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Playing by the Rules: Combating Al Qaeda Within the Law of War

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PLAYING BY THE RULES: COMBATING AL QAEDA WITHIN
THE LAW OF WAR

DAVID GLAZIER*

ABSTRACT

Although the conflict formerly known as the “war on terror” is now in its eighth year, key legal issues governing the use of force and military detention remain largely unresolved. These questions survive the Bush administration, as the United States continues to launch aerial strikes against al Qaeda and President Obama has indicated his intention to continue the use of preventative detention and military trials even after Guantánamo is closed. Military victory is not possible, but good faith application of authority from the law of war can effectively complement traditional criminal law in combating the threat. Even if the Geneva Conventions do not formally apply to this conflict, there is a large body of customary international law, including many Geneva rules, that should. If the war is limited to those adversaries authorized by Congress, and the opposition is validly classified under the law of war, the military (but not the CIA) can legally target members of al Qaeda and detain them without requiring a criminal trial. But the conditions of that detention and any trials that are held must meet international standards, which they currently do not. Good faith application of law of war rules also offers better protections for civil liberties than other proposed solutions, such as national security courts, which offer less due process than regular federal trials. Such measures start down a slippery slope of compromising legal standards on the basis of expediency that can be avoided through the faithful application of existing international law.

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[F]or winning friendships, of which for many reasons nations as well as individuals have need, a reputation for having undertaken war not rashly nor unjustly, and of having waged it in a manner above reproach, is exceedingly efficacious. No one readily allies himself with those in whom he believes that there is only a slight regard for law, for the right, and for good faith.

- Hugo Grotius, 1625¹

INTRODUCTION

Although more than eight years have elapsed since the September 11, 2001 attacks (9/11) precipitated the so-called “war on terror,” core legal issues concerning the conduct of America’s response remain unresolved. Immediately following 9/11, the Bush administration perceived the need for extraordinary measures to protect the nation, evidenced by its adoption of the “war” nomenclature and the extensive roles assigned to the military in combating, detaining, and interrogating suspected terrorists.² But these measures were largely divorced from legal rules governing their application; administration lawyers saw the law of war as a relic unsuited to the post-9/11 challenge and crafted narrow interpretations in an effort to avoid its constraints.³ Their opinions allowed the government to function in something close to a law-free zone while exercising substantial executive power.⁴

This approach met with strident criticism. Many critics called for strict conformance to existing law, particularly the 1949 Geneva Conventions,⁵ while some questioned whether the fight against terrorism could be a war at all.⁶ Predictably, these disputes carried

1. HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, Prolegomena (1625), reprinted in G.G. Wilson, *Grotius: Law of War and Peace*, 35 AM. J. INT’L L. 205, 217 (1941).

2. See SETH G. JONES & MARTIN C. LIBICKI, *HOW TERRORIST GROUPS END* 105-06 (2008).

3. See Dan Nguyen & Christopher Weaver, *The Missing Memos*, PROPUBLICA, <http://www.propublica.org/special/missing-memos> (listing Bush administration legal opinions relied upon on for its conduct of the “war on terror”) (last visited Nov. 22, 2009).

4. See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 64-65 (2007); JANE MAYER, *THE DARK SIDE* 150-51 (2008).

5. See PHILIPPE SANDS, *LAWLESS WORLD* 144-50, 161 (2005).

6. See Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT’L L. & POL. 1, 1-4 (2004).

over into the courts. A host of cases have been litigated, including five already decided by the Supreme Court,⁷ yet basic questions still lack definitive answers. If this is actually a “war,” what international law provisions apply? Who can be killed or captured? How long can those captured be held, and under what conditions? How may prisoners be interrogated? Can detainees be criminally tried? If so, by what courts and on what charges?

The Supreme Court’s decisions have actually confused, rather than clarified, these issues. In 2004, for example, Justice O’Connor’s plurality opinion in *Hamdi v. Rumsfeld* held that detention of enemy fighters was a “fundamental incident” of waging the conflict Congress sanctioned in the September 2001 Authorization for the Use of Military Force (AUMF).⁸ Although not explicitly stated in the opinion, the authority discussed is logically sourced in the law of war governing international armed conflict.⁹ Two years later in *Hamdan v. Rumsfeld*, however, Justice Stevens’s plurality opinion seemed to hold that the conflict is “non-international,” governed by Common Article 3 of the 1949 Geneva Conventions.¹⁰ But the law of war provides no authority for detention in noninternational conflicts; it must be provided by domestic law, and no U.S. law addresses this issue or could logically govern extraterritorial conduct in this realm.¹¹ And in its 2008 *Boumediene v. Bush* decision, the Court held that Guantánamo detainees had a constitutional right to habeas corpus review but gave little guidance as to the substantive law to be applied in judging their cases on the merits.¹²

7. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

8. 542 U.S. at 518-19.

9. *Id.* at 518-21.

10. 548 U.S. at 629-31.

11. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 52-57 (1st ed. 1993); Kevin Jon Heller, *Three Thoughts on the Preliminary Detention Report*, OPINIO JURIS, July 21, 2009, <http://opiniojuris.org/2009/07/21/three-thoughts-on-the-preliminary-detention-report/>. But see Ryan Goodman, *Rationales for Detention: Security Threats and Intelligence Value*, 85 INT’L L. STUD. (forthcoming 2009), available at <http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanSecurityThreatsandIntelligenceValue.pdf>.

12. 128 S. Ct. at 2274-77.

The need to resolve these questions did not end with the Bush administration. President Obama has pointedly distanced himself from some of his predecessor's more controversial positions, including a move toward abandoning the "war on terror" terminology,¹³ committing to close Guantánamo,¹⁴ and backing away from the overbroad categorization of adversaries as "enemy combatants."¹⁵ But Obama has indicated that he intends to preventively detain some suspected terrorists¹⁶ and continues relying on legal authority sourced in the law of war, conducting missile strikes against suspected militants sheltering in Pakistan's remote tribal regions, and announcing plans to resume military commission trials.¹⁷

This Article endeavors to address this void by critically assessing what rules should govern a "war" against al Qaeda conducted in accordance with international law. It will show that, properly applied, the law of war can play a key role in dealing with the al Qaeda threat. The widespread view that 9/11 constituted an actual armed attack offered the opportunity to go beyond the one-time strikes that followed previous terrorist bombings.¹⁸ Unlike the metaphorical wars against crime or drugs, or the stillborn "war on illiteracy,"¹⁹ key international organizations and Congress endorsed

13. See, e.g., Michael Isikoff & Mark Hosenball, *War on Words*, NEWSWEEK, Feb. 4, 2009, <http://www.newsweek.com/id/183251>.

14. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/.

15. See Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay at 7-9, *In re Guantánamo Bay Detainee Litigation*, Nos. 05-0763, 05-1646, 05-2378 (D.D.C. Mar. 13, 2009), available at <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

16. Remarks at the National Archives and Records Administration, DAILY COMP. PRES. DOC. 200900388 (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

17. Statement on Military Commissions, DAILY COMP. PRES. DOC. 200900364 (May 15, 2009), available at <http://gpo.gov/fdsys/pkg/DCPD-200900364/pdf/DCPD-200900364.pdf>.

18. See Timothy D. Hoyt, *Military Force*, in *ATTACKING TERRORISM* 162, 164 (Audrey Kurth Cronin & James M. Ludes eds., 2004) (identifying modern terrorist incidents resulting in U.S. military responses); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 132-33 (2008).

19. Remarks in a Leadership Forum in Jacksonville, Florida, 37 WEEKLY COMP. PRES. DOC. 1297 (Sept. 10, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010910-14.html>.

legal application of the armed conflict paradigm.²⁰ This can be a real war.

For a short time it might have even been just a war. It might have been “won” if al Qaeda’s leadership had been killed or captured before escaping into Pakistan’s tribal regions.²¹ But even then military force may have been inadequate. Terrorist cells embedded in western nations, for example, can only be countered through intelligence and law enforcement activity, not warfare.²² In any event, by early 2002 the primary threat was geographically dispersed into nonhostile states that are not legitimate battlegrounds,²³ and a “war on terror” could not be won by force of arms alone. International cooperation is now a key requirement, and “war” at most can only be one component of a larger legal and political effort.²⁴ Nevertheless, authority can be drawn from the law of war for direct military action, preventive detention, and even military trials as adjuncts to regular criminal procedure in ways that could assist in achieving legitimate national security objectives while maintaining international public support.²⁵

In fairness to the Bush administration, some law of war provisions, including the full 1949 Geneva Conventions,²⁶ may be

20. See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. III 2003)) [hereinafter AUMF]; Lord Robertson, Secretary General, NATO, Statement of NATO’s Position on 9/11 Attack Against U.S. (Oct. 2, 2001) (transcript available at <http://www.nato.int/docu/speech/2001/s0111002a.htm>) (declaring that 9/11 constituted an armed attack invoking collective self-defense).

21. See, e.g., Spencer S. Hsu & Walter Pincus, *U.S. Warns of Stronger Al-Qaeda*, WASH. POST, July 12, 2007, at A1; Rod Nordland et al., *How al-Qaeda Slipped Away*, NEWSWEEK, Aug. 19, 2002, at 34.

22. See JONES & LIBICKI, *supra* note 2, at 103-08, 122-23.

23. See *infra* Part IV.B.

24. See, e.g., Philip Kapusta & Donovan Campbell, *How To Contain Radical Islam*, BOSTON GLOBE, July 27, 2008, at K1.

25. See *infra* Parts IV and V.

26. 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 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 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 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 IV].

inapplicable to fighting a nonstate actor like al Qaeda.²⁷ But this is a far cry from holding that no legal rules govern. There are many other treaties and a large body of customary law that provided the basis for thousands of war crimes trials following World War II.²⁸ The Martens Clause, first incorporated in the 1899 Hague Land Warfare Regulations, explicitly addresses gaps in law of war treaty coverage:

Pending the preparation of a more complete code of the laws of war, the high contracting parties deem it opportune to state that, in cases not provided for in the rules adopted by them, the inhabitants and the belligerents shall remain under the protection of and subject to the principles of the law of nations, as established by the usages prevailing among civilized nations, by the laws of humanity, and by the demands of public conscience.²⁹

In other words, customary international law and other accepted norms govern when there are treaty gaps.³⁰ The law of war takes precedence over conflicting general rules as a *lex specialis* during armed conflict, but international human rights law remains applicable, governing when there are lacunae in law of war coverage.³¹ So even if government lawyers correctly identified gaps in Geneva Convention applicability, this should have been only the beginning of their work. Legal compliance is an important element in securing necessary international cooperation in the fight against terrorists. To succeed, the United States must be seen as a just party battling

27. See David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 76-78 (2006).

28. See generally YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 6-12 (2004).

29. This is the effective 1907 language, differing only slightly from the original 1899 version. Second Hague Peace Conference Convention Regarding the Laws of and Customs of Land Warfare, Oct. 18, 1907, pmbl., 36 Stat. 2277, 3 Martens (3d) 461, *reprinted in* 2 AM. J. INT'L L. 90, 91-92 (Supp. 1908) [hereinafter Hague Regulations].

30. See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 34 (2d ed. 2000).

31. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

an unprincipled enemy,³² as President Bush implicitly recognized when promising to provide a clear choice “between good and evil.”³³

Unfortunately, it has not worked out that way. The world stood with the United States after 9/11. Today global revulsion over conditions at Guantánamo, harsh interrogation techniques sometimes constituting actual torture, and substandard military trials have impaired support for the U.S. fight against al Qaeda³⁴—not to mention the political costs of the invasion of Iraq, although legally the invasion is a separate conflict.³⁵ The damage is not confined to counterterrorism. As Joseph Nye has articulated, the ability to positively influence global events is composed of “soft power”—which includes moral influence—as much as military force; and in alienating much of the world, U.S. conduct has seriously compromised this authority.³⁶

The challenge of successfully combating al Qaeda calls for the accurate identification of applicable law and the synergistic employment of rules from the crime and war paradigms to best advantage. This Article will argue that good faith application of the law of war ultimately provides better protection for both security and civil liberties and greater prospects of maintaining public support, than either continuing to operate within legal loopholes or creating a new hybrid legal regime. Proposed measures, such as special preventive detention and national security courts,³⁷ start down a slippery slope of compromising established legal standards on the basis of expediency. Further curtailment of civil liberties may

32. See Peter Bergen & Lawrence Footer, *Defeating the Attempted Global Jihadist Insurgency: Forty Steps for the Next President To Pursue Against Al Qaeda, Like-Minded Groups, Unhelpful State Actors, and Radicalized Sympathizers*, 618 ANNALS AM. ACAD. POL. & SOC. SCI. 232, 243 (2008).

33. See George W. Bush, U.S. President, Remarks at a Photo Opportunity with the National Security Team (Sept. 12, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010912-4.html>).

34. See Joseph P. “Dutch” Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 1 (2004).

35. Conflict against al Qaeda was authorized by the September 2001 AUMF. See *supra* note 20. The war against Iraq was authorized by the Authorization for Use of Military Force Against Iraq Resolution of 2002. Pub. L. No. 107-243, 116 Stat. 1498 (2002).

36. See generally JOSEPH S. NYE, JR., *SOFT POWER* (2004).

37. See generally BENJAMIN WITTES, *LAW AND THE LONG WAR* (2008); Greg Bruno, *Backgrounder: Closing Guantánamo*, N.Y. TIMES, Feb. 13, 2009, http://www.nytimes.com/cfr/world/slot1_20090212.html.

seem unlikely today,³⁸ but it was wholly unthinkable eight years ago that torture would be approved by our highest leaders.³⁹ So we should be loathe to undertake any further departure from existing legal standards. The law of war provides a defined set of substantive rules that can act as a check on government abuses, backed by the possibility of criminal prosecutions for their violation.

Part I provides foundational analysis, reviewing the threat and evaluating three existing legal regimes that have been proposed to combat terrorism—traditional law enforcement, piracy, and war—and concludes that no one regime can adequately meet the full challenge. Part II then considers how a “war” employed as a partial answer would be legally defined. Part III analyzes the recognized legal classifications that can be assigned to al Qaeda fighters, combatant and civilian, and the contested issue of whether “unlawful combatant” is a valid law of war categorization. Agreement on classification is a critical prerequisite for law of war compliance, determining in large part who can be killed, detained, and tried and under what conditions. Part IV examines *jus in bello* (the law governing conduct of hostilities) considerations, including how these rules might be applied to advantage the United States. Finally, Part V considers how selected measures could be implemented in the near term. Because Congress has authorized the use of military force, the President has the necessary authority to act *in conformance with established law*. Future terrorist attacks on the United States are highly likely. If a sound legal foundation for responding to them is not laid now, the foreseeable result will be more government overreactions, compounding the harm already done to civil liberties, national security, and America’s global reputation.

