

# War and Enemy Status After 9/11: Attacks on the Laws of War

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## I. INTRODUCTION

On September 11, 2001, the United States suffered shocking terrorist attacks on the World Trade Center in New York and the Pentagon in Washington, D.C. Most agree that the attacks were perpetrated by Osama bin Laden and several of his al Qaeda followers and that these same non-state actors had been behind previous attacks on the U.S.S. Cole and U.S. embassies in Kenya and Tanzania. On October 7, 2001, the United States used massive military force in self-defense against such ongoing processes of armed attack by bin Laden and members of al Qaeda in Afghanistan. At that time, the United States also used massive military force against members of the armed forces of the Taliban regime in Afghanistan. This upgraded an ongoing belligerency between the Taliban and the Northern Alliance and triggered application of the laws of war with respect to U.S. military responses in the Afghan theater of war.<sup>1</sup>

By November 13, 2001, President Bush had made the erroneous claim that the September 11th attacks were acts of international terrorism of such an intensity as to create “a state of armed conflict” and that they amounted to acts of “war” by bin Laden and his followers.<sup>2</sup> The Bush administration also argued that it had a right to detain any member of al Qaeda and other persons allegedly posing threats to national security without trial as “enemy” or “unlawful” combatants whether or not they were captured inside Afghanistan or in connection with the October 7th war with the Taliban.<sup>3</sup> Quite inconsistently, the White House also claimed that the war with the Taliban regime did not trigger application of laws of war contained in the 1949 Geneva Conventions. This error was finally admitted on February 8, 2002, when the White House agreed that the law of armed conflict applied to the war with the Taliban, but the administration shifted its argument to one seeking a sweeping denial of prisoner of war status for every member of the

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1. See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L. L. 1, 5-7, 6 n.15 (2001) [hereinafter Paust, *Antiterrorism* No.1]; Jordan J. Paust, *There is No Need To Revise the Laws of War in Light of September 11th*, at <http://www.asil.org/taskforce/paust.pdf>. Portions of the latter essay have been borrowed for use in this essay.

2. See, e.g., Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 § 1(a) (Nov. 16, 2001).

3. See, e.g., Hamdi v. Rumsfeld, 296 F.3d 278, 280, 282-83 (4th Cir. 2002); U.S. Dep't of Defense, “DOD News Briefing—Secretary Rumsfeld and Gen. Myers,” Jan. 11, 2002, [http://www.defenselink.mil/news/Jan2002/t01112002\\_t0111sd.html](http://www.defenselink.mil/news/Jan2002/t01112002_t0111sd.html); Lawyers Committee for Human Rights, *A Year of Loss—Reexamining Civil Liberties since September 11* 25-28, 35 (2002), [http://www.lchr.org/US\\_law/loss/loss\\_report.pdf](http://www.lchr.org/US_law/loss/loss_report.pdf).

armed forces of the Taliban.<sup>4</sup> Such schizophrenic claims are not merely illogical and devoid of legal merit, but can also have dangerous consequences with respect to permissible forms of non-state actor violence, application of the laws of war in actual armed conflicts, and protections of members of the armed forces of the United States and other states.

Despite manipulated rhetoric or claims to unbounded power, did the laws of war apply to the September 11th attacks? What is the legal status under the laws of war of various types of persons detained or being prosecuted by the United States? Perhaps more importantly for the United States and the international community, is there a need to revise the laws of war in view of bin Laden's use of terrorism and the various U.S. responses?

## II. THE UNITED STATES CANNOT BE AT "WAR" WITH AL QAEDA OR "TERRORISM"

Contrary to the assertion of President Bush, the United States simply cannot be at war with bin Laden and al Qaeda as such, nor would it be in the overall interest of the United States for the status of war to apply merely to conflicts between the United States and al Qaeda. Bin Laden was never the leader or member of a state, nation, belligerent, or insurgent group (as those entities are understood in international law) that was at war with the United States. Armed attacks by such non-state, non-nation, non-belligerent, non-insurgent actors like bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the United Nations Charter against those directly involved in an armed attack,<sup>5</sup> but even the use of military force by the United States merely against bin Laden and al Qaeda in foreign territory would not create a state of war between the United States and al Qaeda.

