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Law of War Issues in Ground Hostilities in Afghanistan

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Introduction

British soldiers first came to Afghanistan in 1839, hoping to extend the Empire and counter growing Russian influence there. That four-year conflict ended in the massacre of most of the retreating British force of 16,500, demonstrating that, while Afghanistan could be conquered, holding it was another thing. In 1878, again fearing Russian influence in the region, England once more invaded Afghanistan from its base in India. Britain's early victory and regime change nearly proved Pyrrhic. With their occupation unexpectedly costly in men and treasure, the English gained control of Afghan foreign policy, then withdrew most of their forces to India. In 1919, when remaining British units were attacked by Afghan forces, the British initiated a third foray into Afghanistan, this one more successful than the prior two adventures. Afghanistan nevertheless gained its independence in 1921.

Reminiscent of the British incursions into Afghanistan, from 1978 to 1992 the Soviet Union sponsored an armed conflict between the communist Afghan government and anti-communist Muslim guerrillas. For their trouble, the Russians learned the grim lesson of the Kipling poem, "Young British Soldier": "When you're wounded and left on Afghanistan's plains, And the women come out to cut up what remains, Jest roll to your rifle and blow out your brains, An' go to your Gawd like a soldier. . . ."

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Now, prepared to overcome history with modern weapons and new tactics, the United States is in the seventh year of its war in Afghanistan. Challenges abound. It is a nation of massive mountain ranges and remote valleys in the north and east, with desert-like conditions on the plains to the south and west. Road and rail systems remain minimal and many of those that do exist are in disrepair. About the size of Texas, Afghanistan has a population of around twenty-four million. Now it has a visiting military population embedded in the International Security Assistance Force (ISAF) numbering about 45,000 ground personnel, including 15,000 US troops, with another 19,000 US troops assigned to Joint Task Force 101, a part of Operation Enduring Freedom forces assigned to Afghanistan.¹

This article offers a summary examination of some of the law of armed conflict (LOAC) issues encountered in US ground combat in Afghanistan. These issues were discussed during the June 2008 Naval War College workshop, “The War in Afghanistan,” which was the genesis of this volume of the “Blue Book.” Although it is a conflict whose ending remains to be written, much of its LOAC outlines are already discernable. Difficult issues involving conflict and individual status, questions about prisoner of war (POW) status, arguments regarding targeted killing and “direct participation,” the questionable deportation of individuals from Afghanistan to Guantanamo Bay, and a disturbing number of war crime allegations all arose in workshop discussions of ground combat in Afghanistan. This summary account reflects a few of those issues as seen through the lens of one participant. Not all attendees will agree with all of these assessments, but they provide departure points for discussion at future workshops.

Armed Conflict Commences

The genesis of America’s war in Afghanistan is well known. Long before the attacks of September 11, 2001, the United States was concerned with the direction taken by Afghanistan, as the Department of State’s Coordinator for Counterterrorism said in a 1999 Senate hearing:

Afghanistan has become a new safehaven for terrorist groups. In addition to bin Ladin and al-Qa’ida, the Taliban play host to members of the Egyptian Islamic Jihad, the Algerian Armed Islamic [G]roup, Kashmiri separatists, and a number of militant organizations from Central Asia, including terrorists from Uzbekistan and Tajikistan.²

After the 9-11 attacks, President George W. Bush demanded that Afghanistan close its terrorist camps and hand over al Qaeda leaders in hiding there.³ As Professor Dinstein points out, an ultimatum from one government to another, setting a

deadline and warning that war will immediately commence once the deadline lapses, will, at the designated time, indicate the initiation of armed conflict. Although there was no deadline in the Bush demand, it was clear that the Taliban were required to act immediately or armed conflict would be initiated by the United States.⁴ Such was the case. “[US] military operations against Taliban and Al Qaeda targets in Afghanistan commenced on October 7th. . . . There ought to be no doubt that October 7th—and not September 11th—is the date of the beginning of the war between the United States and Afghanistan.”⁵ In support of the American initiation of armed conflict, the United Nations Security Council passed Resolution 1386, authorizing establishment of an International Security Assistance Force to maintain security in and around Kabul, after the fall of the Taliban. States participating in the ISAF were authorized “to take all necessary measures to fulfil its mandate.”⁶

Shifting Conflict Status

From the outset, a unique aspect of the ground war in Afghanistan has been the heavy use of Special Forces:

Army Special Forces (SF) was tested to a degree not seen since the Vietnam War. With little time to prepare for this mission, SF teams were to land by helicopter deep in hostile territory, contact members of the Northern Alliance, coordinate their activities in a series of offensives . . . and change the government of Afghanistan so that the country was no longer a safe haven for terrorists.⁷

Army SF units were the first US military personnel in Afghanistan for Operation Enduring Freedom, as the invasion was denominated. A first twelve-man SF team was inserted on October 19, 2001, joining with a Northern Alliance Uzbek commander, Abdul Rashid.⁸ SF forces would carry the brunt of US fighting for the brief Common Article 2⁹ period of the Afghan conflict. The Northern Alliance (the United Islamic Front for the Salvation of Afghanistan) had battled the Taliban government since the Alliance’s formation in 1996, in a non-international armed conflict. Now, in the north of Afghanistan, SF/Northern Alliance operations took place near Mazar-e Sharif, Konduz and Taloqan. In other areas the Northern Alliance continued its independent conflict with the Taliban central government.

Meanwhile, in the south of Afghanistan, on the night of October 19–20, an international armed conflict opened when US SF and Ranger forces made a night-time parachute drop to initiate a raid on Kandahar, fighting Taliban units. Common Article 2 and Common Article 3¹⁰ conflicts were being fought at the

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same time in a single country. “The fact that a belligerent State is beset by enemies from both inside and outside its territory does not mean that the international and internal armed conflicts necessarily merge.”¹¹ A few weeks later, on November 13, with the capture of Kabul by Northern Alliance, US and British forces, the international armed conflict began to ebb, but significant LOAC issues were beginning to emerge.

Individual Status and Prisoner of War Issues

The US Army’s official history of Operation Enduring Freedom notes, “At this point the wholesale surrender of the Taliban forces began to cause problems.”¹² More than 3,500 Taliban fighters had surrendered around Konduz. Several thousand more were captured by Northern Alliance forces near Mazar-e Sharif. Douglas Feith, then Under Secretary of Defense for Policy, writes, “The Pentagon’s leadership appreciated the importance of honoring the Geneva Conventions, but issues arose time and again that required the very difficult balancing of weighty but competing interests: on interrogation methods . . . and on whether to prosecute individuals as criminals or simply continue to hold them as enemy combatants.”¹³ US efforts to “balance” the Geneva Conventions against interrogation methods and prosecution choices did not meet with notable success.

