7 Protocol I refers to a rule of international customary law according to which regular armed forces shall wear the uniform of their party to the conflict when directly involved in hostilities. This rule of international customary law had by the nineteenth century already become so well established that it was held to be generally accepted at the Conference in Brussels in 1874. The armed forces listed in Article 4(1) of the GPW are undoubtedly regarded as ‘regular’ armed forces within the meaning of this rule. This is the meaning of ‘armed forces’ upon which the identical Articles I of the Hague Regulations of 1899 and 1907 were based.

Id. *See also* United States v. Lindh, 212 F. Supp. 541, 557 n.35 (E.D. Va. 2002):

Lindh [an American Taliban member captured in Afghanistan] asserts that the Taliban is a “regular armed force,” under the GPW, and because he is a member, he need not meet the four conditions of the Hague Regulations because only Article 4(A)(2), which addresses irregular armed forces, explicitly mentions the four criteria. This argument is unpersuasive; it ignores long-established practice under the GPW and, if accepted, leads to an absurd result. First, the four criteria have long been understood under customary international law to be the defining characteristics of any lawful armed force...Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their

members are to receive combatant immunity. Were this not so, the anomalous result that would follow is that members of an armed force that met none of the criteria could still claim lawful combatant immunity merely on the basis that the organization calls itself a “regular armed force.” It would indeed be absurd for members of a so-called “regular armed force” to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label “regular armed force” cannot be used to mask unlawful combatant status.

Id.

²⁵ See GPW, *supra* note 2, at 4A(2); see also L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 35-36 (2d ed. 2000) (“[The purview of the Geneva Conventions extend] to armies, militia units and voluntary forces, provided they are commanded by a person responsible for his subordinates, have a fixed distinctive emblem recognizable at a distance, carry their arms openly and conduct their operations in accordance with the laws and customs of war.”). See also generally AUSTRALIAN MILITARY LAW, *supra* note 9, at 288:

As regards illegitimate hostilities in arms on the part of private individuals, the conditions under which private individuals may acquire the privileges of members of the armed forces [include “Be commanded by a person responsible for his subordinates; Have a fixed distinctive sign recognizable at a distance; Carry arms openly; and Conduct their operations in accordance with the laws and customs of war.”]. If persons take up arms and commit hostilities without having satisfied these conditions, they are from the enemy’s standpoint guilty of illegitimate acts, and when captured, are liable to punishment as war criminals.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 302; see also WWII War Crimes Trial, *supra* note 13, at 58-59:

Members of militia or a volunteer corps, even though they are not a part of the regular army, are lawful combatants if (a) they are commanded by a responsible person, (b) if they possess some distinctive insignia which can be observed at a distance, (c) if they carry arms openly, and (d) if they observe the laws and customs of war. See Chapter I, Article I, Hague Regulations of 1907....

[In regards to] [t]he question of the right of the population of an invaded and occupied country to resist, ...the ... Hague Regulations, 1907 ... has remained the controlling authority in the fixing of a legal belligerency. *If the requirements of the Hague Regulation, 1907, are met, a lawful belligerency exists; if they are not met, it is an unlawful one.* (emphasis added).

Id.

²⁶ See GPW, *supra* note 2, at 4A(2)(a)(“that of being commanded by a person responsible for his subordinates”).

²⁷ See GPW, *supra* note 2, at 4A(2)(b)(“that of having a fixed distinctive sign recognizable at a distance”); see also

ICRC, COMMENTARY, *supra* note 23, at 52:

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of the armed forces should have for the purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians.

Id. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 438 (1987) [hereinafter COMMENTARY, PROTOCOL I]:

A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may never feign a civilian status and hide amongst a crowd. This is the crux of the rule.

Id. See also Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES at 46-47 (1977):

The objective of the original draftsman of this provision [to wear a distinctive sign] was probably two fold: (1) to protect the members of the armed forces of the Occupying Power from treacherous attacks by apparently harmless individuals; and (2) to protect innocent, truly noncombatant civilians from suffering because the actual perpetrators of a belligerent act seek to escape identification and capture by immediately merging into the general population.

Id. See also AUSTRALIAN MILITARY LAW, *supra* note 9, at 201-02:

The second condition, relative to the fixed distinctive sign recognisable at a distance, would be satisfied by the wearing of a military uniform, but less than a complete uniform will suffice. The distance at which the sign should be visible is left vague, but it is reasonable to expect that the silhouette of an irregular combatant in the position of standing against the skyline should be at once distinguishable from the outline of a peaceful inhabitant, and this by the naked eye of ordinary individuals, at a distance at which the form of an individual can be determined. As encounters now take place at ranges at which it is impossible to distinguish the colour or the cut of clothing, it would seem desirable to provide irregulars with a helmet, slouch hat, or forage cap, as being completely different in outline for the ordinary civilian head-dress.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 239; See also FLECK, HANDBOOK, *supra* note 20, at 471:

[T]he feigning of civilian, non-combatant status in order to attack the enemy by surprise constitutes the classic case of 'treacherous killing of an enemy combatant' which was prohibited by Article 23(b) of the Hague Regulations; it is the obvious case of disgraceful behavior which can (and should) be sanctioned under criminal law as a killing not justified by the laws of war, making it a common crime of murder. Obscuring the distinction between combatants and civilians is extremely prejudicial to the chances of serious implementation of the rules of humanitarian law; any tendency to blur the distinction must be sanctioned heavily by the international community; otherwise the whole system based on the concept of distinction will break down.

Id. Failure to wear a proper uniform, or other distinctive badge, armband, or emblem, is a calculated decision. The failure to be uniformed, or to wear the uniform of the enemy, provides a significant obvious military advantage to a combatant. But, the decision to "blend in" to the civilian population or opposing force carries with it, upon capture,

the consequences of the enemy viewing them as unlawful combatants no longer immune for otherwise lawful combat activities, no longer entitled to POW status upon capture, and subject to penal sanctions for unlawful belligerency. Such has always been, and still is, the increased risks that spies, saboteurs, and other un-uniformed unlawful combatants must accept should they choose to not fulfill the required conditions of lawful belligerency when participating in an international armed conflict.

²⁸ See GPW, *supra* note 2, at 4A(2)(c) (“that of carrying arms openly”). Cf. COMMENTARY, Protocol I, *supra* note 27, at 533 (1987):

The purpose of this rule, of course, is to protect the civilian population by deterring combatants from concealing their arms and feigning civilian non-combatant status, for example, in order to gain advantageous positions for the attack. Such actions are to be deterred in this fashion, not simply because they are wrong (criminal punishment could deal with that), but because this failure of even minimal distinction from the civilian population, particularly if repeated, places that population at great risk.

Id. See also generally AUSTRALIAN MILITARY LAW, *supra* note 9, at 202:

The third condition provides that irregular combatants shall carry arms openly. They may therefore be refused the rights of the armed forces if it is found that their sole arm is a pistol, hand-grenade, or dagger concealed about the person, or a sword stick, or similar weapon, or if it is found that they have hidden their arms on the approach of the enemy.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 240.

²⁹ See GPW, *supra* note 2, at 4A(2)(d) (“that of conducting their operations in accordance with the laws and customs of war”); see also ICRC, COMMENTARY, *supra* note 23, at 61:

[Lawful combatants must] respect the Geneva Conventions to the fullest extent possible In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man; in launching attacks, they must not cause violence and suffering disproportionate to the military result they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty as they expect their enemies to do.

Id. See also generally AUSTRALIAN MILITARY LAW, *supra* note 9, at 203:

The fourth condition requires that irregular corps shall conduct their operations in accordance with the laws and customs of war. It is especially necessary that they should be warned against employment of treachery, maltreatment of prisoners, wounded, and dead, improper conduct towards flags of truce, pillage and unnecessary violence and destruction.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 240. This fourth criterion of lawful belligerency is essential as it fosters reciprocal compliance with LOAC by all parties to a conflict. Historically, reciprocal compliance with such laws by all parties to a conflict has only been successfully achieved through such a practical reciprocal enforcement framework. See generally Joseph P. “Dutch” Bialke, *United Nations Peace Operations: Applicable*

Norms and the Application of the Law of Armed Conflict, 50 A.F.LAW REV. 1, 43 (2001):

The law of armed conflict is based on the principle of equality of application. A state or party to a conflict follows the law because it anticipates the other party will reciprocate, *non facio ne facias*. No examples exist where one state has bound itself to the law of armed conflict without asserting and expecting reciprocity. Without equal application and reciprocity among both parties to a conflict, the law of armed conflict could become meaningless. As Sir Hersch Lauterpacht succinctly explained, “it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.” (citations omitted).

Id.

³⁰ Protocol I provisions that do not rise to customary international law are not relevant to the U.S. lawful belligerency analysis of the Taliban because neither the U.S. nor Afghanistan is a signatory to Protocol I. Protocol I says in pertinent part:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious.

Protocol I, *supra* note 6, at art. 44(3). As a result of the above language in Protocol I, art. 44(3), some claim Protocol I removes the long-standing legal requirement for some combatants to display a fixed recognizable sign in certain circumstances, requiring instead that combatants need only to bear their arms openly during an attack. Protocol I, art. 44(3) also seemingly recognizes that some combatants have the discretion, apparently whenever convenient, to transient out of combatant status into protected noncombatant civilian status, and, then back into combatant status. These incremental dilutions and departures from customary LOAC are far from modest. They tear down walls without proper acknowledgement to the reasons why the walls were previously emplaced and then fortified over many centuries. Allowing civilian-dressed irregular combatants to legally engage in armed conflict would entirely “violate the implicit trust upon which the war convention rests: soldiers must feel safe among civilians if civilians are ever to be safe from soldiers.” MICHAEL WALZER, JUST AND UNJUST WARS 179-82 (1979).

Delegates from Western countries drafted the four post-WWII Geneva Convention treaties. However, delegates from under-developed emerging countries with colonial histories drafted and proposed Protocol I art. 44(3). In their haste to grant lawful combatant status and combatant immunity to civilian-clothed insurgents and guerrillas in armed conflicts of “self-determination” against so-called “racist regimes” and “alien occupations,” art. 44(3) drafters

apparently had a higher toleration of civilian noncombatant armed conflict casualties. The unfortunate practical result has been that art. 44(3) is a failed provision that directly endangers protected noncombatant civilians who find themselves caught in the crossfire within an armed conflict.

The international recognition of such an experimental provision within LOAC should, in the compelling interest of the protection of noncombatant civilians in armed conflict, fade over time and eventually become a nullity. Of specific note, Protocol I, art. 44(3) would apparently accept the disastrous result that al-Qaeda and Taliban civilian-dressed combatants in Afghanistan were virtually indistinguishable from the protected civilian noncombatant population. Such a continued, ill-conceived and expansive construction of Protocol I would essentially legalize combatants fighting while dressed as protected noncombatant civilians. It would result in lawful combatants being reluctant to accept a protected civilian's noncombatant status at face value, instead viewing all civilians as potentially hostile. Primarily because of art. 44(3), the U.S. is not a signatory to Protocol I. The better rule is the continued prohibition of feigning protected noncombatant civilian status in armed conflict, i.e., GPW, *supra* note 2, at 4A(2)(b)(the requirement that lawful combatants in armed conflict display "a fixed distinctive sign recognizable at a distance").

³¹ Protocol I, *supra* note 6, at art. 44 (7).

³² Protocol I, art. 44 (3) has placed protected civilians into much greater risk of incidental death and suffering during armed conflicts. *See generally* OPERATIONAL LAW HANDBOOK, *supra* note 5, at 12. *See also* Message from the President of the United States Transmitting the Protocol I Additional to the Geneva Conventions of August 12, 1949, Concluded at Geneva on June 10, 1977, 1977 U.S.T. LEXIS 465 (Jan. 29, 1987)(Then U.S. President Ronald Reagan rejected Protocol I in 1987 saying: "Protocol I is fundamentally and irreconcilably flawed... [it] 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."); *see also* Matheson, *supra* note 7, at 420; Hans-Peter Gasser, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Convention on the Protection of War Victims*, 81 AM. J. INT'L L. 910, 911 (1987).

³³ Dr. Jiri Toman of the International Committee of the Red Cross explains:
 These condition[s] of Article 4 of Geneva Convention III] concern the movement as a whole and individual violations of these rules [do] not deprive its members of their protection On the contrary, if the movement itself does not respect these conditions, any member of the movement, even if he personally respects the rules, does not receive the benefits of privileged treatment.
 Jiri Toman, *Terrorism and the Regulation of Armed Conflict*, INTERNATIONAL TERRORISM AND POLITICAL CRIMES 40-41 (M. Cherif Bassiouni, ed., 1973).

