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Manooher Mofidi

Amy E. Eckert

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“Unlawful Combatants” or “Prisoners of War”: The Law and Politics of Labels

Manooher Mofidi† and Amy E. Eckert‡

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‡ Amy Eckert is a Ph.D. Candidate at the Graduate School of International Studies, University of Denver. I appreciate the advice, support, and inspiration provided by Professor Ved Nanda. I would also like to thank my husband and my family for their constant support of my educational and professional pursuits.

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It is precisely because [humanitarian law] is so intimately bound to humanity that it assumes its true proportions, for it is upon this category of law, and no other, that the life and liberty of countless human beings depend if war casts its sinister shadow across the world.¹

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can fall outside the law.*²

Introduction

On September 11, 2001, two hijacked commercial jetliners crashed into the Twin Towers of New York's World Trade Center.³ Hijackers crashed a third airplane into the Pentagon. A fourth, likely destined for another target in Washington, D.C., crashed in rural Pennsylvania after passengers and crew on the flight apparently overpowered the hijackers of that plane.⁴ Collectively, these assaults ("9/11 attacks") constituted the deadliest terrorist attack America had ever suffered. The following day, with lower Manhattan and Washington, D.C. still in flames, President George W. Bush characterized the 9/11 attacks as "acts of war,"⁵ and named Osama bin Laden, the elusive leader of the al Qaeda terrorist network, as the prime suspect.⁶ Bin Laden, a wealthy Saudi exile, had been linked to previous attacks on U.S. targets, including the bombing of U.S. embassies in Kenya and Tanzania in 1998 and the attack on the U.S.S. Cole in Yemen.⁷

The 9/11 attacks, along with the United States' response, have tested, if not bedeviled, the U.S. Administration and its stance on humanitarian

1. JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 1 (1985).

2. INTERNATIONAL COMMITTEE OF THE RED CROSS, *COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 51 (1958) (emphasis in original).

3. N. R. Kleinfield, *U.S. Attacked; Hijacked Jets Destroy Twin Towers and Hit Pentagon In Day Of Terror*, N.Y. TIMES, Sept. 12, 2001, at A1; Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at A1.

4. *Id.*

5. President George W. Bush, Morning Remarks at the White House (Sept. 12, 2001).

6. Warren Richey & Faye Bowers, *The Search for a Connection to Osama bin Laden*, CHRISTIAN SCI. MONITOR, Sept. 17, 2001, at 3. In videotaped statements discovered after the 9/11 attacks, bin Laden made incriminating statements that confirmed his involvement in and endorsement of the 9/11 attacks. Jim Rutenberg, *In October Interview, bin Laden Hinted at Role*, N.Y. TIMES, Feb. 1, 2002, at A10.

7. Faye Bowers & Scott Peterson, *Who could have done it? A very short list*, CHRISTIAN SCI. MONITOR, Sept. 12, 2001, at 1.

law. Issues pertaining to those captured in Afghanistan and how they should be classified and treated remain unresolved. While President Bush quickly characterized the 9/11 attacks as acts of war and promptly commenced a war on terror in self-defense, the Bush Administration has proved reluctant to treat as prisoners of war those captured in the course of its war on terror. The Administration later conferred prisoner of war status on the Taliban fighters, but continues to classify the al Qaeda prisoners—captured fighting alongside the Taliban and now held with them in Guantanamo Bay—as “unlawful combatants.”

This article explores the legal and political dimensions of the classification and treatment of these detainees. We begin with an overview of the law of armed conflict and its development, with special attention to the Geneva Conventions and the regime of enforcement that grew alongside these legal instruments. Next, the article specifically considers the treatment of prisoners of war under the Geneva Conventions. Following this survey of humanitarian law, we turn to the specific context of the war on terror and the questions, legal and political, relating to the prisoners. We conclude by analyzing the Administration’s classification and treatment of the Taliban and al Qaeda detainees and discussing the legal and political implications of these decisions.

I. The Meaning of International Humanitarian Law

“International humanitarian law”⁸ is, broadly, that branch of public international law that seeks to moderate the conduct of armed conflict and mitigate the suffering it causes.⁹ It is predicated upon ideas which trace their genesis to the mid-nineteenth century: namely, that methods and means of warfare are subject to legal and ethical limitations, and that the victims of armed conflict are entitled to humanitarian care and protection.¹⁰ Humanitarian law constitutes one of the two branches of the laws of armed conflict, and is termed the *jus in bello* (the law *in* war).¹¹ The other branch is

8. The term “humanitarian law” was coined by Jean Pictet. See generally PICTET, *supra* note 1. Pictet explains the rationale underlying his neologism: “When [I] first proposed the term ‘humanitarian law’ [I] was told that it combined two ideas of different natures, one legal and the other moral. Well, the provisions constituting this discipline are in fact a transposition into international law of moral, and more specifically, of humanitarian concerns. Accordingly the name seems satisfactory.” *Id.* at 1.

9. See HILAIRE MCCOUBREY, *INTERNATIONAL HUMANITARIAN LAW* 22-29, 211-13, 231-49 (1998).

10. *Id.* For an exhaustive treatment of the development of humanitarian thought and the practice of states through the ages, beginning with Antiquity, see PICTET, *supra* note 1, ch. 1.

11. McCoubrey, *supra* note 9, at 1. The *jus in bello* itself has two principal subdivisions, which have conventionally been categorized as “Geneva” and “Hague” law, in recognition of the principal treaty series upon which each is founded. *Id.* at 2. “Geneva” law now rests primarily upon the four 1949 Geneva Conventions and the two 1977 Additional Protocols and focuses on the protection of the victims of armed conflict. *Id.* “Hague” law, so named in reference to the 1899 and 1907 Hague Conventions, focuses on the methods and means of warfare, tactics and the general conduct of hostilities. *Id.* Historically, the term “international humanitarian law” was used to refer specifically to the “Geneva” branch of the *jus in bello*, but this usage is now considered outdated and

known as the *jus ad bellum* ("the law to war").¹² Modern international humanitarian law focuses on the *jus in bello*; its "object . . . is . . . to regulate hostilities in order to attenuate their hardships."¹³

Law follows events more often than it precedes them, and the "evolution"¹⁴ of international humanitarian law has been no exception. As the cruelty practiced in the wars of the last 150 years¹⁵ gnawed at the human conscience, the law evolved to improve protection of civilians and combatants.

II. History of the Geneva Conventions

The birth of the Geneva Conventions dates back to 1859, when Henry Dunant, a Swiss businessman, traveled to Lombardy to meet with Napoleon III in order to obtain an agricultural estate in Algeria.¹⁶ When Dunant arrived in the village of Castiglione, he encountered the aftermath of the battle of Solferino—thousands of wounded Austrian and Franco-Italian soldiers in desperate need of water, shelter, and proper medical attention.¹⁷ This experience prompted Dunant to write *A Memory of Solferino*. Dunant proposed that states establish relief societies to assist their armed forces' medical services and that states fashion an international agreement recognizing a legal basis for the protection of medical personnel.¹⁸ Inspired by Dunant's writing on the mitigation of suffering during war, the Swiss government formed a committee that later became known as the International Committee of the Red Cross (ICRC).¹⁹

While Dunant's ideas were gaining currency in Europe, civil war was ravaging the United States. President Abraham Lincoln, alarmed by the fatalities of the U.S. Civil War, commissioned Francis Lieber, a U.S. politi-

unhelpful. *Id.* In contemporary parlance, "international humanitarian law" embraces the whole *jus in bello*, in both its "Geneva" and "Hague" dimensions. *Id.*

12. *Id.* As McCoubrey notes, some commentators now argue that, in light of the prohibition against the recourse to war, the terminology *jus contra bellum* ("the law against war") is more appropriate. *Id.* See, e.g., GEZA HERCZEG, DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (Sandas Simon & Lajos Czante trans., Akademiai Kiado 1984); JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 13 (1975).

13. PICTET, *supra* note 1, at 1 (original document italicized).

14. As McCoubrey observes, one might hope that humanitarian law did not "evolve," as evolution implies the continued existence of war. McCoubrey, *supra* note 9, at vii. The "development" or "evolution" of humanitarian law presupposes the possibility, if not inevitability, of war. Alas, armed conflict continues unabated, afflicting humanity and prodding international law to seek to temper its incidence and moderate its practice. *Id.*

15. With respect to written law, international humanitarian law began with the first Geneva Convention in 1864. PICTET, *supra* note 1, at 3. With respect to the field of ideas, however, humanitarian law was born in the "mists of prehistory, from the need to protect the human person against hostile forces which menaced them." *Id.*

16. PIERRE BOISSIER, HENRY DUNANT 6-7 (1974).

17. HENRY DUNANT, A MEMORY OF SOLFERINO 61-63 (International Committee of the Red Cross ed., 1986) (1862).

18. *Id.* at 125-27.

19. JUDITH G. GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 16 (1993).

cal philosopher, to draft a code of military conduct for the Union Army.²⁰ Inspired by the thinking of eighteenth century philosophers, this document, later known as the Lieber Code of 1863, formulated humanitarian rules for warfare in the United States.²¹

The Lieber Code's influence was not to be confined to the United States, however. Its national character notwithstanding, the Lieber Code also influenced European efforts to fashion the first international conventions on the laws of war.²² In 1864, the ICRC produced the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.²³ This Convention, which was subsequently amended in 1906, provided protections for the wounded and sick, medical establishments, and the medical and religious personnel of land forces.²⁴ A disaster at sea during the Spanish-American War prompted the ICRC to extend the principles of the 1864 Convention by preparing a new Convention on maritime warfare.²⁵ This Convention was revised as the Tenth Hague Convention of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906.²⁶ The purpose of this Convention was to protect hospital ships, the shipwrecked, and the wounded and sick in war at sea.²⁷ For the protection of prisoners of war, civilians, and neutral persons, the ICRC promulgated the Regulations Respecting the Laws and Customs of War on Land ("the Hague Regulations") in 1907.²⁸ These provisions collectively formed the first binding multilateral standards for armed conflict and, as such, signify the beginnings of modern international humanitarian law.

The unprecedented scope of World War I exposed the incompleteness

20. PICTET, *supra* note 1, at 35.

21. GARDAM, *supra* note 19, at 16-17. The Lieber Code, for example, recognized that "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war still permit." FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 3, 7 (1988).

22. PICTET, *supra* note 1, at 36. A brief note concerning terminology: The expression "laws of war," as used in this paper and generally elsewhere, denotes the various components of the law—for example, the various legal instruments, declarations, and treaties, which form the corpus of the legal system devised for war. Admittedly, the term, as applied to the subject as a whole, tends to convey an image of fragmentary and unrelated regulation involving disparate matters. As such, the term "law of war" may be more conceptually and empirically accurate, for it conveys what is true today, namely, the existence of a homogeneous, if not universally applied, body of rules applicable to the modern state of war. For more on this conceptual distinction and, more generally, on the contents and the purview of the "law of war," see INGRID DETTER, THE LAW OF WAR xvii-xviii (2000).