I. THE CHALLENGE

It has become *de rigueur* to assert that “9/11 changed everything.”⁴⁰ This view typically assumes that it was the magni-

38. *But see* Lara Lakes Jordan, *Senators: FBI Rules Could Target Innocent People*, USA TODAY, Aug. 20, 2008, http://www.usatoday.com/news/washington/2008-08-20-926742133_x.htm.

39. *See generally* MAYER, *supra* note 4, at 64 (describing White House meetings debating the reach of executive power following 9/11).

40. *See, e.g.*, Richard B. Cheney, U.S. Vice President, Remarks at McChord Air Force Base

tude of the attacks per se that required a military response.⁴¹ But law enforcement has successfully responded to threats ranging from the rogue individual who destroyed the Oklahoma City Federal Building to the first terrorist use of an actual weapon of mass destruction—the nerve gas attacks by Japan’s Aum Shinrikyo cult.⁴² What really distinguished 9/11 was that it demanded that the United States finally undertake decisive measures against al Qaeda, and the size and location of al Qaeda dictated that a substantial military effort was required.⁴³ The number of fighters trained in al Qaeda’s Afghan camps has been measured in the tens of thousands.⁴⁴ Even if most of these were fighters trained for other causes, al Qaeda likely had several thousand fighters of its own.⁴⁵ And in the fall of 2001, just getting to the camps required combating the Taliban, which harbored al Qaeda in exchange for training and financial support,⁴⁶ making it perhaps the world’s only “terrorism sponsored state.”⁴⁷

The problem goes beyond apprehension. Criminal law requires the government to promptly present evidence to a judicial official to justify an arrest, subsequent detention, and charges.⁴⁸ When dealing with a remote and secretive adversary such as al Qaeda, however, it may be impossible to present evidence in accordance with the standards and timeliness requirements of ordinary

(Dec. 22, 2003) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031223-1.html>).

41. See, e.g., Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 201-05 (2003).

42. See, e.g., Kyle B. Olson, *Aum Shinrikyo: Once and Future Threat?*, 5 EMERGING INFECTIOUS DISEASES 513 (1999), available at <http://www.cdc.gov/ncidod/EID/vol5no4/pdf/olson.pdf>.

43. See RICHARD A. CLARKE, *AGAINST ALL ENEMIES* 274 (2004).

44. The International Institute for Strategic Studies estimates al Qaeda trained more than 20,000 fighters between 1996 and 2001. Int’l Inst. for Strategic Stud., *Al-Qaeda One Year On*, STRATEGIC COMMENTS, Sept. 2002, available at <http://www.iiss.org/EasysiteWeb/getresource.axd?AssetID=514&type=full&servicetype=Attachment>; see also MAYER, *supra* note 4, at 73 (quoting a Rand official’s estimate that the camps trained more than 70,000 with approximately 10 percent receiving advanced terrorism training).

45. See Lucien J. Dhooge, *A Previously Unimaginable Risk Potential: September 11 and The Insurance Industry*, 40 AM. BUS. L.J. 687, 696 (2003).

46. See, e.g., 9/11 Commission Staff, *Overview of the Enemy*, in UNDERSTANDING THE WAR ON TERROR 38, 43-44 (James F. Hoge Jr. & Gideon Rose eds., 2005).

47. Glazier, *supra* note 27, at 78.

48. See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

criminal procedure rules. Individuals may be captured under circumstances implying affiliation with a hostile organization but without sufficient evidence to support an actual criminal prosecution, while the practical need to conduct timely interrogation for tactical intelligence purposes argues against the provision of Miranda warnings and any right to unilaterally curtail questioning.⁴⁹ Military forces unschooled in evidence collection and chain of custody requirements may capture suspected terrorists under operational conditions precluding “crime-scene” discipline. Physical evidence will likely require evaluation for intelligence value before turn over to law enforcement personnel. Some evidence, such as electronic intercepts or informers, may be legitimately classified to protect the means of collection, complicating use in open trials.

Despite these potential difficulties, criminal prosecution of suspected terrorists offers a number of advantages, including broad international public support, and it merits serious consideration whenever it might be possible. But the challenges just identified also suggest the importance of exploring legal alternatives, and so the following sections will examine in turn criminal prosecution, the potential of applying the piracy paradigm to terrorism, and application of the law of war to combating al Qaeda.

A. Terrorism Under Criminal Law

There is an indisputable legal basis for treating terrorists as criminals. Thirteen global treaties, dating back to 1963, address specific terrorist acts, suppression of financing, and the nuclear terror threat.⁵⁰ These accords typically call upon parties to criminalize specified conduct under national law and create a “no safe haven” rule, requiring any state finding an offender within its jurisdiction to prosecute or extradite them.⁵¹ Many of these treaties

49. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 227 (2001) (statement of Victoria Toensing, Deputy Assistant Att’y Gen. of the United States), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=128&wit_id=84.

50. See United Nations, UN Action To Counter Terrorism, <http://www.un.org/terrorism/instruments.shtml> (last visited Nov. 22, 2009).

51. United Nations Office on Drugs and Crime, United Nations Counter-Terrorism Conventions, <http://www.unodc.org/unodc/en/terrorism/conventions.html> (last visited Nov. 22, 2009).

implicitly authorize universal jurisdiction for terrorist offenses. The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, for example, provides that “[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him.”⁵² The no safe haven principle was reiterated in a post-9/11 Security Council resolution⁵³ and the subsequent Global Counter-Terrorism Strategy adopted by the General Assembly.⁵⁴ Taken together, these accords combine to create a legal obligation for nations to cooperate by responding to terrorism within the criminal law paradigm.

Federal, and in many cases state, criminal law provides significant authority to prosecute terrorists. First, any act of violence committed within the United States should constitute a violation of ordinary criminal law, such as prohibitions against murder or assault. This subject matter jurisdiction includes the ability to prosecute would-be perpetrators under the full spectrum of inchoate offenses recognized by the American legal system including solicitation, conspiracy, and attempts.⁵⁵ Similarly, terrorist acts committed on U.S. registered ships and aircraft and at American facilities abroad likely fall within the set of federal crimes proscribed when committed within the “special maritime and territorial jurisdiction of the United States.”⁵⁶

These general offenses are now supplemented by a number of specific federal law provisions such as the criminalization of aircraft piracy.⁵⁷ Other federal statutes dealing specifically with terrorism are found in Chapter 113B of Title 18,⁵⁸ such as prohibitions on

52. United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167, 168 [hereinafter Convention on Internationally Protected Persons].

53. S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

54. See G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

55. See Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1 (2005); T. O'Connor, *Incomplete (Inchoate) Crimes* (Nov. 3, 2006), <http://www.apsu.edu/oconnort/3010/3010lect03a.htm>.

56. See 18 U.S.C. § 7 (2006) (defining the special maritime and territorial jurisdiction of the United States).

57. 49 U.S.C. § 46502 (2006).

58. 18 U.S.C. § 2331 et seq. (2006).

acquiring missile systems intended to destroy aircraft⁵⁹ or radiological dispersal devices.⁶⁰ This chapter also includes two different schemes for prosecuting the provision of material support to terrorism. Section 2332d⁶¹ criminalizes dealings with governments designated as supporters of international terrorism under the International Export Administration Act of 1979,⁶² whereas § 2339A⁶³ and § 2339B⁶⁴ deal with provision of support to terrorists and terrorist organizations respectively. Providing material support to a government that supports terrorism may also violate the International Emergency Economic Powers Act (IEEPA).⁶⁵ John Walker Lindh, “the American Taliban,” was prosecuted under both IEEPA for supporting the Taliban and 18 U.S.C. § 2339B for supporting al Qaeda.⁶⁶

The robust scope of applicable laws is reflected in a 2006 study finding that suspected terrorists had been prosecuted for 104 different criminal offenses.⁶⁷ Scores of alleged terrorists have been successfully prosecuted⁶⁸ while proponents of alternate schemes overstate some of the concerns about federal courts. Postulated difficulties applying Fourth Amendment search and seizure provisions on the battlefield, for example, should have little impact given that courts hold those protections generally inapplicable outside the United States.⁶⁹ Experienced prosecutors also believe most legitimate concerns about classified information disclosure should be addressed by the Classified Information Protection Act (CIPA) provisions.⁷⁰

59. *Id.* § 2332g.

60. *Id.* § 2332h.

61. *Id.* § 2332d.

62. 50 U.S.C. app. § 2405 (2000).

63. 18 U.S.C. § 2339A (2006).

64. *Id.* § 2332B.

65. 50 U.S.C. §§ 1701-1707 (2006).

66. McCormack, *supra* note 55, at 20.

67. See CTR. ON LAW & SEC., TERRORIST TRIAL: REPORT CARD: U.S. EDITION 3 (Karen J. Greenberg et al. eds., 2006), available at <http://www.lawandsecurity.org/publications/TTRCComplete.pdf>.

68. See, e.g., Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 851, 879-88 (2007).

69. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

70. See, e.g., RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE 81-90 (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>;

A key advantage of civilian criminal trials is the sense of legitimacy they confer on U.S. treatment of terrorists and the resulting facilitation of international cooperation. Some nations take issue with American use of capital punishment,⁷¹ but virtually all would agree that U.S. trials comply with human rights accords such as the International Covenant on Civil and Political Rights (ICCPR).⁷² The fact that more than 100 nations have extradition treaties with the United States⁷³ represents a significant vote of confidence. And since terrorism-related treaties generally contain explicit authorization for transfers between countries lacking a dedicated extradition agreement,⁷⁴ the United States theoretically can get custody of terrorists from almost any nation *when* willing to act within the bounds of criminal law.

Nevertheless, criminal prosecution cannot always provide extended incapacitation of those affiliated with terrorism. Fundamentally, criminal law imposes punishment upon offenders for completed unlawful conduct, requiring more than mere dangerousness or evil intentions to establish liability to detention. Reflecting the law's retributive component, sentence length is tied to the severity of the offense committed.⁷⁵ Criminal law thus has difficulty providing the basis for prolonged preventive detention of persons who may desire to commit terrorist acts but who have not yet engaged in substantive wrongdoing at the time of their capture.

A second challenge, particularly in the post-9/11 environment, is obtaining the requisite admissible evidence to support credible convictions. In the first two Guantánamo military commission cases completed, those of David Hicks and Salim Hamdan, the government's evidence consisted primarily of inculpatory statements made by the accused in custody.⁷⁶ Given detainee treatment that included

Kelly Anne Moore, Editorial, *Take Al Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, available at <http://www.nytimes.com/2007/08/21/opinion/21moore.html>.

71. See, e.g., Sandra Babcock, *The Global Debate on the Death Penalty*, 34 HUM. RIGHTS MAG. 17 (2007), available at <http://www.abanet.org/irr/hr/spring07/babcospr07.html>.

72. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

73. U.S. extradition treaties are listed in 18 U.S.C. § 3181 (2006), available at http://www.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00003181----000-notes.html.

74. See, e.g., Convention on Internationally Protected Persons, *supra* note 52.

75. See James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 WM. & MARY L. REV. 289, 302-04 (2007) (discussing federal sentencing guidelines).

76. Evidence against Hicks is discussed in his plea colloquy. Transcript of Record at 117-

the use of highly coercive interrogation practices and prolonged isolation, *any* such statements are likely to be inadmissible as involuntary under federal criminal procedure standards.⁷⁷ In the seminal voluntariness case, *Bram v. United States*, merely removing the suspect's clothes—tame treatment compared to many Guantánamo interrogations⁷⁸—was sufficient to bar admission of his subsequent statement.⁷⁹ In January 2009, the military commission convening authority, Susan Crawford, revealed that she had refused to approve criminal charges against the alleged twentieth 9/11 hijacker, Mohammed al Qahtani, because he had been subjected to treatment amounting to torture in U.S. custody.⁸⁰ Trying leading al Qaeda figures like Khalid Sheikh Mohammad, who was reportedly subjected to repetitive waterboarding and serious threats made against his family members,⁸¹ could place a federal judge in a real dilemma. If such a case relied primarily on statements made by detainees in custody, following the letter of U.S. law would likely require a directed verdict of acquittal for lack of admissible evidence. But judges would be seriously pressured to give juries the chance to convict, incentivizing departures from criminal procedure standards and rules of evidence. If such pressures prevailed, the result could be long-term damage to the American legal system, unlikely to be cabined to terrorist trials.⁸²

21, *United States v. Hicks*, No. 04-0001 (Military Comm'n, Apr. 19, 2007), available at <http://www.defenselink.mil/news/commissionsHicks.html> (follow "Record of Trial" hyperlink; cites are to the Adobe Acrobat Reader pagination). For the evidence against Hamdan, see Carol J. Williams, *Hamdan Case Is Built On His Own Words*, L.A. TIMES, July 25, 2008, at A10, available at <http://www.latimes.com/news/nationworld/nation/la-na-hamdan25-2008jul25,3,354252.story>.

77. See, e.g., *Spano v. New York*, 360 U.S. 315 (1959) (holding that Petitioner's will was overborne by official pressure, fatigue, and sympathy falsely aroused; his confession was not voluntary and its admission into evidence violated the Due Process Clause); *Bram v. United States*, 168 U.S. 532 (1897) (holding that a statement by the accused to a police officer that evidently was not voluntary was inadmissible).

78. See MICHAEL RATNER & ELLEN RAY, *GUANTANAMO: WHAT THE WORLD SHOULD KNOW* 41-43 (2004).

79. 168 U.S. at 561-66.

80. William Glaberson, *Detainee Was Tortured, A Bush Official Confirms*, N.Y. TIMES, Jan. 14, 2009, at A22.

81. CLIVE STAFFORD SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE* 30 (2007).

82. See, e.g., Charles D. Weisselberg, *Terror in the Courts: Beginning To Assess the Impact of Terrorism-Related Prosecutions on Domestic Criminal Law and Procedure in the USA*, 50 CRIME L. & SOC. CHANGE 25 (2008), available at <http://www.springerlink.com/content/f84450541w77j984/fulltext.pdf>.

Federal trials are thus a credible option only for those detainees who have engaged in actual serious criminal conduct and who can be convicted without using statements made under coercive interrogation. When practicable, however, regular civilian trials will enjoy the greatest legitimacy and best facilitate international cooperation in the fight against al Qaeda and therefore should be the preferred option.

B. Terrorism as Piracy?

Some commentators have advocated past treatment of pirates as a general model for dealing with contemporary terrorists.⁸³ This idea has appeal given some common characteristics of pirates and terrorists. But proponents generally misunderstand the actual law involved and fail to recognize that it ultimately invokes the requirement for traditional criminal law employment.