³⁴ See, e.g., generally U.S. Department of State, *Fact Sheet: The Taliban's Betrayal of the Afghan People*, Oct. 17, 2001, at http://www.usembassyjakarta.org/press_rel/The-Talibans.html (last visited Jun. 16, 2004); Lee A. Casey, et al., *By the Laws of War, They Aren't POWs*, WASH. POST, Mar. 5, 2002, at B03, at <http://www.washingtonpost.com/ac2/wpdyn?pagename=article&node=&contentId=A265982002Mar1¬Found=true> (last visited Dec. 20, 2003); JENNIFER ELSEA, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 18-28 (2002); MICHAEL GRIFFIN, REAPING THE WHIRLWIND: THE TALIBAN MOVEMENT IN AFGHANISTAN 177-78 (2001); Sabrina Saccoccio, CBC NEWS ONLINE, *The Taliban Military*, Oct. 1, 2001, at http://www.cbc.ca/news/indepth/us_strikingback/backgrounders/taliban_military.html (last visited Dec. 20, 2003); Lee A. Casey, et al., *National Security White Papers, Unlawful Belligerency and its Implications Under International Law*, at <http://www.fedsoc.org/Publications/Terrorism/unlawfulcombatants.htm> (last visited Jun. 16, 2004); NEAMOTOLLAH NOJUMI, THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION 229 (2002); Hook, *Detainees or Prisoners of War?: The Applicability of the Geneva Convention to the War on Terrorism* (2002), at <http://www.mobar.org/journal/2002/novdec/hook.htm>; U.N. Report Details Taliban Mass Killings, CNN, Nov. 6, 1998 at <http://edition.cnn.com/WORLD/asiapcf/9811/06/un.taliban.01/> (last visited Jun. 16, 2004); Bob Woodward, *Bin Laden Said to "Own" the Taliban*, WASH. POST, Oct. 11, 2001, at A1; Greg Jaffe & Neil King, Jr., U.S. Says War is Working, but Taliban Remains, WALL ST.J., Oct. 26, 2001, at A3; Tim McGirk, et al., *Lifting the Veil on Sex Slavery: Of All the Ways the Taliban Abused Women, This May be the Worst*, TIME V159 N7, Feb. 18, 2002, at 8; Amnesty International, *Women in Afghanistan: Pawns in men's power struggles*, 1 Nov. 1999, at <http://web.amnesty.org/library/index/ENGASA110111999> (last visited Apr. 20, 2004); Charles Krauthammer, *The Jackals are Wrong. Terrorists? Yes. Prisoners of War? No Way.*, WASH. POST, Jan. 25, 2002, at A25; KAMAL MATINUDDIN, THE TALIBAN PHENOMENON: AFGHANISTAN 1994-1997 (1999); Joseph L. Falvey, Jr., *In Defense of Freedom — Operation Enduring Freedom*, NAT'L LAW. ASS'N REV., V6N4 (Spring 2003), at 3; Michael C. Dorf, *What is an "Unlawful Combatant," and Why it Matters: The Status of Detained Al-Qaeda and Taliban Fighters*, Jan. 23, 2002, at <http://writ.news.findlaw.com/dorf/20020123.html> (last visited Dec. 20, 2003); Pamela Constable, *Many Witnesses Report Massacre by Taliban*, WASH. POST, Feb. 19, 2001, at A 25; [United States v. Lindh](#), 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002); see e.g. also G.A. Res. 54/189, U.N. GAOR, U.N. Doc. A/RES/54/189A-B (2000); S.C. Res. 1193, U.N. SCOR, U.N. Doc. S/RES/1193 (1998); S.C. Res. 1267, U.N. SCOR, U.N. Doc. S/RES/1267 (1999); S.C. Res. 1333, U.N. SCOR, U.N. Doc. S/RES/1333 (2000); S.C. Res. 1368, U.N. SCOR, U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1378, U.N. SCOR, U.N. Doc. S/RES/1378 (2001).

³⁵ If a state provides significant support to a terrorist organization, the acts of the terrorist organization may be imputed to the supporting state. Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, reprinted in HENRY H. HAN, TERRORISM AND POLITICAL VIOLENCE 250 (1993). Professor Arthur Schacter

explains that “[w]hen a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale, it is not unreasonable to conclude that an armed attack is imputable to the government.”). See also e.g., ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 250 (1994); Sage R. Knauff, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT’L & COMP. L. REV. 763, 765 (1996).

³⁶ White House Fact Sheet, *supra* note 18; accord, *N Korea in ‘axis of evil’*, Jan. 30, 2002, at <http://edition.cnn.com/2002/US/01/30/bush.nkorea/>? related (last visited Jun. 16, 2004) (Hamid Karzai, head of the Afghani interim government, addressed the U.S. detention of al-Qaeda and Taliban unlawful combatants during his visit to the U.S. saying, “The people that are detained in Guantanamo, they are not prisoners of war, I see it in very clear terms... They’re criminals, they brutalized Afghanistan, they killed our people, they destroyed our land.”); see also *Afghan Agrees with Bush on Prisoners*, N.Y. TIMES, Jan. 29, 2002, at A 9.

³⁷ See AFP 110-31, *supra* note 4, at 3-3a. See also AFP 11-31, *supra* note 4, at 3-5 n. 7a (“[terrorist] groups do not meet the objective requirements required for PW status”); see also Prosper, *supra* note 19:

[Al-Qaeda] aggressors initiated a war that under international law they have no legal right to wage. The right to conduct armed conflict, lawful belligerency, is reserved only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization or the ability or willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against a state. The members of al Qaida fail to meet the criteria to be lawful combatants under the law of war. In choosing to violate these laws and customs of war and engage in hostilities, they become unlawful combatants. And their conduct, in intentionally targeting and killing civilians in a time of international armed conflict, constitute war crimes. As we have repeatedly stated, these were not ordinary domestic crimes, and the perpetrators cannot and should not be deemed to be ordinary “common criminals.”

Id.

³⁸ See Whitson, *supra* note 8, at 3. (“[U]nconventional forces were generally accorded no legal status as combatants and no mercy when captured. Instead, they were summarily executed outright or were tried for their ‘treacherous’ acts and then executed.”); see also Mackubin T. Owens, *Detainees or Prisoners of War? Ancient distinctions*, at <http://www.nationalreview.com/comment/comment-owensprint012402.html> (last visited Jun. 16, 2004) (“[P]unishment for *latrunculi* traditionally has been summary execution.”); DETTER, *supra* note 4, at 148 (“[Unlawful combatants] are often summarily tried and enjoy no protection under international law.”); EMMERICH DE VATTEL, THE LAW OF NATIONS, BOOK III, OF WAR, CHAP. IV. OF THE DECLARATION OF WAR — AND OF WAR IN DUE FORM, § 67 (1758) (“The inhabitants of Geneva, after defeating the famous attempt to take their city by escalade, caused all the prisoners whom they took from the Savoyards on that occasion to be hanged up as robbers.”);

LIEBER, *supra* note 14; A.J. BARKER, PRISONERS OF WAR 20 (1975):

A soldier, serving in the army of a country which is recognized as being at war with his captors' nation, who is taken prisoner in the course of a military operation is a clear case of a person entitled to POW status ... [in contrast,] irregular combatants, fighting on their own initiative, are outside the shelter of the Geneva Convention's umbrella. And if they are caught they are likely to be dubbed war criminals and shot.

Id.

³⁹ Emmerich de Vattel, an 18th century international law scholar, explains:

Such were the enterprises of the *grandes compagnies* which had assembled in France during the wars with the English, - armies of banditti, who ranged about Europe, purely for spoil and plunder: such were the cruises of the buccaneers, without commission, and in time of peace; and such in general are the depredations of pirates. To the same class belong almost all the expeditions of the Barbary corsairs: though authorized by a sovereign, they are undertaken without any apparent cause, and from no other motive than the lust of plunder. These two species of war, I say, - the lawful and the illegitimate, - are to be carefully distinguished, as the effects and the rights arising from each are very different Thus, when a nation, or a sovereign, has declared war against another sovereign on account of a difference arisen between them, their war is what among nations is called a lawful and formal war; and its effects are, by the voluntary law of nations, the same on both sides, independently of the justice of the cause, as we shall more fully show in the sequel. Nothing of this kind is the case in an informal and illegitimate war, which is more properly called depredation. Undertaken without any right, without even 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 prescribed in formal warfare. She may treat them as robbers.* (emphasis added)(citations omitted).

VATTEL, *supra* note 38, at § 67 ("It is to be distinguished from informal and unlawful war") & at § 68 ("Grounds of this distinction"), at <http://www.constitution.org/vattel/vattel.htm#0> (last visited Jun. 16, 2004); *see also* VATTEL, *supra* note 38 ("It would be too dangerous to allow every citizen the liberty of doing himself justice against foreigners ... Thus the sovereign power alone is possessed of authority to make war."), at § 4; WILLIAM WINTHROP, *Military Law and Precedents* 782 (2d ed. 1920) ("It is the general rule that the operations of war on land can legally be carried on only through the recognized armies or soldiery of the State as duly enlisted or employed in its service."); *see also* DIETER FLECK (ED.), *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (commentary on Joint Services Regulation 15/2 of the German *BUNDESWEHR*), § 304, 71-72 (1995) ("Only states or other parties which are recognized as subjects of international law can be parties to an international armed conflict ... combatants are privileged solely by that entitlement..."); *see also generally* LIEBER, *supra* note 14, at art. 82:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the

occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers--such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates. (emphasis added).

Id. See also CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 127 (Peter DuPonceau, trans. & ed.) (Philadelphia 1810) (“We call pirates and plunderers (praedones) those, who, without authorization from any sovereign, commit depredations by sea or land.”); See also 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 254 (H. Lauterpacht ed., 7th ed. 1952) (“Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces ...”).

⁴⁰ See YONAH ALEXANDER, ET AL., USAMA BIN LADEN’S AL-QAIDA: PROFILE OF A TERRORIST NETWORK, APP 1B 2 (2001); Bin Laden’s Feb. 23, 1998 *fatwa* declaring a global “*Jihad Against Jews and Crusaders*” is also available at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (last visited Jun. 16, 2004).

⁴¹ See generally, Walter Pincus, *Al Qaeda Aims To Destabilize Secular Nations*, WASH. POST, June 16, 2002, at A 21; see also Jim Garamone, *Bin Laden and the Al Qaeda Network* at <http://www.defenselink.mil/cgi-bin/dlprint.cgi> (last visited Jun. 16, 2004); see also http://www.defenselink.mil/news/Sep2001/n09212001_200109216.html (last visited Jun. 16, 2004):

The avowed goal of Al Qaeda (often spelled Al-Qa’ida) is to “unite all Muslims and establish a government which follows the rule of the Caliphs,” according to a U.S. government fact sheet on the organization. “Caliphate” refers to the immediate successors of Mohammed. Under the caliphs, Islam expanded from the Arabian Peninsula through Persia, the Middle East and North Africa. Al Qaeda seeks to overthrow nearly all Muslim governments, because bin Laden regards most of them as corrupted by Western influences.

Id.

⁴² See, e.g., generally, ALEXANDER, *supra* note 40, at 33; U.S. Dep’t of State, *Patterns of Global Terrorism 2000* (2000); see also Ruth Wedgwood, *Al-Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT’L L. 328, 330 (2002):

Al Qaeda’s campaign throughout the 1990s against American targets amounted to a war. In recitation, this may seem more obvious now. The cumulative chain of events is quite striking -- the 1992 attempt to kill American troops in Aden on the way to Somalia; the 1993 ambush of American army rangers in Mogadishu; the 1993 truck bombing of the World Trade Center by conspirators who later announced that they had intended to topple the towers; the 1995 bombing of the Riyadh training center in Saudi Arabia; the 1996 bombing of the Khobar Towers American barracks in Saudi Arabia (five weeks after bin Laden was permitted to leave Sudan); the 1998 destruction of two American embassies in East Africa; and the 2000 bombing of the U.S.S. *Cole*, in a Yemeni harbor. The innumerable other

threats against American embassies and offices around the world; the plot to down ten American airliners over the Pacific and to bomb the Lincoln and Holland Tunnels in New York, as well as the United Nations; the smuggling of explosive materials across the Canadian border for a planned millennium attack at Los Angeles Airport; and finally, the attacks on the Pentagon and the World Trade Center -- were all taken to constitute a coherent campaign rather than isolated acts of individuals.

Id. For a partial recitation of the pre-Sep. 11, 2001 attacks and post-Sep. 11, 2001 attacks of al-Qaeda and Taliban militants against the U.S. and other countries throughout the world, *see* DoD News: Briefing on Detainee Operations at Guantanamo Bay, Presenter: Paul Butler, Principle Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, (Jun. 16, 2004) at 1-3, at <http://www.dod.mil/cgi-bin/dlprint.cgi?http://www.dod.mil/transcripts/2004/tr20040213-0443.html> (last visited Jun. 16, 2004).