The lowest level of warfare or armed conflict to which certain laws of war apply is an insurgency. For an insurgency to occur, the insurgent group would have to have the semblance of a government, an organized military force, control of significant portions of territory as its own, and its own relatively stable population or base of support within a broader population. Al Qaeda never met any of the criteria for insurgent status. Belligerent status under the laws of war is based on the same criteria for insurgent status plus outside recognition by one or more states either as a belligerent or a state.<sup>6</sup> Al

4. See, e.g., Paust, *Antiterrorism* No. 1, *supra* note 1, at 7-8 n.15.

5. See, e.g., Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533 (2002).

6. Concerning criteria regarding an insurgency or belligerency, see, for example, *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862) (criteria include "when the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies;") *id.* at 669; ("Foreign nations acknowledge it as a war by a declaration of neutrality . . . recognizing hostilities as existing."); see also U.S. Dep't of Army Field Manual 27-10, *THE LAW OF LAND WARFARE* 9, para. 11(a) (1956) ("The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents."); U.S. Dep't of Army, Pamphlet 27-161-2, 2 INTERNATIONAL LAW 27 (1962) ("If the rebellious side conducts its war by guerrilla tactics it seldom achieves the status of a belligerent because it does not hold territory and it has no semblance of

Qaeda never met the criteria for insurgent status and certainly lacked any outside recognition as a belligerent, nation, or state. Indeed, al Qaeda is not known to have even purported to be or to have the characteristics of a state, nation, belligerent, or insurgent.

In view of the above, any conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war.<sup>7</sup> Thus, outside the context of war to which the laws of war apply, members of al Qaeda who were not otherwise attached to the armed forces of a belligerent or state cannot be “combatants,” much less “enemy” or so-called “unlawful” combatants, or prisoners of war as those terms and phrases are widely known in both international and U.S. constitutional law. In addition, “war” or “armed conflict” and the laws of war could not have applied to the September 11th attacks by al Qaeda operatives, even though the attacks undoubtedly triggered other international laws involving criminal responsibility and universal jurisdiction, including crimes against humanity in connection with the targeting of the World Trade Center.

With respect to the September 11th attacks as such, any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of non-state actor violence and targetings that otherwise remain criminal could become legitimate and create an extended, but unwanted, form of combatant immunity. Two such targetings would have been the September 11th attack on the Pentagon, a legitimate military target during armed conflict or war (except for the means used, an airliner with passengers and crew), and the previous attack on the U.S.S. Cole, another legitimate military target during armed conflict or war. Similarly, a radical extension of the status of war and the laws of war to terroristic attacks by groups like al Qaeda (and there are or predictably will be many such groups engaged in social violence) would legitimize al Qaeda attacks on the President (as Commander-in-Chief) and various U.S. “military personnel and facilities” in the United States and abroad—attacks of special concern to President Bush, as noted in his November 13th Military Order. Applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution. No leader of any country other than the United States is known to have even suggested a need for such a radical change in the status of war, the threshold levels concerning applicability of the laws of war, and actual application of various laws of war (including an array of competencies, rights, immunities, and obligations thereunder) to terrorist targetings by groups like al Qaeda and selective and proportionate responsive measures against such groups which do not involve the use of military force

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a government.”); JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 809, 812-13, 815-16, 819, 831-32 (2d ed. 2000).

7. See also *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 1013-15 (2d Cir. 1974) (holding that the United States could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts as a non-state, non-belligerent, non-insurgent actor). *But see* Derek Jinks, *September 11 and the Laws of War*, 28 *YALE J. INT'L L.* 1 (2003).

against the military of some other *de facto* or *de jure* state. It is not clear that even President Bush contemplated the corrupting consequences of such an extension of the status of war or the laws of war. Moreover, such consequences would not be in the overall and long-term interests of either the United States or the international community.