Pirates, like al Qaeda, are fundamentally nonstate actors involved in criminal conduct, but are too powerful and geographically remote to be countered by traditional law enforcement. Historically, “wars” against pirates were largely the task of navies, sometimes augmented by land forces when dealing with pirate colonies or crews fleeing ashore to escape capture.⁸⁴

There are other parallels between the history of piracy and terrorism. Despite an oft-quoted Roman maxim that pirates are “common enemies of mankind [*hostes humani generis*],”⁸⁵ the reality of piracy history was quite different through much of the post-Renaissance era, *if it was ever true*.⁸⁶ Between the sixteenth and eighteenth centuries, states made substantial use of private armed vessels, frequently, but far from always, legally cloaked as “privateers” authorized to make captures on the high seas by government commissions⁸⁷ known as “letter[s] of marque and reprisal.”⁸⁸ Nations generally asserted the legitimacy of their own sea warriors while

83. See, e.g., Douglas R. Burgess Jr., *The Dread Pirate Bin Laden*, LEGAL AFF., July-Aug. 2005, http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp.

84. See generally PETER EARLE, *THE PIRATE WARS* (2003).

85. ALFRED P. RUBIN, *THE LAW OF PIRACY* 17 (2d ed. 1998) (brackets in original).

86. See *id.* at 91-94.

87. See EARLE, *supra* note 84, at 21-23, 89-100, 211.

88. LINDLEY S. BUTLER, *PIRATES, PRIVATEERS, & REBEL RAIDERS OF THE CAROLINA COAST* 12 (2000).

branding their adversaries as pirates; a label that the Spaniards attached to British hero Sir Francis Drake⁸⁹ and that the British attached to America's naval icon John Paul Jones.⁹⁰ Even outright pirates often enjoyed informal support from political figures.⁹¹ The infamous Atlantic pirate Edward Teach, better known as Blackbeard, reportedly purchased the favor of North Carolina's colonial governor and chief justice.⁹² Teach was only taken when the governor of neighboring Virginia exceeded his legal authority and dispatched an expedition into Carolina waters.⁹³ After he fought to the death rather than surrender, Teach's head was brought back to Virginia for public display as a deterrent to other pirates.⁹⁴

Proponents of treating terrorists as pirates inevitably focus on the violent component of these efforts, implicitly wishing to see bin Laden treated like Blackbeard. John Yoo, for example, has said:

Why is it so hard for people to understand that there is a category of behavior not covered by the legal system? What were pirates? ... What were slave traders? Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment.⁹⁵

Some indirect historical support can be found for these views. Several sixteenth-century texts use language facially characterizing pirates as outlaws,⁹⁶ for example, and some modern authors have pointed to a passage from a 1762 law dictionary as support for their summary killing: "A Piracy attempted on the Ocean, if the Pirates are overcome, the Takers may immediately inflict a Punishment by hanging them up at the Main-yard End; though this is understood

89. EARLE, *supra* note 84, at 22.

90. SAMUEL ELIOT MORISON, JOHN PAUL JONES: A SAILOR'S BIOGRAPHY 214-18 (1959). Jones, however, was actually a commissioned U.S. Navy officer and not a privateer.

91. *See, e.g.*, EARLE, *supra* note 84, at 114-15.

92. *See* BUTLER, *supra* note 88, at 39-42.

93. *Id.* at 43-44.

94. *Id.* at 44-46.

95. Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14 & 21, 2005, at 106, 114 (quoting John Yoo). Yoo is not alone in this misconception. *See, e.g.*, Jon M. Paladini, *Terrorism: War or Piracy?*, ARIZ. ATT'Y, Feb. 2004, at 38, available at http://www.myazbar.org/AZAttorney/PDF_Articles/0204WinnersTerror.pdf.

96. *See* RUBIN, *supra* note 85, at 28-41.

where no legal judgement may be obtained.”⁹⁷ A critical distinction, however, is that this authority applied only to the exceptional case of a civilian merchant vessel that managed to defeat an attack on itself but could not safely detain captured pirates.⁹⁸ It was a very limited authorization based on strict necessity, inapplicable to those pursuing pirates under governmental authority. The 1695 pirate-hunting commission awarded to Captain William Kidd, who ironically crossed the line and was hanged as a pirate himself, is instructive in this regard:

[We] do hereby give and grant unto you the said captain William Kidd ... full power and authority to apprehend, stop, and take into your custody ... all such pirates ... which you shall meet And if they will not submit without fighting, then you are by force to compel them to yield. And we do also require you to bring, or cause to be brought such pirates ... as you shall seize, to a legal trial; to the end they may be proceeded against according to law.⁹⁹

The law was quite clear. Accused pirates and necessary witnesses had to be shipped back to Britain for trial in Admiralty court until 1700, when Parliament authorized their trials abroad before seven-member “commissions.”¹⁰⁰ The statute provided explicit due process guidelines, requiring commissioners to swear an oath that they would “impartially try and adjudge the Prisoner” and that they had no personal interest in the case, requiring all testimony to be in the defendant’s presence, allowing cross-examination, and permitting the production of defense witnesses.¹⁰¹ A royal official dispatched to North America to brief colonial authorities on the implementation of local trials stressed these formal requirements and made it clear that under the law, any conviction as a pirate required either the testimony of two witnesses or the accused’s confession.¹⁰² American

97. Jonathan M. Guttoff, *The Law of Piracy in Popular Culture*, 31 J. MAR. L. & COM. 643, 647 (2000); Bret Stephens, *Why Don't We Hang Pirates Anymore?*, WALL ST. J., Nov. 25, 2008, at A13.

98. Stephens, *supra* note 97.

99. Commission to William Kidd (Jan. 26, 1695), in RUBIN, *supra* note 85, at 106.

100. EARLE, *supra* note 84, at 21-23; RUBIN, *supra* note 85, at 113.

101. The Piracy Act of 1700, 11 & 12 Will. 3, c.7, §§ 5, 6 (Eng.), reprinted in RUBIN, *supra* note 85, at 401, 402.

102. Erwin C. Surrency, *The Procedure for the Trial of a Pirate*, 1 AM. J. LEGAL HIST. 251,

readers will recognize this as the same heightened standard of proof enshrined in the U.S. Constitution for conviction of treason.¹⁰³ This 300-year old law arguably provided accused pirates more rights than the Guantánamo military commission rules do.¹⁰⁴

In 1819, Congress adopted a terser statute than the British prototype, authorizing “public armed vessels” to seize “piratical” vessels and permitting the circuit courts to try those who have committed “the crime of piracy, as defined by the law of nations,” on the high seas, if they are “brought into or found in the United States.”¹⁰⁵ An 1820 amendment added additional text but kept the basic provisions intact.¹⁰⁶ The characterization of piracy in these statutes remains in the U.S. Code today.¹⁰⁷ Other 1820 language criminalizing slave trafficking contradicts Yoo’s assertion that that offense was also outside the law.¹⁰⁸ Indeed, the first modern international courts were created to deal with the disposition of slave traffickers’ assets while the slavers themselves were prosecuted under national laws.¹⁰⁹

The due process accorded pirates is highlighted in the 1834 Boston trial of the last major Atlantic pirate, Captain Don Pedro Gibert of the slaver *Panda*, for robbing and attempting to burn the American ship *Mexican* in 1832 with its crew locked below decks.¹¹⁰ Gibert was tried with eleven of his crew; Supreme Court Justice

252, 255 (1957).

103. See U.S. CONST. art. III, § 3, cl. 1.

104. See David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315 (2007) (comparing post-MCA commissions with courts-martial); Glazier, *supra* note 18, at 185-93 (critiquing the commissions as modified by the Military Commissions Act of 2006 (MCA)); David Glazier, *Kangaroo Court or Competent Tribunal: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2015-23, 2085-90 (2003) (critiquing the original post- 9/11 military commission process).

105. Piracy Act of March 3, 1819, ch. 77, 3 Stat. 510, *reprinted in* RUBIN, *supra* note 85, at 411-12. Congress first proscribed piracy in confusing language in section 8 of a 1790 statute establishing federal crimes. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. The Supreme Court interpreted these provisions in *United States v. Palmer*, 16 U.S. 610 (1818), leading Congress to clarify its intent in the 1819 act. See RUBIN, *supra* note 85, at 158.

106. Piracy Act of May 15, 1820, ch. 113, 3 Stat. 600, *reprinted in* RUBIN, *supra* note 85, at 419-20 [hereinafter Piracy Act of 1820].

107. 18 U.S.C. § 1651 (2000).

108. Piracy Act of 1820, *supra* note 106.

109. Jenny S. Martinez, *Slave Trade on Trial*, BOSTON REV., Sept.-Oct. 2007, at 12, available at <http://bostonreview.net/BR32.5/martinez.php>.

110. EARLE, *supra* note 84, at 237-38.

Joseph Story presided in his role as a circuit judge.¹¹¹ Because the original purpose of the Panda's voyage was slave trading and not piracy, Story charged the jury that each defendant, other than the captain and mate, who were responsible for any criminal acts because of their command roles, must be proven to have actually participated in overt acts onboard the *Mexican*.¹¹² Ultimately, the captain, mate, and five others were convicted; those acquitted included the cabin boy, found to be too young at fifteen to be culpable, and a slave cook, found to have had no free choice about participating.¹¹³

Acts of terrorism, which are intended for political ends, cannot be directly prosecuted under piracy statutes, which require a private profit motive.¹¹⁴ Nevertheless, terrorism has enough in common with piracy, including the trend towards universal jurisdiction, that there is no obvious bar to patterning its legal treatment on that of piracy. That is, military force could be sanctioned as a lawful means to apprehend terrorists outside U.S. territory who would then be subject to regular criminal laws governing detention and trial. This approach was adopted in the U.S. expedition against Pancho Villa early in the twentieth century.¹¹⁵

There are two practical difficulties that limit the overall utility of this approach. The first is that it implicates all the challenges to regular federal trials previously discussed, requiring a solid body of admissible evidence to justify pretrial confinement and to secure criminal convictions that will hold up on appeal. The U.S. Navy reportedly turned captured Somali pirates over to Kenya for prosecution in 2006 specifically to avoid having to undertake a federal trial.¹¹⁶ The Navy released a second group outright despite the pirates having fired upon U.S. personnel.¹¹⁷ In this case, the lack

111. See *Sentence of the Pirates*, BOSTON CENTINEL, Dec. 17, 1834, reprinted in N.H. PATRIOT & STATE GAZETTE, Dec. 22, 1834, at 2.

112. See *Judge Story's Charge—Conviction of the Pirates*, BOSTON EVENING GAZETTE, reprinted in N.H. SENTINEL, Dec. 4, 1834, at 2.

113. See *id.* at 3-4.

114. See Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Torts Statute*, 80 NOTRE DAME L. REV. 111, 142 (2004).

115. See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 385-86 (2008).

116. Stephens, *supra* note 97.

117. See Adriana Stuijt, *Nine Somalian Piracy Suspects Released by US Navy*, DIGITAL J., Mar. 3, 2009, <http://digitaljournal.com/article/268439> (discussing the release of nine suspected pirates after finding insufficient evidence to convict them).

of evidence satisfying required elements of the crime of piracy precluded foreign trial, although the United States potentially could have prosecuted them for assaulting federal officials.¹¹⁸

The second overarching limitation is that enforcement of piracy laws is geographically constrained. By definition, the crime of piracy can be committed only in international waters,¹¹⁹ but, more critically, its enforcement is also so limited. Outside their own territorial waters, nations can generally only deal with pirates on “the high seas or [] any other place outside the jurisdiction of any State.”¹²⁰ The U.S. Navy’s international law manual informs commanders that foreign territory is inviolable and that, within territorial waters, authority to apprehend and try pirates belongs exclusively to the coastal state.¹²¹ This limitation has been a real factor historically. Lacking legal authority to pursue pirates ashore, the British and American navies, for example, were unable to effectively suppress Cuba-based pirates in the early nineteenth century until Spain began to provide troops to round up those driven ashore by naval actions.¹²² Due to the lack of an effective national government in Somalia, the U.N. Security Council made a special exception with respect to that country in 2008, authorizing the pursuit of pirates into Somalian waters.¹²³ But, absent the same level of international support, the territorial issue would be a particular show stopper to U.S. efforts to capture modern terrorists, who are virtually all land-based. Use of the military in foreign territory without explicit legal sanction from either the U.N. Security Council or the nation whose territory would be violated would constitute a hostile belligerent act.¹²⁴ Indeed, a largely forgotten aspect of the Pancho Villa expedition is that it ultimately

118. Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L. L. 1, 4 n.3, 17 (2007). The U.S. could have tried them for assault on a federal officer but elected not to do so.

119. Piracy is now defined in article 101 of the United Nations Convention on the Law of the Sea, Oct. 12, 1982, 1833 U.N.T.S. 397.

120. *See id.* art. 100.

121. DEP’T OF THE NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 3, at 3-6 (2007).

122. EARLE, *supra* note 84, at 238-47.

123. S.C. Res. 1846, ¶ 10(a), U.N. Doc. S/RES/1846 (Dec. 2, 2008).

124. Grayson Kirtz, *The Enforcement of Security*, 55 YALE L.J. 1081, 1093 (1945-1946).

brought U.S. troops into direct combat against Mexican national forces, nearly precipitating outright war between the two nations.¹²⁵

Despite its romantic appeal, the piracy paradigm appears to be of limited legal advantage as a tool in the fight against terrorists. It does, however, highlight the fact that there is no obvious bar to criminal prosecution of persons that the military captures outside the United States in settings that the law of war does not explicitly regulate. That body of law places specific limits on the trial of those captured in an actual armed conflict in accordance with rules discussed in Parts III and IV.

C. Terrorism Under the Law of War

The law of war does offer authority that can be employed to advantage in the fight against those terrorists whose activity rises to the level of an “armed conflict.” Most obviously, an “enemy” may be attacked with lethal force with no obligation to give prior warning.¹²⁶ Good faith offers of surrender must be accepted, but soldiers, unlike policemen, need not ask for surrender before shooting.¹²⁷ Provided noncombatants are not the direct object of attack, the enemy may be engaged even when likely to result in civilian casualties so long as they are not “disproportionate” to the military advantage to be gained.¹²⁸ Invocation of this paradigm also authorizes a liberal preventative detention regime and the authority to subject adversaries violating law of war provisions to military trials. Detainees famously need give only “name, rank, and serial number,”¹²⁹ but there are no explicit limits on the length or subject of interrogation or any requirement for access to counsel as there would be with criminal detention.¹³⁰

Given the significant challenges posed applying criminal law to a geographically remote—and frequently fanatical—enemy like al

125. Joe Griffith, *In Pursuit of Pancho Villa 1916-1917*, <http://www.hsgng.org/pages/pancho.htm> (last visited Nov. 22, 2009).