What was the status of Taliban captives taken in the brief Common Article 2 phase of the armed conflict? Did they qualify as POWs? Were they members of the armed forces of a party to the conflict? Additional Protocol I defines an armed force to include

all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.¹⁴

Considering that definition, but for their compliance with international law, the Taliban appear to qualify as the armed forces of Afghanistan, entitled to POW status if captured in a Common Article 2 conflict.¹⁵

Or were Afghanistan’s Taliban akin to a post–World War I *Freikorps* in defeated Germany? Consisting of private paramilitary groups, ultraconservative and highly nationalistic, more than sixty *Freikorps* proliferated throughout Germany in 1919, one of them becoming the National Socialist German Workers’ Party—the Nazi Party. But in 1920 the Nazis were just another *Freikorps*, with an allegiance not to

any German government but to their own *Freikorps*.¹⁶ There is an argument that Afghanistan's armed forces ceased to exist after the fall of the communist Najibullah government in September 1996 and were supplanted by rival *Freikorps*-like "armies," the Taliban being one of the more powerful. The argument continues that there is no showing that the Taliban became the armed forces of Afghanistan, professing allegiance to the government of the State.¹⁷ The *Commentary* on the Additional Protocols notes, "[C]ombatant status is given to regular forces only which profess allegiance to a government or authority . . . which claims to represent a State which is a Party to the conflict."¹⁸ Accordingly, under this construct the Taliban were not "the armed forces of a Party to the conflict."¹⁹ Rather, the argument goes, they were merely the armed group in control of Afghanistan and its government.

But the stronger case is that the Taliban were indeed the armed forces of Afghanistan. Starting in 1954, the International Law Commission (ILC) developed guidelines for State responsibility. Article 8 of the ILC's 2001 document, *Responsibility of States for Internationally Wrongful Acts*, reads: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."²⁰ That guidance, combined with the plain language of Additional Protocol I's Article 43.1, leads to the conclusion that the Taliban were the armed forces of Afghanistan.

Accepting, *arguendo*, that the Taliban were Afghanistan's armed forces during the period of the Common Article 2 conflict, did its captured fighters merit POW status as members of "the armed forces of a Party to the conflict"?²¹ Applying the four conditions for lawful combatancy and POW status upon capture, the answer is reasonably clear: although they were the armed forces of Afghanistan, they did not wear uniforms or other distinctive fixed sign. Black turbans, common to many males in the region, do not suffice.

Since the [four] conditions are cumulative, members of the Taliban forces failed to qualify as prisoners of war under the customary law of war criteria. These criteria admit no exception, not even in the unusual circumstances of . . . the Taliban regime. To say that '[t]he Taliban do not wear uniforms in the traditional western sense' is quite misleading, for the Taliban forces did not wear any uniform in any sense at all . . .²²

Throughout the Common Article 2 phase of the conflict they failed to distinguish themselves and were not entitled to POW status. Although there are reasoned views in disagreement,²³ the Taliban captured during the Common Article 2

US invasion were not merely soldiers out of uniform—or out of a Western conception of a uniform. They were not POWs.

What then was their status? Given the definition of civilians in Article 50 of Additional Protocol I, they were simply civilians and, being directly involved in an international armed conflict, they were unprivileged belligerents, i.e., civilians who took a direct part in hostilities, to be captured and tried under military or Afghan domestic law—not for being unlawful combatants, which is not a crime in and of itself, but for the unlawful acts that rendered them unlawful combatants.

One may question whether it would not have been wise to have a competent tribunal determine the status of those Taliban captured during the international phase of the conflict since their presumptive status upon capture was POW.²⁴ But such tribunals are called for only in cases of doubt regarding the captive's status. Was there doubt?²⁵ The US Congressional Research Service specifies several reasons for *not* granting POW status:

The Administration has argued that granting [al Qaeda or Taliban] detainees POW status would interfere with efforts to interrogate them, which would in turn hamper its efforts to thwart further attacks. Denying POW status may allow the Army to retain more stringent security measures The Administration also argued that the detainees, if granted POW status, would have to be repatriated when hostilities in Afghanistan cease, freeing them to commit more terrorist acts.²⁶

Initially the US position on the status of both the Taliban and al Qaeda was seemingly based on such faulty reasoning. Clearly al Qaeda, a violent, transnational, non-State terrorist group, is in violation of all law, including the LOAC.²⁷ Acts of terrorism like those commonly perpetrated by al Qaeda are prohibited by Geneva law, including the 1977 Protocols.²⁸ Initial individual status determinations were needlessly complicated by the inexplicable US view that the fight against the Taliban was an armed conflict, yet was neither a Common Article 2 nor Common Article 3 conflict.²⁹ Despite warnings from the US Secretary of State³⁰ and the Department of State's Legal Adviser,³¹ the Bush administration held that neither the Taliban nor al Qaeda was protected by the Geneva Conventions,³² including Common Article 3 protection.³³ The view that captured Taliban and al Qaeda fighters were outside the protections of Common Article 3³⁴ was rejected by the Supreme Court in its 2006 *Hamdan* decision,³⁵ and the administration subsequently softened its position. Lieutenant General Ricardo Sanchez, former US commander of ground combat troops in Iraq, wrote of the presidential memorandum denying the Taliban the protections of the Geneva Conventions:

This presidential memorandum constituted a watershed event in U.S. military history. Essentially, it set aside all of the legal constraints, training guidelines, and rules for interrogation that formed the U.S. Army's foundation for the treatment of prisoners on the battlefield According to the President, it was now okay to go beyond those standards with regard to al-Qaeda terrorists. And that guidance set America on a path toward torture.³⁶

If not covered by the Geneva Conventions, even Common Article 3, what, in the pre-*Hamdan* US view, was the status of captured Taliban and al Qaeda fighters, and what treatment were they to be accorded? The murky answer was provided by Secretary of Defense Donald Rumsfeld: "The Combatant Commanders shall, in detaining Al Qaeda and Taliban individuals under the control of the Department of Defense, treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949."³⁷ No individual status was specified. A former Assistant US Attorney General wrote, "This formulation sounded good. But it was very vague, it was not effectively operationalized into concrete standards of conduct, and it left all of the hard issues about 'humane' and 'appropriate' treatment to the discretion of unknown officials."³⁸ Nor was it consistent with the law of armed conflict.

Captured Taliban were dubbed "enemy combatants." That phrase first appeared in the US Supreme Court opinion in the World War II Nazi saboteur case, *Ex parte Quirin*. Chief Justice Stone wrote for the majority:

[A spy 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.³⁹

Sixty-five years later, critics of *Quirin* note of the Court's phrase, "enemy combatant," that "the term's meaning is blurred by its failure to appear in the positive case law existing at the time of the case as well as in the current treaty-based law of war."⁴⁰ Another critic dismissively asserts that "[t]he concept of the 'unlawful combatant' was invented to explain the legal fate of the eight German saboteurs tried in *Quirin*. . . . The concept . . . explained why the saboteurs were entitled neither to a jury trial under the Constitution nor to POW status under the Hague Convention."⁴¹ Although *Quirin* continues to be cited when supportive of a writer's position, the opinion is muddled, and a poor example of LOAC insight that lacks legal clarity.

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Canadian Brigadier General Kenneth Watkin writes, “[C]onfusion has also been created by the United States’ use of an even more generic term: ‘enemy combatants.’”⁴² Colonel Charles Garraway agrees:

The term “enemy combatant” . . . merely adds to the confusion. Traditionally, the term “enemy combatant” refers to legitimate combatants who are entitled to prisoner of war status. It is a new usage to describe those who are deemed to be unlawful belligerents as such. What term is left for those legitimate combatants belonging to enemy armed forces?⁴³

Today, “enemy combatant,” like the term “combatant” itself, has come to represent a status rather than an activity. A definition of “enemy combatant” binding US Armed Forces is found in a Department of Defense (DoD) directive: “Enemy combatant. In general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict. The term ‘enemy combatant’ includes both ‘lawful enemy combatants’ and ‘unlawful enemy combatants.’”⁴⁴ No mention is made of the treatment due a captured enemy combatant and the definition appears tailored for the “war on terrorism,” rather than for general LOAC use. Its melding of lawful and unlawful combatants, long-established separate LOAC statuses, is also notable since, upon capture in a Common Article 2 conflict, the two are entitled to significantly differing protections. Whether this definition survives to become State practice, or the subject of treaties, remains to be seen.