### III. THE STATUS OF VARIOUS DETAINEES AND THE LEGAL TEST FOR COMBATANT STATUS

Whether there is a need for revision of the laws of war that applied during the armed conflict of an international character in Afghanistan on and after October 7th is a separate issue. With respect to the 1949 Geneva Conventions and the 1977 Protocols thereto, the caretaker of Geneva law, the International Committee of the Red Cross (ICRC), sees no need for revision of Geneva law in view of the October 7th conflict. However, the ICRC does openly express the need for greater compliance. In rare public statements, the ICRC, like several European allies, has criticized the United States for its initial refusal to recognize that the laws of war applied to the armed conflict with the Taliban, for its mischaracterization of the status of Taliban military detainees held in Afghanistan and at Guantanamo Bay, and for its refusal to grant members of the armed forces of the Taliban prisoner of war status as required under Geneva law.<sup>8</sup> The ICRC also confirms that compliance with Geneva law “in no manner constitutes an obstacle to the struggle against terror and crime.”<sup>9</sup> More generally, there is no significant need to revise the laws of war, including Geneva law, because of the al Qaeda attacks on September 11th or the October 7th international armed conflict in Afghanistan. Some have made sophistic, overly broad generalizations concerning the alleged status of various types of persons detained by the United States after September 11th, but there is no need to adopt radically new claims concerning the status of various persons detained by the United States, such as those who were (1) merely members of al Qaeda, (2) members of the armed forces of the Taliban, or (3) U.S. citizens who were members of one or the other or both. Extension of combatant or individual belligerent status to mere members of al Qaeda—or denial of combatant or individual belligerent status to members of the armed forces of the Taliban—would not merely be legally inappropriate, but could also have seriously harmful consequences. In particular, this would extend a radically new reach of combat immunity to mere members of al Qaeda and a radically new denial of combat immunity to members of the armed forces of various states. It should also be noted that during an armed conflict, certain non-POWs who pose a real threat to security can be detained without trial while they continue to pose such a threat and detention is necessary, although they are entitled to judicial review of the propriety of their

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8. See, e.g., Paust, *Antiterrorism* No.1, *supra* note 1, at 7 n.15.

9. Sean D. Murphy, *Contemporary Practice of the United States*, 96 AM. J. INT'L L. 461, 479 (2002) (quoting ICRC Press Release on Geneva Convention on Prisoners of War (Feb. 9, 2002) at <http://www.icrc.org>).

detention. Furthermore, prisoners of war can be detained without trial for the duration of the armed conflict.<sup>10</sup> Additionally, any such person can be prosecuted for an international crime that he or she is reasonably accused of having committed.

The test for combatant or individual belligerent status under the laws of war is straightforward. It is membership in the armed forces of a party to an armed conflict of an international character. Thus, privileged or lawful belligerents include members of the armed forces of a state, nation, or belligerent during an armed conflict. As noted in U.S. military texts, “[a]nyone engaging in hostilities in an armed conflict on behalf of a party to the conflict” is a “combatant”<sup>11</sup> and “[c]ombatants . . . include all members of the regularly organized armed forces of a party to the conflict.”<sup>12</sup> Article 1 of the Annex to the 1907 Hague Convention expressly states that belligerent status will “apply . . . to armies” and expressly sets forth additional criteria to be met merely by “militia.”<sup>13</sup> The customary 1863 Lieber Code also affirmed: “So soon as a man is armed by a sovereign government, and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”<sup>15</sup> Today, Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War<sup>16</sup> (GPW) has actually expanded the prisoner of war (POW) status which exists for members of “armies” or “armed forces” to include such status for members of certain militia forming part of the armed forces of a party to an armed conflict.