126. See DINSTEIN, *supra* note 28, at 27.

127. *Id.* at 145.

128. *Id.* at 13, 119-20.

129. This is the popular formulation; date of birth is also included in the treaty. Geneva III, *supra* note 26, art. 17.

130. See, e.g., U.K. MINISTRY OF DEF., *THE MANUAL OF THE LAW OF ARMED CONFLICT* § 8.34 (2004).

Qaeda, there is obvious advantage to at least selective law of war employment as tools in the fight. The real problem with the Bush administration's approach was not the choice of the war paradigm, but rather treatment of war as a regime in which "the gloves came off"¹³¹ and legal constraints on U.S. action were ignored.

The idea that war frees a nation from legal constraints is far from new. Grotius observed almost four centuries ago: "That war is irreconcilable with all law is a view held not alone by the ignorant populace; expressions are often let slip by well-informed and thoughtful men which lend countenance to such a view. Nothing is more common than the assertion of antagonism between law and arms."¹³²

But even the most cursory study of the law of war quickly reveals the fallacy of this view. Virtually every society that has left a written record has documented legal constraints on the conduct of hostilities.¹³³ The law of war constitutes a major portion of eighteenth- and nineteenth-century international law treatises.¹³⁴ The explosive growth of international law in the twentieth century, including the proliferation of multinational organizations and international courts, as well as the development of such new fields as international environmental and human rights law, relegated the law of war to relative obscurity. Today, it typically occupies just a single chapter in an international law text.¹³⁵ This is ironic given the equally expansive development of the law of war during this same era¹³⁶ but may explain why expertise on this subject seems so limited among policymakers.

131. MAYER, *supra* note 4, at 39-41 (describing the CIA's initial leading role).

132. GROTIUS, *supra* note 1, at 206.

133. See A. P. V. ROGERS, *LAW ON THE BATTLEFIELD 1* (1996).

134. See, e.g., EMER DE VATEL, *THE LAW OF NATIONS* (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (dedicating one of four "books" to "war"). The law of war takes up two-thirds of Henry Halleck's 1861 treatise. H. W. HALLECK, *INTERNATIONAL LAW: OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* 311-892 (D. Van Nostrand 1861).

135. See, e.g., MALCOLM N. SHAW, *INTERNATIONAL LAW* 1054-81 (5th ed. 2003) (discussing "International Humanitarian Law" or *jus in bello* in a single twenty-eight page chapter in a 1200 page text).

136. The ICRC's website compiles 102 treaties and documents central to the development of international humanitarian law—which is also termed as the law of war. See ICRC, *International Humanitarian Law—Treaties & Documents*, <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (last visited Nov. 22, 2009). Eighty-eight of these treaties and documents date after 1900. *Id.*

1. *Practical Roots of the Law of War*

Most modern commentators view the law governing armed conflict as primarily humanitarian, assuming it is the product of lawyers and organizations such as the International Committee of the Red Cross (ICRC).¹³⁷ Indeed, many academics and humanitarians use International Humanitarian Law (IHL) as a synonym for the law of war¹³⁸ rather than in its traditional sense as a subset of that corpus juris.¹³⁹ The reality is that the law of war reflects a great degree of pragmatism, striking a balance between humanitarian concerns and military necessity,¹⁴⁰ and warriors contributed substantially to its formulation.¹⁴¹

As early as the Revolutionary War, Americans assumed leading roles in law of war adherence and development, recognizing practical and political advantages from U.S. compliance. George Washington insisted on better treatment for captured British, and particularly Hessian, personnel than Americans received, both to incentivize surrender and to secure broad political support for the U.S. cause.¹⁴² Predating the Constitution, the 1785 Treaty of Amity and Commerce with Prussia incorporated rules for the treatment of prisoners that were far ahead of their time.¹⁴³ Article 24 requires that prisoners:

[s]hall be placed in ... wholesome situations; [] they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the

137. DAVID KENNEDY, *OF WAR AND LAW* 6 (2006).

138. Even the ICRC, the international champion of humanitarian law, now defines IHL as synonymous with the law of war. Fact Sheet, ICRC, What is International Humanitarian Law? (July 31, 2004), [http://www.icrc.org/Web/eng/siteeng0.nsf/html/humanitarian-law-factsheet/\\$File/What_is_IHL.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/html/humanitarian-law-factsheet/$File/What_is_IHL.pdf).

139. See GÉZA HERCZEGH, *DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW* 56-57 (1984).

140. DINSTEIN, *supra* note 28, at 13, 16-20.

141. David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 *RUTGERS L. REV.* 121, 129-32 (2005).

142. DAVID HACKETT FISCHER, *WASHINGTON'S CROSSING* 375-79 (2004).

143. Treaty of Amity and Commerce, U.S.-Pruss., art. xxiv, July 9-Sept. 10, 1785, 8 Stat. 84, available at http://avalon.law.yale.edu/18th_century/prus1785.asp.

common men be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for their own troops.¹⁴⁴

The rest of the world took over a century to catch up. These rules are consistent with provisions of the Third Geneva Convention of 1949, considered to have achieved universal status with 194 state ratifications.¹⁴⁵

U.S. military leaders were responsible for other law of war advances as well. General Winfield Scott realized the critical importance of Mexican acquiescence to the American presence in their country during the Mexican War.¹⁴⁶ Measures he implemented to ensure the success of his mission were subsequently codified as the basis of what became the “laws of belligerent occupation.”¹⁴⁷ The first effort to capture the customary law of war in a form suitable for guiding military conduct in the field was the “Lieber Code,”¹⁴⁸ authored by Columbia professor Francis Lieber under sponsorship of the Army’s General in Chief, Henry Halleck.¹⁴⁹ Issued to the Union Army under cover of General Order No. 100 in April 1863, this seminal effort formed the basis of the next half-century of law of war development, culminating in the Hague Land Warfare Regulations, which remain valid law today.¹⁵⁰

Faithful adherence to international law regulating both the resort to and conduct of war remained a hallmark of U.S. policy through the twentieth century. Despite a few egregious violations such as My Lai, U.S. policy was to comply with formal law of war requirements during the Vietnam conflict even when it meant refraining from striking otherwise lawful targets or increasing the risk to U.S.

144. *Id.*

145. See Official Statement, ICRC, A Milestone for International Humanitarian Law (Sept. 22, 2006), <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/geneva-conventions-statement-220906>.

146. Glazier, *supra* note 141, at 140.

147. See *id.* at 139-46.

148. FRANCIS LIEBER, U.S. DEP’T OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> [hereinafter LIEBER CODE].

149. Glazier, *supra* note 141, at 129, 151-60.

150. *Id.* at 129-33. Violation of key Hague articles is explicitly criminalized in the War Crimes Act of 1996. 18 U.S.C. § 2441(c)(2) (2006).

personnel.¹⁵¹ President George H. W. Bush sought explicit U.N. authorization for launching the first Gulf War,¹⁵² and law of war compliance was emphasized during all aspects of military operations.¹⁵³ These measures were important elements in maintaining world public support for the war and the cohesion of the broad coalition of participating forces.¹⁵⁴

It is only post-9/11 that U.S. leaders have consciously advocated a policy seeking to narrow the scope of, or even except the United States from following, law of war provisions governing conduct of an armed conflict.¹⁵⁵ Legal analyses and presidential declarations seeking to place the Taliban and al Qaeda outside law of war protections¹⁵⁶ are unprecedented in U.S. history.¹⁵⁷

2. *War as a Protector of Civil Liberties*

Terrorist threats pose a fundamental dilemma for modern governments. The U.N. Secretary General's High-level Panel on Threats, Challenges, and Change recognized the protection of innocent citizens as a core governmental responsibility.¹⁵⁸ But practical difficulties in preventing and prosecuting terrorist acts have led some governments to accept departures from ordinary criminal procedure and fundamental rights. Examples include extended detention without charges or based on lower standards of evidence, "enhanced" interrogations, and special courts for trying

151. See W. Hays Parks, *Linebacker and the Law of War*, AIR U. REV. (1983), available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1983/jan-feb/parks.html>.

152. Comm. on Int'l Sec. Affairs of the Ass'n of the Bar of the City of N.Y., *The Legality and Constitutionality of the President's Authority To Initiate an Invasion of Iraq*, 41 COLUM. J. TRANSNAT'L L. 15, 23-24 (2002).

153. Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 63, 63-64 (Peter Rowe ed., 1993).

154. Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, SURVIVAL, Spring 2002, at 7, 14.

155. See, e.g., PHILIPPE SANDS, TORTURE TEAM 2-5 (2008).

156. See, e.g., [Draft] Memorandum from John Yoo, Deputy Assistant Att'y Gen., for William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002), available at <http://www.slate.com/features/whatistorture/pdfs/020109.pdf>.

157. James B. Staab, *The War on Terror's Impact on Habeas Corpus: The Constitutionality of the Military Commissions Act of 2006*, 2008 J. INST. JUST. INT'L STUD. 280, 285 n.24.

158. HIGH-LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, Executive Summary 4 (2004).

terrorists.¹⁵⁹ Russia is currently rolling back the recently renewed right to jury trials for suspected terrorists.¹⁶⁰ Fundamentally, these policies are based on expediency rather than any principled grounds, raising the quandary of how these precedents are to be cabined if determined to be legal with respect to terrorists. The U.S. government has engaged in a metaphorical “war on drugs” for several decades, including limited use of military forces in support of law enforcement.¹⁶¹ What would prevent the President and Congress, acting together, from deciding that this threat now required warrantless offshore detention of suspected traffickers, exemption from Fifth Amendment protections, and trial by special tribunals offering less due process than Article III courts? This approach risks starting down a slippery slope in which established constitutional criminal procedure protections could be denied to an expanding set of groups deemed to pose special dangers to the public welfare.

A principle advantage of the war paradigm is that it is self-limiting. There are formal legal prerequisites under both domestic and international law for its lawful invocation. Domestically, the Framers were careful to divide the King’s war powers between the President and Congress. The President as Commander in Chief can direct the conduct of hostilities as “first general and first admiral”¹⁶² and can take immediate action to defend the United States.¹⁶³ The President may well have the authority to conduct a limited strike justified as an urgent response to a terrorist attack, for example. But the power to commit the United States to an extended conflict, and to authorize incidental measures permitted by the law of war such as preventive detention, was entrusted to Congress, which has among its enumerated powers the power “[t]o declare War ... and to make Rules concerning Captures on Land and Water.”¹⁶⁴

159. See Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT’L L. 56, 58 (2007).

160. Agence France-Presse, *Russia: Jury Trials Under Attack*, N.Y. TIMES, Dec. 6, 2008, at A8.

161. See Maj. Darren C. Huskinsson, *The Air Bridge Denial Program and the Shootdown of Civil Aircraft Under International Law*, 56 A.F. L. REV. 109, 112 (2005).

162. David Luban, *On The Commander in Chief Power*, 81 S. CAL. L. REV. 477, 483 (2008).

163. See *id.* at 568.

164. U.S. CONST. art. I, § 8.

Formal declarations of war have been rare. Congress has enacted a total of eleven such declarations in just five wars: the War of 1812, the Mexican War (1846), the Spanish-American War (1898), World War I (1917) (WWI), and World War II (1941-42) (WWII).¹⁶⁵ Many commentators think they are now a thing of the past.¹⁶⁶ But Michael Ramsey persuasively argues that the Constitution's use of "declare war" should be read to confer on Congress the power to authorize actions that create a state of war, not merely to issue a formalistic "proclamation."¹⁶⁷ Congress has specifically authorized recent conflicts through joint resolutions generally agreed as satisfying the constitutional requirement.¹⁶⁸

The Constitution imposes no explicit limits on when Congress can authorize war, but we would surely agree that it could not, say, declare a "war on illiteracy" authorizing the military to bomb poorly performing schools or shoot their teachers. Other constitutional provisions, such as the Fifth Amendment protection of life and property, presumably would bar the declaration of war against domestic entities, whereas political processes would check the most egregious abuses abroad. Decisions to go to war almost reflexively follow actual attacks like Pearl Harbor and 9/11, but there has been serious debate in "optional" cases such as the two Iraq wars. One hopes Congress ultimately would fail to authorize the expansive application of "war" as a legal regime to criminal organizations such as drug cartels or even terrorist groups lacking the robust military capacities of al Qaeda.

This does not mean that courts should be powerless to check excesses. Logically, the definition of war and the rules for its commencement found in international law should be considered to have been implicitly incorporated in the constitutional language.

165. War was declared separately on Germany and Austria-Hungary in WWI and against Japan, Germany, Italy, Bulgaria, Hungary, and Rumania in WWII. JENNIFER K. ELSEA & RICHARD F. GRIMMET, CRS REPORT FOR CONGRESS: DECLARATIONS OF WAR AND AUTHORIZATIONS FOR USE OF MILITARY FORCE 2-3 (2007).

166. See generally Naval Historical Center, Instances of Use of the United States Forces Abroad, 1798-1993, <http://www.history.navy.mil/wars/foabroad.htm> (last visited Nov. 22, 2009).

167. MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 237-38 (2007).

168. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057 (2005). The Congressional Research Service believes there are differences between a declaration of war and authorizations for use of force in their domestic law implications. See ELSEA & GRIMMET, *supra* note 165, at 28-29.

Resort to “war” thus should be limited by these legal constraints as well. While Part II.B. will conclude that wars can be fought against nonstate actors, they still are limited to politically motivated conflicts between defined armed groups.

After more than a century of substantial legal developments, international rules regulating the resort to war, or *jus ad bellum*, now impose significant constraints on the ability of states to embark in armed conflict. War was considered a lawful sovereign right of states until the early twentieth century,¹⁶⁹ but that view is now obsolete. Parties to the 1928 Kellogg-Briand Pact agreed to “condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy.”¹⁷⁰ The Nuremberg Judgment, subsequently ratified by the United Nations General Assembly,¹⁷¹ affirmed that this made war “illegal in international law” and that those launching an aggressive war “commit[] a crime in so doing.”¹⁷² Today, Articles 2(3)-(4) and 51 of the 1945 United Nations Charter explicitly limit use of force to cases of self-defense.¹⁷³ After the recent Iraq War, U.N. Secretary-General Kofi Annan assembled an international blue-ribbon panel to consider, inter alia, how literally Article 51, confirming the right of self-defense against an armed attack, was to be construed. Its report concluded that it preserved the previously extant right of self-defense against imminent threats.¹⁷⁴ It repudiated President Bush’s broader preemptive war doctrine,¹⁷⁵ recognizing only the narrow right to respond to truly immediate threats outlined in correspondence between U.S. and British officials following the 1837 Caroline incident.¹⁷⁶ As articulated by Daniel Webster, anticipatory use of

169. See JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 38-39 (2004).

170. Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, available at <http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm>.