A competing US directive, Joint Publication 3-63, adopts the just-mentioned DoD directive’s definition but, significantly, omits its last sentence: “Enemy combatant. In general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict.”⁴⁵ Again, the Joint Publication’s definition does not mention the captive’s individual status (unless “enemy combatant” is considered a discrete status), or presumptive POW status or protected person status, one or the other of which must be applicable in a Common Article 2 conflict. In Afghanistan, the United States has been at pains to avoid referring to captured opposing fighters as POWs. The unsatisfactory term “enemy combatant” is instead used.

Taxonomic issues aside, Operation Enduring Freedom continued, its participants oblivious to status issues. On November 16, 2001, the battle of Tora Bora began. In support of Afghan warlord Hazrat Ali, dozens of US SF operators guided airstrikes on al Qaeda mountain strongholds. Although the constant strikes and pressure from ground forces reduced the enemy presence, fighting came to a halt in mid-December. Most of the enemy had either fought to the death or had found refuge across the Pakistan border.⁴⁶

Also in November, at Tarin Kot, US aircraft guided by SF ground controllers decimated Taliban fighters, killing an estimated one thousand. On November 25, the first US conventional forces entered Afghanistan when five hundred Marines of the 15th Marine Expeditionary Unit (MEU) debarked from *USS Peleliu* and landed at Kandahar. They had moved by helicopter from their shipboard base four hundred miles inland to Kandahar, so distant an inland objective not being the usual Marine ship-to-shore movement. The 15th MEU departed a few weeks later, replaced by the 26th MEU,⁴⁷ who themselves departed within two months. On the ground, Afghanistan was still essentially an SF/Northern Alliance show.

Also, on November 25, 2001, during a riot at a prison located at Mazar-e Sharif, CIA Special Activities Division officer Johnny M. Spann was the first American killed by Taliban enemy action.⁴⁸

Unmanned Aerial Vehicles and Targeted Killing

Operation Enduring Freedom is notable for the use of unmanned aerial vehicles (UAVs). Their role in ground combat has been significant because at least one UAV, the MQ-1 Predator, can carry and fire two laser-guided air-to-ground Hell-fire missiles, changing the fundamental nature of ground combat when it is employed.

Predator UAVs first deployed to the Balkans in 1995. Since then, the Predator's offensive capabilities have increased. Today, it carries a daytime television nose camera, a forward-looking infrared camera for low-light and night operations, and a laser designator. Cruising at eighty-five miles per hour at 25,000 feet, a Predator can loiter for in excess of forty hours.⁴⁹ The first armed Predator mission in Afghanistan was flown on October 7, 2001.

Employing the Predator, the US admitted engaging in targeted killing for the first time.⁵⁰ On November 3, 2002, over the desert near Sana, Yemen, a CIA-controlled Predator tracked an SUV containing six men. One of the six, Qaed Salim Sinan al-Harethi, was believed to be a senior al Qaeda lieutenant who had played a major role in the 2000 bombing of the American destroyer *USS Cole*. He "was on a list of 'high-value' targets whose elimination, by capture or death, had been called for by President Bush."⁵¹ The United States and Yemen had tracked al-Harethi's movements for months. Now, away from any inhabited area, the Predator fired a Hell-fire missile at the vehicle. Its six occupants, including al-Harethi, were killed.⁵² There is no consensus definition of "targeted killing" in the LOAC or in case law.⁵³ However, a reasonable definition is offered by International Committee of the Red Cross (ICRC) legal advisor Nils Melzer: "The use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to

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kill individually selected persons who are not in the physical custody of those targeting them.”⁵⁴

Additional Protocol I, Article 51.3, usually considered to be customary law, appears to prohibit targeted killing: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” Those interested in international law or the LOAC know that for several years the phrase “unless and for such time as they take a direct part in hostilities” has been the subject of debate and the focus of meetings of international experts sponsored by the ICRC and the Asser Institute.⁵⁵ The plain meaning of the phrase indicates that terrorists and terrorist accomplices, such as weapon makers and communications experts, cannot lawfully be targeted unless, at the time of targeting, they are actually directly engaged in hostilities. Those who argue against such a constricting limitation urge that such terrorists should be lawful targets whenever and wherever their locations can be confirmed.

But events on the ground in Afghanistan and Iraq are making the debate moot. As Melzer notes:

Today, targeted killing is in the process of escaping the shadowy realm of half-legality and non-accountability, and [is] gradually gaining legitimacy as a method of counter-terrorism and “surgical” warfare. Several Governments have expressly or implicitly acknowledged that they have resorted to targeted killings in their respective efforts to curb insurgent or terrorist activities.⁵⁶

Those governments include the United States, Israel, Russia, Pakistan, the United Kingdom, Germany and Switzerland.

For better or worse, in the United States the 9-11 attacks caused shifts in public opinion, and often shifts in public policy, relating to terrorism and terrorists. For example, torture, previously rejected out of hand, shockingly became acceptable. A 2005 survey indicated that sixty-one percent of the American public would not rule out torture,⁵⁷ and President George W. Bush said in a nationally televised address that “the CIA used an alternative set of procedures”⁵⁸ when interrogating certain captured terrorist suspects.

Another post-9-11 change in policy and attitude related to targeted killing. Once anathema to America (in public at least),⁵⁹ after 9-11 targeted killing became tolerated,⁶⁰ then embraced. Under a series of classified presidential findings, President Bush reportedly broadened the number of named terrorists who may be killed if their capture is impractical.⁶¹ In early 2006, it was reported that since 9-11 the US had successfully carried out at least nineteen targeted killings via Predator-fired

Hellfire missiles. In June 2006, the targeted killing of Abu Musab al-Zarqawi, leader of al Qaeda in Iraq, was celebrated as a US strategic and political victory.

In October 2001, a US Predator killed the military chief of al Qaeda in Afghanistan. In June 2004, a senior Taliban planner, Nek Mohammad, was killed by a UAV-launched missile. In May 2005, on the Afghanistan-Pakistan border, a CIA-controlled UAV killed Haitham al-Yemeni, a suspected senior figure in Afghan al Qaeda operations.⁶² In August 2008, an Afghan warlord's camp in the mountains of Pakistan was destroyed and nine insurgents reportedly killed by four missiles.⁶³ The roster continues to lengthen. Though it occasionally admits to targeted killing, the US government remains reticent and evasive in acknowledging employment of the tactic, but its value to ground combat operations is apparent.⁶⁴

Even considering their inevitable collateral damage, the effectiveness of UAVs mated with Hellfire missiles, combined with their relatively low cost and zero exposure of friendly personnel, assures their continued use. Although targeting errors, actual or contrived, are media staples,⁶⁵ the international trend toward their legitimization, whether or not seen to be in compliance with Article 51.3, is all but assured.