Of course, members of the armed forces of the Taliban were not simplistically mere “militia” or subject to the need to comply with additional criteria for combatant status beyond the determinative criterion of membership in an armed force or army of a state, nation, or belligerent. Although some confuse the two, the tests for combatant status and prisoner of war status can be different for certain types of combatants. For example, both combatant status and prisoner of war status with respect to members of the armed forces of a state, nation, or belligerent are based on a single determinative criterion—membership in the armed forces.<sup>17</sup> However,

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10. See, e.g., Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. (forthcoming 2003). The article also identifies relevant human rights law concerning arbitrary detention, the human rights and Geneva law requirements of judicial review of the propriety of detention, and trends in U.S. judicial decisions.

11. U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, OPERATIONAL LAW HANDBOOK 12 (2002), <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf>.

12. U.S. NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK OF NAVAL OPERATIONS § 5.3 (1999).

13. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 1, 36 Stat. 2277, T.S. No. 539.

15. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) [hereinafter 1863 Liber Code], art. 57.

16. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

17. See, e.g., *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992); George H. Aldrich, *Editorial Comment, The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 894-95 (2002); Paust, *Antiterrorism* No. 1, *supra* note 1, at 5-6 n.15; Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT’L L. 905, 911 (2002).

prisoner of war status for certain “militia” or members of “volunteer corps” not attached to the armed forces of a party to an armed conflict hinges on applicability of various additional criteria, as noted below concerning POW status. With respect to an actual armed conflict (as opposed to the September 11th attacks as such), adding the word “enemy” to “combatant” has no legal consequence. Enemies in a war who are combatants are indeed enemy combatants.

#### IV. COMBAT IMMUNITY

Importantly, enemy combatants during an armed conflict of an international character are privileged to engage in lawful acts of war such as the targeting of military personnel and other legitimate military targets. Such acts are privileged belligerent acts or acts entitled to combat immunity if they are not otherwise violative of the laws of war or other international laws (e.g., those proscribing aircraft sabotage, aircraft hijacking, genocide, or other crimes against humanity).<sup>18</sup> Violations of the laws of war are war crimes; violators are not entitled to immunity, and are thus prosecutable. However, lawful acts of war are covered by the rule of combat immunity and cannot properly be criminal under domestic law, nor can they be judged elements of domestic crime or acts of an alleged conspiracy to violate domestic law. The laws of war should not be changed to provide otherwise. As former General and Professor Telford Taylor once wrote:

War consists largely of acts that would be criminal if performed in time of peace . . . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war.<sup>19</sup>

Language in several cases is also informing. In *United States v. Ohlendorf*,<sup>20</sup> decided during the subsequent Nuremberg proceedings, a similar view was recognized:

Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare . . . they are entitled to be protected as combatants . . . . The language used in the official German reports . . . show[s], however, that combatants were indiscriminately punished only for having fought against the enemy. This is contrary to the law[s] of war.<sup>21</sup>

18. See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 683-85, n.35 (2002).

19. TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 19-20 (1970). For a more extensive list of authorities concerning combat immunity, see, e.g., Paust, *supra* note 18, at 683-84, n.35; Jordan J. Paust, *The Right to Life in Human Rights Law and the Laws of War*, 65 SASK. L. REV. 463, 471-72 n.44 (2002).

20. 4 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG, MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1 (1949).

21. *Id.* at 492-93. See also, *United States v. List*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 757, 1236, 1246 (1948); see also, *In re Yamashita*, 327 U.S. 1, 47 (1946) (Rutledge, J., dissenting) (“[W]e have no question here of

If lawful combat actions could be the basis for domestic crimes, U.S. military personnel would be placed in serious danger in any future armed conflict involving U.S. military forces. The United States rightly expects as a matter of venerable law that combat actions of U.S. armed forces that are not violative of international law will be immune from prosecution under the domestic laws of various countries in which they operate and that captured U.S. military personnel will be treated as prisoners of war. There is no need to make changes in the laws of war that will change such results or provide ready pretexts for denial of combatant or prisoner of war status to U.S. or other military personnel. Similarly, a decision to deny combat immunity to members of the armed forces of the Taliban with respect to lawful acts of war would be illegal and could have serious unwanted repercussions for U.S. military personnel in the future.