171. G.A. Res. 95 (I), U.N. Doc. A/64/Add. 1 (Dec. 11, 1946).

172. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 462 (1948).

173. U.N. Charter arts. 2(3)-(4), 51.

174. *Report of the High-level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 at 54-55 (Dec. 2, 2004).

175. Compare *id.*, with THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15-16 (2002).

176. Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defence in*

force requires a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁷⁷

Today, nations thus are entitled to invoke the law of war’s authority in self-defense only following an actual attack or the rare situation meeting the Caroline imminency requirements. These limitations highlight how the war paradigm can be more readily cabined than proposed alternatives. The U.N. Security Council specifically cited the United States’s right of self-defense after 9/11,¹⁷⁸ and NATO determined that it constituted an armed attack on a member—the only one in the alliance’s sixty-year history.¹⁷⁹ These organizations will not endorse a military response to less robust threats, providing a potential check on inappropriate resort to the war paradigm.

The war paradigm offers another unique advantage; abuse of the authority it provides may constitute war crimes prosecutable under domestic¹⁸⁰ and international law.¹⁸¹ Even though there have been few U.S. war crimes prosecutions since WWII, this liability nevertheless can have an actual deterrent effect, evidenced by both the growing numbers of international prosecutions and the efforts of Bush administration lawyers to try to place U.S. actions outside the scope of law of war coverage.¹⁸²

Since the law of war might be applied in responding to the 9/11 perpetrators’ attack, the larger challenge is determining both what it permits and what constraints it should impose on U.S. conduct. The first step is to define the nature and scope of the conflict.

Contemporary International Law, 1 MISKOLC J. INT’L L. 104 (2004); *see also infra* note 199 and accompanying text.

177. Letter from Daniel Webster to Mr. Fox (Apr. 24, 1841), *quoted in* Rouillard, *supra* note 176.

178. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (referencing the inherent right of self-defense); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (same).

179. *See* Robertson, *supra* note 20.

180. *See* 18 U.S.C. § 2441 (2006) (codifying the War Crimes Act of 1996).

181. *See generally* KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2001) (discussing conduct proscribed under the law of war).

182. *See* GOLDSMITH, *supra* note 4, at 12.

II. DEFINING AND CHARACTERIZING THE WAR

A. *Defining the Conflict*

Any serious effort to apply the law of war logically begins by identifying the parties involved because this law focuses on defining their rights and responsibilities.¹⁸³ Only then can rational discussions occur about who can lawfully be subject to targeting, capture, detention, and military trial.

The precise identity of the opponents has frequently been clouded in the “war on terror.” President Bush termed the commencement of combat in Afghanistan as “part of our campaign against terrorism.”¹⁸⁴ In March 2002, he spoke of fighting “terror networks of global reach.”¹⁸⁵ By September of that year he had adopted the “war on terror” terminology and sought to incorporate Iraq within its ambit.¹⁸⁶ The Bush administration subsequently endeavored to treat the legally distinct conflicts against Iraq and al Qaeda as a single “war.” The official White House website, for example, headlined presidential speeches on Iraq as “[discussions on the] Global War on Terror”¹⁸⁷ and requests for supplemental appropriations for Afghanistan and Iraq were jointly requested for “the global war.”¹⁸⁸

Ultimately, of course, it is not the political rhetoric, but rather the legal definition of the conflict that matters. The “war on terror” nomenclature was simply nonsensical. Terrorism is a means of warfare, not a political entity against which a conflict can be contested. The Obama administration reportedly decided in March 2009 to use the vague euphemism “overseas contingency operations”

183. See Gabor Rona, *An Appraisal of U.S. Practice Relating to “Enemy Combatants,”* 10 Y.B. OF INT’L HUMANITARIAN L. 232, 238 (2007).

184. Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, 2 PUB. PAPERS 1211, 1211-12 (Oct. 9, 2001).

185. Remarks on the Six-Month Anniversary of the September 11th Attacks, 1 PUB. PAPERS 374, 376 (Mar. 11, 2002).

186. Remarks by President Bush and President Alvaro Uribe of Colombia in Photo Opportunity, 2 PUB. PAPERS 1656, 1657 (Sept. 25, 2002).

187. The White House, President Bush Discusses Global War on Terror (Mar. 19, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080319-2.html>.

188. The White House, President Requests \$72.4 Billion for the Global War on Terror (Feb. 16, 2006), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/02/20060216-11.html>.

instead of “war on terror,”¹⁸⁹ but this phrase ultimately could be even worse, allowing essentially any extraterritorial military activity to be included in its ambit.

The Framers entrusted the authority to define the nation’s conflicts to Congress as the power to “declare war,” and Congress has defined the enemy in this conflict. The AUMF, enacted on September 18, 2001, limited the scope of the war to “those nations, organizations, or persons [who] ... planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” or harbored those who did.¹⁹⁰ President Bush carefully stopped just short of claiming Iraq fell within the AUMF’s scope even though his administration wanted to link Saddam Hussein to 9/11 and obtained separate congressional authorization for the 2003 invasion.¹⁹¹ It is now well established that al Qaeda was the “organization” responsible for the 9/11 attacks while Afghanistan’s Taliban harbored them, making these two groups the legitimate adversaries.¹⁹² The “War Against al Qaeda and the Taliban” (WAQT) is thus a much more apt description of the conflict than the “war on terror.” The latter term was particularly disadvantageous because it allowed other nations to link their own, often heavy-handed, efforts to suppress indigenous resistance movements with the U.S. conflict, cloaking their actions with a claim of legitimacy, and implying an alliance in a common fight.¹⁹³

Faithful adherence to international law also results in a narrow definition of the conflict. Given the U.N. Charter’s strict restriction on the use of force to self-defense, conflict must be implicitly limited to fighting one’s attacker as well as any direct allies who take its side. International law thus should impose the same limits on the post-9/11 conflict as the AUMF does, limiting the adversaries to al Qaeda and the Taliban.

189. Scott Wilson & Al Kamen, ‘Global War on Terror’ Is Given New Name, WASH. POST, Mar. 25, 2009, at A4.

190. AUMF, *supra* note 20.

191. Glazier, *supra* note 27, at 62-63.

192. *Id.* at 63.

193. See generally Benn Criticises ‘War on Terror,’ BBC NEWS, Apr. 16, 2007, http://news.bbc.co.uk/2/hi/uk_news/politics/6558569.stm.

B. War Against a Nonstate Actor?

Defining the conflict as the WAQT raises the question of whether a nation, the United States, can legally wage war against a nonstate actor, al Qaeda.¹⁹⁴ Up through at least the middle of the eighteenth century the answer would seem to have been a fairly clear “no.” Emer de Vattel’s 1758 classic, *The Law of Nations*, declared that “the sovereign power alone is possessed of authority to make war.”¹⁹⁵ Five years later Jean Jacques Rousseau was equally explicit, declaring “each State can have only other States, and not men, as enemies since no true relationship can be established between things of different natures.”¹⁹⁶ Nevertheless, the American colonials expected the law of war to apply to their conflict against Great Britain.¹⁹⁷ The Supreme Court held the law of war applicable to hostilities between the self-proclaimed Venezuelan Republic and Spain in 1820 although the U.S. government had not recognized Venezuelan independence.¹⁹⁸ The Caroline incident, which resulted in the establishment of modern rules concerning the right of self-defense, involved conflict between Britain and private citizens.¹⁹⁹ And the United States made the seminal contribution to modern law of war development, the Lieber Code, in a civil war against an enemy that it denied had any legal status.²⁰⁰ Nevertheless, the Union employed belligerent measures taken from the international law of war in the conflict, including the blockade of Confederate ports, which it enforced against ships from all nations. These developments may not seem revolutionary given that most of these adversaries self-identified as nations and arguably could meet

194. It should not matter whether the Taliban was an actual state in 2001. If it was, there is no doubt as to its qualification as a conflict party; if it was not, the same logic applicable to al Qaeda should apply.

195. VATTEL, *supra* note 134, at 471.

196. 4 JEAN JACQUES ROUSSEAU, *Social Contract*, in THE COLLECTED WRITINGS OF ROUSSEAU 128, 136 (Roger D. Masters & Christopher Kelly eds., Judith R. Bush et al. trans., University Press of New England 1994).

197. FISCHER, *supra* note 142, at 377.

198. *The Josefa Segunda*, 18 U.S. (5 Wheat.) 338, 357-58 (1820).

199. NEFF, *supra* note 115, at 389.

200. Glazier, *supra* note 141, at 147, 151-53.

statehood criteria,²⁰¹ but they reveal a clear trend toward recognition of nonstates as belligerents.²⁰²

By the end of the nineteenth century, the United States had fought wars against Indian tribes and Philippine insurrectionists despite refusing them full sovereign recognition.²⁰³ The latter conflict also made significant, albeit little known, contributions to law of war development, including war crimes trials under the theory of command responsibility.²⁰⁴ The trend toward treating nonstate actors as conflict parties expanded in the twentieth century. By the 1970s, the U.N. General Assembly decided that “national liberation movements” were entitled to status as belligerents in international armed conflicts.²⁰⁵ This concept was codified in the 1977 Additional Geneva Protocol I.²⁰⁶ Although the United States is not a party to the Protocol, 168 other nations are, indicating its wide acceptance.²⁰⁷

The evolution of the law of war to incorporate nonstate actors within the realm of belligerents is fully consistent with overall trends in international law. States were its only recognized subjects in the nineteenth century. But in the twentieth century, international law expanded to give formal legal status to intergovernmental organizations, regulate states’ treatment of their own nationals, and impose individual criminal liability for an expanding set of violations.²⁰⁸ A nonstate group, particularly one controlling no actual territory, may not always be entitled to demand treatment as a belligerent, but nothing should prevent a state fighting against a

201. See, e.g., ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 16 (2005) (identifying statehood criteria as “(a) a permanent population; (b) defined territory; (c) a government; and (d) capacity to enter into relations with other states”).

202. Eibe H. Riedel, *Recognition of Belligerency*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 167, 168 (1982).

203. See, e.g., Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 13-14 (1990).

204. See David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 52 (2005).

205. G.A. Res. 3103 (XXVIII), U.N. Doc. A/RES/3103 (Dec. 12, 1973).

206. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3, June 8, 1977, 1125 U.N.T.S. 438 [hereinafter Protocol I].

207. See ICRC, *supra* note 136.

208. See, e.g., AUST, *supra* note 201, at 198-99, 233-36, 268-72.

nonstate opponent from choosing to recognize their adversary as a belligerent and invoking the law of war in the conflict.²⁰⁹

C. Characterization of the Conflict

Assuming that the United States can engage in a war against al Qaeda, it is necessary to characterize the conflict in terms that identify the set of law of war rules that apply. Traditionally, conflicts have been bifurcated as either “international” or “non-international.” The former were contested between nation states, whereas the latter term applied to conflicts between a government and internal opposition within its own territory, for example, a civil war. In the days when international law addressed only sovereign states, nations were on sound ground resisting the imposition of external regulation to these internal conflicts. Nations steadfastly reserved the right to treat internal opponents as common criminals to be dealt with strictly as a matter of domestic law.²¹⁰ As a result, international law has never defined opposition participants in these conflicts as “combatants” or “prisoners of war” and contains no authority for detention of captured fighters. This is left entirely to domestic law. The United States has taken two different tacks in past conflicts that international law would have allowed it to characterize as “noninternational,” choosing either to treat the adversaries under existing criminal law, as it did in the Whiskey Rebellion, or adopting international belligerency rules, as it ultimately did during the Civil War.²¹¹ U.S. law thus contains no explicit provisions governing detention in noninternational conflict.

As international law expanded to provide more protections for noncombatants, humanitarians concluded that similar measures would be equally valuable in internal conflicts, and the ICRC sought to encourage steps in this direction in the early twentieth century.²¹² It was only after World War II, however, when the Nuremberg judgment, the Universal Declaration of Human Rights, and the 1948 Genocide Convention explicitly extended the reach of interna-

209. See GREEN, *supra* note 30, at 318.

210. See, e.g., ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 65, 69 (2008).

211. BURRUS M. CARNAHAN, ACT OF JUSTICE 41-42, 61 (2007).

212. *Id.* at 21-22.

tional law into internal state conduct, that significant headway was made in this realm.²¹³ Common Article 2 (CA2)²¹⁴ of the four Geneva Conventions of 1949 facially limits the applicability of the full treaties to “armed conflict which may arise between two or more of the High Contracting Parties.”²¹⁵ Although the ICRC wanted the conventions to apply to internal conflicts, the Diplomatic Conference compromised by drafting a stand-alone article providing a limited set of protections.²¹⁶ The resulting Common Article 3 (CA3) applies only to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”²¹⁷ Highly abbreviated compared to the full conventions, it gives several basic protections to those “taking no active part in the hostilities,” including fighters who have surrendered or otherwise been rendered “*hors de combat*” (for example, incapacitated by wounds or sickness).²¹⁸ These include a generic requirement for “humane” treatment and express prohibitions against further violence, degrading treatment, or trials lacking fundamental judicial guarantees.²¹⁹ These protections were further expanded and more specifically enumerated in the second Additional Geneva Protocol of 1977.²²⁰ President Reagan submitted this treaty for Senate approval in 1987,²²¹ where U.S. action is still pending.²²² It has been ratified by 164 other nations in the interim.²²³

213. GEOFFREY BEST, HUMANITY IN WARFARE 290-301 (1980).

214. The first three articles of the four 1949 Geneva Conventions are identical and thus are commonly referred to as “Common Articles” 1, 2, and 3. See, e.g., Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 65 (2009).

215. Geneva I, *supra* note 26, art. 2; Geneva II, *supra* note 26, art. 2; Geneva III, *supra* note 26, art. 2; Geneva IV, *supra* note 26, art. 2.

216. LINDSEY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 23-29 (2002).

217. Geneva I, *supra* note 26, art. 3; Geneva II, *supra* note 26, art. 3; Geneva III, *supra* note 26, art. 3; Geneva IV, *supra* note 26, art. 3.

218. See *supra* note 217.

219. See *supra* note 217.

220. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 1, 4, 5, June 8, 1977, 1125 U.N.T.S. 609-17 [hereinafter Protocol II].