Meanwhile, in April 2002, coalition members met in Geneva and agreed on five "pillars" of change in Afghanistan. The United States assumed responsibility for building the Afghan army; Germany agreed to build the Afghan police; Italy took on the judicial system; the United Kingdom was to take the lead on curbing illegal drug use; and Japan accepted responsibility for disarmament, demilitarization and reintegration of the Afghan warlords and militias.⁶⁶ Six years on, one can only smile ruefully at such ambitious plans.

By late 2002 an Afghanistan conflict timeline was discernable. The US invasion was in October 2001. Coalition forces removed the Taliban from power in December.⁶⁷ According to the 2001 Afghan Bonn Agreement, Afghan sovereignty re-arose in December 2001 with the establishment of the Interim Authority.⁶⁸ Accepting those dates, the international armed conflict phase of the "war" lasted sixty-two days and the US occupation a mere fifteen days. In June 2002 the Afghans created a transitional government referred to as a *Loya Jirga*, or grand assembly.

In terms of ground combat, one observer noted that "[d]uty in Afghanistan isn't turning out to be the low-key operation many expected."⁶⁹ An infantry officer reported, "Afghanistan is home to some of the most extreme terrain and environmental conditions in the world. During our time there we operated in mostly mountainous terrain in excess of 8,000 feet [above] mean sea level, with temperatures ranging during the day from 80 to 100 degrees."⁷⁰

Through 2003 Afghanistan's stresses on troop availability were reflected in tour lengths: Army tours of duty were from nine to twelve months; Marine Corps units

rotated into and out of country every seven months; Air Force personnel rotated every three or four months. Five years later, manning levels and tour lengths continue to bedevil Pentagon planners.

Transfer of Protected Persons from Afghanistan to Guantanamo Bay

During the Newport workshop, several of us wondered why more has not been made of the movement of prisoners from Afghanistan and Iraq to Guantanamo Bay, Cuba. The history of deportations in armed conflicts is familiar. During World War I Germany deported thousands of French and Belgian citizens to Germany as forced laborers. The German action was called “an act of tyranny, contrary to all notions of humanity.”⁷¹ Georg Schwarzenberger wrote: “In World War II, Nazi Germany resorted to deportation as part of its policies of terrorisation and extermination and, even more so, for the purpose of implementing its slave-labour programme.”⁷² In response, the Charter of the International Military Tribunal at Nuremberg specified that the deportation of civilians from occupied territories—for any purpose—was a crime against humanity and a breach of the laws and customs of war.⁷³ In the post-war “Subsequent Proceedings,” tried under authority of Control Council Law No. 10, unlawful deportation was among the charges in several of the twelve military tribunals. National tribunals prosecuted individuals for deportation as well.⁷⁴

Article 49 of Geneva Convention IV addresses the removal of protected persons: “Individual . . . transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”⁷⁵

The *Commentary* to Convention IV explains, “There is doubtless no need to give an account here of the painful recollections called forth by the ‘deportations’ of the Second World War. . . . The prohibition . . . is intended to forbid such hateful practices for all time. . . . The prohibition is absolute and allows of no exceptions”⁷⁶ How then to explain the history of forced movement of individuals from Afghanistan and Iraq to Guantanamo in the “war against terrorism”?

In non-international conflicts, Additional Protocol II mandates that “[c]ivilians shall not be compelled to leave their own territory for reasons connected with the conflict.”⁷⁷ The Statute of the International Criminal Court⁷⁸ renders deportations in non-international conflicts a war crime as well, while the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda denominate deportations as crimes against humanity.⁷⁹

The ICRC's study, *Customary International Humanitarian Law*, states, "Numerous military manuals specify the prohibition of unlawful deportation or transfer of civilians in occupied territory."⁸⁰ The study goes on to specify the legislation of thirty-nine States, several applicable in non-international conflicts, making deportation of civilians a domestic offense. The ICRC study finds State practice to establish the rule against deportation, in both international and non-international armed conflicts, as customary international law.⁸¹ Finally, Geneva Convention IV mandates that "[p]rotected persons accused of offenses shall be detained in the occupied country, and if convicted they shall serve their sentences there."⁸²

These prohibitory sources against deportation indicate the incontrovertible nature of the prohibition. Throughout the armed conflict in Afghanistan and the US occupation, Article 49 applied, prohibiting the deportation of protected persons from the occupied State to Guantanamo.

Who is a "protected person" whose deportation is prohibited? Geneva Convention IV, Article 4, tells us that, essentially, a protected person is someone in an international armed conflict, other than a POW, who is in the hands of the other side. There are limitations on the application of protected person status, of course—notably the "nationality requirement" and cobelligerents. The cobelligerent's requirement of diplomatic representation is significant,⁸³ because at the time of the armed conflict with the United States, the Taliban government did not have such relations with the United States. The nationality and cobelligerent limitations on protected person status did not apply to nationals of Afghanistan vis-à-vis the United States.

Can extraordinary measures, such as deportation, be taken in the case of unlawful combatants, as many Afghan insurgents were? The "unprivileged belligerent" has been characterized by the ICRC "as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy."⁸⁴

Dinstein argues that

[a] person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status⁸⁵

Captured unlawful combatants are entitled to the basic humanitarian protections of Common Article 3 and of Article 75 of Additional Protocol I.⁸⁶ While being an unprivileged belligerent is not a war crime, the unlawful combatant

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forfeits the combatant's privilege and potential POW status, and may be charged for law of war violations that made him an unlawful combatant.

What is "deportation" in the LOAC? William Schabas states that

[d]eportation . . . involves the movement of individuals, under duress, from where they reside to a place that is not of their choosing. Deportation would involve such transfer when an international border is crossed. It must be proven that the accused intentionally perpetrated an act or omission to effect such deportation . . . that was not motivated by the security of the population or imperative military reasons.⁸⁷

ICTY jurisprudence defines deportation simply as forcible transfer beyond one's home State borders,⁸⁸ and finds it an inhumane act.⁸⁹

In the pertinent timeframe, the seventy-seven-day-long US-Afghanistan conflict, whose deportation to Guantanamo Bay was prohibited? Answer: captured unlawful combatants who were nationals of a State other than Afghanistan *and*, because Afghanistan lacked normal diplomatic relations with the United States, Afghan nationals held by the United States in occupied Afghanistan who were allegedly unlawful combatants. Individuals in both categories were protected persons.

The only discovered US government document addressing deportations to Guantanamo is a March 2004 draft opinion written by the Justice Department's Office of Legal Counsel. The fourteen-page memorandum to Alberto Gonzales, then-Counsel to the President, is entitled "Permissibility of Relocating Certain 'Protected Persons' from Occupied Iraq."⁹⁰ Relying on a definition of deportation taken from Roman times, the draft memorandum argues that Geneva Convention IV does not prohibit the deportation of protected persons who are illegal aliens—presumably meaning foreign fighters—captured in Iraq. Creating the LOAC from whole cloth, the memorandum argues that protected persons, even if nationals of the State in which captured, may be deported as long as they have not been formally accused of wrongdoing, apparently an effort to circumvent the requirement of Article 76 of the Fourth Convention that protected persons accused of offenses be detained in the occupied State.