23. G.I.A.D. Draper, *The Development of International Humanitarian Law*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 67, 70 (Jean Pictet ed., 1988).

24. ANDRE DURAND, FROM SARAJEVO TO HIROSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 32-33 (1984).

25. PICTET, *supra* note 1, at 34.

26. DURAND, *supra* note 24, at 33.

27. *Id.*

28. *Id.*

and lack of precision of the Conventions then in place.²⁹ The Hague Regulations, for example, proved inadequate to address the treatment of the seven million prisoners of war, because the required condition of captivity was not sufficiently regulated.³⁰ Consequently, the parties signed bilateral agreements, known as the Berne Agreements of 1917 and 1918, creating an official prisoner of war status and providing guidelines for the treatment of prisoners of war.³¹ The Berne Agreements had their flaws, however. Most notably, because they were only bilateral, the Berne Agreements fell short of providing a comprehensive worldwide standard for the treatment of prisoners of war. In response to this inadequacy, the ICRC in 1929 produced a Convention Relative to the Treatment of Prisoners of War.³² This Convention supplanted The Hague Regulations and the Berne Agreements and expanded the safeguards for prisoners of war.³³

Just as World War I had exposed the shortcomings of the then-fledgling humanitarian law regime, the death of over twenty million civilians during World War II revealed the inadequacy of the protections afforded to noncombatants during wartime under existing conventions. Also, the ghastly events of World War II showed that, as valuable as the 1929 Convention undoubtedly had proved for countless prisoners, it nevertheless required revision in many areas; the categories of persons entitled to prisoner of war status, for example, needed to be expanded. This led to the development of a new Convention dedicated exclusively to the protection of civilians.³⁴ By special agreement, the belligerent parties agreed to apply provisions of the 1929 Convention Relative to the Treatment of Prisoners of War to civilians.³⁵ The sheer inhumanity of World War II also led to a major revision of the three Conventions already in force.³⁶ The experience of World War II resulted in the expansion and codification of the laws of war in the four Geneva Conventions of 1949.³⁷

After the adoption of the four Geneva Conventions, developments in the character of armed conflicts subsequent to World War II led to the growing realization that the laws of war needed to be further adapted to the conditions of contemporary warfare. Technological advancements in weap-

29. DRAPER, *supra* note 23, at 76.

30. PICTET, *supra* note 1, at 36-37.

31. *Id.*

32. *Id.*

33. *Id.* at 32.

34. OSCAR M. UHLER ET AL., COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3-8 (1958).

35. *Id.* at 4-5.

36. DRAPER, *supra* note 23, at 80.

37. 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 [hereinafter Geneva Convention I]; 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 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; 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 [hereinafter Geneva Convention IV].

only called for the crafting of additional provisions to protect civilians from the new forms of attack.³⁸ The emergence of guerrilla warfare raised the issue of whether guerrilla fighters should be entitled to prisoner of war status.³⁹ Also, Article 3, the only portion of the four Geneva Conventions devoted to civil wars, proved inadequate in light of the intensity and scale of the fighting accompanying internal armed conflicts.⁴⁰ In response to these new concerns, the ICRC invited states to develop new humanitarian provisions to supplement the Geneva Convention. These ultimately became the Additional Protocols of 1977.⁴¹

III. The Geneva Conventions Regime

The Geneva Conventions consist of four instruments: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration for the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention Relative to the Treatment of Prisoners of War; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁴² Article 2, common to all four Conventions, provides 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, even if the state of war is not recognized by one of them.”⁴³

Article 3, also common to all four Geneva Conventions, applies in the case of an “armed conflict not of an international character, which occurs within the territory of a contracting nation.”⁴⁴ Article 3 does not define the characteristics of an “armed conflict not of an international character.” Authoritative ICRC commentary states that the “conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an

38. DRAPER, *supra* note 23, at 82.

39. *Id.*

40. *Id.*

41. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

42. *See supra* note 37.

43. Geneva Convention I, *supra* note 37, art. 2, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Geneva Convention II, *supra* note 37, art. 2, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Geneva Convention III, *supra* note 37, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva Convention IV, *supra* note 37, art. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288. “High Contracting Parties” denotes the signatory states of the Geneva Conventions.

44. Geneva Convention I, *supra* note 37, art. 3, 6 U.S.T. at 3116-18, 75 U.N.T.S. at 32-34; Geneva Convention II, *supra* note 37, art. 3, 6 U.S.T. at 3220-22, 75 U.N.T.S. at 86-88; Geneva Convention III, *supra* note 37, art. 3, 6 U.S.T. at 3318-20, 75 U.N.T.S. at 136-38; Geneva Convention IV, *supra* note 37, art. 3, 6 U.S.T. at 3518-20, 75 U.N.T.S. at 288-90.

international war, but take place within the confines of a single country.”⁴⁵

The Additional Protocols of 1977 supplement the protection of victims in armed conflict provided by the Geneva Conventions.⁴⁶ Although the provisions of Protocol I apply exclusively to the victims of international conflicts, Protocol II attempts to overcome the definitional inadequacies of Article 3 by enhancing the protections for victims in large-scale civil wars. The guarantees for civilians provided by Protocol II reaffirm the rules set forth in Article 3, even as they expand the protections to include, for example, the prohibition of collective punishments, acts of terrorism, slavery, pillage, and rape.⁴⁷ Protocol II elaborates upon the general obligation imposed by Article 3 of the Geneva Conventions to treat persons “humanely,”⁴⁸ and provides safeguards for “persons whose liberty has been restricted.”⁴⁹

The scope of both Protocol I and II is limited, however, in that although 185 states are party to the Geneva Convention, only 100 states have ratified Protocol I, and only 125 states have ratified Protocol II.⁵⁰ The United States has not ratified either Protocol.⁵¹

IV. The Protection of Combatants and the “Prisoners of War” Status

The Geneva Convention III and Protocol I are both replete with detailed provisions for the protection of prisoners of war in international conflicts. However, not all persons captured in the course of armed conflict are entitled to the prisoner of war status and the legal protections that flow from that designation.

Article 4 of Convention III defines categories of persons entitled to prisoner of war status and describes the treatment that must be accorded prisoners of war. The basic principle holds that persons recognized as “combatants” under the 1949 Conventions and the 1977 Additional Protocol I are entitled to be treated as prisoners of war upon capture by an adverse party in armed conflict.

The text provides, in pertinent part, that “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:

45. UHLER, *supra* note 34, at 36.

46. See Protocols I and II, *supra* note 41.

47. Protocol II, *supra* note 41, art. 4(2)(h), 1125 U.N.T.S. at 612.

48. Geneva Convention I, *supra* note 37, art. 3(1), 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Geneva Convention II, *supra* note 37, art. 3(1), 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Geneva Convention III, *supra* note 37, art. 3(1), 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva Convention IV, *supra* note 37, art. 3(1), 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

49. Protocol II, *supra* note 41, art. 5, 1125 U.N.T.S. at 612-13.

50. See Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977 Signatures, Ratifications, Accessions, and Successions: Addendum, Changes Since the Edition of 30.06.94, DDM/JUR 94/3503-CPS/13a, July 28, 1994 (on file with the International Committee of the Red Cross).

51. See Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977 Signatures, Ratifications, Accessions, and Successions: As of 31 December 1993, at 8, DDM/JUR 94/007-CPS/12, Jan. 14, 1994 (on file with the International Committee of the Red Cross).

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, 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;
 - (d) that of conducting their operation in accordance with the laws and customs of war.⁵²

Regarding condition (a), the “responsible” may be civilian or military.⁵³ Condition (b) tolerates no exceptions: the sign must be constantly worn.⁵⁴ With respect to condition (c), the usage of “openly,” and not “obviously,” stems from the recognition that surprise is a necessary and accepted element of wartime success.⁵⁵ Finally, commentators consider condition (d) to be so vital that they construe it to apply to the other three conditions.⁵⁶

Under Article 5 of Convention III, where there is even a scintilla of doubt whether persons having committed a belligerent act and having fallen into the hands of the enemy come within any of the categories enumerated in Article 4, such persons are treated as *prima facie* entitled to the status of prisoner of war until such time as the question of status has been determined by a competent tribunal.⁵⁷

Protocol I enlarges the category of “lawful belligerents”—i.e., those combatants entitled to the protection afforded by the laws of war—in several crucial respects.⁵⁸ Geneva Convention III establishes certain conditions that combatants must meet to be considered “lawful belligerents.”⁵⁹ By their very nature, however, guerrilla movements would fail to satisfy these conditions. Article 44 of Additional Protocol I seeks to extend legal recognition to certain types of guerrilla activity by modifying the require-

52. Geneva Convention III, *supra* note 37, art. 4, 75 U.N.T.S. at 138-39.

53. See PICTET, *supra* note 12, at 104.

54. *Id.* at 104-05.

55. *Id.*

56. *Id.*

57. Geneva Convention III, *supra* note 37, art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 140.

58. The relaxation of the criteria for the identification of “armed forces,” whose members are entitled to prisoner of war status, was the product of changes in patterns of armed conflict since 1949, specifically the emergence of “guerrilla” and other less “formal” types of warfare. McCoubrey, *supra* note 9, at 134. The consensus in the 1970s, in light of the experience of the Vietnam War, was that guerrilla warfare would be the “typical” pattern of any future conflicts. *Id.* at 135. This opinion has been proved wrong by subsequent events, however. The examples of the 1982 Falklands Conflict involving Argentina and Britain, the 1980-88 Gulf War between Iran and Iraq, and the 1990-91 Gulf Conflict, to name but three conspicuous examples, signal the persistence of “traditional” patterns of warfare between formally identified national forces. *Id.*

59. Geneva Convention III, *supra* note 37.

ments of distinctive emblems and carrying arms openly.⁶⁰ Article 44(3) provides that, while combatants should clearly distinguish themselves from civilians, to facilitate the protection of the latter, it may be that "the nature of hostilities" will in some cases effectively preclude such distinction.⁶¹ In that case, members of a fighting force will nevertheless retain "combatant" status and be entitled to "prisoner of war" status upon capture, provided they "carry arms openly" during actual military engagements and are visible to the enemy during deployment in preparation for such engagements.⁶² The scope of this relaxation is circumscribed by Article 44(7), which provides that the accepted practice of members of the armed forces wearing uniforms is not intended to be generally compromised.⁶³ A captured combatant who fails to satisfy the minimum criteria set out in the Protocol will not be entitled to prisoner of war status, although such a person will benefit from "equivalent" protections, with particular reference to the fundamental guarantees of treatment and due process in the context of offenses committed prior to capture.⁶⁴

The practical effect of Article 44 is that "combatants" entitled to prisoner of war status upon capture fall into three broad categories: 1) members of regular armed forces and duly authorized supporting personnel; 2) combatants who, although otherwise satisfying the qualifying criteria, are not in "uniform," but carry arms openly and distinguish themselves with some distinctive sign that is visible at a distance; and 3) combatants who otherwise satisfy the qualifying criteria, but who are precluded by particular circumstances from wearing any distinctive sign or clothing, even though they do carry arms openly.⁶⁵

A. "Combatants" versus "Unlawful Combatants"

The term "unlawful combatants"⁶⁶ is designed to draw a distinction

60. Protocol I, *supra* note 41.

61. *Id.* art. 44(3), 1125 U.N.T.S. at 23.