⁴³ *See, e.g.,* P.R. Prosper, *United States Embassy Stockholm: U.S. in line with international law at Guantanamo*, Mar. 13, 2003, at http://www.usis.usemb.se/newsflash/prosper_eng_03_13_03.html (last visited Jan. 2, 2004); *See also* DoD News: Secretary Rumsfeld Remarks to Greater Miami Chamber of Commerce, Presenter: Donald H. Rumsfeld, Secretary of Defense, (Feb. 13, 2004), at 2-3, at <http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html> (last visited Jun. 19, 2004):

Detaining enemy combatants ... provides us with intelligence that can help us prevent future acts of terrorism. It can save lives and indeed I am convinced it can speed victory. For example, detainees currently being held at Guantanamo Bay have revealed al Qaida leadership structure, operatives, funding mechanisms, communication methods, training and selection programs, travel patterns, support infrastructures and plans for attacking the United States and other friendly countries. They've provided information on al Qaida front companies and on bank accounts, on surface to air missiles, improvised explosive devices, and tactics that are used by terrorist elements. And they have confirmed other reports regarding the roles and intentions of al Qaida and other terrorist organizations. This information is being used by coalition intelligence officials and by our forces on the battlefield and it's been important to our efforts in the war and in preventing further terrorist attacks.

Id. *See also generally* Butler, *supra* note 42, at 2-3 (comment by Major General Geoffrey D. Miller, Commander, Joint Force Guantanamo):

There are ... enemy combatants here at JTF Guantanamo -- some for almost two years, some for as little as two months. And so as we go about determining their intelligence value and their threat, we go through this very thorough process. There are three types of intelligence: technical intelligence -- that what the enemy combatant was doing when he was captured, if he had a weapon; and then there is operational and strategic intelligence, that allows us to better understand how terrorists are recruited, how terrorism is sustained, how the financial networks power terrorism. And so we developed this intelligence and are continuing to develop this intelligence. We continue to get extraordinarily valuable intelligence from the detainees who are at Guantanamo...It's my responsibility to make an assessment and recommendation on the detainee's intelligence value and their risk. We do that every day and that process is ongoing. Some are getting very close for us to make a recommendation; others, who are enormously

dangerous and have enormous -- intelligence of enormous value, are still in this process.

Id.

⁴⁴ For example, during the first half of the 19th century, U.S. armed forces regularly engaged *hostes humani generis*, specifically pirates, privateers, smugglers, and slave traders. U.S. engagements against *hostes humani generis* took place in areas such as the Caribbean, Algiers, Tripoli, the Dominican Republic, Africa, Cuba, Puerto Rico, and Greece. See Richard F. Grimmett, *CRS Report for Congress: Instances of Use of United States Armed Forces Abroad, 1798-2001*, at 4-7 (Feb. 5, 2002), at <http://www.fas.org/man/crs/RL30172.pdf> (last visited Jun. 16, 2004). K.J. Riordan details further some historical examples of states taking military action against stateless organizations engaged in “private warfare”:

[During] the so-called Indian Wars of the 19th Century in North America. From 5 July — 19 July 1873 a United States Military Court at Fort Klamath tried Chief Kientpoos of the Modoc tribe — known to the whites as ‘Captain Jack’ — for ‘killing of a civilian in violation of the rules of war.’ He and three of his braves were found guilty and hanged. Captain Jack was neither a state nor the agent of a state, he was a war chief of a tribe in rebellion against the authority of the United States. Kientpoos would have undoubtedly been categorised as a terrorist in modern jargon. However his acts were classified as acts of war by the United States Government. Similarly the actions of the Viet Cong, and the innumerable warlords from Africa to the Balkans, and the scores of other non-state actors who have been the perpetrators of warfare through the ages, have been — albeit unevenly - classified as acts of war. (citations omitted).

K.J. Riordan, *Asymmetric Warfare — Combating Transnational Terrorist Campaigns: The Emerging Legal Situation*, 2-3 (May 15, 2002)(unpublished manuscript on file, with the *Air Force Law Review*).

⁴⁵ See BLACK’S LAW DICTIONARY 742 (7th ed. 1999) (defining *hostes humani generis* as the “[e]nemies of the human race; specif., pirates.”); see generally *Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 18 at 339, U.N. Doc. A/8018 (1970) (“Every State has a duty from organizing, instigating, assisting, or participating in ... terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts”); see also G.A. Resolution 2131, U.N. GOAR, 20th Sess., Supp. No. 14 at 107, U.N. Doc. A/6221 (1965) (“No state shall organize, assist, forment, finance, incite, or tolerate subversive terrorist or armed activities directed toward the violent overthrow of another regime...”); G.A. Res. 40/61, U.N. Doc No A/RES/40/61 (1985) (“Calls upon all States to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts”); and, S.C. Res. No 748, U.N. Doc No. S/RES/748 (1992) (“Reaffirming that, in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force”). Pirates,

terrorists, bandits, genocidalists, slave traders, and conceivably, illicit drug traffickers, acting internationally absent defined borders, are the most common and egregious examples of *hostes humani generis*.

⁴⁶ UN Charter, art. 51 says:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id. The international community regards al-Qaeda's Sep. 11, 2001 attack against the U.S. as an "armed attack." Gordon P. Hook, a New Zealand international lawyer, explains:

[O]n 12 September 2001, the day after the New York and Washington attacks, the Security Council issued Resolution No. 1368 which stated that "such acts, like other acts of terrorism, are a threat to international peace and security" and affirmed the right of nations to individual and collective self-defence under the Article 51 of the UN Charter. Article 51 provides that individual and collective self-defence is inherent to nations when an "armed attack" occurs against a Member of the United Nations." Moreover, following the September 11 attacks, NATO invoked Article 5 of the NATO treaty (which establishes the alliance) recognizing that an "armed attack" on one of its members had occurred justifying a response to that attack by the collective force of the alliance. And Australia, with the US, invoked Article 4 of the ANZUS treaty on the basis that the attacks were an attack on the US from abroad.

Gordon P. Hook, *US Military Commissions and International Criminal Law*, N. ZEALAND L. J. 1, 4 (Nov. 2003); see also *Organization of American States, Meeting of Consultation of Ministers of Foreign Affairs*, 24th Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24, RC.24/RES.1/01, Sep. 21, 2001, *Terrorist Threat to the Americas* (unanimously invoking the 1948 Rio Mutual Defense Treaty), at <http://www.oas.org/OASpage/crisis/RC.24e.htm> (last visited Jan. 2, 2004):

CONSIDERING the terrorist attacks perpetrated in the United States of America on September 11, 2001, against innocent people from many nations; RECALLING the inherent right of states to act in the exercise of the right of individual and collective self-defense in accordance with the Charter of the United Nations and with the Inter-American Treaty of Reciprocal Assistance (Rio Treaty); ... RESOLVES: That these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.

Id. More importantly, in response to al-Qaeda's armed attack against the United States, over 20 nations deployed more than 16,000 troops against al-Qaeda and the Taliban. In June of 2002, countries other than the U.S. were contributing over 8,000 troops to military operations in Afghanistan. Numerous states, such as Great Britain, Canada,

Australia, New Zealand, Belgium, Denmark, France, Germany, Norway, *inter alia*, have contributed troops to the Afghanistan operation. See Fact Sheet; U.S. Department of Defense, Office of Public Affairs, Washington, D.C., June 14, 2002, *International Contributions to the War Against Terrorism*, at <http://usembassy.state.gov/posts/pk1/wwwh02062901.html> (last visited Jun. 16, 2004). Because the only lawful basis for these states to have participated in the Afghanistan military operation would have been individual or collective self-defense in the absence of specific authority from the United Nations Security Council, such participation substantiates that the Afghanistan military operation was in response to the “armed attack” by al-Qaeda, a terrorist stateless organization. Within international law, state actions and practice speak much louder generally than do the words of international lawyers and scholars. This is especially so in the area of *ius ad bellum*, international law that establishes a state’s right to engage in international armed conflict, an area absolutely vital to the survival of a state.

⁴⁷ See e.g., Solf, *International Terrorism in Armed Conflict* in HENRY H. HAN, *TERRORISM AND POLITICAL VIOLENCE* 317-331 (1993); See also generally Greg Travalio, et al., *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: [Terrorism, State Responsibility, and the Use of Military Force](#)*, 4 *CHI. J. INT’L L.* 97, 114 n.51 (2003):

The nature of the state from which the terrorists are operating should also impact the legitimacy of the use of military force. There should be less concern for the territorial integrity and political independence of a state whose government, while in de facto control, is not an accepted part of the international community. A state whose government is both undemocratic and which is also not recognized as legitimate by the international community of states should be accorded the least respect. The Taliban government, prior to September 11, was recognized by only one state. It was violent, repressive, and undemocratic, violating numerous international norms concerning the treatment of its own people. While the undemocratic nature of the regime, and its regular violation of international norms, should not alone make it subject to the use of military force, there should be less concern for the territorial integrity of a state or its political independence when the government that is making the decision to harbor or support terrorists does not represent the will of its people. Obviously, this argument should not be carried too far. There are many governments that do not neatly fit the Western definition of “democratic,” and in most instances they must be accorded the same rights in international law as other states. Nonetheless, certainly in extreme cases, the lack of legitimacy in the world’s eyes of a government that chooses to harbor or support terrorist groups should factor into whether or not the use of force is justified.

Id.

⁴⁸ Art. Two, common to all four Geneva Conventions, says:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no

armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 2, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in [Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114](#), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, [6 U.S.T. 3217](#), 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [6 U.S.T. 3316](#), 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [6 U.S.T. 3516](#), 75 U.N.T.S. 287.

⁴⁹ The scope or level of intensity that is necessary to constitute an international armed conflict is less than clear. Nevertheless, if the violent attacks of *hostes humani generis* (with the tacit or overt complicity of a rogue state) cause an attacked state to respond with significant military force internationally against them, the likely result would be an international armed conflict. In short, however, an armed conflict exists when the Geneva Convention Common art. Two threshold is crossed. Armed Conflict has been defined as:

A conflict involving hostilities of a certain intensity between armed forces of opposing Parties ... There are, of course, obvious cases. Nobody will probably doubt for a moment that the Second World War, or the Vietnam War, were armed conflicts, nor that the Paris students' revolt of May 1968 did not qualify as such. For the less obvious cases, however, one will have to admit that thus far no exact, objective criterion has been found which would permit us to determine with mathematical precision that this or that situation does or does not amount to an armed conflict.

FRITS KALSHOVEN, *THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT* 10-11 (1973). See also Prosecutor v. Tadic, Case No. IT-94-AR72, 37 (App., Oct. 2, 1995) ("Armed conflict" is when "there is resort to armed force between states or protracted armed violence between government authorities and organized armed groups or between such groups within a State."); AFP 110-31, *supra* note 4, at para. 12(b) ("[A]rmed conflict--conflict between states in which at least one party has resorted to the use of armed force to achieve its aims. It may also embrace conflict between a state and organized, disciplined and uniformed groups within the state such as organized resistance movements;") Sylvie Junod, [Additional Protocol I: History & Scope](#), 33 *AM. U.L. REV.* 29, 30 (1983) ("[T]he concept of armed conflict is generally recognized as encompassing the idea of open, armed confrontation between relatively organized armed forces or armed groups."); 3 *CUMULATIVE DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW: 1988-91* at 3457 (Marian Nash-Leich ed., 1989) ("Armed conflict includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting..."); Director Air Force Legal Services, et al., DI (AF) AAP 1003 OPERATIONS LAW FOR RAAF COMMANDERSSSSSSS 2 (1994) ("International Armed Conflict. This term refers to conflict between nations in which at least one party has resorted to the use of armed force to achieve its aim. It may also include conflict between a nation and an organized and disciplined force such as an armed resistance movement."). U.S. President George Bush has determined and declared that an armed conflict

exists between the U.S. and al-Qaeda:

International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

MILITARY ORDER OF NOV. 13, 2001: DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM, at 1(a).

⁵⁰ GPW, *supra* note 2, at art. 5, says in pertinent part:

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. (emphasis added).

Id. See also generally Butler, *supra* note 42, at 3-4 (detailing the extensive screening process preceding a detainee's transfer from Afghanistan to Guantanamo Bay):

[T]here is an elaborate screening process that takes place in the field in Afghanistan. Over 10,000 detainees were taken into some form of custody; less than 800 have been brought to Guantanamo Bay. First, in a hostile environment, soldiers detain those who are posing a threat to U.S. and coalition forces based on available information or direct combat. After an initial period of detention, the individual is sent to a centralized holding area. At that time, a military screening team at the central holding area reviews all available information, including interviews with the detainees. With assistance from other U.S. government officials on the ground, including military lawyers, intelligence officers and federal law enforcement officials, and considering all relevant information, including the facts from capture and detention, the threat posed by the individual and the intelligence and law enforcement value of the individual, the military screening team assesses whether the detainee should continue to be detained and whether transfer to Guantanamo is warranted. A general officer designated by the commander of Central Command then makes a third assessment of those enemy combatants who are recommended for transfer to Guantanamo Bay. The general officer reviews recommendations from the central holding area screening teams and determines whether enemy combatants should be transferred to Guantanamo. In determining whether a detainee should be transferred, the combatant commander considers the threat posed by the detainee, his seniority within hostile forces, possible intelligence that may be gained from the detainee through questioning, and any other relevant factors. Once that determination is made, Department of Defense officials in Washington also review the proposed detainee for transfer to Guantanamo. An internal Department of Defense review panel, including legal advisors and individuals from policy and the Joint Staff, assess the information and ask questions about whether the detainee should be sent...Once the detainee is at Guantanamo, there is a very detailed and elaborate process for gauging the threat posed by each detainee to determine whether, notwithstanding his status as an enemy combatant, he can be released to the custody of a foreign government consistent with our security interests.