The draft memorandum's conclusion is that the United States may remove—deport—protected persons when the intent is not to accuse them of wrongdoing but only to interrogate them. From the memorandum: "[A]rticle 49(1)'s prohibition of forcible transfers and deportations *out of* occupied territory . . . should not be construed to extend to temporary transnational relocations of brief but not indefinite duration" (emphasis in original). This would allow authorities to simply

designate a protected person as destined for interrogation and deport him without further accountability.

The draft memorandum was never finalized,⁹¹ although its conclusions were confirmed by Mr. Gonzales when he was nominated to be Attorney General of the United States.⁹² “A related issue that has inexplicably escaped broader attention is the fate of persons apprehended in the ‘war on terrorism’ who were or are being held at undisclosed locations.”⁹³ The draft memorandum was the basis for the secret removal by the CIA of at least a dozen detainees from Iraq.⁹⁴

How many Afghan and Iraqi prisoners held by the United States were deported to Guantanamo in contravention of Article 49? It is unlikely there will ever be a satisfactory answer.

Increased War Crimes Prosecutions—Perception or Fact?

Large-scale ground operations in Afghanistan, e.g., the US Army’s Operations Anaconda (March 1–16, 2002), Valiant Strike (March 20–25, 2003) and Mountain Viper (September 4–5, 2003), do not usually give rise to charges of LOAC violations. Day-to-day operations in urban Afghan settings, however, have seen many such allegations. War crime charges are even more frequent in Iraq, where urban operations are more common.

Anytime a government puts high-power weapons in the hands of very young men and women, bad things will inevitably happen.⁹⁵ In fighting terrorists who ignore customary battlefield norms, incite retaliation and hide within the noncombatant population, the spur for opposing forces to commit offenses is only heightened. The “CNN factor” often ensures that offenses are broadcast worldwide in near-real time. The armed forces are in a difficult position: fail to formally investigate even flimsy allegations of wrongdoing and be pilloried for covering up war crimes, or prefer court-martial charges with slim evidence and be pilloried as overly aggressive martinets.

But one may ask, as some workshop attendees did around Naval War College luncheon tables, have LOAC violations actually increased in Afghanistan, or have their reporting and prosecution increased? Are US armed forces members less controlled today or has a heightened awareness of the law of armed conflict resulted in greater command awareness and increased prosecutions? Either way, anecdotal evidence suggests that there have been proportionally more courts-martial for LOAC-related offenses than in previous armed conflicts.

One cannot obtain accurate numbers of courts-martial for such violations. Each of the military Services annually reports total numbers of convictions (as opposed to charges) to the Court of Appeals for the Armed Forces, but the convictions are

not broken down by offense. Even if they were, the murder of a POW, for example, would simply be reported as a murder, with no victim, no grave breach and no LOAC violation indicated. There is no requirement in federal law or military regulation to do otherwise.⁹⁶ Nor are media reports reliable indicators of indiscipline or criminality.

In December 2004 the Department of Defense reported that 130 US combatants had been punished or charged with prisoner abuse in Afghanistan, Iraq or Guantanamo.⁹⁷ Numbers in other reports for specific geographic areas vary.⁹⁸ In any event, there is no base point to which any number may be compared. Is 130 an unusually high number or normal or unusually low? Figures recorded in the current conflict cannot be compared to similar offenses in prior conflicts because, even if numbers had been kept—and they were not—every conflict is unique, with fundamentally different conflict characteristics that would make comparisons meaningless.

In both Afghanistan and Iraq there have clearly been a disturbingly high number of deaths of detainees at the hands of US warders. The *New York Times* reported: “At least 26 prisoners have died in American custody in Iraq and Afghanistan since 2002 in what Army and Navy investigators have concluded or suspect were acts of criminal homicide, according to military officials.”⁹⁹ A few months later the *Los Angeles Times* reported that “[a]utopsy reports on 44 prisoners who died in US custody in Iraq and Afghanistan indicate that 21 were victims of homicide, including eight who appear to have been fatally abused by their captors.”¹⁰⁰ And a few months after that the *Philadelphia Inquirer* reported: “Ninety-eight detainees in Iraq and Afghanistan have died in US custody since August 2002, and 34 of them were suspected or confirmed homicides, a human-rights group reported yesterday. Only 12 cases have resulted in punishment of any kind . . .”¹⁰¹ Which media figures, all said to be based on armed forces figures, can be relied upon—if any?

There are media reports of combatant misconduct occurring in Afghanistan, most involving detainee mistreatment¹⁰² but not all. A closely watched case arose in March 2007 in Jalalabad, when it was reported that ten to nineteen Afghan non-combatants were killed (the actual number has never been settled) and thirty-three more wounded by uncontrolled US fire when a Marine Corps convoy was hit by a car bomb that slightly wounded one Marine. As the convoy sped from the scene it allegedly continued to fire on Afghan civilians over the course of a six-mile “escape.” The area’s Army commander immediately ordered the Marine unit out of the country, initiated an investigation, paid \$2,000 in compensation for each reported death and apologized to the victims and their families on behalf of the United States. The Marine commander of the convoy unit was relieved by his Marine Corps seniors. At

the same time the Commandant of the Marine Corps, General James Conway, publicly expressed his anger at the Army commander's expressions of regret and acceptance of responsibility, which General Conway considered premature. The involved Marines disputed the initial account, insisting they had only returned fire after the initial car bombing and subsequent lengthy escape.¹⁰³

In May 2008, a court of inquiry cleared all Marines involved of criminal charges. In a fourteen-month arc the incident moved from newspaper front pages to back pages to silence, leaving hard feelings between the Marines and the Army, and Afghans distrustful and embittered against the United States. If not typical, it was a not uncommon progression, initially raising the specter of Haditha-like horrific unlawful conduct, fading to anticlimax and no charges.

There have indeed been numerous courts-martial involving war crime charges and there have been instances in which prosecution was found unwarranted. There have been convictions in which sentences were not commensurate with the offenses of which the accused was convicted.¹⁰⁴ All that can be said with assurance is that, after seven years in Afghanistan, there is no documented answer to the question of whether there are more LOAC violations than in prior conflicts; only arguments. Several attendees suggested the Department of Defense should require that all formal allegations of violent offenses involving indigenous individuals and armed service personnel, including prisoners of any description, whether or not resulting in trial, be periodically reported by the armed Service involved to a common DoD authority.

Meanwhile, in mid-2006 the US Marine Corps departed Afghanistan, leaving ground fighting to the Army and NATO combatants, and fledgling Afghan National Army troops. The Marine units would move on to Iraq. One observer noted: "The end of the Corps' Afghan deployments comes as the overall U.S. commitment to that country is on the decline. Military officials have said that American forces will be reduced from the roughly 23,000 troops there now to 16,000 by the end of the summer [of 2006]."¹⁰⁵ Planning was underway for the so-called "surge" in Iraq, which began in February 2007. Even at some tactical cost, US troop drawdowns in Afghanistan were required to meet the manpower needs of the coming "surge." By 2007, Afghanistan was being referred to as the "forgotten war."¹⁰⁶ But, once the surge was over, the Marines were back,¹⁰⁷ to the consternation of the Marine Corps' Commandant.¹⁰⁸ But, almost immediately, new plans were announced indicating they would yet again leave Afghanistan, this time within a year.¹⁰⁹ Such undulating personnel requirements, presenting planners with constantly moving targets, are one more price of fighting two wars at once.