62. *Id.*

63. *Id.* art. 44(7), 1125 U.N.T.S. at 24.

64. *Id.* arts. 44(4) and 45, 1125 U.N.T.S. at 23-24.

65. McCoubrey, *supra* note 9, at 135-36. This third category has proved controversial, assailed by its critics as a "terrorist's charter." *Id.* at 136. The criticisms may be somewhat overstated, however, for terrorist organizations could not reasonably be considered to be legitimized by the Protocol. *Id.* Such organizations would fail to meet even the relaxed qualifications for "combatant" status because of their unwillingness to apply and abide by a "Geneva" regime in their own activities. *Id.* Moreover, few, if any, organizations, which might be classified as terrorist in nature, would satisfy the other prerequisites for combatant and prisoner of war status, namely, responsible command and internal discipline incorporating observance of the laws of armed conflict. *Id.* at 136. Finally, Protocol I's relaxation of the general requirement for combatants to wear uniform or some other distinguishing mark applies only where such distinction is "not possible." *Id.* at 137; see Protocol I, *supra* note 41, art. 44(3), 1125 U.N.T.S. at 23.

66. The term does not appear in the Geneva Conventions; in fact, it is not recognized by international law. It was applied by the U.S. Supreme Court in *Ex parte Quirin*, which upheld military tribunals for a group of German saboteurs, wearing civilian clothes, who had slipped into the United States by submarine. *Ex parte Quirin*, 317 U.S. 1, 21 (1942). The Supreme Court distinguished between the "armed forces and the peaceful populations of belligerent nations and also between those who are lawful and

between the civilian population and “combatants” in armed conflict, so as to avoid any confusion of the demarcation between the two groups. Clearly, regular troops form the core of “lawful combatants.” Article 4(A) of Geneva Convention II⁶⁷ refers only to “armed forces.”⁶⁸ As discussed, The Hague Regulations and the Geneva Conventions both provide qualifying criteria to distinguish civilians from combatants. Although no specific text requires that members of regular armed forces wear uniforms, the proposition that regular armed forces wear uniforms is customarily applied as a rule of law to determine the status of a person.⁶⁹ Therefore, any regular soldier who commits a belligerent act in civilian clothes is no longer a lawful combatant and loses his privileges.⁷⁰ “Unlawful” combatants, therefore, may be either members of the regular forces or members of resistance or guerilla movements who do not fulfill the conditions of lawful combatants.⁷¹

Protocol I of 1977 to the Geneva Conventions, on the other hand, does not rely on “understood” criteria for regular armed forces, per se.⁷² It defines the “armed forces” of a Party to a conflict as:

All organized armed forces, groups and units which are under the 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 in armed conflict.⁷³

Members of such forces are combatants and “have the right to participate directly in hostilities.”⁷⁴ Although the language is more flexible than that of the 1949 Conventions, the requirements for combatant status remain, at least if various parts of the text in the Protocol are read in context.⁷⁵

Protocol I affords no protection for terrorists, nor does it authorize soldiers to conduct military operations disguised as civilians.⁷⁶ In practice, however, it is obviously difficult to identify terrorists and distinguish

unlawful combatants. *Id.* at 30-31 (emphasis added). According to the Supreme Court, “lawful combatants are subject to capture and detention as prisoners of war” whereas unlawful combatants, in addition to being subject to capture and detention, “are subject to trial and punishment by military tribunals for acts which render belligerency unlawful.” *Id.* at 31. The Court ruled that spies and saboteurs were violators of the law of war and so were not entitled to prisoner of war status. *Id.*

67. Geneva Convention II, *supra* note 37.

68. This reference is designed to eliminate any ambiguity that might arise between “combatants” and “non-combatants”—who are members of the armed forces not taking direct part in hostilities. DETTER, *supra* note 22, at 136-37.

69. *Id.* at 136.

70. *Id.*

71. *Id.* at 136-37.

72. Protocol I, *supra* note 41, art. 44, 1125 U.N.T.S. at 23-24.

73. *Id.* art. 43(1), 1125 U.N.T.S. at 23.

74. *Id.* art. 43(2), 1125 U.N.T.S. at 23.

75. DETTER, *supra* note 22, at 137.

76. *Id.* at 145.

them from lawful combatants.⁷⁷

B. Legal Effects of “Combatant” Status: General Protections

The main effect of being a lawful combatant is entitlement to prisoner of war status. Unlawful combatants, though a legitimate target for any belligerent action, are not, if captured, entitled to any prisoner of war status.⁷⁸ Under Article 12 of Geneva Convention III, prisoners of war are the responsibility of the capturing power from the moment of capture.⁷⁹

Article 13 of Convention III sets out the basic standard of treatment.⁸⁰ It states that “prisoners of war must at all times be humanely treated.”⁸¹ In particular, prisoners of war must not be unlawfully killed or endangered, physically mutilated or subjected to medical or scientific experiment not justified by the medical needs of the individuals concerned.⁸² Article 13 expressly prohibits reprisals against prisoners of war, and requires that they be protected from violence, intimidation, insults, and public curiosity.⁸³

Article 15 requires that prisoners receive free maintenance and the medical attention that their state of health requires.⁸⁴ Articles 17 through 108 cover the following areas: 1) beginning of captivity; 2) internment of prisoners of war; 3) labor of prisoners of war; 4) financial resources of prisoners of war; 5) relations of prisoners of war with the exterior; and 6) relations between prisoners of war and the authorities. Below is a brief survey outlining some of the more important articles and the ones potentially germane to the Taliban and al Qaeda detainees.

1. Beginning of Captivity

Prisoners of war are not bound to supply information to the capturing power; they will probably be forbidden to do so by their own laws, and may not be coerced into doing so.⁸⁵ The only information that a prisoner of war is bound to supply is name, rank, and number.⁸⁶

77. *Id.*

78. *Id.* at 148. Unlawful combatants are also liable for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier. *Id.* They are often summarily tried and enjoy no protection under international law. *Id.*

79. Geneva Convention III, *supra* note 37, art. 12, 75 U.N.T.S. at 146.

80. *Id.* art. 13, 75 U.N.T.S. at 146.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* art. 15, 75 U.N.T.S. at 148.

85. *Id.* art. 17, 75 U.N.T.S. at 150. The text declares that “no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.” *Id.*

86. *Id.* More precisely, “first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.” *Id.*

2. *Internment of Prisoners of War*

Article 21 recognizes the necessity of internment, which is designed to safeguard the state security of the capturing power.⁸⁷ It cautions, however, that prisoners may not be held in close confinement except when necessary to safeguard their health.⁸⁸ Prisoners of war are not in any sense malefactors or persons undergoing “punishments.”⁸⁹

Article 22 requires that prisoners be interned only on land and not in unhealthy areas or where the climate is injurious to them.⁹⁰

Article 26 directs that “the basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies.”⁹¹

Article 27 requires that sufficient quantities of clothing, underwear, and footwear be provided to the prisoners with due consideration to the prevailing climate.⁹²

Articles 29 through 32 impose upon the detaining power the responsibility of insuring that internment camps are sanitary and that prisoners have regular, periodic medical attention.⁹³

Articles 34 through 38 provide that prisoners may practice their religion, undertake intellectual and educational pursuits, and have the opportunity for physical exercise.⁹⁴

3. *Relations of Prisoners of War with the Exterior*

Articles 69 through 77 cover the prisoners' relationship to the exterior. Article 70 calls for the notification of prisoner of war status by requiring, inter alia, that “[i]mmediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp. . . , every prisoner of war shall be enabled to write direct to his family. . . , informing his relatives of his capture, address and state of health.”⁹⁵

4. *Relations between Prisoners of War and the Authorities*

Article 78 guarantees to prisoners the right to make complaints regarding the conditions of their captivity without any fear of punishment for making a complaint.⁹⁶

Articles 82 through 108 cover penal and disciplinary sanctions and provide generally that prisoners shall be subject to the same laws, regulations, orders, penal sentences, and disciplinary sanctions as are members of the armed forces of the detaining power, provided that the proceedings

87. *Id.* art. 21, 75 U.N.T.S. at 152-54.

88. *Id.*

89. *Id.*

90. *Id.* art. 22, 75 U.N.T.S. at 154.

91. *Id.* art. 26, 75 U.N.T.S. at 158.

92. *Id.* art. 27, 75 U.N.T.S. at 158.

93. *Id.* arts. 29-32, 75 U.N.T.S. at 160-62.

94. *Id.* arts. 34-38, 75 U.N.T.S. at 164-66.

95. *Id.* art. 70, 75 U.N.T.S. at 188.

96. *Id.* art. 78, 75 U.N.T.S. at 196.

or punishments are not contrary to any convention provisions.⁹⁷

Article 84, a basic due process requirement, decrees that “[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defense provided for in Article 105.”⁹⁸

Article 87 forbids collective punishment for individual acts, corporal punishment, imprisonment without daylight and, in general, any form of torture or cruelty.⁹⁹

5. Termination of Captivity

Article 118 states that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”¹⁰⁰ It provides that this should be done in accordance with or in the absence of any agreement.¹⁰¹ The last three paragraphs of Article 119, however, provide for the retention of prisoners of war against whom criminal proceedings for indictable offenses are pending or where the punishment for such offenses has not been completed.¹⁰²

V. Criteria for Application of the Four Geneva Conventions

A number of questions arise in the context of the implementation of humanitarian law, the most basic being the circumstances in which it is to be applied. The general refrain is, of course, “during armed conflicts.” Defining the levels and categories of armed conflict, however, has proved difficult; consequently, specifying when humanitarian law applies has also proved problematic.

That the laws of armed conflict are to be applied in armed conflicts might, at first blush, seem too obvious a proposition to warrant discussion. The criteria of application of the laws of armed conflict have, nevertheless, at times, proved problematic; most of these difficulties have centered on the precise meaning of the term “war.”¹⁰³ The difficulties stem from the fact that as a matter of international law, “war” has come to be construed as a

97. *Id.* arts. 82-108, 75 U.N.T.S. at 200-18.