Id. Due to the comprehensive information obtained through this individualized screening process, along with other applicable information, the U.S., as the detaining power acting in good faith, had no doubt as to the individual and *en*

masse unlawful combatant status of al-Qaeda and Taliban combatants. See generally Colonel G.I.A.D. Draper, *The Legal Classification of Belligerent Individuals* (Paper delivered at University of Brussels, 1970), reprinted in REFLECTIONS ON LAW AND ARMED CONFLICTS—SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, O.B.E. 1996, 220-21 n.23 (Michael A. Meyer and Hilaire McCoubrey, eds., 1998) (“The Detaining Power seems to be the sole arbiter, in good faith, of whether a doubt occurs as the status of the individual concerned.”).

⁵¹ David B Rivkin, Jr., et al., *Enemy Combatant Determinations and Judicial Review*, n. 5 (2003), at <http://www.fed-soc.org/Laws%20of%20war/enemycomb.pdf> (last visited Jun. 16, 2004). A tribunal is defined as simply “one that has the power of determining, or judging.” AMERICAN HERITAGE DICTIONARY 1293 (2nd ed. 1982). A tribunal may also be an “adjudicatory body.” BLACK’S LAW DICTIONARY 1512 (7th ed. 1999).

⁵² See The Federalist Society, *Treatment of Al Qaeda and Taliban Detainees under International Law*, Feb. 27, 2002 at <http://www.fed-soc.org/Publications/Transcripts/Belligerents1.PDF> (last visited Jan. 2, 2004):

Article 5 was adopted to address situations where it’s not a question of adjudicating whether your organization is one of lawful or unlawful belligerents, but who you are. You’re a deserter. You lost your documents ... Article 5 was never meant to give people an opportunity to adjudicate time and again whether or not an organization to which they belong is a bunch of lawful or unlawful combatants ... [it is illogical to make] individual determinations of unlawful combatancy under Article 5 [because] ... out of four criteria for lawful combatants, only one can be met on an individual basis. And that’s a matter of bearing arms openly. The other three criteria cannot be met by an individual on his own. For example, one requirement is having a distinctive uniform. A distinctive uniform that identifies you as belonging to a particular group, not distinctive in the sense that it looks flashy or gaudy. Obviously, a uniform can only be distinctive if it is worn by all members of a given group or entity. Another key requirement is having a transparent chain of command and the last one is making an institutional commitment to comply with laws of war -- none of those things can be met by anyone on an individual basis.

Id.

⁵³ See Rivkin, et al., *supra* note 51, at 9-10:

The purpose of [Article 5] is not to require a judicial process through which a captive can challenge his or her status as an enemy combatant. In fact, Article 5 assumes that the individual is an enemy combatant, having “committed a belligerent act and having fallen into the hands of the enemy.” Rather, it was adopted to ensure that captured enemy combatants were not summarily punished in the field (as unlawful combatants) in cases where it was not immediately obvious, based upon their uniforms and identifying papers, whether they were entitled to POW treatment. As explained by the International Committee of the Red Cross in its commentaries on the Geneva Convention, “[t]his would apply to deserters, and to persons who accompany the armed forces and have lost their

identity card.” See International Committee of the Red Cross, *Commentary on the Geneva Convention III Relative to the Treatment of Prisoners of War* 77 (1960).

Id.

⁵⁴ See generally GPW, *supra* note 2, at art. 5, and note 50 *supra*. It must be noted that the plural language in art. 5 inclusive of “persons” and “their status” implies that an art. 5 tribunal may make a collective determination as to the lawful or unlawful status of a group of captured combatants; rather than prescribing that, when there is any doubt as to status, an art. 5 tribunal must make a separate status determination as to each individual captured combatant. See also W. Thomas Mallison, et al., *The Juridical Status of Irregular Combatants under the International Law of Armed Conflict*, 9 CASE W. RES. J. INT’L L. 39, 62 (1977) (“According to the widely accepted view, if the group does not meet the ... criteria ... the individual member cannot qualify for privileged status as a POW.”).

⁵⁵ See UK PARL., APP. 9 TO THE MINUTES OF EVIDENCE, SUPPLEMENTARY MEMORANDUM BY PROFESSOR SIR ADAM ROBERTS 41 (Dec. 2002) at <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmdfence/93/93ap10.htm> (last visited Jun. 17, 2004):

[I]n a struggle involving an organization that plainly does not meet the [Geneva Convention treaty-defined criteria for POWstatus] (and especially where, as with al-Qaeda, it is not in any sense a state) it may be reasonable to proclaim that captured members are presumed not to have PoWstatus. In cases where it is determined that certain detainees are not PoWs, they may be considered to be “unlawful combatants.”

Id.

⁵⁶ John Mintz, et al., *Bush Shifts Position on Detainees. Geneva Conventions to Cover Taliban, but Not Al Qaeda*, WASH. POST, Feb. 8, 2002, at A 1 (“[T]he decision [that captured members of the Taliban and al-Qaeda are not entitled to POWstatus] was made after long discussions at two National Security Council meetings, chaired by Bush, which included the views of the Defense, State and Justice departments, as well as the opinions of other officials.”); see also Christopher Greenwood, *International law and the ‘war against terrorism’*, 78 INT’L AFF. 301, 315-16 (2002):

The initial US position was that these detainees were not entitled to prisoner of war status, because they were ‘unlawful combatants’ (a term which was not, as some journalists suggested, invented by the United States but which has long been used to describe combatants who are not entitled, for one reason or another, to take part in conflict but who have nevertheless done so). On 7 February 2002 the United States changed its position. The White House announced that captured members of the Taliban armed forces would be treated in accordance with the Third Convention but would nevertheless not be considered prisoners of war, because they did not meet the requirements of POWstatus laid down in the convention.

Id.

⁵⁷ See, e.g., Human Rights Watch Letter to Donald Rumsfeld, Mar. 6, 2003, at <http://www.hrw.org/press/2003/03/us030603-ltr.htm> (last visited Jun. 17, 2004); see also Ruth Wedgwood, *Prisoners of a Different War*, Jan. 30, 2002, originally published in *Financial Times of London*, at http://www.law.yale.edu/outside/html/Public_Affairs/190/yls_article.htm (last visited Jun. 17, 2004):

Article 5 panels were designed to look at fact-specific cases, such as deserters or soldiers who have lost their identification cards, or persons who have committed a belligerent act but are of uncertain affiliation. They were not designed for resolving interpretive questions of treaty law and customary law in a new kind of war. This is the duty of nation states at the highest level of political responsibility.

Id.

⁵⁸ See, e.g., generally Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc A/810 at 71 (1948); see also Protocol I art. 75, *supra* note 6; Greenwood, *supra* note 56, at 316 (“[combatant] status, however, is only part of the story. Whether prisoners of war or not, [the al-Qaeda and Taliban] detainees are not held in legal limbo. Whatever their status, they have a right to humane treatment under customary international law...”); and, LEVIE, *supra* note 27, at 44-45:

[M]ost Capturing Powers will deny the benefits and safeguards of the [Geneva] Convention to any such individual who is in any manner delinquent in compliance [of the four conditions of lawful belligerency]. It must also be emphasized that if an individual is found to have failed to meet the four conditions, this may make him an unprivileged combatant but it does not place him at the complete mercy of this captor, to do so with as the captor arbitrarily determines. He is still entitled to the general protection of the law of war, which means that he may not be subjected to inhumane treatment, such as torture, and he is entitled to be tried before penal sanctions are imposed.

Id.

⁵⁹ See, e.g., generally White House Fact Sheet, *supra* note 18; Warren Richey, *A Prisoner's Day at Guantanamo Bathing While Shackled, Praying on a Towel, and Eating Froot Loops*, Mar. 14, 2002, at <http://www.csmonitor.com/2002/0314/p01s04-usmi.htm> (last visited Jun. 17, 2004); Alphonso Van Marsh, *For Gitmo's Detainees, Spice is Nice*, Apr. 3, 2002, at <http://edition.cnn.com/2002/WORLD/americas/04/02/marsh.otsc/> (last visited Jun. 17, 2004); Prosper, *supra* note 43; John Mintz, *Delegations Praise Detainees' Treatment, Diet, Medical Care Good, Legislators Say*, WASH. POST, Jan. 26, 2002, at A 15; John Mintz, *Media Given Tour of Tent Hospital U.S. Seeks to Show Detainees' Health, Dignity Respected*, WASH. POST, Feb. 4, 2002, at A 3; ICRC *Visits Afghan Detainees in Cuba*, Jan. 18, 2002, at <http://www.redcross.org/news/in/intllaw/020118detainees.html> (last visited Jun. 17, 2004); Nick P. Walsh, *Russian Mothers Plead for Sons to Stay in Guantanamo*, GUARDIAN, Aug. 9, 2003, at <http://www.guardian.co.uk/russia/article/0,2763,1015309,00.html> (last visited Jun. 17, 2004); Prosper, *supra* note 19; Jeffrey Toobin, *Inside the Wire, Can an Air Force colonel help the detainees in Guantanamo?*, THE NEW

YORKER, Feb. 9, 2004, at 36; Pamela Constable, *Former Guantanamo Prisoners Say They Weren't Tortured*, WASH. POST, Oct. 29, 2002, at A 1:

The men described their confinement at Guantanamo as boring but not inhumane. They said they were allowed to bathe and change clothes once a week and were given copies of the Koran to read. Faiz Mohammed said the food was good, but he complained that there was no okra or eggplant.

Id. See also *CDI Terrorism Project Q&A with Rear Adm. (Ret.) Stephen H. Baker, USN Senior Fellow, CDI*, Jan. 25, 2002, at <http://www.cdi.org/terrorism/bakerqa11102-pr.cfm> (last visited Jun. 17, 2004):

[T]he “outcry” [regarding the Taliban and al-Qaeda unlawful combatant detainees] is unfounded and primarily the result of the notorious British tabloids, Islamic groups in London, and political critics that have specific agendas to pursue. I think the majority of the American public, and the world, understands that inhumane treatment of prisoners is not the American way. The Navy and Marine Corps personnel assigned to Camp X-Ray are a highly trained, professional security police force and they are doing a good job. The terrorist captives are in an environment that appropriately demands maximum security. These people are as dangerous as any criminal we hold in other maximum-security prisons. They are receiving exercise periods, warm showers, toiletries, water, clean clothes, blankets, three meals a day, prayer mats, excellent medical care, writing materials and private visits from the Red Cross. A Navy Muslim chaplain is available to minister to their religious needs if requested, and calls to prayers are broadcast over the camp PA system, with a sign indicating the direction of Mecca. No one who has personally visited the camp, to include human-rights monitors from the International Committee of the Red Cross and a British team of investigators, has reported any complaints of inhumane treatment.

Id. See also Rajeev Syal, *I had a good time at Guantanamo, says inmate*, The Daily Telegraph (Feb. 8, 2004) at <http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/08/wguan08.xml> (last visited Apr. 19, 2004):

Mohammed Ismail Agha, 15, ... said that he was treated very well and particularly enjoyed learning to speak English ... Mohammed said: “They gave me a good time in Cuba. They were very nice to me, giving me English lessons.”... They gave me good food with fruit and water for ablutions and prayer,” ... He said that the American soldiers taught him and his fellow child captives - aged 15 and 13 - to write and speak a little English. They supplied them with books in their native Pashto language. When the three boys left last week for Afghanistan, the soldiers looking after them gave them a send-off dinner and urged them to continue their studies.

Id. In accordance with its domestic and international legal obligations, the U.S. immediately investigates any suspected abuse or other inappropriate treatment of detainees by detention facility guards or others, and, when substantiated, appropriately punishes the abusers. See e.g., Paisley Dodds, *U.S. Disciplines 2 Guantanamo Bay Guards*, All Headline News (May. 5, 2004) at <http://www.allheadlinenews.com/articles/1083797499> (last visited Jun. 3, 2004) (“Promising a broader investigation, the U.S. military acknowledged Wednesday that two guards at the U.S. prison camp in Guantanamo Bay, Cuba, had been disciplined over allegations of prisoner abuse.”); Marian Wilkinson, *Pentagon to report on Hicks, Habib treatment*, The Age (May 22, 2004) at <http://www.theage.com.au/articles/2004/05/21/1085120117118.html> (last visited Jun. 19, 2004) (regarding certain allegations of U.S. personnel abuse against two Australian detainees at Guantanamo):

The Pentagon sent a letter to the [Australian] embassy saying that detainees at Guantanamo are treated humanely and

the US “does not permit, tolerate or condone any abuse or torture by its personnel under any circumstances”. It said “credible allegations of illegal conduct by US personnel are taken seriously and investigated promptly”. The new pledge to investigate the Hicks’ claims follows consistent reports by his lawyers and a witness that he was beaten during interrogation in Afghanistan.