Conclusion

After more than seven years of ground combat in Afghanistan, at the cost of more than nine hundred lives, well over five hundred of them American, and having spent in excess of \$175 billion,¹¹⁰ where are we?

We have succeeded in deposing the Taliban government and installing an elected parliament. We have disrupted al Qaeda in Afghanistan. There has been a major increase in availability of basic health care. A central banking system and a stable currency are in place. Yet, mid-2008 reports, not all of which are media-based, present a discouraging picture. Among media reports were these: "Security in the provinces ringing the capital, Kabul, has deteriorated rapidly in recent months. Today it is as bad as at any time since the beginning of the war . . ." ¹¹¹ "[T]he Taliban are demonstrating a resilience and a ferocity that are raising alarm here [in Kabul], in Washington and in other NATO capitals." ¹¹² "Al Qaeda is more capable of attacking inside the United States than it was last year . . ." ¹¹³ "There were ten times as many armed attacks on international troops and civilian contractors in 2007 as there were in 2004. Every other measure of violence, from roadside bombs to suicide bombers, is also up dramatically." ¹¹⁴ In April 2006, a National Intelligence Estimate reported that "the global jihadist movement . . . is spreading and adapting to counterterrorism efforts." ¹¹⁵ In 2007, the last year for which totals are available, enemy encounters, roadside bombs, suicide bombers and casualty figures all reached new highs. In 2008, the *Baltimore Sun* reported: "The chairman of the House Armed Services Committee, Democratic Rep. Ike Skelton of Missouri, has said the United States 'risks strategic failure' in Afghanistan." ¹¹⁶

Poppy crop eradication, once a primary US mission in Afghanistan, has been abandoned. The media has reported that "[t]he Marines don't want to antagonize the local population by joining US-backed efforts to destroy the crop. 'We're not coming to eradicate poppy,' [a Marine major] says. 'We're coming to clear the Taliban.'" ¹¹⁷

An open Pakistan border combines with Pakistani perfidy and Afghan exhaustion to undercut coalition efforts against a resurgent Taliban. The invasion of Iraq eclipsed Afghanistan as the battleground against terrorism, stripping it of military resources, American funding and public interest. So far, efforts to deny sanctuary to terrorists in Afghanistan have been unsuccessful. One reporter alleges: "In a vicious cycle, narcotics, corruption and the absence of law and order are rotting the heart of the government and rippling the economy. Despite massive Western investment, Afghanistan is close to being a failed state." ¹¹⁸

An August 2008 editorial in the *New York Times* reflected the widespread concern regarding the progress of Operation Enduring Freedom:

The news out of Afghanistan is truly alarming. . . . Taliban and foreign Qaeda fighters are consolidating control over an expanding swath of territory sprawling across both sides of the porous Afghanistan-Pakistan border. . . . Unless the United States, NATO and its central Asian allies move quickly, they could lose this war. . . . [s]even years have already been wasted. . . . Afghanistan's war is not a sideshow. It is the principal military confrontation between America and NATO and the forces responsible for 9/11¹¹⁹

Seven years of ground combat in Afghanistan have not gained control of Afghanistan's borders, which is critical to ultimate success. The Afghan government has not yet established its authority or credibility. The Taliban are far from defeated.

The United States is not at the point of taking Kipling's advice to "Jest roll to your rifle and blow out your brains An' go to your Gawd like a soldier." But there is a large measure of ground combat yet to come in Afghanistan.

Notes

1. Gerry J. Gilmore, Pentagon Proposes Change to U.S. Command Structure in Afghanistan (Aug. 8, 2008), available at <http://www.defenselink.mil/news/newsarticle.aspx?id=50748>.
2. *Extremist Movements and Their Threat to the United States, Hearing Before the Subcomm. on Near East and South Asian Affairs of the S. Foreign Relations Comm.*, 106th Cong. 3 (1999) (statement of Amb. Michael A. Sheehan, Coordinator for Counterterrorism, US Dept. of State), available at http://www.state.gov/www/policy_remarks/1999/991102_sheehan_terrorism.html.
3. Address by President George W. Bush, *The War Against Terrorism*, in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 856–58 (Sally Cummins & David Stewart eds., 2001).
4. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 31 (4th ed. 2005).
5. *Id.*
6. S.C. Res. 1386, ¶ 3, U.N. Doc. S/RES/1386 (Dec. 20, 2001).
7. Richard W. Stewart, The United States Army in Afghanistan, Operation Enduring Freedom, October 2001–March 2002, at 8 (2003), available at <http://www.history.army.mil/brochures/Afghanistan/Operation%20Enduring%20Freedom.htm>.
8. DOUGLAS J. FEITH, WAR AND DECISION 104 (2008). Feith notes that there may have been Central Intelligence Agency paramilitary personnel on the ground in Afghanistan before October 19.
9. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]: all reprinted in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively. Article 2 provides in pertinent part that "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," i.e., international armed conflict.

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10. Geneva Conventions I, II, III and IV, *supra* note 9, art. 3. Article 3 applies to all cases “of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” i.e., non-international armed conflict.

11. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 14 (2004).

12. Stewart, *supra* note 7, at 16.

13. FEITH, *supra* note 8, at 165.

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43(1), June 8, 1977, 1125 U.N.T.S. 3, reprinted in *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 9, at 422 [hereinafter Additional Protocol I]. See also Geneva Convention I, *supra* note 9, art. 13(1).

15. Marco Sassòli, *Query: Is There a Status of “Unlawful Combatant”?*, in *ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS* 57, 61 (Richard B. Jaques ed., 2006) (Vol. 80, US Naval War College International Law Studies).

16. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 33–34, 42–43 (1960).

17. Posting of John B. Bellinger, *Unlawful Enemy Combatants* (Jan. 15, 2007), to <http://opiniojuris.org/author/john-bellinger/>.

18. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 508 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

19. Geneva Convention III, *supra* note 9, art. 4A(1).

20. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf. Article 10 continues, “[t]he conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.” Article 11 adds, “[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.” These articles appear to fairly encompass the Taliban’s relation to the State of Afghanistan.

21. Geneva Convention III, *supra* note 9, art. 4A(1).

22. DINSTEIN, *supra* note 11, at 48. Footnote omitted.

23. Marco Sassòli argues, “This allegation may astonish those who remember that during Operation Enduring Freedom, the United States stressed that it attacked Taliban command and control centers and did not complain that it was impossible to distinguish the Taliban from civilians.” Sassòli, *supra* note 15, at 61; see also Jennifer Elsea, Congressional Research Service, *Treatment of “Battlefield Detainees” in the War on Terrorism* (Jan. 13, 2005), at 7; Robert K. Goldman & Brian D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, ASIL TASK FORCE PAPERS (American Society of International Law), Dec. 2002, at 23–31, available at <http://www.pegc.us/archive/Journals/goldman.pdf>; George H. Aldrich, *Editorial Comments, The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 891, 894 (2002).

24. Geneva Convention III, *supra* note 9, art. 5; Additional Protocol I, *supra* note 14, art. 45.1. George Aldrich writes,

Without a doubt, the most difficult element to defend of the decisions made . . . with respect to the prisoners taken in Afghanistan is the blanket nature of the decision to

deny POW status to the Taliban prisoners. By one sweeping determination, the president ruled that not a single Taliban soldier, presumably not even the army commander, could qualify for POW status under the Geneva Convention.