98. *Id.* art. 84, 75 U.N.T.S. at 200-02. Article 105 affords accused prisoners of war the right to present a defense with the assistance of a qualified advocate or counsel, an interpreter, a fellow prisoner and with the power to call witnesses. *Id.* art. 105, 75 U.N.T.S. at 214.

99. *Id.* art. 87, 75 U.N.T.S. at 202.

100. *Id.* art. 118, 75 U.N.T.S. at 224.

101. *Id.*

102. *Id.* art. 119, 75 U.N.T.S. at 224-26.

103. Under international law there is no binding definition of war invested with the imprimatur of a multilateral convention in force. Despite, or perhaps because of, this definitional lacuna, there are numerous scholarly attempts to depict the practice of states in this area and to capture, in a parsimonious formulation, a richly complex idea. For a thorough definitional treatment and highly readable analysis of the concept of “war,” see YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE*, 3-19 (3d ed. 2001).

declared state of international relations, and yet most military hostilities have not been subject to declaration.¹⁰⁴

The four Geneva Conventions attempt to circumvent this problem of technical usage by not speaking in terms of "war." Common Article 2, which sets out the criteria for application of the four Geneva Conventions,¹⁰⁵ states 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, even if the state of war is not recognized by one of them."¹⁰⁶ By referring to both declared war and (undeclared) armed conflict, Article 2 seeks to avoid the potentially dangerous ambiguities inherent in the more technical criteria of application.¹⁰⁷

VI. The Legal Status of Terrorists, the Legal Significance of the 9/11 Attacks, and the Legality of the War on Terror

President Bush quickly characterized the 9/11 attacks as an "act of war." Is there a basis in international law for this characterization? To answer this question, we must first consider the status of terrorists under international law. Are terrorists merely "domestic criminals," whose capture, trial, and punishment are subject to the rules relating to international jurisdiction and treaties governing extradition? Or, are terrorists "international criminals," a status which may convey broader jurisdictional rights? Also, under what circumstances, if any, might terrorists even be considered to be prisoners of war?

In light of the war on terror, the answers to the above questions, in turn, raise a related inquiry into the rights of states to use military force in self-defense against a terrorist group physically located within the boundaries of another state. To what extent does this inquiry hinge on the level of support given to the terrorists by the state in which they are located?

104. McCoubrey, *supra* note 9, at 58. The *jus ad bellum*, as predicated upon Article 2 and Chapter VII of the United Nations Charter, clearly provides that war, indeed armed conflict, is not a lawful condition of international relations. U.N. CHARTER art. 2. Of course, this is not to say that the legal prohibition of war is the only explanation for why most military hostilities have not been subject to declaration. A more basic explanation may be that states value the verdict of the court of public opinion; and, therefore, refrain from "declaring" war so as not to risk being perceived as the aggressor.

105. Geneva Convention I, *supra* note 37, art. 2, 75 U.N.T.S. at 32; Geneva Convention II, *supra* note 37, art. 2, 75 U.N.T.S. at 86; Geneva Convention III, *supra* note 37, art. 2, 75 U.N.T.S. at 136; Geneva Convention IV, *supra* note 37, art. 2, 75 U.N.T.S. at 288.

106. *Id.*

107. As such, it may be said that Article 2 acknowledges both senses of "war": the technical as well as the material. War in the technical sense commences with a declaration of war and terminates with a peace treaty or some other formal step indicating that the war is over. War in the material sense unfolds regardless of any formal steps. Its occurrence hinges on the eruption of hostilities between the parties, even in the absence of a declaration of war. Accordingly, the laws of armed conflict, constituting the nucleus of the international *jus in bello*, are triggered as soon as war in the material sense occurs, despite the absence of a technical state of war. Dinstein, *supra* note 103, at 9-10.

A. Terrorists under International Law

Terrorist acts¹⁰⁸ can be subdivided into two groups: those sponsored by states and those sponsored by private groups. Private citizens, including terrorists, have no claim to the benefits of protection guaranteed soldiers under Geneva Convention III. Under Geneva Convention III, attacks must avoid civilians and non-military targets by all means possible. Terrorist acts violate that principle. Article 4 requires that to qualify for protection as lawful combatants, irregular troops must: (a) be commanded by a responsible person; (b) wear a fixed emblem; (c) carry arms openly; and (d) comply with the laws of war.¹⁰⁹ Terrorists do not fulfill items (b), (c), and (d), because they rely on their civilian cover to conceal their intent to use force, and because they use force against civilians in a way proscribed under the customary laws of war, especially those codified under Geneva Convention IV.¹¹⁰ And, of course, not even the relaxed qualifying criteria of the 1977 Additional Protocols can alter this analysis.¹¹¹

To the extent a terrorist act can be construed as an act of war, such an act by private persons could not be a legal act of war under international humanitarian law. War is a condition between states or between a state and an identifiable force. Because terrorists are not states and generally refuse to fulfill the requirements for becoming an identifiable warring party under Geneva Convention III, terrorists, by definition, are never engaged in a legal act of war under accepted customary definitions. Few have questioned the view that terrorists are fundamentally criminals, and should be treated as such, without regard to the terrorists' sponsorship or targets. These factors, however, may have a bearing on whether a terrorist is a common criminal, an unlawful combatant, or perhaps, in rare circumstances, a prisoner of war.¹¹²

108. The international legal norms regarding terrorism are set forth in twelve multi-lateral treaties that criminalize a broad range of terrorist acts. None of these treaties define "terrorism," however. Instead, the treaties criminalize certain actions, such as taking hostages. See, e.g., International Convention Against the Taking of Hostages, Dec. 18, 1979, available at http://www.undcp.org/terrorism_convention_hostages.html. A comprehensive treaty on terrorism has been under discussion at the United Nations in recent years, but it has not advanced beyond the discussion stage, thanks to a lack of consensus on a definition of terrorism. For a "politically neutral" definition of terrorism that seeks to identify the different kinds of terrorism (domestic and international, private and state-sponsored, etc.), see Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 *TOURO J. TRANSNAT'L L.* 67, 81-94 (1991).

109. Geneva Convention III, *supra* note 37, art. 4, 75 U.N.T.S. at 138-39.

110. See Geneva Convention IV, *supra* note 37.

111. See *supra* note 65 and accompanying text.

112. In assessing the legitimacy of the use of force against terrorist organizations, an essential ingredient is the level of support provided by the state in whose territory the terrorists are located. Commentators have identified four general levels of state activity: 1) sponsorship or direction—the state actively controls or directs the terrorist activities; 2) support—although the terrorists are not controlled by the state, their activities are encouraged by the state, and the state provides active support; 3) toleration—the state makes no effort to arrest or suppress the terrorists, although it does not actively support or direct them either; and 4) inaction—the state, because of political factors or inherent weakness, is simply unable to deal effectively with the terrorists. See, e.g., RICHARD ERICKSON, *LEGITIMATE USE OF FORCE AGAINST STATE SPONSORED TERRORISM* 32-34 (1989).

The mere inability of a state to control terrorist activity within its borders does not constitute an armed attack by that state.¹¹³ Decisions of the International Court of Justice strongly suggest that a substantial degree of state control over the acts of an individual or individuals is necessary before these acts can be legally attributed to the state.¹¹⁴ Weak states that cannot control terrorist activity emanating from within their territory can hardly be said to have acted at all.¹¹⁵ Were a terrorist attack to emanate from such a feckless state, its impotence in controlling the terrorist organization, arguably, could not amount to an armed attack against another state.

In the context of the war on terror, there is no indication that Afghanistan (or the Taliban government) controlled, directed, or funded al Qaeda. No evidence has been adduced that specifically links the then-Taliban regime of Afghanistan to the 9/11 attacks. On the contrary, Osama bin Laden was a major benefactor of the Taliban government. Furthermore, al Qaeda was not made up of nationals from Afghanistan;¹¹⁶ nor was it formally or openly associated with it. Rather, al Qaeda operated, and quite possibly continues to operate, as a network, with operational organs in many countries.

B. The War on Terror as Self-defense

The United States opted to respond to the 9/11 attacks with force against al Qaeda and the Taliban government in Afghanistan. The UN Charter, in Articles 2(4) and 51, appears to contemplate such use of force. By these

Not surprisingly, the greater the level of support by a state to the terrorist organization, the greater the legitimacy of the use of military force under international law to respond to the terrorist threat.

113. Gregory M. Travalio, *Terrorism, International Law, and the Use of Force*, 18 WIS. INT'L L.J. 145, 152 (2000).

114. *Id.* at 152-53 ("In *Nicaragua v. United States*, the International Court of Justice addressed the issue of whether the activities of the Nicaraguan 'contras' could be attributed to the U.S. government because of strong evidence that the contras were largely trained, equipped, and armed by the United States. The Court decided that only if it could be proved that the United States exercised effective control over the contras 'in all fields' could the contras be considered as acting on behalf of the U.S. government. In the *Iran Hostages* case, the Court was faced with the question whether the actions of the Iranian students in taking over the U.S. Embassy and holding members of its staff hostage could be attributed to the government of Iran. The Court decided that, although the initial takeover was the result of the acts of individuals and, therefore, could not be attributed to the Iranian government, holding the hostages beyond the initial seizures could be considered an act of the government, because it was clear that the students were subject to the control of the government and would obey its instructions."). See also Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. LAW 635 (1997).

115. See Travalio, *supra* note 113, at 153.

116. The U.S. Administration appears to have assumed that bin Laden is an independent terrorist, finding refuge in a third country, rather than an independent contractor who has been retained by a particular state. See Benjamin Weiser, *U.S. Closer to Tying Bin Laden to Embassy Bombings*, N.Y. TIMES, Oct. 8, 1998, at A3 (noting that an indictment of a suspected bin Laden cohort describes his organization, al Qaeda, as independent).

provisions, the UN Charter establishes a general rule and a specific exception to it. Although Article 2(4) prohibits a member state from using force against another state, Article 51 creates an exception to that prohibition by permitting the use of force in self-defense “if an armed attack occurs.”¹¹⁷ Although it seems plausible that the Charter’s drafters, in formulating that phrase, envisioned an attack on a state by another state, the language is not on its face limited to that situation. It would not be unreasonable, therefore, to apply the language broadly to encompass the 9/11 attacks—commandeering passenger jetliners to serve as weapons against important U.S. commercial and military centers.¹¹⁸ The two ground-breaking resolutions adopted by the UN Security Council within days of the 9/11 attacks arguably support this interpretation of Article 51.¹¹⁹ The resolutions framed the international legal issues relating to terrorism and imposed sweeping obligations on UN member states.¹²⁰

The 9/11 attacks, with their concomitant horrific loss of life, clearly constituted “armed attacks” triggering the forcible measures of self-defense, even under the most stringent reading of UN Charter requirements. Article 51 recognizes the inherent right of self-defense in the face of an armed attack, and declares that a victimized nation is entitled to engage in unilateral or collective self-defense until and unless the Security Council has addressed the issue.¹²¹ Nothing in the UN Charter or international practice circumscribes the identity of aggressors against whom states may respond: private actors as well as governments may be the sources of cata-

117. For an extensive treatment of, and interplay between Article 2(4) and Article 51 of the U.N. Charter, see DINSTEN, *supra* note 103, at 177-245.