221. Letter from President Ronald Reagan to the U.S. Senate, Jan. 29, 1987, S. TREATY DOC. NO. 100-2 (1987).

222. U.S. Department of State, Treaties Pending in the Senate, <http://www.state.gov/s/l/treaty/pending> (last visited Nov. 22, 2009).

223. ICRC, *supra* note 136.

The Supreme Court deferred decision about whether the full Conventions apply to Guantánamo detainees in its 2006 *Hamdan v. Rumsfeld* decision but held that, at minimum, CA3 would.²²⁴ The Court reasoned that conflict with the nonstate affiliated al Qaeda was literally “noninternational,” that is, not between nations.²²⁵ Although linguistically appealing, this ignores CA3's explicit language requiring a qualifying conflict to occur within the territory of *one* state.²²⁶ The Court also ignored two basic considerations implicit in the logic for limiting the application of international law to internal conflicts. First, internal combatants violate a duty of loyalty to the state they are fighting. Second, they will get the procedural due process provided by the country's domestic legal system when prosecuted as ordinary criminals. Today, protections accorded by national legal systems must comport with human rights mandates, most commonly the ICCPR,²²⁷ which has 162 state parties, including the United States.²²⁸

The WAQT, however, is not confined to any single state, and only two detainees held during the conflict, Jose Padilla and Ali al-Marri, were captured on American soil.²²⁹ Since 9/11, the United States has used military force against al Qaeda at least in Afghanistan, Pakistan, and Yemen,²³⁰ exercised belligerent rights of visit and search on the high seas,²³¹ and detained and tried captured enemies in Guantánamo, Cuba.²³² Al Qaeda's membership also transcends nationality, described by one scholar as “an assemblage of Moslem fanatics from all parts of the world.”²³³ Few of these individuals

224. 548 U.S. 557, 629-31 (2004).

225. *Id.* at 628-30.

226. *See, e.g.*, Geneva I, *supra* note 26, art. 3.

227. ICCPR, *supra* note 72.

228. Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, July 22, 2008, 99 U.N.T.S. 171, *available at* [http://treaties.un.org/doc/Publication/MTDSG/Volume I/Chapter IV/IV-4.en.pdf](http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf).

229. Emily Bazelon, *Here We Go Again*, SLATE, Mar. 3, 2009, <http://www.slate.com/id/12793/>.

230. *See, e.g.*, Record of Achievement, Waging and Winning the War on Terror, <http://georgewbush-whitehouse.archives.gov/infocus/achievement/chap1.html> (last visited Nov. 22, 2009).

231. *Cf.* Lt. Col. Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 116 (2007) (explaining the legal justification for such exercises).

232. SANDS, *supra* note 5, at 144.

233. DINSTEIN, *supra* note 28, at 49.

could be said to owe any loyalty to the United States. The United States also denies the applicability of normal criminal procedure, holding detainees subject to military commissions deliberately chosen to avoid the formal due process protections of regular civilian courts, or even those of courts-martial.²³⁴ The United States also asserts that ICCPR mandates do not extend beyond national boundaries, denying its applicability to Guantánamo.²³⁵ Treating the WAQT as “noninternational” thus defies logic. Adopting this approach requires asserting that international law gives a nation the right to dispatch military force into the sovereign territory of another state, kill or capture members of a nonstate group who are not citizens of the capturing power, and remove them to territory under its control where it may detain and try them under whatever laws it chooses to enact for this purpose with essentially no greater legal obligation other than to treat them “humanely.” After more than a half-century of extensive development of both international humanitarian and international human rights law, it simply strains credibility to make such a claim.

Semantically, the most apt description for the conflict with al Qaeda would be a “transnational” conflict because the adversary consists of individuals of diverse nationalities while the conflict locus transcends national borders. This term has the additional advantage of implicitly highlighting that the full Geneva Conventions may not be expressly applicable under the language of CA2. Since the term “transnational conflict” is not yet legally recognized, there is no explicit international agreement on the specific rules that would govern. If the choice is between the rules governing “international” and “noninternational” conflict, then the former clearly seems the better alternative. Even if many law of war treaties might not facially apply to such a conflict, per the Martens Clause “the principles of the law of nations, as they result from the usages established among civilized peoples,”²³⁶ for example, customary international law of war rules, should apply. It would be perverse to assert that international law had evolved to permit nonstate entities to be the subject of a war yet did not extend its

234. SANDS, *supra* note 5, at 144, 146.

235. *Id.* at 145.

236. *See supra* note 29 and accompanying text.

rules regulating conflict to such a war, particularly given the law's concurrent extension to both nonstate organizations and the protection of individual human rights. Regardless of how the WAQT is ultimately termed, the customary law of war as it has evolved from the Lieber Code through the present day should govern.

Although the Geneva Conventions may not apply to the WAQT *as treaty law*, their universal ratification may argue for finding that most convention provisions are now *customary law*.²³⁷ The ICRC completed an extensive study of customary law of war rules in 2005.²³⁸ Because of the Conventions' wide ratification, the study focused on rules contained in less widely accepted accords.²³⁹ It did conclude, however, that "the great majority of the provisions of the Geneva Conventions, including Common Article 3, are considered to be part of customary international law."²⁴⁰ Judges of the International Criminal Tribunal for the Former Yugoslavia have gone further, holding that the full texts of the 1949 Conventions are now fully incorporated into customary law.²⁴¹

Most of the 1977 Additional Geneva Protocols should also now have customary law status. The United States has refused to ratify Protocol I but considers many of its provisions to be customary law.²⁴² For example, the Bush administration's first State Department Legal Advisor, William H. Taft, IV, confirmed that the United States accepts the core protections contained in Protocol I's Article 75 as customary law,²⁴³ a view shared almost universally by scholars.²⁴⁴ These views are shared by the ICRC study, which

237. *But see* Theodore Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 367 (1987) (noting the difficulty in establishing the requisite *opinio juris* that Convention provisions have assumed customary law status when almost all states are obligated to follow them as a matter of treaty law).

238. *See generally* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005).

239. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, 87 INT'L REV. RED CROSS 175, 187 (2005).

240. *Id.*

241. KITTICHAISAREE, *supra* note 181, at 139.

242. *See, e.g.*, Memorandum of the Department of Defense Law of War Working Group (May 8, 1986) (on file with author); Michael Matheson, Deputy Legal Advisor, Dep't of State, Speech at American University (Jan. 22, 1987), in 2 AM. U.J. INT'L L. & POL'Y 419, 420 (1987).

243. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 321-22 (2003).

244. *See, e.g.*, DINSTEIN, *supra* note 28, at 32; Roberts, *supra* note 154, at 16.

concluded that “the basic principles of Additional Protocol I have been very widely accepted, more widely than the ratification record ... would suggest.”²⁴⁵ Even if the application of the full scope of IHL to the WAQT is not mandatory, there should be no grounds for other nations to object to the United States electing to do so as long as it does so in a consistent manner. This has effectively been the approach adopted by the U.S. military for several decades, and the military has never encountered any international objection.²⁴⁶ The United States thus should be free to select appropriate measures from the full scope of permissible courses of action under the law of war but should also be subject to virtually all the constraints it imposes.

III. CLASSIFYING THE ENEMY IN THE “WAR ON TERROR”

The most controversial aspect of U.S. conduct in the “war on terror” to date has been the treatment of detainees. Drawing on arguably misconstrued precedent,²⁴⁷ until early 2009 the United States classified detainees as “enemy combatants”—a term Department of Defense officials coined in 2002,²⁴⁸ which lacks understood meaning under the law of war—and treated them as falling outside any recognized protective regime.²⁴⁹ In February 2002, President Bush accepted the Department of Justice’s view that neither al Qaeda nor the Taliban qualified for protection under the Geneva Conventions but ambiguously declared that:

Our values as a Nation ... call for us to treat detainees humanely, including those who are not legally entitled to such

245. Henckaerts, *supra* note 239, at 187; *see also* Roberts, *supra* note 154, at 16.

246. *See, e.g.*, JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 81 (2006) (describing the U.S. history of liberal application of the Geneva Conventions to past conflicts).

247. Most accounts cite *Ex parte Quirin*, 317 U.S. 1 (1942), as a conceptual foundation for the existence of “unlawful combatants” as a distinct category. *See, e.g.*, DINSTEIN, *supra* note 28, at 30; *see also* GOLDSMITH, *supra* note 4, at 64-65, 133. For a critique of this view, *see* Gabor Rona, *Enemy Combatants in the “War on Terror?”: A Case Study of How Myopic Lawyering Makes Bad Law*, ABA NAT’L SEC. L. REP., Mar. 2008, at 2, which argues that the application of *Ex parte Quirin* is mistaken.

248. LEIGH SALES, DETAINEE 002, at 82 (2007).

249. *See* Mark David “Max” Maxwell & Sean M. Watts, *‘Unlawful Enemy Combatant’: Status, Theory of Culpability, or Neither?*, 5 J. INT’L CRIM. JUST. 19, 25 (2007).

treatment.... As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.²⁵⁰

Given the modern development of international humanitarian and human rights law, it is inconceivable that there are now any human beings not legally entitled to humane treatment. Yet the Bush administration sought to place these detainees in the law-free zone that John Yoo erroneously imagined was occupied by nineteenth century pirates and slave traders.²⁵¹ Further, anyone remotely familiar with the law of war recognizes that military necessity is already incorporated into its provisions and can never justify departure from its rules.²⁵² Probably the single most important step towards reestablishing compliance with the rule of law is to identify a recognized legal classification into which U.S. adversaries can be placed and to treat them in accordance with the rules governing that category.²⁵³

International law indisputably recognizes two legal classifications for participants in armed conflict, combatants and civilians,²⁵⁴ while some commentators argue for the existence of unlawful combatants as a discreet third group.²⁵⁵ Credible lawyering requires careful analysis of the rules governing these categories and the practical ramifications of their selection.

250. Memorandum from President of the United States to Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), available at http://www.pege.us/archive/White_House/bush_memo_20020207_ed.pdf [hereinafter Bush Memo].

251. See *supra* Part II.B.

252. DINSTEIN, *supra* note 28, at 16-20; HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 303-07 (1998).

253. Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the War of Terror*, THE FLETCHER F. OF WORLD AFF., Summer-Fall 2003, at 55, 69.

254. *Id.* at 66.

255. DINSTEIN, *supra* note 28, at 33. There is an additional category, noncombatants, comprised of military personnel not authorized to participate in hostilities, such as medical and religious staffs. See, e.g., Lt. Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 2 (2002). Confusingly, some sources apply this term to anyone not a lawful belligerent, including all civilians. Noncombatants in the traditional meaning of military personnel who are not authorized to participate in combat have not been an issue in the WAQT and will not be discussed further.

A. *Combatant Status Under the Law of War*

Identifying persons legally entitled to participate in hostilities is a key element of the law of war.²⁵⁶ Francis Lieber first gained government attention by addressing guerillas and the classification of prisoners in a civil war.²⁵⁷ Provisions Lieber incorporated in his subsequent "Code" underwent further development in the unratified Brussels Declaration of 1874²⁵⁸ and the first binding codification of rules governing combatant qualifications, adopted at the Hague in 1899. The Hague Regulations' declare:

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."²⁵⁹

The key "right" accorded belligerents meeting these criteria is immunity from domestic prosecution for their conduct. As Yoram Dinstein explains:

At bottom, warfare by its very nature consists of a series of acts of violence (like homicide, assault, battery and arson) ordinarily penalized by the criminal codes of all countries. When a combat-

256. See, e.g., Rona, *supra* note 253, at 58.

257. See, e.g., FRANCIS LIEBER, GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR 7-8 (1862); F. L. [Francis Lieber], *The Disposal of Prisoners*, N.Y. TIMES, Aug. 19, 1861, at 5; see also Glazier, *supra* note 141, at 152-59 (discussing Lieber's relationship with the army).

258. *Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels*, Aug. 27, 1874, reprinted in 1 AM. J. INT'L L. 96, 97-98 (Supp. 1907).

259. Convention (II) with Respect to the Laws and Customs of War on Land, Annex, art. 1, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, 247.

ant, John Doe, holds a rifle, aims it at ... a soldier belonging to the enemy's armed forces[] with an intent to kill, pulls the trigger, and causes ... death, what we have is a premeditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. [The law of war] provides John Doe with a legal shield, protecting him from trial and punishment.²⁶⁰

This immunity, often called “the combatant’s privilege,”²⁶¹ is more important than the standards of treatment mandated for a prisoner of war (POW), which seem to be the preoccupation of most commentators.²⁶² Rules governing POW treatment would be of little practical value if captured belligerents could be criminally prosecuted for taking part in hostilities. Belligerent immunity, limiting combatants’ trials to actual violations of the law of war, is really the most fundamental benefit conferred by that law, and leads, as Ryan Goodman observes, to the fact that these individuals can generally be killed or detained in wartime but *not* tried.²⁶³ It is the threat of trial and actual criminal punishment, or even execution, that is the primary incentive for combatants to conform their conduct to the law of war, preserving their place within the category of persons who may only be detained without trial.

Many scholars, including Dinstein, view this domestic immunity as intertwined with POW status²⁶⁴—a position arguably bolstered by provisions of Protocol I discussed later in this article.²⁶⁵ In 1929, the first Geneva POW convention explicitly adopted the Hague criteria for combatants as the formal standard for POW eligibility.²⁶⁶ But Geneva III’s Article 4 in 1949 expanded POW eligibility.²⁶⁷ Part A of that article lists six categories of persons entitled to POW

260. DINSTEIN, *supra* note 28, at 31.

261. See, e.g., Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 45, 46-47 (2003).

262. See, e.g., MICHAEL BYERS, WAR LAW 129 (2005).

263. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 58-60 (2009).