Some who argue that members of the armed forces of the Taliban should be denied either combatant or prisoner of war status stress partial language from an old U.S. Supreme Court case, *Ex parte Quirin*,<sup>22</sup> that was decided before the creation of the 1949 Geneva Conventions and much of the modern law of warfare. In any event, *Ex parte Quirin* actually involved prosecution of a set of combatants for war crimes, i.e., for one of the exceptions to combat immunity for those combatants who engage in a violation of the laws of war. Thus, *Ex parte Quirin* actually provides implied support for the principle of combat immunity for lawful acts of combat. Defendants in that case were clearly “enemy belligerents” or enemy combatants, but they were prosecutable for war crimes<sup>23</sup> “because [their particular acts were then] in violation of the law of war,”<sup>24</sup> and thus, the defendants were combatants,<sup>25</sup> but had nonetheless “violated the law of war applicable to enemies.”<sup>26</sup> Thus, the war crimes engaged in by particular individuals (as opposed to those engaged in by other members of the armed forces of Germany) resulted in a lack of combat immunity for those individuals with respect to their particular acts.<sup>27</sup>

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what the military might have done in a field of combat . . . . The purpose of battle is to kill.”); *United States v. Noriega*, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990) (“[T]he essential purpose of” GPW “is to protect prisoners of war from prosecution for conduct which is customary in armed conflict.”); *United States v. Calley*, 22 C.M.A. 534, 540 (1973); *Arce v. State*, 202 S.W. 951, 953 (Tex. Crim. App. 1918) (holding that four soldiers under command of the *de facto* government of Mexico who killed a U.S. Army corporal during hostilities could not be lawfully prosecuted for such conduct); 1863 Lieber Code, *supra* note 15, arts. 49, 56-57.

22. 317 U.S. 1 (1942).

23. *Id.* at 36 (“Specification 1 of the First charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation.”) (emphasis added).

24. *Id.* at 37. See also *id.* at 28 (noting jurisdiction of military tribunals to try “offenders or offenses against the law of war”).

25. *Id.* at 35 (“Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those *who though combatants* do not wear ‘fixed and distinctive emblems’. And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to ‘the law of war.’”) (emphasis added).

26. *Id.* at 44.

27. *Id.* at 36-7 (“As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act. *It subjects those who participate in it* without uniform to the punishment prescribed by the law of war for unlawful

However, this did not result in a lack of combatant status for those individuals (or the rest of the German armed forces), a lack of combat immunity for lawful acts of war, or a lack of access to federal courts concerning the propriety of their detention and prosecution.<sup>28</sup> *Ex parte Quirin* also affirmed that judicial power exists to finally determine the legal status of detainees under and in accordance with international law: "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals."<sup>29</sup> Other federal courts have also addressed international legal issues concerning prisoner of war status, the propriety of detention, and provisional characterizations by the Executive during war.<sup>30</sup>

Some use the regrettable and technically oxymoronic phrase "unlawful combatant" in an inappropriate way that confuses separate issues regarding personal status (e.g., as a combatant or noncombatant who is not privileged to engage in warfare) and the lack of immunity for personal acts committed in violation of the laws of war. If one is a combatant under the laws of war, one is not an "unlawful combatant" and one does not become an "unlawful combatant" merely because other members of the armed forces or unit to which one belongs commit war crimes. More generally under the laws of war, mere membership (even in a criminal organization) is not a crime and one cannot become an "unlawful" combatant or lose POW status merely because other members of the armed forces violate the laws of war. Additionally, during war reprisals against any detainee and "collective punishment" (i.e., punishment of an individual not for what he or she has done but for the acts of others) are war crimes. An attempt to deny combatant status to all members of the armed forces of one's enemy because of the acts of some of its members merely serves unlawful policies that form the foundation for such prohibitions. Further, as expressed in common Article 1, Geneva law must be applied "in all circumstances."