118. “Armed attacks by non-state armed bands are still armed attacks, even if commenced only from—and not by—another state.” *Id.* at 214. Dinstein further explains that “[w]hereas [State A] may bear international responsibility for having tolerated the activities of armed bands carrying out an armed attack from within its territory against [State B], that does not mean that the armed attack as such is attributable to [State A].” *Id.* at 215. Notwithstanding that fact, “[j]ust as [State B] is entitled to exercise self-defense against an armed attack by [State A], it is equally empowered to defend itself against armed bands operating from within [State A’s] territory.” *Id.* at 216. For a still more persuasive argument in support of the thesis that “armed attacks” justifying the use of force in self-defense under Article 51 can be committed by non-state actors, see Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT’L L. 559, 564 (1999).

119. In Resolution 1368, adopted on September 12, 2001, the Security Council recognized that the right of self-defense applies to terrorist attacks by non-state actors. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> (recognizing the inherent right of individual or collective self-defense in accordance with the Charter). In Resolution 1373, adopted on September 28, 2001, the Security Council, pursuant to its mandatory authority under Chapter VII of the Charter, required states to undertake a host of wide-ranging measures to combat terrorism. S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

120. *Id.*

121. U.N. CHARTER art. 51, para. 1, available at <http://www.un.org/aboutun/charter7.htm>.

strophic conduct.¹²²

Three days after the 9/11 attacks, the United States embarked on this path with a congressional resolution empowering President Bush to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”¹²³

The investigation of the 9/11 attacks quickly focused on Osama bin Laden and the Taliban regime in Afghanistan, believed to be harboring bin Laden. As U.S. officials urged Afghanistan to turn over bin Laden, the UN Security Council also demanded that the Taliban government in Afghanistan surrender bin Laden and terminate support for terrorist activities.¹²⁴ Despite these demands, Taliban leader Mullah Mohammed Omar refused to hand bin Laden over to U.S. authorities, claiming that no evidence linked bin Laden to the 9/11 attacks.¹²⁵

On September 20, 2001, President Bush addressed a joint session of Congress. In his address, President Bush thanked Congress for its leadership and allies for their support in the wake of the 9/11 attacks, and stated that evidence pointed to al Qaeda as the party responsible for the 9/11 attacks. During his speech, President Bush made the following demands on the Taliban:

Deliver to United States authorities all the leaders of al Qaeda who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in you country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will

122. Wedgwood, *supra* note 118, at 563-64. As Wedgwood points out, “[i]ndeed, the constitutional provision for punishing offenses against the law of nations was framed with piracy in mind—the private misuse of naval capacity, thought to be so destructive to international commerce in the eighteenth century that any state could undertake a pirate’s capture and punishment.” *Id.* at 564.

123. S.J. Res. 23, 107th Cong. (2001). Congress issued this Authorization for Use of Military Force pursuant to the War Powers Resolution.

124. The Security Council had, in its previous resolutions, demanded that the Taliban cease providing sanctuary and training for terrorists, turn over bin Laden to authorities in a country where he has been indicted, close terrorist training camps, and comply with its previous resolution 1267. See S.C. Res. 1333, UNSCOR, 4251st mtg., U.N. Doc. S/RES/1333 (2000), available at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElement>.

125. See Rajiv Chandrasekaran, *Taliban Refuses to Surrender bin Laden: U.S. Develops Options for Military Action*, WASH. POST, Sept. 19, 2001, at A1.

share in their fate.¹²⁶

In response to President Bush's demands, Abdul Saleem Zaeef, the Taliban's ambassador to Pakistan, again refused to turn over bin Laden without evidence linking him to the 9/11 attacks.¹²⁷ While religious leaders, and later the Taliban, urged bin Laden to leave Afghanistan, the Taliban took no steps to force his departure.¹²⁸

In light of the Taliban's continued unwillingness to surrender bin Laden, the United States continued mobilizing for war while seeking authorization for the same from the UN. Invoking its Chapter VII powers, the UN Security Council unanimously approved a U.S.-sponsored resolution aimed at preventing further terrorist attacks. The resolution called on UN Member States to sever their ties with terrorists, freeze their assets, and deny safe haven to those who commit terrorist acts.¹²⁹ In his October 6, 2001 radio address, President Bush again warned the Taliban that its time was running out.¹³⁰ The commencement of air strikes the following day confirmed the truth of this warning.

C. The War on Terror

On October 7, U.S. and British forces began attacking Afghan targets, including airfields, air defense systems, terrorist training camps, and concentrations of Taliban and al Qaeda troops.¹³¹ As legal justification for the attacks, the United States invoked the right to self-defense contained in the UN Charter.¹³² U.S. forces also worked in cooperation with Northern Alliance forces on the ground in Afghanistan. By November 4, U.S. Secretary of Defense Donald Rumsfeld announced that the Taliban had ceased to function.

On November 13, well ahead of schedule, Northern Alliance forces entered the capital city of Kabul behind retreating Taliban forces.¹³³ The following day, the Taliban's military resistance continued to crumble as Northern Alliance forces edged closer to the southern city of Kandahar.¹³⁴ Under the authorization of the United Nations, peacekeeping forces began landing in Afghanistan to supervise disarmament of hostile forces and to

126. President George W. Bush, Address to Joint Session of Congress (Sept. 20, 2001).

127. See Chandrasekaran, *supra* note 125.

128. See *id.* at A2.

129. See *supra* note 119 and accompanying text.

130. Mike Allen & Alan Sipress, *Bush Warns Taliban Time is Running Out*, WASH. POST, Oct. 7, 2001, at A14.

131. See Dan Balz, *U.S., Britain Launch Airstrikes Against Targets in Afghanistan*, WASH. POST, Oct. 8, 2001, at A1.

132. See Colum Lynch & Steven Mufson, *U.S. Reserves Right to Attack State Sponsors of Terrorists*, WASH. POST, Oct. 9, 2001, at A13.

133. See Keith B. Richburg, *"Second Life" in Afghan Capital*, WASH. POST, Nov. 14, 2001, at A1.

134. See John Pomfret & Rajiv Chandrasekaran, *Taliban Set to Pull Out of Kandahar*, WASH. POST, Nov. 17, 2001, at A1.

begin the process of rebuilding the country.¹³⁵

By November 26, 2001, U.S. and Northern Alliance forces controlled the Taliban's southern strongholds of Kandahar and Kunduz following the Taliban's surrender of those cities.¹³⁶ In the course of this military campaign, U.S. and Northern Alliance forces captured members of Taliban and al Qaeda forces. Those captured were initially imprisoned near Mazar-e Sharif in the Qala Jangi prison.¹³⁷ As controversy swirled around these detainees, many were transferred to the American naval base in Guantanamo Bay, Cuba.¹³⁸

VII. Prisoners of the War on Terror

While President Bush quickly labeled the 9/11 attacks as "acts of war," prisoner of war status for those captured in the war of terror has been less forthcoming. Ultimately, the U.S. Government agreed to treat those captured according to the standards set forth in the Geneva Conventions, though still maintaining its position that they are "detainees" rather than prisoners of war.¹³⁹

The United States has imprisoned captured Taliban and al Qaeda fighters at Camp X-Ray in Guantanamo Bay, Cuba.¹⁴⁰ Organizations including Amnesty International¹⁴¹ and the Organization of American States¹⁴² have expressed concern about the legal status and the treatment of these detainees. In a memorandum to the Bush Administration, Amnesty International raised a number of concerns about the conditions under which detainees at Camp X-Ray are being held.¹⁴³ Specific concerns raised by Amnesty International include the denial of legal counsel or court access to detainees, holding prisoners under conditions that amount to cruel, inhuman, or degrading treatment, and the threat of trial by military tribunal and indefinite detention, perhaps even after acquittal.¹⁴⁴

135. See Colum Lynch, *Britain to Lead Peacekeeping Force*, WASH. POST, Dec. 20, 2001, at A33.

136. See Bradley Graham & Thomas E. Ricks, *Marines Secure Afghan Foothold*, WASH. POST, Nov. 27, 2001, at A1.

137. See John Mintz, *On Detainees, U.S. Faces Legal Quandary*, WASH. POST, Jan. 27, 2002, at A22.

138. *Id.*

139. *Id.*

140. Sue Anne Pressley, *Detainees Arrive in Cuba Amid Very Tight Security*, WASH. POST, Jan. 12, 2002, at A12.

141. Press Release, Amnesty International, *AI Calls on the USA to End Legal Limbo of Guantanamo Prisoners*, AMR 51/009/2002 (Jan. 18, 2002), available at <http://web.amnesty.org/802568F7005C4453/0/926FDF718913300080256B430056163A?Open> (last visited Mar. 3, 2003).

142. John Mintz, *U.S. Told to Rule on Detainees' Status*, WASH. POST, Mar. 14, 2002, at A12.

143. Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay, Amnesty International, AMR 51/053/2002 (Dec. 12, 2002), available at <http://web.amnesty.org/802568F7005C4453/0/807F25047CCE1E6F80256B97004FD0C0?Open> (last visited Mar. 3, 2003).