264. See DINSTEIN, *supra* note 28, at 31.

265. See *infra* Part III.C.

266. See Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 41 Stat. 2021, 2 Bevans 932.

267. Geneva III, *supra* note 26, art. 4.

status,²⁶⁸ but does not explicitly state that only four of these can ever be entitled to combatant status.²⁶⁹ The “combatant privilege” is thus logically separable from POW status. A combatant receives no immunity for law of war violations, however, only from domestic prosecutions. It has been clear from Lieber’s time that “[a] prisoner of war remains answerable for his crimes against the captor’s army or people, committed before he was captured, and for which he has not been punished by his own authorities.”²⁷⁰

The immunities accorded the combatant under the law of war come with a substantial price. In exchange for the right to engage in violence, combatants are in turn subject to being killed or wounded at essentially any place and any time during an armed conflict from the time they enlist until they are separated from military service.²⁷¹ If captured, they may be preventively detained for the duration of the conflict based solely on their membership in the enemy’s forces. Geneva III now requires combatants to carry an identification card that establishes their entitlement to POW status but also provides prima facie authority for their detention.²⁷² Geneva III, Article 5 calls for a “competent tribunal” to determine status in cases of doubt about POW eligibility but provides no criteria for their composition or procedure.²⁷³

268. *Id.*

269. Only those individuals falling within Geneva III’s Article 4.A. paragraphs (1)-(3) and (6) are entitled to combatant status. Geoffrey Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT’L SEC. L. & POL’Y, 257, 258-59, 259 n.5 (2008). Contrary to popular misconception, Geneva III does not define the term combatant because it does not need to. The treaty discusses only mandatory treatment of persons qualifying as prisoners of war and so Article 4 limits itself to that subject. The formal criteria for combatant status per se is found in the Hague Regulations as declaratory of customary international law, and, for those states who are parties to it. Protocol I, *supra* note 206, art. 43; *see, e.g.*, Geneva I, *supra* note 26, art. 4 (discussing mandatory treatment of POWs); *see also Land Warfare Regulations, supra* note 150, art. 1 (exemplifying criteria of combatant status); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 43, June 8, 1977, 1125 U.N.T.S. 4 (defining combatant status for party states).

270. LIEBER CODE, *supra* note 148, ¶ 59.

271. TOM FARER, *CONFRONTING GLOBAL TERRORISM AND AMERICAN NEO-CONSERVATISM* 86-87 (2008).

272. Geneva III, *supra* note 26, art. 17.

273. *Id.* art. 5.

Al Qaeda is not a state and thus lacks an “army,” but it could be a “militia” or “volunteer corps,” which can have combatant status under Hague and Geneva rules. Testimony was given during Salim Hamdan’s 2008 military commission trial that al Qaeda had a unit composed of several thousand fighters, the 055 Brigade, who fought for the Taliban in camouflage uniforms.²⁷⁴ While al Qaeda fighters failing to wear uniforms or follow the law of war have no *right* to demand combatant status, nothing in the law would bar the United States from choosing to treat them as combatants.²⁷⁵

Unilaterally according al Qaeda members combatant status would have several advantages. First, there would be no question of the legality of military action to kill al Qaeda personnel without first attempting their capture. The United States has been killing al Qaeda members via airstrikes, missiles fired from remotely operated Predator drones, and traditional ground combat.²⁷⁶ Second, simply establishing a detainee’s status as an al Qaeda fighter would justify preventive detention for the duration of hostilities. It would not be necessary to link them with any hostile acts or even to demonstrate any specific individual intent to commit such acts. The government and its critics have said much about “battlefield” captures—the government generally asserts that detainees were captured on a battlefield and critics seek to refute these claims.²⁷⁷ But there is no formal provision in the law of war that requires any tie to a battlefield to justify preventive detention; it is the affiliation with opposition forces, not the locus of capture or personal conduct, which determines eligibility for detention. Indeed, Geneva III defines prisoners of war as persons “who have fallen into the power of the enemy,”²⁷⁸ not even requiring that they have been “captured” at all. Third, although combatants are protected from abuse and do not *have* to provide any information beyond basic identifying data,

274. Brian Glyn Williams, *The Al-Qaida We Don't Know: The 055 Brigade*, WORLD POL. REV., Oct. 26, 2008, available at <http://www.worldpoliticsreview.com/article.aspx?id=2821>.

275. Bialke, *supra* note 34, at 1-2.

276. Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT'L & COMP. L. REV. 453, 456 (2004).

277. See, e.g., Mark Denbeaux et al., *The Meaning of “Battlefield”: An Analysis of the Government’s Representations of “Battlefield” Capture and “Recidivism” of the Guantánamo Detainees 4-5* (Dec. 12, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089475.

278. Geneva III, *supra* note 26, art. 4A.

there are no explicit legal limitations on the subject or duration of interrogations and no right to counsel during questioning.²⁷⁹ Fourth, al Qaeda members would be subject to military trial for any law of war violations they commit. A Geneva III provision that might now be customary law calls for combatant trials by “the same courts according to the same procedure as in the case of members of the ... Detaining Power.”²⁸⁰ This precludes use of the current military commissions, which are limited to aliens.²⁸¹ But this Geneva provision does allow trial by courts-martial,²⁸² which would merit greater international support than the current commissions, which are roundly criticized even by close allies.²⁸³ Despite the combatants’ immunity from ordinary domestic crimes, Article III courts also should be able to try them for War Crimes Act²⁸⁴ violations because these courts also have jurisdiction over U.S. service personnel.²⁸⁵

These advantages must be balanced against potential downsides to granting al Qaeda combatant status. Perhaps the most significant is political; letting al Qaeda fighters claim the mantle of “combatants” could facilitate their self-portrayal as warriors engaged in jihad against the West.²⁸⁶ Treating them as combatants also could legitimate attacks on valid military targets such as the Pentagon and the USS Cole.²⁸⁷ Al Qaeda’s means of attack employed to date, including the use of commercial airliners as weapons and the indiscriminate targeting of civilians, should still render most past attacks unlawful,²⁸⁸ but “combatant” classification opens the possibility that future strikes could be done lawfully. Although the United States could elect to accord al Qaeda combatant status, it might thus choose not to do so.

279. FARER, *supra* note 271, at 88.

280. Geneva III, *supra* note 26, art. 102.

281. Military Commissions Act of 2006, 10 U.S.C. § 948b (2006).

282. Geneva III, *supra* note 26, art. 84.

283. See Ben Russell, *Attorney General Hits Out on Guantanamo*, INDEPENDENT (London), June 26, 2004, available at <http://www.independent.co.uk/politics/attorney-general-hits-out-on-guantanamo-733593.html>.

284. 18 U.S.C. § 2441 (2000).

285. *Id.* § 2441(b).

286. See DAVID COLE & JULES LABEL, *LESS SAFE, LESS FREE* 144-45 (2007).

287. See, e.g., U.K. MINISTRY OF DEF., *supra* note 130, §§ 5.4-5.4.5 (discussing lawful military objectives).

288. See, e.g., DINSTEIN, *supra* note 28, at 49.

B. Civilian Status Under the Law of War

Although initially counterintuitive, the other classification indisputably available is “civilian.”²⁸⁹ This seems illogical since civilians are protected persons under the law of war,²⁹⁰ and the goal of applying the war paradigm is to gain greater freedom of action against al Qaeda than criminal law provides, not to grant terrorists additional safeguards. But the “civilian” category is sufficiently broad that Protocol I’s Article 50 declares that anyone not meeting the legal criteria for combatant status is a civilian.²⁹¹ Combatant status is determined with respect to individual conflicts, so even a uniformed service person can be considered a civilian if not an actual participant in the conflict.²⁹² British military officers caught in Kuwait during Iraq’s 1990 invasion and U.N. peacekeepers thus have both been held legally to be civilians.²⁹³ Any doubt as to whether persons considered to be “unlawful combatants” could be civilians should be dispelled by the facial language of Geneva IV’s Article 5 which includes persons detained as “a spy or saboteur” within the ambit of “protected person[s]”²⁹⁴ and Article 68, which allows their trial for espionage, sabotage, or offenses “solely intended to harm the Occupying Power.”²⁹⁵

Geneva IV gives belligerents significant flexibility to deal with civilians posing actual security threats.²⁹⁶ Historically, the law of war simply declared that civilians could not be the object of attack but provided few specific rules for their treatment. As a result there are comparatively few longstanding customary rules in this area. But since IHRL should be fully applicable in the absence of positive law of war rules constituting a *lex specialis*, states should find it advantageous to recognize most Geneva IV provisions as constituting customary law and thus applicable even when there are technical gaps in the treaty’s application. Otherwise civilians will logically be governed by more restrictive rules such as the ICCPR,

289. See *supra* note 254 and accompanying text.

290. See, e.g., U.K. MINISTRY OF DEF., *supra* note 130, § 12.19.

291. Protocol I, *supra* note 206, art. 50.

292. *Id.* art. 43.

293. MCCOUBREY, *supra* note 252, at 138-39.

294. Geneva IV, *supra* note 26, art. 5.

295. *Id.* art. 68.

296. See *id.* art. 5.

which proclaims “[n]o one shall be deprived of his liberty except ... in accordance with such procedure as are established by law” and mandates an enforceable right to compensation for anyone wrongfully detained.²⁹⁷

Treating detainees as civilians governed by the basic principles of Geneva IV and Protocol I advances U.S. objectives in several ways. First, civilians have *no* right to participate in hostilities and thus get no immunity from domestic law.²⁹⁸ Any acts of violence they commit remain domestic crimes, subjecting them to stigmatization as common criminals and the indignity of ordinary courtroom prosecution.²⁹⁹ Second, like POWs, enemy civilians are subject to preventive internment if they pose a significant threat,³⁰⁰ that is, “if the security of the Detaining Power makes it absolutely necessary.”³⁰¹ The physical conditions mandated for civilian internment are very much like those mandated for POWs. Unlike the one-time determination made at the beginning of combatant detention, however, Geneva IV’s Article 43 requires an initial threat determination and semiannual review “by an appropriate court or administrative board.”³⁰² But there is no bar to holding a detainee who is periodically reassessed as a threat until the end of hostilities.³⁰³ Third, civilians who participate in hostilities are subject to attack while doing so. The Israeli Supreme Court held that “participating” should be interpreted fairly broadly even while upholding application of the law of war to fighting terrorists.³⁰⁴ This result makes logical sense in applying the law of war to a group like al Qaeda. Protocol I focused on the resistance figures who were “farmers by

297. ICCPR, *supra* note 72, art. 9.

298. DINSTEIN, *supra* note 28, at 31.

299. *See id.*

300. *See* Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. RED CROSS 375, 380 (2005).

301. Geneva IV, *supra* note 26, art. 42. Geneva IV uses the term “internment” for preventive detention of civilians based on ex-ante security assessments, reserving the term “detention” for captivity resulting from actual criminal violations such as espionage and sabotage. *Compare id.* arts. 5, 71, 76 (discussing detention), *with id.* arts. 41-43, 68, 79-135 (regulating internment).

302. *Id.* art. 43.

303. *Id.*

304. H CJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [2000], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.

day and soldiers by night,”³⁰⁵ such as the Viet Cong.³⁰⁶ The logic for limiting attacks to periods of actual participation in fighting is that it is difficult to distinguish between insurgents and innocent civilians when both are engaged in everyday activities and there is a risk of collateral harm to innocent persons during attacks in civilian settings. An additional consideration is that in an occupation setting, where military forces traditionally encountered resistance fighters, the military exercises governmental authority and could arrest individuals isolated from their units.

Al Qaeda is a full-time job for most personnel,³⁰⁷ so they may be “participating” in hostilities through a broader scope of activity than just heading to or from an attack.³⁰⁸ There is no principled reason why these persons, like actual military personnel, should not be subject to attack while planning or training for a combat operation.³⁰⁹ But, as Curtis Bradley notes, attempts to expand the definition of “participat[ing] in hostilities” will undoubtedly incur some international public opposition toward the United States as it has for Israel.³¹⁰

Like combatants, interned civilians should also be subject to interrogation outside traditional criminal procedure constraints. Geneva IV’s Article 31 bars “physical or moral coercion ... against protected persons, in particular to obtain information from them or from third parties.”³¹¹ There are no express limits on the duration or subject of questioning, however, providing a clear advantage over criminal law.³¹²

As previously noted, civilians participating in armed conflict enjoy no immunity from prosecution under domestic laws.³¹³ Any killing they commit is a homicide and any destruction of property a

305. GREEN, *supra* note 30, at 111 (citing Protocol I, art. 44).

306. Roberts, *supra* note 154, at 23.

307. LAWRENCE WRIGHT, *THE LOOMING TOWER* 141-42 (2006).

308. See ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 § 1944 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds. 1987).

309. Curtis A. Bradley, *The United States, Israel & Unlawful Combatants*, 12 GREEN BAG 2d 397, 401-03 (2009), available at http://www.greenbag.org/v12n4/v12n4_bradley.pdf.

310. *Id.* (quoting HELEN DUFFY, *THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW* 230 (2005)).

311. Geneva IV, *supra* note 26, art. 31.

312. *Id.*

313. See *supra* text accompanying note 298.

criminal act. As offenses against regular domestic law, the proper venue for such trials is ordinary civilian courts. Although such acts have been punished by military tribunals in the past, these typically drew their authority either as martial law courts, such as those in border states during the U.S. Civil War, or as military government courts situated in occupied territory.³¹⁴ Despite having the functional appearance of law of war tribunals, the law applied was formally “domestic.” Typically, this would be either an ad hoc code established for an occupied territory or the existing criminal code left in effect by military authorities.³¹⁵

Civilians can be tried for war crimes in some circumstances but generally must either be inciting or directing military personnel, or engaged in conduct with them, to be prosecuted under the law of war.³¹⁶ Most legal scholars agree that persons not entitled to combatant status do not commit a war crime just by participating in hostilities,³¹⁷ but rather that any acts of violence they commit are punishable as crimes under domestic law. When civilians can be tried for grave breaches of Geneva IV, that convention mandates legal protections at least equivalent to those provided POWs.³¹⁸

Treating al Qaeda personnel as civilians thus imposes more legal constraints on U.S. actions than according them combatant status would, including less authority to target such personnel and a higher burden to justify their detention. But it has the advantage of weakening their claims to be warriors and facilitates their stigmatization as criminals. It also allows their prosecution under the full scope of U.S. federal criminal law, including inchoate offenses, rather than the more limited set of acts constituting actual law of war violations.

314. See Glazier, *supra* note 204, at 9-10.

315. See, e.g., *id.* at 15-18 (describing the establishment of military tribunals in Colonial America).

316. See KITTICHAISAREE, *supra* note 181, at 133-34.

317. See, e.g., Jelena Pejic, “Unlawful Enemy Combatants”: *Interpretations and Consequences*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 338 (Michael Schmitt & Jelena Pejic eds., 2007).