Aldrich, *supra* note 23, at 897.

25. Geneva Convention III, *supra* note 9, art 5.

26. Elsea, *supra* note 23, at 7.

27. Aldrich, *supra* note 23, at 893 (“Its methods brand it as a criminal organization under national laws and as an international outlaw”).

28. See Geneva Convention IV, *supra* note 9, art. 33; Additional Protocol I, *supra* note 14, art. 51.2; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 4(2)(d) & 13(2), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 9, at 483 [hereinafter Additional Protocol II].

29. See Memorandum from John C. Yoo & Robert Delahunty to William J. Haynes II, General Counsel, Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38 (Karen J. Greenberg & Joshua Dratel eds., 2005) [hereinafter Yoo Memorandum] (“Common Article 2 . . . is limited only to cases of declared war or armed conflict ‘between two or more of the High Contracting Parties.’ Al Qaeda is not a High Contracting Party . . . Al Qaeda is not covered by common Article 3, because the current conflict is not covered by the Geneva Conventions. . . . Article 3 . . . shows that the Geneva Conventions were intended to cover either: a) traditional wars between Nation States . . . or non-international civil wars Our conflict with al Qaeda does not fit into either category”). The same conclusion applied to the Taliban (“Article 2 states that the Convention shall apply to all cases of declared war or other armed conflict between the High Contracting Parties. But there was no war or armed conflict between the United States and Afghanistan . . . if Afghanistan was stateless at that time. No[r], of course, is there a state of war or armed conflict between the United States and Afghanistan now”). And “[e]ven if Afghanistan under the Taliban were not deemed to have been a failed State, the President could still regard the Geneva Conventions as temporarily suspended during the current military action.”

30. See Memorandum from Colin L. Powell to Counsel to the President & Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *reprinted in* TORTURE PAPERS, *supra* note 29, at 122.

31. Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), *reprinted in id.* at 129.

32. Yoo Memorandum, *supra* note 29 (“The weight of informed opinion strongly supports the conclusion that . . . Afghanistan was a ‘failed State’ whose territory had been largely overrun and held by violence by a militia or faction rather than by a government. Accordingly, Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions, and the Taliban militia[,] like al Qaeda, is therefore not entitled to the protections of the Geneva Convention”).

33. Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, & William J. Haynes II, General Counsel of the Department of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *reprinted in* TORTURE PAPERS, *supra* note 29, at 81 (“Further, common Article 3 addresses only non-international conflicts that occur within the territory of a single state party, again, like a civil war. This provision would not reach

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an armed conflict in which one of the parties operated from multiple bases in several different states”).

34. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24, 2007), available at <http://www.fas.org/irp/offdocs/eo/eo-13440.htm> (“On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination . . .”).

35. Hamdan v. Rumsfeld, 548 U.S. 557, 629–31 (2006).

36. RICARDO SANCHEZ, WISER IN BATTLE 144 (2008).

37. Memorandum from the Secretary of Defense to the Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaeda (Jan. 19, 2002), reprinted in TORTURE PAPERS, *supra* note 29, at 80.

38. JACK GOLDSMITH, THE TERROR PRESIDENCY 120 (2007).

39. Ex parte Quirin, 317 U.S. 1 (1942).

40. Mark D. Maxwell & Sean M. Watts, ‘Unlawful Enemy Combatant’: Status, Theory of Culpability, or Neither?, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 19, 21 (2007).

41. Marco Sassòli, *The Status of Persons Held in Guantánamo under International Humanitarian Law*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 96, 123 (2004).

42. Kenneth Watkin, *21st Century Conflict and International Humanitarian Law: Status Quo or Change?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 265, 286 (Michael N. Schmitt & Jelena Pejic eds., 2007).

43. Charles H. B. Garraway, ‘Combatants’ – Substance or Semantics?, in *id.*, at 327.

44. US Department of Defense, Directive 2310.01E, The Department of Defense Detainee Program (Sept. 5, 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>.

45. Chairman of the Joint Chiefs of Staff, Joint Publication 3-63, Detainee Operations, at I-4 (2008).

46. Stewart, *supra* note 7, at 10–16.

47. Staff Report, *26th MEU Tapped for Enduring Freedom*, MARINE CORPS TIMES (Nov. 26, 2001), at 9; Gordon Lubold, *Marines Prepare to Leave Afghanistan*, MARINE CORPS TIMES (Jan. 7, 2002), at 10.

48. Afghanistan’s first US military killed in action was Army Sgt. 1st Class Nathan R. Chapman, killed in a January 1, 2002 firefight in Paktia.

49. For Predator characteristics, see MQ-1 Predator Unmanned Aircraft System, <http://www.af.mil/factsheets/factsheet.asp?fsID=122>; Predator RQ-1 / MQ-1 / MQ-9 Reaper - Unmanned Aerial Vehicle (UAV), USA, <http://www.airforce-technology.com/projects/predator> (both last visited Feb. 24, 2009).

50. It may be argued that the Vietnam War’s Phoenix Program, Operation El Dorado Canyon (the 1986 bombing of Libyan leader Muammar Qadhafi), or the attacks on Osama Bin Laden in 1998 (when he was linked to the bombing of US embassies in Dar es Salaam and Nairobi), constituted targeted killing. Those attacks may also be argued to be assassinations and attempted assassinations, mounted with political rather than tactical motives.

51. Seymour M. Hersh, *Manhunt*, NEW YORKER, Dec. 23, 2002, at 66.

52. *No holds barred*, ECONOMIST, Nov. 7, 2002, at 49.

53. There are other definitions in scholarly articles. One, for example, is “[p]remeditated killing of an individual by a government or its agents.” William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 UNIVERSITY OF RICHMOND LAW REVIEW 667, 671 (2003). Another is “the intentional killing of a specific civilian who cannot

reasonably be apprehended, and who is taking a direct part in hostilities, the targeting done at the direction and authorization of the state in the context of an international or noninternational armed conflict.” Gary D. Solis, *Targeted Killing and the Law of Armed Conflict*, NAVAL WAR COLLEGE REVIEW, Spring 2007, at 127, 127.

54. NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (2008).

55. See, e.g., Second Expert Meeting: Direct Participation in Hostilities under International Humanitarian Law (Oct. 25–26, 2004), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2004_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf).

56. MELZER, *supra* note 54, at 9–10.

57. Will Lester, *Poll Finds Support for Use of Torture in War on Terror*, WASHINGTON TIMES, Dec. 7, 2005, at A1.

58. See Press Release, The White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (“In some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need . . . and they withhold information that could save American lives. In these cases, it has been necessary to move these individuals to an environment where they can be held secretly, questioned by experts, and—when appropriate—prosecuted for terrorist acts”).

59. *Self-licensed to kill*, ECONOMIST, Aug. 4, 2001, at 12 (“Israel justifies these extra-judicial killings as self-defense. . . . But the usual context of such a discussion would be that the two sides involved were at war . . .”); Editorial, *Assassination Ill Befits Israel*, NEW YORK TIMES, Oct. 7, 1997, at A24 (“[T]rying to assassinate Palestinian leaders in revenge is not the answer”).