Id.

⁶⁰ See generally *Guantanamo Bay-Camp Delta*, at [http:// www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm) (last visited Jan. 3, 2004); see also *A Detainee Packs His Personal Belongings*, at <http://www.defenselink.mil/photos/May2003/030228-N-4936C-016.html> (last visited Jun. 17, 2004).

⁶¹ See White House Fact Sheet, *supra* note 18.

⁶² See generally quoted comments regarding unlawful belligerency, *supra* note 15; but see INSTRUCTION NO. 2, *infra* note 79, at 2 (U.S. military commission instructions require the prosecution, whenever charging an offence associated with unlawful belligerency, to affirmatively prove beyond a reasonable doubt that the defendant lacked combatant immunity).

⁶³ See GPW, *supra* note 2, at art. 118, saying in pertinent part:
Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation....
Id. Although GPW, art. 118, only applies to POWs, detention of both lawful and unlawful combatants for the duration of hostilities has occurred throughout the history of armed conflict. ROSAS, *supra* note 4, at 44-45.

⁶⁴ See WINTHROP, *supra* note 39, at 788 (detention of combatants during time of armed conflict is “a simple war measure.” It is not “a punishment” or “an act of vengeance.”); see also ROSAS, *supra* note 4, at 44-45, 59-60 (explaining that customary LOAC through state practice over time has long recognized that a party to a conflict may hold prisoners of war while hostilities are continuing); see also AUSTRALIAN MILITARY LAW, *supra* note 9, at 208:
Few of the customs of war have undergone greater changes than those relating to the treatment of prisoners. In antiquity war captives were killed, or at best enslaved; in the Middle Ages they were imprisoned or held to ransom; it was only in the seventeenth century that they began to be deemed prisoners of the state and not the property of individual captors. Even during the wars of the last 100 years they were often subject to cruel neglect, unnecessary

suffering and unjustifiable indignities.

Id. See also BRITISH MILITARY LAW, *supra* note 9, at 244-45. Historically, Vattel explains:

The right of making prisoners of war. But all those enemies thus subdued or disarmed, whom the principles of humanity oblige him to spare, — all those persons belonging to the opposite party, ... he may lawfully secure and make prisoners, either with a view to prevent them from taking up arms again, or for the purpose of weakening the enemy.

VATTEL, *supra* note 38, at § 148; see also Rumsfeld, *supra* note 43, at 2:

Today enemy combatants are being detained at the U.S. military facility at Guantanamo Bay, Cuba, as you know well. They include not only rank and file soldiers who took up arms against the coalition in Afghanistan but they include senior al Qaeda and Taliban operatives, including some who may have been linked to past and potential attacks against the United States, and other who continue to express commitment to kill Americans if released. Very simply the reason for their detention is that they're dangerous. Were they not detained, they would return to the fight and continue to kill innocent men, women and children. Detention is not an arbitrary act of punishment. Indeed, it is a practice long established under the law of armed conflict for dealing with enemy combatants in a time of war and it was practiced, I am told, in every war we have fought. It is a security necessity, and I might add it is just plain common sense.

Id. See also generally *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated, or otherwise released.”)(footnotes omitted).

⁶⁵ See, e.g., GPW, *supra* note 2, art. 105 (allowing a POW, not an unlawful combatant detainee, a right to counsel or advocate, but only when criminal charges have been brought against the POW); Letter from William J. Haynes II, General Counsel of the Department of Defense, to Alfred P. Carlton, Jr., President of the American Bar Association 3 (Sep. 23, 2002), at http://www.defenselink.mil/news/Oct2002/b10022002_bt497-02.html (last visited Jun. 17, 2004):

There is no due process or any other legal basis, under either domestic or international law, that entitles enemy combatants to legal counsel. And providing such counsel as matter of discretion at this time would threaten national security in at least two respects: It would interfere with ongoing efforts to gather and evaluate intelligence about the enemy. And it might enable detained enemy combatants to pass concealed messages to the enemy.

Id.

⁶⁶ See Prosper, *supra* note 43 (“Many detainees in Guantanamo have stated that they would rejoin this war and commit terrorist acts if released.”); See DoD News: Defense Department Operational Update Briefing - Secretary Rumsfeld and Gen. Pace, Mar. 9, 2004, at <http://www.defenselink.mil/transcripts/2004/tr20040309-secdef0523.html> (last visited Jun. 17, 2004) (quoting U.S. Secretary of Defense Donald H. Rumsfeld: “[O]f the [detainees] that have been

released, we know of at least one who has gone back to being a terrorist. So life isn't perfect...In other words, you can make mistakes in evaluating these people.”); *see also* Lee A. Casey, et al., *The Facts about Guantanamo*, WALL. ST. J., Feb. 16, 2004, at A 6 (The U.S. Department of Defense has confirmed that some released Guantanamo detainees have “returned to the fight”); *see also* Kathleen Knox, *Afghanistan, Are Taliban and Al-Qaeda ‘Detainees’ Actually POWs?*, Jan. 3, 2002, at <http://www.rferl.org/nca/features/2002/01/03012002080615.asp> (last visited Jun. 17, 2004) (*quoting* Adam Roberts, Oxford University Professor of International Relations):

Normally the assumption of the whole prisoner-of-war regime is that a prisoner of war at the end of a conflict is repatriated to his country. And in this case it's not at all clear that it would make sense to repatriate prisoners because they would continue to represent a danger. [They] are a personal threat Both because of their training and their ideology, they are individually potentially dangerous. But also it's far from clear that their own countries in all cases would want to accept them as free, repatriated individuals. They might want to keep them in detention themselves.

Id.

⁶⁷ *See* DoD News Briefing - Secretary Rumsfeld and Gen. Myers, Mar. 28, 2002, at http://www.defenselink.mil/news/Mar2002/t03282002_t0328sd.html (last visited Jun. 17, 2004) (*quoting* U.S. Secretary of Defense Donald H. Rumsfeld: “[T]he way I would characterize the end of the conflict is when we feel that there are not effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities.”). Two years after the U.S. and its allies first engaged the Taliban in Afghanistan, the Taliban are still highly active. *See e.g.*, Taliban Resurgence Undermining UN Afghan Aid Work, Oct. 25, 2003, at <http://www.abc.net.au/news/newsitems/s974961.htm> (last visited Jan. 3, 2004):

A Taliban resurgence has forced UN aid workers to suspend their work in most of southern Afghanistan during a crucial period, a top UN official told the Security Council... Due to soaring Taliban attacks on Afghan civilians as well as aid workers in the south, all UN aid missions have been temporarily halted in Nimruz, Helmand, Uruzgan and Zabul provinces while armed escorts are required for all aid work in four districts of adjacent Kandahar province, he said.

Id.; *see also* Butler, *supra* note 42, at 2-3:

Between September 2003 and December 2003, Taliban militants stepped up the insurgency in southern and eastern provinces in Afghanistan, including attacks on innocent civilians and coalition forces. On November 15th, 2003, two suicide truck bombs exploded outside the Neve Shalom and Beth Israel Synagogues in Istanbul, killing 25 and wounding 300 more. An al Qaeda-related group claimed responsibility. On November 20th, 2003, two suicide truck bombs exploded near the British consulate and the HSBC Bank in Istanbul, killing 25, including the British consul general, and injuring more than 309. Al Qaeda claimed responsibility. In November 2003, Taliban bombings killed U.S. and Romanian soldiers and several Afghan civilians. In November 2003, al Qaeda also struck again in Riyadh, Saudi Arabia, killing 17 and injuring more than 100. In January 2004, Taliban bombings in Afghanistan killed soldiers from the United Kingdom and Canada. And since August of 2003, 11 U.S. soldiers have died in the war in

Afghanistan.

Id.

⁶⁸ Gerry J. Gilmore, *U.S. 'Has Every Right' to Hold Detainees, Says Rumsfeld*, American Forces Information Service, Mar. 28, 2002, at http://www.defenselink.mil/news/Mar2002/n03282002_200203282.html (last visited Jun. 17, 2004) (quoting U.S. Secretary of Defense Donald H. Rumsfeld, "I can assure you, the United States does not want to keep any [al-Qaeda or Taliban detainee] any longer than we have to."); See also Butler, *supra* note 42, at 7-8:

There is an elaborate [ongoing detainee screening] process. Detainees are not in a legal black hole. There is an enormous amount of time spent scrutinizing each individual case through various agencies of the government to help us determine who these people are. We are not interested in holding anyone for one more day than we have to. We want to evaluate them. If we can reach the conclusion that they're no longer a threat, we will release them. If we believe that we can reach transfer agreements with foreign governments who will take responsibility for them so that they're no longer a threat to us or to their populations, we want to do that.

Id.

⁶⁹ See Butler, *supra* note 42, at 6:

There are three basic ways in which the enemy combatants are categorized in [Guantanamo Bay]: those who will be potentially be eligible for release, those who will be eligible for transfer to their foreign governments, and those who will remain in continued detention...[F]or those who will remain in continued detention, the Secretary announced some additional procedures that we are going to implement, and that is an Administrative Review Panel. And this will be a panel that will meet ... more than annually. It will review each detainee's case annually to determine whether that detainee continues to pose a threat to the United States. The detainee will have the opportunity to appear in person before that panel. The detainee's foreign government will have the opportunity to submit information on the detainee's behalf. And the panel will consider all of the information, including intelligence information gained on the detainee and the information presented by the detainee and his government, and to make an independent recommendation about whether the detainee should be held.

Id.; see also Haynes, *supra* note 65, at 4:

[D]isquiet about indefinite detention is misplaced for two reasons. First, the concern is premature. In prior wars combatants (including U.S. prisoners of war) have been detained for years. We have not yet approached that point in the current conflict. And second, the government has no interest in detaining enemy combatants any longer than necessary, and is reviewing the requirement for their continued detention on a case-by-case basis. But, as long as hostilities continue and the detainees retain intelligence value or present a threat, no law requires the detainees be released, and it would be imprudent to do so.

Id.

⁷⁰ See, e.g., Pamela Constable, *Another Chance At Freedom In Afghanistan, Hundreds of Taliban Fighters Released From Crowded Jail*, WASH. POST, Mar. 24, 2002, at A 24; *Afghans Release Pakistani Prisoners*, Apr. 25, 2002, at <http://www.cbsnews.com/stories/2002/04/25/attack/main507196.shtml> (last visited Jun. 17, 2004); *87 Pak Prisoners who Fought for Taleban Released*, Nov. 26, 2002, at <http://news.indiainfo.com/2002/11/26/26taleban.html> (last visited Jan. 3, 2004); *Afghanistan to release 1000 Pakistani Prisoners*, Mar. 17, 2003, at http://www.inq7.net/wnw/2003/mar/17/wnw_3-1.htm (last visited Jun. 17, 2004); and *Afghanistan Releases 66 Pak Taliban Prisoners*, May 6, 2003, at <http://www.expressindia.com/fullstory.php?newsid=21667> (last visited Jun. 17, 2004); see also Rumsfeld, *supra* note 43, at 4:

Detainees at Guantanamo Bay represent only a small fraction of those scooped up in the global war on terror. Of the roughly 10,000 people that were originally detained in Afghanistan, fewer than ten percent were brought to Guantanamo Bay in the first place. The vast majority were processed in Afghanistan and released in Afghanistan. Of those sent to Guantanamo Bay, 87 have been transferred for release thus far and a few have already been returned to their home country for continued detention or prosecution.

Id.

⁷¹ See *Terror Suspects Reportedly Offer Tips, Guantanamo General Says Prisoners More Forthcoming as Preparations Begin for Expected Military Tribunals*, July 24, 2003, at <http://stacks.msnbc.com/news/943781.asp?0sl=-11&cp1=1> (last visited Jun. 17, 2004) (“About 70 detainees have been released, and about 120 have been rewarded with moves to a medium-security wing where they get more exercise, books and other liberties for cooperating in interrogations, [according to Major General Geoffrey D. Miller, Camp Commandant.]”); Charles Lane, *Justices to Rule on Detainee’s Rights Court Access for 660 Prisoners at Issue*, WASH. POST, Nov. 11, 2003, at A 1:

Sixty-four inmates, mostly Afghans and Pakistanis, have been sent from the prison back to their home countries to be released, and four more have been flown to Saudi Arabia, where they are still jailed and may face trial. U.S. officials are privately negotiating the return of scores more Guantanamo detainees to their home nations.