In view of the above, broad brush generalizations concerning all al Qaeda or all Taliban are both intellectually and legally deficient. Lawful combatant status, combat immunity, and POW status for members of the armed forces of a party to an armed conflict rest either on the individual's membership or personal conduct. Today under GPW, even a prisoner of war being prosecuted for or who has been convicted of war crimes does not lose POW status or protections. No changes in relevant laws of war are needed, and some changes could have dire consequences for U.S. soldiers and afford enemies of the United States a pretext for denial of present legal protections.

## V. LEGAL TESTS FOR PRISONER OF WAR STATUS

With respect to prisoner of war status, the Geneva Convention Relative to the Treatment of Prisoners of War sets forth separate categories of persons

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belligerents.") (emphasis added).

28. *Id.* at 24-25.

29. *Id.* at 27.

30. *See, e.g.,* Paust, *supra* note 10.

who are entitled to prisoner of war status during an armed conflict of an international character.<sup>31</sup> The 1949 Convention's list of six separate categories involved a clear change of certain prior interpretations of coverage under the 1929 Convention. Under express terms of the treaty, only one category out of six contains criteria limiting prisoner of war status to those belonging to a group that carries arms openly, wears a fixed distinctive sign recognizable at a distance, and conducts operations generally in accordance with the law of war. Under GPW Article 4(A)(2), these limiting criteria expressly apply only to certain "militias or volunteer corps" or "organized resistance movements." They expressly do not apply to "[m]embers 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" covered under 4(A)(1) or to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" covered under 4(A)(3).<sup>32</sup>

With respect to the armed forces of a party to the armed conflict in Afghanistan (such as those of the Taliban and the United States), the determinative criterion for prisoner of war status is membership. Thus, members of the armed forces of each party qualify as prisoners of war under GPW Article 4(A)(1), if not 4(A)(3), and the authoritative ICRC has expressly recognized combatant and POW status for all members of the armed forces of the Taliban. Moreover, POW status does not inhibit the ability to detain enemy POWs for the duration of an armed conflict, whether or not particular POWs can also be prosecuted for war crimes or other violations of international law. Indeed, prisoners of war subject to prosecution do not thereby lose their status as a prisoner of war. There is no need to change the laws of war in that regard.

## VI. DANGEROUS CONSEQUENCES CAN ARISE IF THE LEGAL TESTS ARE CHANGED.

A new extension of the four criteria expressly applicable only to one of six categories addressed in GPW Article 4(A), i.e., those covered in 4(A)(2),

31. Insurgents during an armed conflict not of an international character to which merely common Article 3 applies (and perhaps Protocol II to the Geneva Conventions and certain customary laws of war) presently have no right to POW status or combat immunity. Curiously, the Bush pretense of "war" against al Qaeda as such and "terrorism" might require such a status and immunity for those who do not even have the status of insurgents under the laws of war. This would not be a preferable result.

32. Article 4(A)(1) and (3) of the GPW states:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. . . . (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

*Expressum facit cessare tacitum.* ("Something expressed nullifies what is unexpressed."). BLACK'S LAW DICTIONARY 1635 (7th ed. 1999). Only 4(A)(2) contains the four limitations. *Specialia generalibus derogant.* ("Special words derogate from general words. A special provision . . . is to be preferred to general language, which might have governed in the absence of such special provision."). BLACK'S LAW DICTIONARY 1570 (Rev. 4th ed. 1968). See, e.g., Paust, *Antiterrorism* No. 1, *supra* note 1, at 5-8 n.15.