144. *Id.*

The detainees themselves have also protested their treatment. In their first organized protest, Camp X-Ray prisoners staged a hunger strike, chanted "God is great" in unison, and threw items from their cells after a guard removed a turban from the head of one of the prisoners.¹⁴⁵ Following the protest, General Michael Lenhart, the Marine in charge of Camp X-Ray, announced that Camp X-Ray prisoners would be allowed to wear turbans made from their bed sheets.¹⁴⁶

Thus far the detentions at Guantanamo Bay have given rise to two civil lawsuits in U.S. courts. The first, filed by a coalition of clergy, lawyers, and professors, sought writs of habeas corpus on behalf of those detained at Camp X-Ray. The petitioners alleged, inter alia, that those imprisoned were held in violation of the Geneva Conventions.¹⁴⁷ The U.S. District Court for the Central District of California ultimately dismissed this action, finding that the petitioners lacked standing, that the court lacked jurisdiction to entertain the claims, and that no federal court could exercise jurisdiction over the claims.¹⁴⁸ However, the court carefully limited the scope of its holding:

The Court understands that many concerned citizens, here and abroad, believe this case presents the question of whether the Guantanamo detainees have any rights at all that the United States is bound, or willing, to recognize. That question is *not* before this Court and nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever.¹⁴⁹

The second lawsuit was brought in the U.S. District Court for the District of Columbia by the relatives of several Guantanamo Bay detainees.¹⁵⁰ As in *Coalition of Clergy v. Bush*, the U.S. District Court for the District of Columbia dismissed the action for lack of jurisdiction, holding that because the aliens held at Guantanamo Bay are outside the territory of the United States writs of habeas corpus are not available to them.¹⁵¹ The district court, too, limited the scope of its holding, cautioning that "this opinion . . . should not be read as stating that these aliens do not have some form of rights under international law."¹⁵²

145. John Mintz, *Detainees' Protest Wins U.S. Reversal*, WASH. POST, Mar. 1, 2002, at A1.

146. *Id.*

147. First Amended Verified Petition for Writ of Habeas Corpus, *Coalition of Clergy v. Bush*, (C.D. Cal. Feb. 11, 2002) (No. CV 02-570), available at <http://news.findlaw.com/hdocs/docs/terrorism/cltnbush022102ord.pdf> (last visited Mar. 3, 2003).

148. *Coalition of Clergy v. Bush*, No. CV 02-570 (C.D. Cal. Feb. 2002) (order dismissing Petition for Writ of Habeas Corpus and First Amended Petition for Writ of Habeas Corpus), available at <http://news.findlaw.com/hdocs/docs/terrorism/cltnbush022102ord.pdf> (last visited Mar. 3, 2003).

149. *Id.*

150. Petition for Writ of Habeas Corpus, *Rasul v. Bush*, No. 02-229 (D.D.C. 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/rasulbush021902pet.html> (last visited Mar. 3, 2003).

151. *Rasul v. Bush*, No. 02-229 (D.D.C. July 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/rasulvbush073102dsm.pdf> (last visited Mar. 3, 2003).

152. *Id.* at 30.

The Bush Administration's position on the status of the detainees has shifted in response to these external pressures as well as internal disputes. Initially, the Bush Administration denied that those captured in the war on terror were prisoners of war as defined by the Geneva Conventions.¹⁵³ Reportedly, the Administration's decision had been predetermined by its wish to try those captured before military tribunals.¹⁵⁴ Even while denying prisoner of war status to those detained, Secretary of Defense Rumsfeld stated that "we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent that they are appropriate."¹⁵⁵ While the United States claimed to be treating the prisoners humanely, the Bush Administration balked at labeling them prisoners of war and thus trying them as it would American soldiers, through a court martial.¹⁵⁶

A. Taliban Troops

Among those in custody at Camp X-Ray are members of the Taliban regime in Afghanistan and their supporters. Although the Taliban controlled much of Afghanistan, most legal scholars and diplomats concurred that it was not the legitimate government of Afghanistan. The Taliban's human rights practices, particularly with regard to women, marked it as an international pariah. For these reasons, most governments denied recognition to the Taliban regime. Though lacking international legitimacy, the Taliban exercised de facto control over Afghanistan.

Eventually, the United States pledged to treat Taliban fighters according to the standards established for prisoners of war, but continued to deny that those captured in the war on terror are in fact prisoners of war.¹⁵⁷ After agitation from outside groups and pressure by Secretary of Defense Donald Rumsfeld and Secretary of State Colin Powell, the Administration distinguished between Taliban and al Qaeda fighters, conferring prisoner of war status on the former but denying it to the latter.¹⁵⁸ This reversal was attributed to Afghanistan having been a party to the Geneva Conventions, and the Taliban, though unrecognized as a legitimate government, having governed much of Afghanistan prior to its fall. The decision may have been entirely political, however, stemming in part from fears if the United States were to deny prisoner of war status to Taliban fighters, the

153. John Mintz, *Debate Continues on Legal Status of Detainees*, WASH. POST, Jan. 28, 2002, at A15.

154. *Id.*

155. Peter Ford, *Fate of 'detainees' hangs on US wording*, CHRISTIAN SCI. MONITOR, Jan. 17, 2002, at 1.

156. Seth Stern & Peter Grier, *Untangling the legalities in a name*, CHRISTIAN SCI. MONITOR, Jan. 30, 2002, at 3.

157. Mike Allen & John Mintz, *Bush Makes Decision on Detainees: Geneva Convention Applies to Afghan, Taliban Fighters, Not al Qaeda*, WASH. POST, Feb. 7, 2002, at A1.

158. John Mintz & Mike Allen, *Bush Shifts Position on Detainees: Geneva Conventions to Cover Taliban, but not al Qaeda*, WASH. POST, Feb. 8, 2002, at A1.

Taliban, in turn might not afford prisoner of war status to U.S. soldiers captured in the war on terror.¹⁵⁹

B. Al Qaeda Terrorists

While Taliban troops possessed at least the semblance of state authority, the captured al Qaeda fighters lacked even that semblance. Al Qaeda—Arabic for “the base”—is a loosely organized confederation of terrorist cells with a global reach.¹⁶⁰ Osama bin Laden began to weave together this global terrorist network in the mid-1980s as he organized Afghans against their Soviet invasion.¹⁶¹ After the Soviet withdrawal in 1990, bin Laden returned to Saudi Arabia, where the Saudi government’s invitation to American forces to be stationed there intensified bin Laden’s militant Islamic fundamentalism.¹⁶² Bin Laden called on Muslims worldwide to unite against the West.¹⁶³ Even prior to the 9/11 attacks, bin Laden’s al Qaeda network had been linked to several significant attacks on American targets, including the embassy bombings, the attack on the U.S.S. Cole, and the first World Trade Center bombing in 1993.¹⁶⁴

Although the al Qaeda detainees have been held at the Guantanamo Bay naval base along with captured Taliban fighters, the Bush Administration has denied that al Qaeda detainees deserve treatment in accordance with the standards of the Geneva Convention.¹⁶⁵ Al Qaeda detainees will likely be tried before military commissions.¹⁶⁶

President Bush has openly stated his opposition to trying suspected terrorists in courts martial or civilian courts. His November 13, 2001 order established military commissions for the purpose of trying al Qaeda terrorists.¹⁶⁷ The minimum conditions¹⁶⁸ described for the military tribunals relax the evidentiary standards that would apply in a court martial, allowing the commission to consider any evidence with probative value. This standard differs markedly from that applied to Taliban prisoners.

159. John Mintz, *Debate Continues on Legal Status of Detainees*, WASH. POST, Jan. 28, 2002, at A15.

160. Scott Baldauf & Faye Bowers, *Origins of bin Laden Network*, CHRISTIAN SCI. MONITOR, Sept. 14, 2001, at 6.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. See Bob Kemper & Naftali Bendavid, *U.S. Grants POW Status to Taliban, not Al Qaeda*, CHI. TRIB., Feb. 8, 2002, at 1.

166. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Based on the 9/11 attacks, and the possibility of future attacks, Bush ordered that individuals belonging to al Qaeda, involved in terrorist attacks on the United States, or harboring those involved in al Qaeda or terrorist attacks, be tried by military commissions. *Id.*

167. *Id.*

168. See *id.* More detailed procedural rules have been established in the Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002), 41 I.L.M. 725.

VIII. Legal Status of the Taliban Government

In conducting its war on terror, the Bush Administration has distinguished between the Taliban and al Qaeda prisoners. The Bush Administration has justified this distinction based on the Taliban's status as the de facto government of Afghanistan. Are these distinctions justified under international law?

Though largely denied diplomatic recognition¹⁶⁹ and roundly condemned for human rights violations,¹⁷⁰ the Taliban seized control of Afghanistan in 1996 following expulsion of Soviet invaders and a bloody civil war. The Mujahideen succeeded in driving the Soviet invaders out of Afghanistan in 1989. The achievement of their goal marked the beginning of the Mujahideen's decline, as the group lacked any other common purpose to hold it intact.¹⁷¹ Mullah Mohammed Omar Mujahed, who would eventually become the leader of the Taliban movement, grew disgusted by the conduct of Mujahideen leaders who, after rebuffing the Soviet invasion, engaged in internecine disputes.¹⁷² Mullah Mohammed Omar's Taliban movement gained popular support in the absence of a clear popular consensus on any one of the Mujahideen factions.¹⁷³ Eventually the Taliban forces gained control over the majority of Afghanistan's territory, with the remaining limited areas embroiled in combat with rebel Northern alliance forces.¹⁷⁴

Although the Taliban functioned as Afghanistan's governing authority, most states refused to engage in diplomatic relations with it. What legal significance may be attached to this refusal? Recognition of a government indicates the willingness of the society of states to treat a regime as the entity legally entitled to bind a state and to fulfill its obligations to other states. Not every change in government requires such acknowledgement, but states will frequently extend either express or tacit recognition to governments that come to power through "extra-legal" means, such as civil war.¹⁷⁵

169. The only states to recognize the Taliban were Pakistan, the United Arab Emirates, and Saudi Arabia. Most states and international organizations continued to recognize the previous government, headed by Burhanuddin Rabbani. Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya*, 15 AM. U. INT'L L. REV. 869, 876-77 (2000) (arguing that the Taliban's recognition of Chechnya possessed only nominal value because of the illegitimacy of the Taliban government that conferred the recognition); see also Christopher L. Gadoury, *Should the United States Officially Recognize the Taliban? The International Legal and Political Considerations*, 23 HOUS. J. INT'L L. 385 (2001).

170. See Gadoury, *supra* note 169, at 395.

171. KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON: AFGHANISTAN 1994-1997*, 5 (1999).

172. NEAMATOLLAH NOJUMI, *THE RISE OF THE TALIBAN IN AFGHANISTAN: MASS MOBILIZATION, CIVIL WAR, AND THE FUTURE OF THE REGION* 121 (2002).

173. *Id.*

174. *Id.*

175. M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE 1815-1995*, 17-18 (1997).

The refusal to recognize the Taliban government stands in stark contrast with the Restatement view, which obligates states “to treat as the government of another state a regime that is in effective control of that state.”¹⁷⁶ The Restatement view adopts the Estrada doctrine, which obviates recognition of new governments, even those that come to power through extra-constitutional means as the Taliban did.¹⁷⁷

The adoption, explicitly or implicitly, of the Estrada doctrine by most governments has modified traditional practice with regard to the recognition of governments. Under the traditional view, states extended recognition only when a government exercised effective control over its territory, enjoyed the consent of its people, and was willing to fulfill its international legal obligations.¹⁷⁸ More recently the United States has adopted the Restatement view and downplayed the importance of recognition.¹⁷⁹

Consequently, effective control by a regime over its territory is typically an adequate basis for states to extend recognition to a new government.¹⁸⁰ Despite its exercise of effective control over the majority of the country’s territory, the Taliban government in Afghanistan remained widely unrecognized, maintaining, prior to its downfall, diplomatic relations only with Pakistan, Saudi Arabia, and the United Arab Emirates. Widespread refusal to recognize the Taliban government stemmed from several factors, including the Taliban’s support for Osama bin Laden and al Qaeda¹⁸¹ and the regime’s egregious human rights violations, particularly against women.¹⁸²

176. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 203 (1997). The comments further provide that no formal recognition of the “government in fact” is required. *See id.* at cmt. b.