Id. See also *Transfer of Guantanamo Detainees Complete*, U.S. DEPARTMENT OF DEFENSE NEWS RELEASES, Nov. 24, 2003, at <http://www.defenselink.mil/releases/2003/nr20031124-0685.html> (last visited Jan. 3, 2004):

The Department of Defense announced today that it transferred 20 detainees for release from Guantanamo Bay, Cuba, to their home countries on Nov. 21. Additionally, approximately 20 detainees arrived at Guantanamo from the U.S. Central Command area of responsibility on Nov. 23, so that the number of detainees at GTMO is approximately 660. Senior leadership of the Department of Defense, in consultation with other senior U.S. government officials, determined that these detainees either no longer posed a threat to U.S. security or no longer required detention by the United States. Transfer or release of detainees can be based on many factors, including law enforcement and intelligence, as well as whether the individual would pose a threat to the United States. At the time of their detention, these enemy combatants posed a threat to U.S. security. In general terms, the reasons detainees may be released are based on the nature of the continuing threat they may pose to U.S. security. During the course of the War on

Terrorism, we expect that there will be other transfers or releases of detainees. Because of operational security considerations, no further details will be available.

Id. See also Jim Noteboom, et al., *A Principled Approach, Doing Justice in the War on Terrorism*, Nov. 12, 2002, at <http://www.osbar.org/2practice/bulletin/02nov/principled.html> (last visited Jan. 3, 2004):

The United States has no interest in detaining anyone longer than necessary, and has released approximately 40 people from Guantanamo who were no longer a threat to the United States in the war on terror, had no further intelligence information to prevent future terrorist attacks and were not appropriate for criminal proceedings.

Id. See also *U.S. Releases 26 Guantanamo Detainees*, WASH. POST, Mar. 16, 2004, at A02 (“The Pentagon ... has released a total of 119 prisoners from Guantanamo Bay, and 12 others have been transferred for continued detention elsewhere.”); see also *Detainee Transfer Complete*, U.S. DEPARTMENT OF DEFENSE NEWS RELEASE, Apr. 2, 2004, at <http://www.dod.mil/releases/2004/nr20040402-0505.html> (last visited Jun. 17, 2004) (DoD released 15 detainees from 6 countries, leaving 595 detainees remaining).

⁷² See Noteboom, et al., *supra* note 71 (explaining that armed conflict creates numerous prosecutorial challenges in trying war crimes):

The scene of the crime is often a battlefield in an ongoing war, and battlefields, by definition, are chaotic places. Prosecutors will have to deal with such things as preservation of battlefield crime scenes, battlefield chain of custody, death of witnesses in combat, large numbers of relatively anonymous detainees, protection of national security interests, trying members of an ongoing terrorist organization, and risks to ongoing military operations.

Id. See also generally Douglas W. Kmiec, *Infinite Justice: Military, Not Federal Trials, for the Terrorists*, Oct. 11, 2001, at <http://www.nationalreview.com/comment/comment-kmiec101101.shtml> (last visited Jun. 17, 2004):

Terrorists are neither soldiers (justifying widespread military action against a given nation state) nor garden-variety criminals, meriting federal indictment, they are war criminals...By definition, terrorism is aimed at indiscriminately killing civilian innocents and destroying civilian property. Such actions are not crimes against a single state, but humanity. Terrorism is not some social or cultural dysfunction capable of rehabilitation or rectification by ordinary law enforcement. *If terrorism is a military threat, and it is, then the terrorists are more appropriately punished by the system of military tribunals that has a long history in our nation.* (emphasis added).

Id.

⁷³ UCMJ art. 2(a)(9)(2002). This is in compliance with LOAC. POWs may only be tried and sentenced in a criminal judicial forum that is substantially equivalent to the proceedings and rights provided to members of the armed forces of the detaining power. See generally GPW, *supra* note 2, at arts. 84, 87, 88, 95, 100, 102, 103, 106, & 108. Although a substantially equivalent forum usually would be a court-martial, a military commission that provides similar rights and proceedings to a court-martial could also try a POW. See UCMJ art. 21 (providing concurrent jurisdiction to military commissions authorized under the laws of war); see also R.C.M. 201(e)(2002)(affirming that the U.S. Code and Manual for Courts-Martial “do not deprive military commissions ... of concurrent jurisdiction

with respect to offenders or offenses that by statute or the law of war may be tried by military commissions"). Al-Qaeda and Taliban unlawful combatant detainees do not have POW status, however, and may therefore only be tried by a U.S. military commission or other U.S. military tribunal.

⁷⁴ See Quirin, *supra* note 10:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. (n. 5). By the Articles of War ... Congress has explicitly provided ... that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress ... has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

Id. at 27-28, n. 5, (citations omitted). See also Ambassador William H. Taft IV, *Military Commissions: Fair Trials and Justice*, Mar. 26, 2002, at <http://usinfo.state.gov/topical/pol/terror/02032603.htm> (last visited Jun. 17, 2004) ("Nations as diverse as the Philippines, Australia, China, The Netherlands, France, Poland, Canada, Norway, and the United Kingdom have prosecuted war criminals in military commissions, to name just a few ... European States made similar use of military commissions in 19th-century conflicts and even more extensively in the 20th century"); Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41 (detailing military commissions to try crimes of war from the early 17th century to post-WWII); Spencer J. Crona, et al., *Justice For War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U.L.REV. 349, 367-70 (1996) (detailing use of U.S. military commissions during the U.S. Civil War, and both during and immediately after WWII); See U.S. Secretary of Defense Donald H. Rumsfeld & Deputy Secretary of Defense Paul Wolfowitz, *Prepared Statement: Senate Armed Services Committee "Military Commissions"*, Dec. 12, 2001, at <http://www.dod.mil/speeches/2001/s20011212-secdef.html> (last visited Jun. 17, 2004) ("During and following World War II [in Germany, the US] prosecuted 1,672 individuals for war crimes before U.S. military commissions. Convictions were obtained in 1,416 cases. In Japan, we tried 996 suspected war criminals before military commissions - of which 856 were convicted."); see also Ambassador Pierre-Richard Prosper, *The Campaign Against Terrorism: Military Commissions and the Pursuit of Justice*, Dec. 4, 2001, at <http://www.state.gov/s/wci/rm/8584.htm> (last visited Jun. 17, 2004):

Military commissions have been utilized and legally accepted throughout our history to prosecute persons who violate the laws of war. They were used by General Winfield Scott during his operations in Mexico, in the Civil War by President Lincoln, and in 1942 by President Roosevelt. They are an internationally accepted practice with deep historical roots. The international community has utilized military commissions and tribunals to achieve justice, most notably at Nuremberg and in the Far East. The tribunals which tried most of the leading perpetrators of Nazi and Japanese war crimes were military tribunals. These tribunals were followed by thousands of Allied prosecutions of the lower-level perpetrators under the Control Council Law No. 10. By the end of 1958, the Western Allies had used

military tribunals to sentence 5,025 Germans for war crimes. In the Far East, 4,200 Japanese were convicted before military tribunals convened by U.S., Australian, British, Chinese, Dutch, and French forces for the atrocities committed during the war.

Id. See also Wedgwood, *supra* note 42, at 332:

[M]ilitary commissions have been the historic and traditional venue for the trial of war crimes. The Nuremberg trials of the Nazi leadership were organized by the Allies in 1945 to educate the German public and the world, and were held in a mixed military commission. Military commissions tried war crimes throughout Europe and the Far East at the conclusion of the world war, and considered the cases of approximately twenty-five hundred defendants.

Id.

⁷⁵ John Mintz, *Tribunal Rules Aim To Shield Witnesses. Judges, Prosecutors May Be Anonymous*, WASH. POST, Mar. 22, 2002, at A 1; see also Prosper, *supra* note 74:

Should we be in a position to prosecute Bin Laden, his top henchmen, and other members of al Qaida, [the] option [of trying them in military commissions] should be available to protect our civilian justice system against this organization of terror. We should all ask ourselves whether we want to bring into the domestic system dozens of persons who have proved they are willing to murder thousands of Americans at a time and die in the process. We all must think about the safety of the jurors, who may have to be sequestered from their families for up to a year or more while a complex trial unfolds. We all ought to remember the employees in the civilian courts, such as the bailiff, court clerk, and court reporter and ask ourselves whether this was the type of service they signed up for — to be potential victims of terror while justice was pursued. And we all must think also about the injured city of New York and the security implications that would be associated with a trial of the al Qaida organization.

Id.

⁷⁶ Bryan G. Whitman, *Military Commissions will provide detainees fair trial*, July 14, 2003, ATLANTA J. CONST., at <http://www.ajc.com/opinion/content/opinion/0703/14equal.htm> (last visited Jan. 5, 2004). See also Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18 (“There is ... the problem of publishing information to the world, and to al-Qaeda, through an open trial record. As Churchill said, your enemy shouldn’t know how you have penetrated his operations.”). It is also necessary to protect U.S. classified intelligence information and U.S. intelligence gathering capabilities and methods from foreign intelligence agencies, and any other individual or group who could use such classified information against the U.S. and its allies.

⁷⁷ Gordon Hook elaborates on the many parallels regarding evidence procedures among U.S. military commissions and United Nations international war crimes tribunals:

Rule 89 of the Rules of Procedure and Evidence for the [International Criminal Tribunal for Former Yugoslavia] ICTY provides that the tribunal is “not bound by national rules of evidence” and “may admit any relevant evidence

which it deems to have probative value” which might also include un-sworn statements. The rules of evidence for the International Criminal Tribunal for Rwanda (ICTR) are the same (Rules 89A and 89C). The [International Criminal Court] ICC’s rules of evidence pursuant to Article 69(4) of the Rome Statute and Rule 63(2) of the ICC’s Rules of Procedure and Evidence (ISS-ASP/1/3) are also similar to a certain extent. Article 69 of the Rome Statute provides that the ICC “may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice ... to a fair trial or fair evaluation of the testimony of a witness” (the latter part of this rule is explained in Article 69(7)). Moreover, like the ICTY, the ICTR and the ICC, U.S. military commission rules do not prohibit commission members from “weighing evidence” and determining which evidence is more reliable than other evidence. It will be for counsel to make any submissions in that regard in order to persuade the commission in respect of any evidence admitted.

Hook, *supra* note 46, at 7.

⁷⁸ The underlying rationales for formal rules regarding the admissibility of evidence are not necessarily applicable to the gathering of evidence as intelligence in time of armed conflict. Major General (retired) Michael Nardotti, former U.S. Army Judge Advocate General, explains:

[T]here is a great difference between gathering *evidence* under the normal restrictions of law enforcement and gathering *information* in the context of a military operation. Obviously we have restrictions in place, and exclusionary rules that we apply in the courts throughout the country, in order to discourage the improper conduct of law enforcement officials -- because that has occurred in the past. And the way to do it, the courts have adjudged, is not simply to punish those who have erred — in some cases it’s not necessarily intentional -- but they concluded that the greatest disincentive to that kind of conduct would be simply to exclude the evidence. Now, when you go into a military operation, which is what we are engaged in now, as part of the operations, *if they’re gathering information, not gathering evidence for criminal prosecution purposes but gathering evidence for intelligence to conduct further operations*, it would be illogical to suggest that those collecting that *information* should or would conform their conduct to the rules that would be acceptable for the admission of *evidence* in the Federal courts. Some flexibility has to be accorded, because there can be probative evidence gathered in that way. And there are methods to examine evidence and consider the methods with which it was obtained to determine whether it has the indicators of reliability and trustworthiness and whether there is some probative value. (emphasis added).

CATO Institute Policy Forum, *Terrorists, Military Tribunals, and the Constitution*, 17-18, Dec. 6, 2001, at <http://www.cato.org/events/transcripts/011206et.pdf> (last visited Jun. 19, 2004); *see also* Ruth Wedgwood, *supra* note 76 (“U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al-Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case.”); *see also* Colonel Frederic L. Borch III, *A Rebuttal to “Military Commissions: Trying American Justice,”* ARMY LAW., Nov. 2003, at 10, 13 (“[W]hat happens in a war setting is markedly different from traditional peacetime law enforcement practices in the United States. Soldiers cannot be expected to complete a chain-of-custody document when under fire from an enemy combatant in a cave.”); *see also* Toobin, *supra* note 59,

at 39:

Major John Smith, a Pentagon attorney, says. “We don’t fight a war the same way we conduct a police investigation. [Military commissions] are geared toward accepting evidence from the battlefield. It’s not more or less fair — it’s just different. [Military commissions] recognize the unique battlefield requirements. You are not getting search warrants. There are no Miranda warnings.

Id. See also *Noteboom*, *supra* note 71; *Testimony, DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, United States Senate Committee on the Judiciary* (2001), at http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=84 (last visited Jun. 19, 2004)(testimony of Victoria Toensign, former Deputy Assistant Attorney General):

A federal trial in the United States would pose a security threat to the judge, prosecutors and witnesses, not to mention the jurors and the city in which the trial would be held. We do not have sufficient law enforcement personnel to provide these trial participants round-the-clock armed protection, the type of security still in place for the federal judge who tried Sheik Rahman in 1993. A federal trial in the United States may preclude reliable evidence of guilt. When the evidence against a defendant is collected outside the United States (the usual situation for international terrorism investigations) serious problems arise for using it in a domestic trial. The American criminal justice system excludes evidence of guilt if law enforcement does not comply with certain procedures, a complicated system of rules not taught to the Rangers and Marines who could be locked in hand-to-hand combat with the putative defendants. For sure, the intricate procedures of the American criminal justice system are not taught to the anti-Taliban fighters who may capture prisoners. Nor to the foreign intelligence agencies and police forces who will also collect evidence. At just what point is a soldier required to reach into his flak jacket and pull out a Miranda rights card? There are numerous evidentiary and procedural requirements of federal trials that demonstrate the folly of anyone thinking such trials should be used in wartime for belligerents.