to the “armed forces” of a party to an armed conflict (who are presently covered by Article 4(A)(1)) would result in a nonsensical, policy-thwarting denial of POW status to all members of the armed forces of a party to an armed conflict whenever several members do not wear a fixed distinctive sign recognizable at a distance or several members violate the laws of war. Such an approach is illogical and contrary to normal approaches to treaty interpretation; it would seriously threaten POW status, combat immunity, and protections for soldiers of various countries including U.S. military; and it would be inconsistent with general state practice (which is also relevant for treaty interpretation). In Afghanistan and more generally and in conformity with widespread state practice, several types of U.S. soldiers (e.g., special forces) and various regular soldiers at different times have used camouflage and have otherwise attempted to blend in with local flora or geography in an effort to avoid being recognizable at a distance, since they prefer not to be clearly recognizable at all. Indeed, various U.S. soldiers in Afghanistan have not only not met the criterion of wearing distinctive emblems or signs recognizable at a distance, but have also been spotted wearing Afghan civilian clothing and sporting beards to “blend in.”<sup>33</sup>

Thus, under the nonsensical approach, all U.S. soldiers could be denied prisoner of war status during the conflict in Afghanistan and an upgraded war with Iraq. Further, under the nonsensical approach, Lieutenant Calley’s war crimes at My Lai and those of other U.S. military personnel there and elsewhere would have required a denial of POW status to any member of the armed forces of the United States captured in Vietnam.<sup>34</sup> Since it is not unlikely, although regrettable, that during any armed conflict war crimes will be committed by some soldiers on each side, the nonsensical approach thwarts policies behind the prohibition of collective punishment and would provide a pretext for enemies of the United States to deny POW status, combatant status, and combat immunity to U.S. soldiers. There is no need to change the laws of war to adopt such a nonsensical approach.

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33. See, e.g., Henry J. Kenny, *Mission: Free the Oppressed; U.S. Commandos Have Special Skills—and Philosophy*, CHI. TRIB., Sept. 29, 2002, § 2, at B3 (wearing “beards, riding donkeys into combat”); Max Blenkin, *SAS Troops Are the Mountain Phantoms - War on Terror*, THE DAILY TELEGRAPH (Sydney), Sept. 21, 2002, at 10 (“They sport bushy beards like the locals.”); see also, Ian Bruce, *US Soldiers Ordered To Lose Beards*, THE HERALD (Glasgow), Sept. 16, 2002, at 11 (noting U.S. Special Forces grew “beards and adopted local dress to allow them to blend in on undercover missions”); James Brooke, *Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right*, N.Y. TIMES, Sept. 12, 2002, at B21 (noting that U.S. Special Forces “have been growing beards and donning local garb in an effort to blend in with the local people and their surroundings”); Michael R. Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. TIMES, Dec. 3, 2001, at B1 (“Dressed in Afghan clothing and sporting scruffy beards, American soldiers here do their best to blend in when they move in and out of the Afghan Capital, Kabul.”); Glenn Mitchell, *Bin Laden Bolts After Surrender*, HERALD SUN (Melbourne), Dec. 13, 2001, at 15 (reporting “a convoy of five trucks carried US troops wearing Afghan dress”).

34. See, e.g., *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975).

## VIII. CONCLUSION

Reason, various policies at stake, reciprocity, and established practice stand in opposition to recent claims to change the law of war. Acceptance of such claims would result in changing the status of war, modifying thresholds for application of the laws of war, redefining “combatant” status, as well as refusing to grant prisoner of war status to members of the armed forces of a party to an international armed conflict. Were such changes to be made, serious consequences could ensue for the United States, other countries, U.S. military personnel, military personnel of other countries, and the rest of humankind. In some ways, claimed changes in the laws of war could even serve those who attacked the United States on September 11th as well as other non-state actors who might seek to engage in various forms of transnational terrorism in the future. Mean-spirited denials of international legal protections are not merely unlawful, but also disserve a free people. Such denials have no legitimate claim to any role in our nation’s responses to terrorism.