177. OPPENHEIM’S INTERNATIONAL LAW 152 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1993). The Mexican Foreign Minister, after whom the doctrine is named, proclaimed that conditioning recognition of a state on the constitutionality of a government’s origins unduly interfered in that state’s domestic affairs. *Id.*

178. *Id.* at 150–51. This is the view expressed by Woodrow Wilson in 1913 following General Huerta’s overthrow of the Mexican government. 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 181 (1940). Wilson stated that a government coming to power by force should not be treated as an equal of a government “with the consent of the governed.” *Id.*

179. The implementation of this view has by no means been consistent, for at times the U.S. policy has been to recognize the government in power despite distaste for the way it acceded to power, or for its ideology, policies, or personnel. The constitutionality of a regime’s coming to power was often legally and factually difficult to determine and, in any event, the inquiry might offend the country involved. It could also become awkward to continue to refuse to deal with a regime that was thriving in spite of non-recognition. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 203, note 1 (1987).

180. *See* PETERSON, *supra* note 175, at 30–35.

181. Prior to the 9/11 attacks, U.S. officials attributed their refusal to recognize the Taliban government in part to that regime’s continued support of bin Laden. During her tenure, Secretary of State Madeleine Albright went so far as to state that an end to that support would improve the Taliban’s prospects for recognition and for gaining Afghanistan’s seat at the United Nations. *The Taliban’s Strategy for Recognition*, ECONOMIST, Feb. 6, 1999, at 41.

182. These abuses have been well-documented. *See, e.g.*, HUMAN RIGHTS WATCH, HUMANITY DENIED: SYSTEMATIC VIOLATIONS OF WOMEN’S RIGHTS IN AFGHANISTAN (2001), available at <http://www.hr.org/reports/2001/afghan3/>; AMNESTY INTERNATIONAL,

Under the traditional view of recognition, these considerations may translate into questions about whether or not the Taliban government enjoys the support of its citizens. In these circumstances, withholding recognition may prove an effective tool for expressing the dissatisfaction of the international community with the Taliban's policies, particularly with respect to human rights.¹⁸³ For the purposes of applying the Geneva Conventions to the Taliban detainees, however, the Bush Administration utilized the Restatement view and eventually relented; treating the Taliban detainees as prisoners of war on the ground that Afghanistan was a signatory to the Geneva Conventions.

IX. Assessing the Classification and Treatment of the Taliban and al Qaeda Prisoners under the Geneva Conventions

The 9/11 attacks, involving, as they did, the coordinated use of force to hijack and use large airlines loaded with fuel to attack commercial and military centers in the United States, amounted to a factual condition of armed conflict. The attack constituted an unequivocal *animus belligerendi*—i.e., an intention to wage war—to which the rules and principles of the humanitarian *jus in bello* apply.¹⁸⁴ And to the extent there exists any doubt under international law as to whether the 9/11 attacks constituted a factual condition of armed conflict triggering the Geneva Conventions regime, there can be no such doubt as to whether armed conflict at least existed starting on October 7, 2001, when U.S. and British forces began attacking Afghan targets.

The United States opted to respond to the 9/11 attacks with force, against al Qaeda and the Taliban government in Afghanistan. It would appear that this response had a sound basis in international law. Article 51 of the UN Charter permits the use of force in self-defense in the event an armed attack occurs.¹⁸⁵ That the perpetrators of the 9/11 attacks were non-state entities does not alter this prescription: armed attacks by non-state entities are still armed attacks, even if commenced only from, and not by, another state.¹⁸⁶ Moreover, the Taliban regime bore some international responsibility for the 9/11 attacks as well, having tolerated the activities of al Qaeda in its territory.¹⁸⁷

WOMEN IN AFGHANISTAN: A HUMAN RIGHTS CATASTROPHE (1995), available at <http://web.amnesty.org/ai.nsf/Index/ASA110031995?OpenDocument&of=COUNTRIES\AFGHANISTAN>.

183. For a contrary view, see Gadoury, *supra* note 169, at 423 (arguing for integrating the Taliban's Afghanistan into the international community).

184. Also, the subsequent U.S. response to the 9/11 attacks confirms that war existed.

185. See *supra* Part VI.B.

186. See *supra* note 118 and accompanying text.

187. As discussed, the Taliban government exercised effective control over the territory of Afghanistan and therefore bears responsibility for the actions of Afghanistan. In addition, a state assumes responsibility for violations of international law by private actors where the state ratifies them. See *supra* note 114 and accompanying text. In the *Iran Hostages* case the I.C.J. attributed responsibility for acts by private actors to Iran after Iran failed to take preventive or corrective action against those who took U.S.

Under Common Article 2, the Geneva Conventions 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.”¹⁸⁸ Both the United States and Afghanistan have ratified all four of the Geneva Conventions and are, therefore, “High Contracting Parties.”¹⁸⁹ Accordingly, the Geneva Conventions apply to the armed conflict.¹⁹⁰

A. Classification of Detainees

What, then, to make of the classification of those captured during the armed conflict? The Camp X-Ray detainees are members of both the Taliban and bin Laden’s al Qaeda terrorist network. Under Article 4 of Geneva Convention III, to qualify as a prisoner of war, and thus be protected by Geneva Convention III, those captured must fall into one of the enumerated categories.¹⁹¹ The first category, set forth in Article 4(A)(1), includes members of the armed forces of a party to the conflict.¹⁹² This category may be said to cover the Taliban fighters who comprised the armed forces defending the de facto government of Afghanistan¹⁹³ against Northern Alliance and, later, U.S. forces. Furthermore, the lack of recognition of the Taliban as the legitimate government of Afghanistan would not appear to deprive Taliban fighters of prisoner of war status, for Article 4(A)(3) renders the recognition of a government irrelevant to the determination of prisoner of war status.¹⁹⁴

The second category, set forth in Article 4(A)(2), includes members of other militias or volunteer corps operating independently of a government’s regular armed forces, so long as they fulfill certain additional condi-

Embassy staff hostage. *Id.* Here Afghanistan’s actions suggest a similar type of responsibility. Mohammed Atta, one of the hijackers in the 9/11 attacks, is now believed to have trained at an al Qaeda camp in Afghanistan with two other 9/11 hijackers. Douglas Frantz & Desmond Butler, *Germans Lay Out Early Qaeda Ties to 9/11 Hijackers*, N.Y. TIMES, Aug. 24, 2002, at A1.

188. See *supra* Part VI.

189. See *supra* note 43 and accompanying text.

190. The United States’ participation in the armed conflict, and that of other countries such as Britain, would appear to rule out the applicability of Article 3 of the Geneva Conventions, dealing with “armed conflict not of an international character,” and instead require the application of the entire remainder of the Geneva Conventions.

191. See *supra* Part IV.

192. *Id.*

193. See *supra* Part VIII.

194. Article 4(A)(3) accords prisoner of war status without qualification to “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.” See Geneva Convention III, *supra* note 37, art. 4(A)(3). The four-part test of Article 4(A)(2) applies only to militia operating independently of a government’s armed forces, not to members of a recognized (Article 4(A)(1)) or unrecognized (Article 4(A)(3)) government’s armed forces. Thus, whether a government is recognized or not, members of its armed forces are entitled to prisoner of war status without the need to meet the four-part test. This reading of the plain language of Article 4 is consistent with past U.S. practice. During the Korean War, the United States treated captured Communist Chinese troops as prisoners of war under the Geneva Conventions, even though at the time neither the United States nor the United Nations recognized the People’s Republic of China as the legitimate government of China.

tions. To qualify for prisoner of war status, such forces must: 1) have a chain of command; 2) be identifiable, usually by wearing uniforms; 3) follow the laws of war (which means, among other things, not targeting civilians); and 4) carry arms openly.¹⁹⁵

Because al Qaeda detainees were not part of the Taliban armed forces, to qualify for prisoner of war status under the Geneva Convention III, they must meet the specific conditions for prisoners of war status for members of irregular forces. Al Qaeda militants, do not—indeed cannot—meet those conditions: they do not wear uniforms; they brazenly defy the rules of war by targeting civilians; they often operate independently of a direct chain of command; and they often conceal their weapons. By almost any account, they are properly “unlawful combatants,” not prisoners of war. What is more, because members of al Qaeda operated with neither the direction nor the support of the Taliban regime, they are simply criminals and can, therefore, be charged with crimes such as murder and assault.¹⁹⁶ Accordingly, they cannot enjoy the immunity from criminal prosecution accorded to prisoners of war under the Geneva Conventions.

By this analysis, United States has performed commendably well under the Geneva Conventions. But has it? What criticisms might be leveled against the classification of detainees?

Under Article 5 of Geneva Convention III, where there is any factual question as to the status of captured belligerents, such persons are to be treated as *prima facie* entitled to prisoner of war status until such time as their status is formally determined by a competent tribunal, in practice, usually a panel of military officers from the capturing country.¹⁹⁷ A competent tribunal is thus needed to determine whether the detainees are members of the Taliban’s armed forces (or an integrated militia)—in which case they would be entitled to prisoner of war status automatically, or members only of al Qaeda—in which case they probably would not be entitled to prisoner of war status because of their likely failure to meet the four-part test under Article 4(A)(2) of Geneva Convention III. Until a tribunal makes that determination, Article 5 of Geneva Convention III requires all detainees to be treated as prisoners of war.