Id.

⁷⁹ See Protocol I, art. 75 (3), (4), (6) & (7), *supra* note 6 (detailing minimum standards of due process afforded unlawful combatants); see MILITARY ORDER, *supra* note 49; DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 1: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM, Mar. 21, 2002; DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 2: DESIGNATION OF DEPUTY SECRETARY OF DEFENSE AS APPOINTING AUTHORITY, Jun. 21, 2003 (*revoked by* DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 5: DESIGNATION OF APPOINTING AUTHORITY, Mar. 15, 2004, para. 2); DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 3: SPECIAL ADMINISTRATIVE MEASURES FOR CERTAIN COMMUNICATIONS SUBJECT TO MONITORING, Feb. 5, 2004; DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 4: DESIGNATION OF DEPUTY APPOINTING AUTHORITY, Jan. 30, 2004 (*revoked by* DEPARTMENT OF DEFENSE MILITARY COMMISSION ORDER NO. 6: REVOCATION OF MILITARY COMMISSION ORDER NO. 4, Mar. 26, 2004);

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The military commission regulations just issued are consistent with this tradition and ensure that the conduct of U.S. military commissions will provide the fundamental protections found in international law. Indeed, in a number of respects the procedures represent improvements on past practice. In preparing the procedures, the Pentagon not only listened carefully but also took into account the constructive advice and concerns raised by other governments and the non-governmental community. The procedures offer essential guarantees of independence and impartiality and afford the accused the protections and means of defense recognized by international law. They provide, in particular, protections consistent with those set out in the 1949 Geneva Conventions, the customary principles found in Article 75 (Fundamental Guarantees) of Additional Protocol I to the Geneva Conventions, and the International Covenant on Civil and Political Rights. Even though many of these specific provisions may not be legally required under international law, the military commission procedures nevertheless comport with all of them.

Id. Of specific note is that, in cases involving charged acts of unlawful belligerency, military commission instructions require the prosecution to affirmatively prove beyond a reasonable doubt that the defendant lacked combatant immunity:

With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the case of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. (emphasis added).

INSTRUCTION NO. 2, *supra*, note 79, at 2.

⁸⁰ *Id.* See also generally John Mintz, *Both Sides Say Tribunals Will Be Fair Trials*, WASH. POST, May 23, 2003, at A 3 (“The newly appointed chief prosecutor and head defense lawyer who will handle the trials of alleged terrorists before the planned military tribunals said they expect no-holds-barred legal combat between the two sides, and that fair trials will be the result.”); John Mintz, *6 Could Be Facing Military Tribunals. U.S. Says Detainees Tied To Al Qaeda*, WASH. POST, July 4, 2003, at A 1 (quoting Ruth Wedgwood, a John Hopkins scholar of international law, “Pentagon lawyers took great care in drawing up a process that is fair and allows for zealous courtroom combat.”); see also John Mintz, *Extended Detention In Cuba Mullied, Officials Indicate Guantanamo Bay Could Hold Tribunals, Carry Out Sentences*, WASH. POST, Feb. 13, 2002, at A 16: Insofar as JAG officers are involved, they’ll bring a JAG sensibility to the proceedings, and they are very careful people,” said Ruth Wedgwood, an expert on international law at Yale University who supports the Bush tribunal plan. “They’re proud of having brought military justice to the point that it provides up to and sometimes beyond” the protections afforded in civil justice.

Id. See also *U.S. and Australia Announce Agreements on Guantanamo Detainees*, Nov. 25, 2003, at <http://www.defenselink.mil/releases/2003/nr20031125-0702.htm> (last visited Jan. 5, 2004):

The United States and Australian governments announced today that they agree the military commission process provides for a full and fair trial for any charged Australian detainees held at Guantanamo Bay Naval Station. Following discussions between the two governments concerning the military commission process, and specifics of the Australian detainees’ cases, the U.S. government provided significant assurances, clarifications and modifications that benefited the military commission process.

Id.

⁸¹ *Id.* U.S. Secretary of Defense Donald H. Rumsfeld has appointed four distinguished senior civilian jurists to serve on the civilian independent review panel that will hear appeals of decisions made by military commissions. Griffin B. Bell is a former federal appellate judge and was the U.S. Attorney General during the Carter administration; William T. Coleman, Jr., is a civil rights lawyer, and was a U.S. Supreme Court law clerk, the U.S. Secretary of Transportation (which oversees the U.S. Coast Guard) during the Ford administration, as well as an

advisor/consultant to six U.S. presidents; Frank J. Williams is the sitting chief justice of the Rhode Island Supreme Court. Additionally, Justice Williams is a decorated U.S. veteran, having served as an U.S. Army Infantry Captain during the Vietnam War; and, Edward G. Biester, Jr., a former Pennsylvania Attorney General and former member of the U.S. Congress, is a senior judge in a Pennsylvania Court of Common Pleas. *See e.g., Tribunals' Review Panel Picked, Former Attorney General Bell Among 4 Named*, WASH. POST, Dec. 31, 2003, at A 06. *See also Appointing Authority Decision Made*, Dec. 30, 2003, at <http://www.dod.mil/releases/2003/nr20031230-0820.html>:

Secretary of Defense Donald H. [delegated] the position of appointing authority for military commissions to John D. Altenburg, Jr. The appointing authority is responsible for overseeing many aspects of the military commission process, including approving charges against individuals the president has determined are subject to the Military Order of Nov. 13, 2001. Among other things, the appointing authority is also responsible for appointing military commission members, approving plea agreements and supervising the Office of the Appointing Authority. Altenburg will serve in this capacity as a civilian. Altenburg retired from the Army as a major general in 2002. His last military assignment was assistant judge advocate general for the Department of the Army.

Id. *See also generally* DEPARTMENT OF DEFENSE DIRECTIVE 5105.70: APPOINTING AUTHORITY FOR MILITARY COMMISSIONS, Feb. 10, 2004; *see* ORDER NO. 5, *supra*, note 79.

⁸² INSTRUCTION NO. 9, *supra*, note 79, at 5.

⁸³ In mid-2003, U.S. President Bush determined six Guantanamo detainees were subject to his Nov. 13, 2001 Military Commissions order. *See* DoD News Release: President Determines Enemy Combatants Subject to his Military Order (Jul. 3, 2003) at 1, at <http://www.defenselink.mil/releases/2003/nr20030703-0173.html> (last visited Jun. 17, 2004). On Feb. 24, 2004, the U.S. formally charged two of the six detainees. The two al-Qaeda detainees, Ibrahim Ahmed Mahmoud al Qosi of Sudan and Ali Hamza Ahmed Sulayman al Bahlul of Yemen, were charged to stand trial by U.S. Military Commissions for allegedly committing “a range of offenses including terrorism, attacking civilians, murder and destruction of property.” *See* John Mintz, *U.S. Charges 2 as Bin Laden Aides*, WASH. POST, Feb. 25, 2004, at A 01. Additionally, David Hicks, an Australian detainee captured in Afghanistan and who had previously trained with al-Qaeda, is also one of the six named eligible for trial by military commission. *See Australian May Face U.S. Tribunal*, N.Y. Times, Jun. 2, 2004, at <http://www.nytimes.com/2004/06/02/politics/02gitmo.html> (last viewed on Jun. 3, 2004). The U.S. charged Mr. Hicks on Jun. 10, 2004 “with conspiracy to commit war crimes, attempted murder by an unprivileged belligerent, and aiding the enemy. Allied forces captured Hicks in Afghanistan as he fought with al Qaeda and the Taliban regime against U.S. forces who invaded to end the terror group’s grip on the country.” Rowen Scarborough, *U.S. charges Guantanamo Bay detainee*, WASH. TIMES, at <http://washingtontimes.com/national/20040610-112608-3841r.htm> (last viewed Jun. 15, 2004). All three charged detainees have been assigned military defense counsel and, unless delays are requested by defense counsel, the military commissions are expected to convene in the Aug. to Nov. 2004 timeframe.

⁸⁴ See Apostolou, et al., *supra* note 14:

It is precisely because the U.S. takes the Geneva Convention seriously, with both its protections for combatants and the line it draws between combatants and civilians, the U.S. is being so careful in the use of the POW label ... restricting the Geneva Convention's protections to those who obey its rules is the only mechanism that can make the Geneva Convention enforceable.

Id.

⁸⁵ See Butler, *supra* note 42 at 3:

[N]either al Qaeda nor the Taliban were state parties to the Geneva Conventions. Second of all, they did not fight in uniform or subject to a clear chain of command. But most importantly, the Geneva Conventions were designed in large part to protect civilian populations, and al Qaeda, the Taliban and its affiliates, as you can see by that litany of events, deliberately violates those rules. Not only do they attack civilian populations, but they blend in with civilian populations, thereby increasing the possibility of civilian casualties. If the Geneva Conventions are to be enforceable law, there need to be incentives built in. And what kind of incentives would we send if we allow the full treatment under the Geneva Conventions to be extended to enemy combatants who deliberately and purposely violate them?

Id. See also Apostolou, et al., *supra* note 14:

What is clear is that to give the detainees a status they do not deserve, and protections that would both give aid and comfort to terrorists running free, would not only set a dangerous precedent. It would in the long run demolish the Geneva Conventions and undermine the safety of American soldiers and civilians alike.

Id.

⁸⁶ See Prosper, *supra* note 19:

[There is an] important question of whether terrorists have rights. They do -- to be treated humanely. However, they do not deserve nor should they be given heightened status or benefits that are reserved for lawful belligerents. We should not seek to legitimize their conduct or organization by conferring upon them unearned status. Bestowing Prisoner of War status on detainees who do not meet the clear requirements of the law would undermine the rule of law by diminishing norms found in the plain language of the Geneva Convention itself. It would confer the status and privileges of a law-abiding soldier on those who purposefully target women and children. Unlawful combatants by their nature forfeit special benefits and privileges accorded by the Geneva Convention on the Treatment of Prisoners of War.

Id.

⁸⁷ See David B. Rivkin, Jr., et al., *The Laws of War*, WALL STREET J., Mar. 4, 2003, at A 14:

[I]n the 21st century, unlawful combatants relentlessly seek access to weapons of mass destruction, and pose a life-and-death threat to democracies — the need to delegitimize them is particularly compelling. Thus, not according

them a full set of POW privileges does not reflect a compassion deficit on our part. Rather, it is an important symbolic act which underscores their status as enemies of humanity. The failure by many of our allies and international humanitarian groups to appreciate this is particularly ironic. Blurring the distinction between lawful and unlawful belligerents, which lies at the very core of modern laws of war, is likely to erode this entire hard-won set of normative principles, disadvantaging both the interests of law-abiding states and making warfare even more destructive and barbarous.

Id.