60. In 1989, Abraham D. Sofaer, then US State Department Legal Adviser, equivocated:

While the U.S. regards attacks on terrorists being protected in the sovereign territory of other States as potentially justifiable when undertaken in self-defense, a State’s ability to establish the legality of such an action depends on its willingness openly to accept responsibility for the attack, to explain the basis for its action, and to demonstrate that reasonable efforts were made prior to the attack to convince the State whose territorial sovereignty was violated to prevent the offender’s unlawful activities from occurring.

Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MILITARY LAW REVIEW 89, 121 (1989).

61. James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, NEW YORK TIMES, Dec. 15, 2002, at A1.

62. MELZER, *supra* note 54, at 41, 409.

63. Associated Press, *9 Suspected Insurgents Killed in Missile Strike, Pakistan Says*, NEW YORK TIMES, Aug. 14, 2008, at A7.

64. Josh Meyer, *CIA Expands Use of Drones in Terror War*, LOS ANGELES TIMES, Jan. 29, 2006, at A1 (“The Predator strikes have killed at least four senior al Qaeda leaders, but also many civilians, and it is not known how many times they missed their targets”).

65. See, e.g., Candace Rondeaux, *Civilian Airstrike Deaths Probed*, WASHINGTON POST, July 25, 2008, at A12 (“78 have died in three incidents this month alone, Afghan officials say”); Carlotta Gall, *British Criticize U.S. Air Attacks in Afghan Region*, NEW YORK TIMES, Aug. 9, 2007, at A1.

66. US GOVERNMENT ACCOUNTABILITY OFFICE, AFGHAN SECURITY: EFFORTS TO ESTABLISH ARMY AND POLICE HAVE MADE PROGRESS, BUT FUTURE PLANS NEED TO BE BETTER DEFINED 5 (2005), available at <http://www.gao.gov/new.items/d05575.pdf>.

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67. US Department of State, *Timeline — Key Events in Afghanistan's Political and Economic Reconstruction*, Jan. 26, 2006, <http://www.america.gov/st/pubs-english/2006/January/20060126120012dpnosmoht0.9750482.html>.

68. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, attached to Letter from the Secretary-General addressed to the President of the Security Council para. I.3, U.N. Doc. S/2001/1154 (Dec. 5, 2001), *available at* <http://www.afghangovernment.com/AfghanAgreementBonn.htm> (“Upon the official transfer of power, the Interim Authority shall be the repository of Afghan sovereignty. . . . As such, it shall, throughout the interim period, represent Afghanistan in its external relations and shall occupy the seat of Afghanistan at the United Nations . . .”).

69. Christian Lowe, *Leathernecks Aim to Take Back a Province*, MARINE CORPS TIMES, June 28, 2004, at 10.

70. Paul Merida, *Dismounted Infantry Operations*, MARINE CORPS GAZETTE, Nov. 2004, at 39.

71. James W. Garner, *Contributions, Requisitions, and Compulsory Service in Occupied Territory*, 11 AMERICAN JOURNAL OF INTERNATIONAL LAW 106 (1917).

72. II GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 230 (1968).

73. Charter of the International Military Tribunal arts. 6(b) & 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp>.

74. *See, e.g.*, Trial of Robert Wagner, Gauleiter and Six Others (Perm. Milit. Trib. at Strasboug, 1946, and Ct. of Appeal, July 24, 1946), III LAW REPORTS OF TRIALS OF WAR CRIMINALS 23 (UN War Crimes Commission, 1948); Trial of Jean-Pierre Lex (Perm. Milit. Trib. at Nancy, May 13, 1946), VII LAW REPORTS OF TRIALS OF WAR CRIMINALS 23 (UN War Crimes Commission, 1948).

75. Article 147 of Geneva Convention IV makes the unlawful transfer of protected persons from an occupied area a grave breach, as does Additional Protocol I. Additional Protocol I, *supra* note 14, art. 85.4(a).

76. COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 278–79 (Jean S. Pictet ed., 1958).

77. Additional Protocol II, *supra* note 28, art. 17.2.

78. Statute of the International Criminal Court art. 8(2)(e), July 17, 1998, 2187 U.N.T.S. 90, *available at* <http://www.un.org/law/icc/statute/romeofra.htm>.

79. Statute of the International Criminal Tribunal for the former Yugoslavia art. 5(d), S.C. Res. 827, U.N. Doc. S/RES/827 (May 23, 1993), *available at* http://www.icls.de/dokumente/icty_statut.pdf; Statute of the International Criminal Tribunal for Rwanda art. 3(d), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), *available at* <http://www.un.org/icttr/statute.html>.

80. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 458 (Rule 129) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). The study notes that Israel argues that Article 49 of Geneva Convention IV was not meant to apply to the deportation of selected individuals for reasons of public order and security, and that Article 49 is not customary international law and contrary deportation orders under Israeli domestic law were lawful. *Id.*

81. *Id.* at 459 & 457.

82. Geneva Convention IV, *supra* note 9, art. 76.

83. Article 4 of Geneva Convention IV provides in pertinent part that “nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

84. Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INTERNATIONAL REVIEW OF THE RED CROSS 45 (2003). In US domestic law, in the Military Commissions Act of 2006, an unlawful combatant is defined as a person who has engaged in, or purposefully and materially supported another in engaging in, hostilities against the United States and its allies, and who does not qualify as a lawful combatant, or an individual who has been deemed an unlawful enemy combatant by a Combatant Status Review Tribunal or any other competent tribunal. Military Commissions Act of 2006 § 948 a(1), Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) (codified in 10 U.S.C. § 47(A)).

85. DINSTEIN, *supra* note 11, at 29.

86. Jelena Pejić, *'Unlawful/Enemy Combatants': Interpretations and Consequences,* in INTERNATIONAL LAW AND ARMED CONFLICT, *supra* note 42, at 340; Department of the Army, FM 27-10, *The Law of Land Warfare* para. 31 (1956); UK MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* para. 9.18.1 (2004); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, para. 271 (Nov. 16, 1998).

87. WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS* 252–53 (2006), citing Prosecutor v. Naletilic et al., Case No. IT-98-34-T, Judgment, paras. 519–21 (Mar. 31, 2003).

88. Prosecutor v. Kristic, Case No. IT-98-33-T, Trial Chamber Judgment, paras. 521, 531–32 (Aug. 2, 2001). See also Prosecutor v. Naletilic, *supra* note 87, para. 519, where “forcible transfer” is defined as “the movement of individuals under duress from where they reside to a place that is not of their choosing.”

89. Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment, para. 662 (July 31, 2003).

90. Draft Memorandum from Jack I. Goldsmith, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq (Mar. 19, 2004), reprinted in TORTURE PAPERS, *supra* note 29, at 367.

91. John R. Crook, *Contemporary Practice of the United States Relating to International Law, Reported Removal of Prisoners from Iraq,* 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 253, 266 (2005).

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93. Jelena Pejić, *Terrorist Acts and Groups: A Role for International Law?*, 75 BRITISH YEARBOOK OF INTERNATIONAL LAW 71, 94 (2004).

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96. During the US-Vietnam conflict, the US Army in Vietnam, at the direction of then-Colonel George Prugh, the Military Assistance Command-Vietnam Staff Judge Advocate, recorded the numbers of LOAC offenses referred to courts-martial. When he was transferred from theater, the accounting coasted to a close. See GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964–1973* (1975).

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