The Bush Administration’s classification of the detainees, therefore, is inconsistent with the Geneva Conventions on several counts. First, the United States may not classify all detainees as a group; the determination of prisoner of war status must be made on an individual basis by a compe-

195. See *supra* Part IV.

196. See *supra* Part VI.A.

197. See *supra* Part IV. U.S. officials have endorsed the government’s adherence to this principle. In 1987, then-Deputy Legal Advisor to the U.S. State Department, Michael Matheson, stated: “We [the United States] do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement before a judicial tribunal and to have that question adjudicated.” Michael J. Matheson, *Remarks*, 2 AM. U. J. INT’L L. & POL’Y 425-26 (1987).

tent tribunal. Second, there is a presumption that a captured combatant is a prisoner of war unless determined otherwise. The detainees, however, have been held incommunicado since being taken into U.S. custody. Despite regular interrogation by U.S. agents, they have not been charged with an offense, notified of any pending charges, made any appearances before either a military or civil tribunal, informed of their rights under domestic or international law, or provided counsel or the means to contact counsel.¹⁹⁸

B. Treatment of Detainees

The Taliban detainees, who are properly classified as prisoners of war under the Geneva Convention, must be treated humanely at all times.¹⁹⁹ This includes receiving adequate medical care and being free from physical or mental torture.²⁰⁰ They are also entitled to, among other things, medical attention, adequate food, sanitary quarters as favorable as their captors', the free practice of religion, mail, and release without delay after active hostilities have ended.²⁰¹

As for the treatment of the al Qaeda detainees, despite not being entitled to prisoner of war status under the Geneva Conventions, they are still entitled to fundamental guarantees of humane treatment under the Geneva Conventions and may not be tortured or degraded. Even if not technically prisoners of war, al Qaeda detainees still qualify for "humane treatment" under the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, a resolution adopted by the United Nations General Assembly in 1988.²⁰² The U.S. Administration has said that its treatment of the al Qaeda detainees meets those standards. An April 2002 Amnesty International report, however, accused the United States of violating international law by confining detainees to tiny cells and preventing them from communicating with their families or attorneys.²⁰³

C. Rationale or Rationalization

How might we explain the initial vacillation over classification of the Taliban detainees and derogation from the spirit, if not the letter, of Geneva Convention III with respect to the al Qaeda detainees? To date, several reasons have been proffered. None, however, passes legal muster.

One rationale fears that treating the detainees as prisoners of war would compel the United States to repatriate them at the end of the conflict. This, the reasoning goes, would mean not prosecuting the detainees

198. In the same vein, the Presidential Executive Order of November 13, 2001, authorizing indefinite detention without due process of law, is at best legally infirm, at worst a disquieting precedent. See Military Order, *supra* note 166, at 57,833.

199. See *supra* Part IV.B.

200. *Id.*

201. *Id.*

202. G.A. Res. 132, U.N. GAOR, 43d Sess., U.N. Doc. A/Res/43/132 (1988), available at <http://www.un.org/documents/ga/res/43/a43r132.htm>.

203. Memorandum, *supra* note 143.

for their alleged involvement in terrorist crimes against Americans. This reasoning is flawed because prisoner of war status provides protection only for the act of taking up arms against opposing military forces. If that is all a prisoner of war has committed, then repatriation at the end of the conflict would indeed be required. Under Article 82 of Geneva Convention III, however, prisoner of war status does not shield detainees from criminal offenses that are applicable to the detaining powers' soldiers as well. Put another way, if appropriate evidence can be gathered, the United States would be entitled to charge the detainees with war crimes, crimes against humanity, or other violations of U.S. criminal law. Such prosecutions would sufficiently address any act of terrorism against U.S. citizens—whether or not a competent tribunal finds some of the detainees to be prisoners of war. As Article 115 of Geneva Convention III explains, prisoners of war detained in connection with criminal prosecutions are entitled to be repatriated only “if the Detaining Power [here, the United States] consents.”²⁰⁴

Another rationale for not granting prisoner of war status to captured fighters is that doing so would preclude the interrogation of those alleged to have information about possible future terrorist attacks, and undermine efforts to penetrate and neutralize terrorist cells. If released, the argument goes, many of the captured terrorists would immediately seek to attack U.S. citizens. Better, therefore, to retain as much flexibility as possible in dealing with the captured fighters. This reasoning misconstrues Article 17 of Geneva Convention III, which provides that prisoners of war are obliged to give only their name, rank, serial number, and date of birth. Failure to provide this information subjects prisoners of war to “restriction” of their privileges. Nothing in Geneva Convention III, however, precludes interrogation on other matters: Geneva Convention III only relieves prisoners of war of the duty to respond. Whether or not prisoner of war status is granted, interrogators still face the formidable task of encouraging, with limited tools at their disposal, hostile detainees to provide information. Article 17 of Geneva Convention III excludes torture and other forms of coercion from the list of available tools. But this same exclusion applies to all detainees, whether held in time of peace or war. While Article 17 of Geneva Convention III forbids threats of adverse treatment for failing to cooperate with interrogators, it does not preclude classic plea bargaining, i.e., the offer of leniency in return for cooperation, or other incentives for that matter. Prisoner of war status hardly protects captured fighters from pressure. Prisoners of war can be interrogated and cajoled; they just cannot be coerced or tortured.

A third rationale is that the detainees are highly dangerous and thus should not be entitled to the more comfortable conditions of detention required for prisoners of war. While this reasoning may be empirically accurate, it is legally unsound. In light of the two prisoner uprisings in Afghanistan, there is no doubt that some of the detainees might well be

204. See Geneva Convention III, *supra* note 37, art. 115.

highly dangerous. Nothing in the Geneva Conventions, however, precludes appropriate security precautions; in fact, Geneva Convention III prescribes measures to keep captured prisoners securely captive, under lock and key. Even if some of the detainees are otherwise entitled to prisoner of war status, the Geneva Conventions do not allow them to be stripped of their status because of some perceived danger.

X. Legal and Political Implications of Deviating from the Geneva Conventions

Not only does the U.S. Administration's conduct fall outside the guidelines of the Geneva Conventions, but it also establishes a dangerous precedent. Every time the community of nations is forced to contend with flagrant aggression, such as that unleashed by the 9/11 attacks, the *de facto* response leaves normative (*de jure*) footprints in its wake.

Interpolating unrecognized exceptions into the contours of prisoner of war status, particularly when done by the world's leading military superpower, undermines the Geneva Conventions as a whole. That would hardly be in the interest of the United States, for it is all too easy to imagine how that precedent will boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying prisoner of war status. By flaunting international law at home, the United States risks undermining its own authority to demand implementation of international law abroad.

Also, the protections under the Geneva Conventions extend far beyond the physical conditions under which prisoners are held. The Geneva Conventions permit members of the armed forces of parties to a conflict to engage in legal acts of war without threat of prosecution for those acts. By denying some of the detainees prisoner of war status and labeling them "unlawful combatants," the U.S. Administration is effectively saying that some of the detainees can be prosecuted for murder or attempted murder for merely aiming a gun or shooting at a U.S. soldier, even if they complied with the laws of war. This message undermines the very principle that protects members of the U.S. armed forces from criminal prosecution for killing soldiers or the accidental killing of civilians.

The reasons for complying with the Geneva Conventions are, therefore, as much political as they are moral or humanitarian: the United States has an immediate and long-term interest in upholding the Geneva Conventions and their regime for establishing universal rules of war and regulating the treatment of prisoners of war. The United States also has an interest in not alienating its battlefield allies through high-handed, unilateralist decision-making and selective compliance with international law. If the rules of war can be capriciously suspended at any time, our ability to form solid and lasting alliances will be seriously undermined.

Far from impeding military efficacy in the conduct of the war on terrorism, obedience to the norms of international humanitarian law and

assigning tentative prisoner of war status to the captured detainees only sharpens the contrast between the United States and al Qaeda, giving al Qaeda the reputation for barbarism it so richly deserves.

If the Administration's rationale for its classification and treatment of captured fighters to date lacks legal or political support, how else might the U.S. position be explained? Arguably, something deeper and more emotional is involved.²⁰⁵ The calculus seems to run something like this: "the depravity and unprecedented nature and form of the 9/11 attacks justifies unprecedented means in response; new threats and actions by an enemy demand new rules." Formulated differently, "because al Qaeda operatives violated the rules of war, they deserve to be stripped of all protections based on those laws." This train of thought stems from the maxim, *ex injuria jus non oritur*.²⁰⁶

It is difficult, if not impossible, to conceive of perpetrators of the barbaric 9/11 attacks as "victims," for that is how they would be classified if given prisoner of war status. This reasoning, understandable though it may be at a visceral level, misconstrues the purpose of the rules of war, conflating the considerations normally reserved for *jus ad bellum* with those restricted to *jus in bello*. The issue goes beyond the treatment of individual detainees. The rules of war were designed to provide order in a violent world. For over a hundred years, they have provided a framework that protects combatants. Armed conflict is arguably the ultimate challenge to the international legal order: not only is legal regulation stretched to the limits of capacity, but the very occurrence of armed conflict is in defiance of that regulation. But it is precisely at this stage, where extra-legal violence has been perpetrated that the efficacy of humanitarian law is tested—and should be upheld and championed: "if international law is . . . the vanishing point of law, the law of war is even more conspicuously the vanishing point of international law."²⁰⁷ The distinction between the right to make war and the law of war must be zealously defended.

To be sure, the slaughter of innocent civilians must be condemned in the strongest terms. The perpetrators of the ghastly and unconscionable 9/11 attacks must be apprehended and brought to justice using every

205. Professor Wedgwood's comments capture this sentiment: "We tolerate multiple acts of individual and social violence as the cost of safeguarding our privacy and liberty, demanding that the government meet an extraordinary standard of proof before it can claim any power over our person, acting with retrospective rather than anticipatory glance. But now the stakes seem different. We are not accustomed to losing thousands of lives in the blink of an eye and the view of a camera. We are not used to the malevolent leverage that lets a handful of men multiply their destructive power through the ordinary instruments of transport and commerce. The deliberate temperance and incompleteness of criminal law enforcement seem inadequate to the emergency, when the threat to innocent life has multiplied by orders of magnitude. Ruth Wedgwood, *The Law's Response to September 11*, at <http://www.carnegiecouncil.org/viewMedia.php?prmTemplateID=8&prmID=97#wedgwood> (last visited Mar. 5, 2003).

206. He who acts contrary to the law cannot acquire rights as a result of his transgression.

207. H. Lauterpacht, *The Problem of the Revision of the Law of War*, 1952 BRIT. Y.B. INT'L LAW, 360, 381-82.

resource of the world community—including war. But fear need not, indeed must not, dictate policy; reason and sobriety must be vindicated.²⁰⁸ That is one of the definitive tasks of law: to prevent inflamed passions and emotions from running amok. To the extent the United States can resist the temptation to suspend its commitment to the calm and rational, albeit slow, path of law in response to the extraordinary wickedness of the 9/11 attacks, it can continue to contribute, as it has, to the building of a just, humane, peaceful, and secure society.

Humanitarian law questions the maxim: *inter arma silent leges*.²⁰⁹ Humanitarian law urges force and law to communicate. If events outstrip humanitarian law in the worst of times, humanitarian law loses its relevance, its capacity to provide order in an otherwise (dis-)orderly situation. Even “a war to rid the world of evil” should be subject to humanitarian law.

208. As Edmund Burke observed, “[n]o passion so effectually robs the mind of all its powers of acting and reasoning as fear.” EDMUND BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 57 (James T. Boulton ed., Routledge & Kegan Paul 1958) (1757).

209. When force speaks, the laws are silent.