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<p>4. ENEMY COMBATANTS IN THE WAR ON TERROR AND THE IMPLICATIONS FOR THE U.S. ARMED FORCES, 85 N.C. L. Rev. 636, 668+</p> <p>Introduction. 636 I. The Origins and Nature of the War on Terror. 639 A. The War on Terror. 639 B. The Detainee Problem. 641 II. International Laws of Armed Conflict and...</p>	2007	Law Review	—

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<p>5. GENERAL ORDERS NO. 100: WHY THE LIEBER CODE'S REQUIREMENT FOR COMBATANTS TO WEAR UNIFORMS IS STILL APPLICABLE FOR THE PROTECTION OF CIVILIAN POPULATIO...</p> <p>"As the order now stands, I think the No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French and Germans. It is a...</p>	2012	Law Review	—
<p>6. CONGRESS'S CONSISTENT INTENT TO UTILIZE MILITARY COMMISSIONS IN THE WAR AGAINST AL- QAEDA AND ITS ADOPTION OF COMMISSION RULES THAT FULLY COMPLY WITH ...</p> <p>I. Introduction. 596 II. The Evolution of a Militaristic Threat. 602 III. The Military Commissions Act of 2006. 604 IV. The Military Commissions Act of 2009. 605 V. The MCA of...</p>	2011	Law Review	—
<p>7. THINKING THE UNTHINKABLE: HAS THE TIME COME TO OFFER COMBATANT IMMUNITY TO NON-STATE ACTORS?, 22 Stan. L. & Pol'y Rev. 253, 294+</p> <p>If there is one designation that has come to symbolize the complexity of characterizing the struggle against international terrorism as an armed conflict, it is "unlawful enemy...</p>	2011	Law Review	—
<p>8. Murakush Caliphate of Amexem Inc. v. New Jersey</p> <p>790 F.Supp.2d 241, 260 , D.N.J.</p> <p>LITIGATION - Costs. Entity supported by members of Moorish and sovereign citizenship movements did not qualify for pro bono representation.</p>	May 13, 2011	Case	
<p>9. THE PRACTICE OF CRIMINAL LAW IN THE GUANTÁNAMO MILITARY COMMISSIONS, 67 A.F. L. Rev. 35, 88</p> <p>I. Introduction. 37 II. Preliminary/General Observations. 41 A. Personal Preparation. 42 1. Security Clearance/Passport. 42 2. Background Reading. 43 B. Assembling a Defense...</p>	2011	Law Review	—

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<p>10. THE U.S. WAR CRIMES TRIBUNALS AT THE FORMER DACHAU CONCENTRATION CAMP: LESSONS FOR TODAY?, 24 Berkeley J. Int'l L. 554, 609</p> <p>War Crimes Courts were established, not to right wrongs, as that is impossible, but to attempt to impose proper penalties upon proven wrongdoers. The evils of concentration camps...</p>	2006	Law Review	—
<p>11. A UNIVERSAL ENEMY?: "FOREIGN FIGHTERS" AND LEGAL REGIMES OF EXCLUSION AND EXEMPTION UNDER THE "GLOBAL WAR ON TERROR", 41 Colum. Hum. Rts. L. Rev. 355...</p> <p>This Article argues that the ongoing U.S.-driven "Global War on Terror" stands apart from similar state campaigns in its special focus on confronting "foreign fighters"--armed,...</p>	2010	Law Review	—
<p>12. AN ALTERNATIVE PROPOSAL TO MODERNIZE THE LIABILITY REGIME FOR SURFACE DAMAGE CAUSED BY AIRCRAFT TO ADDRESS DAMAGE RESULTING FROM HIGHJACKINGS OR OTHER...</p> <p>On-going efforts within the International Civil Aviation Organization (ICAO) to modernize the liability regime for surface damage caused by aircraft in flight (aka the Rome...</p>	2007	Law Review	—
<p>13. BRAVE NEW WORLD: NEUROWARFARE AND THE LIMITS OF INTERNATIONAL HUMANITARIAN LAW, 41 Cornell Int'l L.J. 177, 210</p> <p>Introduction. 177 I. DARPA's Brain-Machine Interfaces and Human Assisted Neural Assistance Programs. 179 II. The Use of Brain-Machine Interfaces in the Context of International...</p>	2008	Law Review	—

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<p>14. <u>TEACHING AN OLD DOG NEW TRICKS: OPERATIONALIZING THE LAW OF ARMED CONFLICT IN NEW WARFARE</u>, 1 Harv. Nat'l Sec. J. 45, 85</p> <p>Gone are the days of soldiers facing each other across large battlefields, tanks shelling tanks, and fighter jets engaging in dogfights. War, or armed conflict, to use a more...</p>	2010	Law Review	—
<p>15. <u>COMPLEX LEGAL FRAMEWORKS AND COMPLEX OPERATIONAL CHALLENGES: NAVIGATING THE APPLICABLE LAW ACROSS THE CONTINUUM OF MILITARY OPERATIONS</u>, 26 Emory Int'l... ↗</p> <p>Modern conflicts and stability operations pose complex challenges for both military and civilian actors tasked with promoting the rule of law during conflicts and stability...</p>	2012	Law Review	—
<p>16. <u>UNLAWFUL COMBATANT OR INNOCENT CIVILIAN? A CALL TO CHANGE THE CURRENT MEANS FOR DETERMINING STATUS OF PRISONERS IN THE GLOBAL WAR ON TERROR</u>, 21 Fla. J... ↗</p> <p>"Injustice anywhere is a threat to justice everywhere." Although it has been over forty years since Dr. King wrote these words, they still ring true. In particular, injustices to...</p>	2009	Law Review	—
<p>17. <u>IF THE HAT FITS, WEAR IT, IF THE TURBAN FITS, RUN FOR YOUR LIFE: REFLECTIONS ON THE INDEFINITE DETENTION AND TARGETED KILLING OF SUSPECTED TERRORISTS...</u></p> <p>Introduction. 802 I. International Authorities. 811 II. Indefinite Detention of Illegal Combatants. 813 A. Why Do States Endorse a Policy of Indefinite Detention?. 813 B...</p>	2005	Law Review	—
<p>18. <u>LEGAL POLICY FOR A TWILIGHT WAR</u>, 30 Hous. J. Int'l L. 89, 109</p> <p>I. How Lawyers Found Themselves at the Center of the Policy Debate. 91 II. Reframing the Debate: From "Can" to "Should" . 92 III. A Legal Policy Perspective: Should We Treat...</p>	2007	Law Review	—

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<p>19. THE DISPENSABLE LIVES OF SOLDIERS, 2 J. Legal Analysis 115, 165</p> <p>Why are all soldiers fair game in war? This paper challenges the status-based distinction of the laws of war, calling instead for revised targeting doctrines that would place...</p>	2010	Law Review	—
<p>20. PREVENTIVE DETENTION-RESTRICTING THE FREEDOM TO HARM, 2008 J. Inst. Just. Int'l Stud. 166, 181</p> <p>Increasing concern about terrorism has reinforced what has long been apparent in other contexts—that there are dangerous people in the world who are not deterred by the threat of...</p>	2008	Law Review	—
<p>21. THE MILITARY COMMISSIONS ACT OF 2006: AN UNNECESSARY SCHEME FOR SECOND-CLASS JUSTICE OR AN ESSENTIAL MEANS TO PROSECUTE PERSONS WHO OTHERWISE WOULD ES...</p> <p>The Military Commissions Act of 2006 (MCA), is an extraordinary development in the American judicial system. Prosecutions of criminal acts have, throughout this nation's history,...</p>	2008	Law Review	—
<p>22. THE UNCONSTITUTIONAL PROSECUTION OF THE TALIBAN UNDER THE MILITARY COMMISSIONS ACT, 55 Naval L. Rev. 1, 30</p> <p>We further our mission of destroying the enemy by propagandizing his troops, by treating his captured soldiers with consideration, and by caring for those of his wounded who fall...</p>	2008	Law Review	—
<p>23. THE "WAR ON TERROR" THROUGH BRITISH AND INTERNATIONAL HUMANITARIAN LAW EYES: COMPARATIVE PERSPECTIVES ON SELECTED LEGAL ISSUES, 10 N.Y. City L. Rev. 4...</p> <p>To say that public international law in general--and international humanitarian law in particular--has been in a state of ferment since the onset of the "War on Terror" in...</p>	2007	Law Review	—

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<p>24. <u>YESTERDAY'S LAWS, TOMORROW'S TECHNOLOGY: THE LAWS OF WAR AND UNMANNED WARFARE</u>, 24 N.Y. Int'l L. Rev. 39, 84</p> <p>On a winter's afternoon in February 2002, three men ascended a mountain near the Afghan city of Khost. Standing outside a series of caves, the men appeared to be talking. At 5'11",...</p>	2011	Law Review	—
<p>25. <u>HAMDAN V. RUMSFELD: A BAD DECISION WITH THE BEST INTENTIONS - WHY THE COURT WAS WRONG IN INTERPRETING THE GENEVA CONVENTIONS AND WHAT SHOULD BE DONE, ...</u></p> <p>On September 11, 2001, the terrorist group, al Qaeda, attacked the United States by flying hijacked, commercial airplanes into the twin towers of the World Trade Center, the...</p>	2007	Law Review	—
<p>26. <u>TO BOLDLY GO WHERE NO SIGNATORY HAS GONE BEFORE: HOW THE MILITARY COMMISSIONS ACT OF 2006 HAS REWRITTEN THE UNITED STATES' OBLIGATIONS UNDER THE GENEV...</u></p> <p>"[T]he war against terrorism is a new kind of war. . . . In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners." ...</p>	2007	Law Review	—
<p>27. <u>GIVEN AN INCH, THE DETAINEE EFFORT TO TAKE A MILE: THE DETAINEE LEGISLATION AND THE DANGERS OF THE "LITIGATION WEAPON IN UNRESTRAINED ENEMY HANDS"</u>, 36...</p> <p>I. Introduction II. Background A. Origin and Evolution of the Writ in England B. Constitutional Incorporation of the English Common Law Writ C. The Operation of the Writ in...</p>	2008	Law Review	—
<p>28. <u>FIGHTING TERRORISM: ASSESSING ISRAEL'S USE OF FORCE IN RESPONSE TO HEZBOLLAH</u>, 45 San Diego L. Rev. 305, 352</p> <p>I. Introduction. 305 II. Israel and Lebanon Armed Conflict. 309 III. History and Development of the Rules of War. 313 A. Christian Theory of War. 313 B. Codification of the...</p>	2008	Law Review	—

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<p>29. <u>RASUL V. BUSH: VICTORY FOR ENEMY ALIENS AS EXECUTIVE EMERGENCY POWER IS SEIZED, 20 St. John's J. Legal Comment. 385, 418</u></p> <p>The United States Constitution does not contain emergency provisions. There is not an emergency system of government, nor any formal acceptance of exceptions to the normal...</p>	2006	Law Review	—
<p>30. <u>MARAUDERS IN THE COURTS: WHY THE FEDERAL COURTS HAVE GOT THE PROBLEM OF MARITIME PIRACY (PARTLY) WRONG, 62 Syracuse L. Rev. 53, 74</u></p> <p>Strangers, who are you? Whence do you sail over the watery ways? Is it on some business, or do you wander at random over the sea, as pirates do, who wander hazarding their lives...</p>	2012	Law Review	—
<p>31. <u>TRUE TERROR: LIFE AFTER GUANTANAMO, 77 UMKC L. Rev. 1093, 1121+</u></p> <p>When a man wants to murder a tiger, it's called sport; when the tiger wants to murder him it's called ferocity. The distinction between Crime and Justice is no greater. 9:31:57...</p>	2009	Law Review	—
<p>32. <u>TRIAL BY JURY OR BY MILITARY TRIBUNAL FOR ACCUSED TERRORIST DETAINEES FACING THE DEATH PENALTY? AN EXAMINATION OF PRINCIPLES THAT TRANSCEND THE U.S. C...</u></p> <p>Justice Robert Jackson, about to serve as the chief prosecutor of Nazi officers charged with war crimes in the Nuremberg trials, calmly appealed to transcendent values amid the...</p>	2006	Law Review	—

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<p>33. AN ENEMY WITHIN OUR MIDST: DISTINGUISHING COMBATANTS FROM CIVILIANS IN THE WAR AGAINST TERRORISM, 57 U. Kan. L. Rev. 213, 249</p> <p>In any civilized society the most important task is achieving a proper balance between freedom and order.--Chief Justice William Rehnquist On September 10, 2001, Ali Saleh Kahlah...</p>	2008	Law Review	—
<p>34. BOUMEDIENE V. BUSH: JUSTICE SCALIA'S FEAR OF AN UNFAMILIAR RACE AND RELIGION, 9 U. Md. L.J. Race, Religion, Gender & Class 181, 211+</p> <p>In Boumediene v. Bush, the Supreme Court of the United States considered whether the Military Commissions Act of 2006 (MCA) serves as an unconstitutional suspension of the writ of...</p>	2009	Law Review	—
<p>35. CIVILIANS IN CYBERWARFARE: CONSCRIPTS, 43 Vand. J. Transnat'l L. 1011, 1076+</p> <p>Civilian-owned and -operated entities will almost certainly be a target in cyberwarfare because cyberattackers are likely to be more focused on undermining the viability of the...</p>	2010	Law Review	—
<p>36. COMBATANT STATUS: IT IS TIME FOR INTERMEDIATE LEVELS OF RECOGNITION FOR PARTIAL COMPLIANCE, 46 Va. J. Int'l L. 209, 249</p> <p>I. History of Combatant Status. 214 II. Combatant Status under Current International Law. 218 A. Analysis of Article 4 of the GPW. 220 B. Protections for Noncombatants. 224 ...</p>	2005	Law Review	—
<p>37. REDEFINING TORTURE IN THE AGE OF TERRORISM: AN ARGUMENT AGAINST THE DILUTION OF HUMAN RIGHTS, 13 Wash. & Lee J. Civil Rts. & Soc. Just. 83, 115</p> <p>In our "war on terrorism," national security interests may constitute a legitimate reason for sacrificing other interests, except for one uncompromising interest: the human right...</p>	2006	Law Review	—

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<p>38. QUERIES FROM QUIRIN: GUANTANAMO TRIBUNALS AND THE SEPARATION OF POWERS DOCTRINE, 14 Wm. & Mary Bill Rts. J. 1629, 1655</p> <p>Many recent nonfiction writings contemplate recent history with one watershed event: the catastrophic terrorist attacks of September 11, 2001. Whether in social commentary,...</p>	2006	Law Review	—
<p>39. PLAYING BY THE RULES: COMBATING AL QAEDA WITHIN THE LAW OF WAR, 51 Wm. & Mary L. Rev. 957, 1052</p> <p>Although the conflict formerly known as the "war on terror" is now in its eighth year, key legal issues governing the use of force and military detention remain largely...</p>	2009	Law Review	—