318. Geneva IV, *supra* note 26, art. 146.

C. *Unlawful Combatants*

Despite universal agreement on the existence of the combatant and civilian categories, the U.S. approach has been to assert that al Qaeda and even Taliban fighters fall into a third group—unlawful combatants—which the U.S. holds lies outside existing legal protections.³¹⁹ First, the Bush administration excluded al Qaeda from Geneva Convention coverage because they are nonstate actors.³²⁰ The Bush administration then categorized both Taliban and al Qaeda personnel as “unlawful combatants” by this apparent logic:

- (1) they are fighters so they must be *combatants*, not civilians;
- (2) they fail to satisfy two key criteria for *lawful* combatants:
 - lacking a “fixed distinctive emblem”; and,
 - not following “the laws of war”;
- (3) therefore they must be *unlawful combatants*.³²¹

Because “unlawful combatant,” like the term “enemy combatant” which the government has also employed, is not explicitly defined by the law of war, this reasoning endeavored to place members of these groups outside formal legal protections. They were thus effectively “extra-conventional persons.”³²² The government considered them subject to detention for the duration of hostilities and triable for law of war violations by military commissions but contended that their treatment did not have to meet any specific legal standards.³²³

This logic might have been dispositive a century ago. Historic practice held irregulars to be subject to summary execution as recently as the nineteenth century. The French shot Spanish guerillas during the Napoleonic Wars, for example.³²⁴ American General

319. FARER, *supra* note 271, at 90-95.

320. Bush Memo, *supra* note 250.

321. See Lt. Col. Paul E. Kantwill & Maj. Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons:” How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 *FORDHAM INT’L L.J.* 681, 688-96 (2004). The Military Commissions Act of 2006 (MCA) also adopted the term “unlawful enemy combatant.” 10 U.S.C. § 948a (2006).

322. Kantwill & Watts, *supra* note 321, at 681 n.1.

323. See Bush Memo, *supra* note 250; Frits Kalshoven, “*Enemy Combatants in American Hands: Are There Limits to the Presidents Discretion?*,” in FRITS KALSHOVEN, *REFLECTIONS ON THE LAW OF WAR* 575 (2007).

324. CHARLES J. ESDAILE, *FIGHTING NAPOLEON* 11 (2004).

Winfield Scott established Councils of War in 1847 to deal with law of war violators more summarily than military commissions, which he also created, dealt with other offenses.³²⁵ He justified this on a greater power/lesser power argument, asserting the law of war allowed guerrillas' summary execution so *any* process provided exceeded international requirements.³²⁶

Even assuming these examples reflected the law at the time, however, they do not reflect the law as it stands today. The 1899 Hague Regulations declared that spies could no longer be executed without trial, and contemporary commentary asserts that this rule applies "in all other cases" as well.³²⁷ This principle was clearly evidenced by the 1902 British court-martial convictions of Lieutenant Harry H. "Breaker" Morant and several other members of the Bushveldt Carbineers for the summary killing of Boer guerillas, rejecting defense arguments that such individuals fell outside the protections of the law of war.³²⁸ And a number of World War II era war crimes prosecutions held Axis personnel criminally liable for punishing alleged unlawful combatants without a valid trial.³²⁹ So it seems, by the start of the twentieth century, no one was subject to punishment for law of war violations without trial. Any residual doubt about whether individuals can remain outside formal legal protection is dispelled by the expansive proliferation of international humanitarian and human rights law in the latter half of the twentieth century.³³⁰

The existence *vel non* of unlawful combatants as a discreet category is debated by experts today. Israel's Yoram Dinstein is perhaps the leading proponent of unlawful combatants as a continuing separate classification.³³¹ But other scholars as diverse as Britain's A. P. V. Rogers,³³² America's Gabor Rona,³³³ the Congressional

325. See Glazier, *supra* note 204, at 36.

326. *Id.*

327. Glazier, *supra* note 141, at 165.

328. See generally GEORGE WITTON, SCAPEGOATS OF THE EMPIRE (1907).

329. See Glazier, *supra* note 204, at 75-76.

330. See, e.g., Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, 590-93 (2006) (tracing the interrelationship between the law of war and human rights law).

331. DINSTEIN, *supra* note 28, at 29-33.

332. A. P. V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996).

333. Gabor Rona, *Legal Issues in the "War on Terrorism"—Reflecting on the Conversation between Silja N.U. Voneky and John Bellinger*, 9 GERMAN L.J. 711, 723 (2008).

Research Service's Jennifer Elsea,³³⁴ and current and former U.S. Army Judge Advocates Paul Kantwill and Sean Watts³³⁵ endorse the single combatant/civilian distinction. This view also finds support in both the language of Protocol I's Article 50³³⁶ and the commentary to Geneva IV, which declares:

Every person in enemy hands must have some status under international law: he is either a prisoner of war ... 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 be outside the law.³³⁷

Assuming that one purpose of applying the law of war is to foster public belief in the legitimacy of U.S. conduct and facilitate international cooperation in defeating al Qaeda, bullish reliance on a legal position fairly characterized as "colorable" at best seems like an extremely poor choice.³³⁸ But that is what the U.S. seems to have done over the objections of the State Department, which foresaw many of the practical and political ramifications that have resulted from placing detainees outside the law.³³⁹ The denial of *any* mandatory protections is particularly hard to justify given that Protocol I's Article 75, widely regarded as declaratory of customary law,³⁴⁰ provides a minimum set of baseline protections that must now be applied to anyone not benefitting from a more favorable regime.³⁴¹ Legitimate scholars arguing for the existence of "unlawful combatants" as a third category typically dispute the view that no specific legal protections apply and agree that Article 75 is fully applicable.³⁴² Article 75 protections, which are more extensive than

334. JENNIFER ELSEA, CRS REPORT FOR CONGRESS, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 8-9 (2006).

335. Kantwill & Watts, *supra* note 321, at 683-86.

336. Protocol I, *supra* note 206, art. 50.

337. Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 51 (Jean S. Pictet ed., 1958) [hereinafter Geneva IV Commentary].

338. See Kantwill & Watts, *supra* note 321, at 686.

339. See, e.g., *id.* at 697 (summarizing Secretary of State Powell's memorandum of Jan. 25, 2002).

340. See, e.g., Hamdan v. Rumsfeld, 548 U.S. 566, 633 (2006) .

341. Protocol I, *supra* note 206, art. 75.

342. DINSTEIN, *supra* note 28, at 33; Roberts, *supra* note 154, at 23.

those of CA3, include requiring release from noncriminal detention “with the minimum delay possible” and a detailed set of fair trial standards.³⁴³ Even if the Bush administration was correct in identifying al Qaeda fighters as “unlawful combatants,” it was clearly mistaken in holding that they fall outside the law of war’s protective ambit.

D. Unlawful Combatants as a Subset of Combatant Status

Though the existence of unlawful combatants as a stand alone category is controversial, implicit support for a limited existence of this category as a *subset* of the universally recognized combatant category can be found in the fourth paragraph of Protocol I’s Article 44.³⁴⁴ The first paragraph of the preceding Article 43 defines the “armed forces of a Party to a conflict” to include “all organized [] groups and units” under responsible command with an internal discipline system that includes enforcement of “compliance with the rules of international law applicable in armed conflict.”³⁴⁵ The next paragraph declares that these persons “have the right to participate directly in hostilities.”³⁴⁶ The first paragraph of Article 44 then states that “[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.”³⁴⁷

The third paragraph of Article 44 is one of the most controversial provisions of the entire Protocol, cited by the Reagan administration as a primary reason for not ratifying it.³⁴⁸ After noting combatants are obliged to distinguish themselves from civilians, it declares that “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself.”³⁴⁹ It allows these fighters to retain combatant status so long as they carry their arms openly during precombat deployment and actual attacks.³⁵⁰ Finally, the fourth paragraph of Article 44 states that a combatant who is captured while failing to carry his arms

343. Protocol I, *supra* note 206, art. 75.

344. *Id.* art. 44.

345. *Id.* art. 43(1).

346. *Id.* art. 43(2).

347. *Id.* art. 44(1).

348. Roberts, *supra* note 154, at 12-13.

349. Protocol I, *supra* note 206, art. 44(3).

350. *Id.*

openly in these circumstances “shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by [Geneva III] and by this Protocol.”³⁵¹

This seems nonsensical; persons forfeit the right to be POWs but get fully equivalent protections? At first reading, this appears to remove the incentive to comply with the rule requiring combatants to carry their arms openly. The answer to this conundrum lies in “the combatant’s privilege,” the immunity from domestic prosecution sourced in the Hague Regulations but frequently articulated as part of the right to be a POW.³⁵² This is made clearer in the ICRC Commentary on Protocol I, which notes the majority view of the drafters is that “such a prisoner can be made subject to the provisions of the ordinary penal code of the Party to the conflict which has captured him.”³⁵³ The Protocol thus implies that there are “unlawful combatants” who still receive extensive legal protections but cannot cloak themselves with either the honorable “prisoner of war” nomenclature or combatant immunity. This approach of recognizing the existence of unlawful combatants as a subset of combatants reconciles the seemingly divergent views that unlawful combatants do exist on the one hand and that there are fundamentally only combatants and civilians on the other.

An “unlawful combatant” regime based on Protocol I’s Article 44 has attributes reflecting a mixture of those from the combatant and civilian regimes previously considered. First, members of this class are persons who would fall within the general category of combatants *but for* the failure to adequately distinguish themselves during operations. They share the lawful combatant’s liability to attack on sight and would be subject to preventive detention for the duration of hostilities based simply on an initial showing that they were in fact fighters for the enemy. Any preventive detention would have to meet conditions specified by international law for prisoners of war, and detained individuals would be fully subject to the detaining power’s military law.³⁵⁴ The difference between “lawful” and “unlawful” combatants, however, is that, when it can be shown that

351. *Id.* art. 44(4).

352. *See supra* notes 261-63 and accompanying text.

353. ICRC, *supra* note 308, § 1719.

354. Geneva III, *supra* note 26, art. 82.

fighters failed to distinguish themselves from the civilian population during attacks, they are stripped of combatant immunity and subject to ordinary criminal prosecution for *any* acts of violence they have committed, just like a civilian.³⁵⁵ They also remain liable for prosecution under the law of war for any war crimes committed, just like a combatant.³⁵⁶ Assuming that they had committed both war crimes and general acts of violence, the detaining power could exercise discretion as to which set of rules, civilian, military, or both, it would elect to prosecute them under if and when it decided to try them.³⁵⁷ But the detaining nation retains the right to exercise merely preventive detention as well.³⁵⁸

This view is consistent with the treatment of the Nazi saboteurs at issue in *Ex Parte Quirin* even though that case predated Protocol I by a quarter-century.³⁵⁹ The saboteurs were directly employed by the German military, transported to the United States in operational navy submarines, and issued at least partial uniforms to wear ashore so that they could claim POW status if captured upon landing.³⁶⁰ Had they continued to wear distinguishing clothing, they could have conducted acts of sabotage against military targets in the continental United States without fear of criminal prosecution; it was the effort to blend surreptitiously into the American civilian population that rendered them “unlawful combatants.”³⁶¹

By its terms, Protocol I’s Article 44 implies that the determination of unlawful combatancy is made on an individual basis. It makes sense that individuals belonging to a unit generally comporting with the law of war should forfeit their individual protection if they personally engage in hostilities while willfully failing to distinguish themselves from the civilian population. But the determination of lawful combatancy cannot be wholly individual. Even military-looking clothing can only be a “uniform” if it matches what the others in the organization wear. One fighter cannot buy a

355. Protocol I, *supra* note 206, art. 44(3)-(4).

356. Geneva III, *supra* note 26, art. 82.

357. *Id.* art. 84.

358. *See* Bradley, *supra* note 309, at 398-99.

359. 317 U.S. 1 (1942).

360. *Id.* at 21.

361. *Id.* at 31, 35.

camouflage outfit from a military surplus store and thereby claim to be a lawful combatant.

Conversely, it logically goes too far to attempt a blanket determination for all the combatants of a political entity. Hitler launched the worst wars of aggression in history and directed some forces under his ultimate authority, such as the Einsatzgruppen, to commit crimes of virtually incomprehensible barbarity,³⁶² but that did not undermine the legitimate combatant status of other German units. Although al Qaeda's leaders are clearly responsible for a number of terrorist outrages, and those who have planned or participated in them might fairly be found to be unlawful combatants, this does not prove that everyone affiliated with that group should be categorized in the same manner. Much of the training provided in al Qaeda's camps was oriented toward general military skills rather than terror.³⁶³ In addition to testimony about the 055 Brigade, images of Osama bin Laden acquired by CNN show him accompanied by figures in camouflage uniforms openly carrying assault rifles.³⁶⁴ Some units within al Qaeda could potentially qualify as lawful combatants, and President Bush's determination denying the organization as a whole any privileged status was thus overbroad.³⁶⁵ Each individual's status should be determined at the time of capture, even though as a practical matter most al Qaeda members would probably be found to be unlawful combatants.

The ability to classify most al Qaeda personnel with the pejorative designation "unlawful combatants" while obtaining targeting and detention flexibility by declaring the enemy to be combatants suggests that this classification offers real practical advantages over that of "civilian." It does allow the adversary some opportunity to claim the "combatant" mantle, but it is more sullied than in the pure combatant formulation. Additionally, classification as "unlawful combatants" gives greater flexibility in choosing how to prosecute those detainees against whom a credible legal case can be

362. See, e.g., The Holocaust, http://www.martinfrost.ws/htmlfiles/holocaust.html#Death_squads (last visited Nov. 22, 2009).

363. See MAYER, *supra* note 4, at 73.

364. See, e.g., Photograph of bin Laden, <http://www.andyworthington.co.uk/images/binladen2.jpg> (last visited Nov. 19, 2009).

365. See Bush Memo, *supra* note 250.

assembled and overcomes the issues that have been identified as criticisms of the more simplistic “two-category” approach.³⁶⁶

The “unlawful combatant” approach has several less obvious, but potentially quite important, advantages. First, there are no express limits on combatant nationality. Anyone who elects to affiliate with the enemy’s forces is subject to targeting and detention, whereas the authority to detain civilians under Geneva IV is at least implicitly conditioned upon them being foreign nationals.³⁶⁷ U.S. courts have had no difficulty finding governmental authority to detain American citizens affiliating with the enemy to be combatants under the law of war in past conflicts.³⁶⁸ This is particularly relevant in the case of detainees with claims to American citizenship, like Jose Padilla, who was detained as a combatant for several years before ultimately being convicted in regular federal court, and Yasser Hamdi, who was eventually expatriated to Saudi Arabia.³⁶⁹ According the adversary combatant status also permits greater choice in the siting of detention facilities. Unlawful deportation of protected civilians from occupied territory constitutes a grave breach of Geneva IV³⁷⁰ and now might be a war crime under customary international law as well. So a detainee is transferred from the locus of capture to other countries under the civilian regime at some peril. Another minor advantage of the combatant designation is that it offers the linguistically superior prospect of having opposing combatants against whom to fight. It would be odd to fight a war in which the only adversaries were “civilians.”

A key advantage of the “unlawful combatant” classification is that granting detainees protections equivalent to the customary rules governing POWs would effectively silence much of the strident criticism of U.S. detainee treatment. And no nation could object to exercising the legally permissible approach of civilian trials given

366. See Bradley, *supra* note 309, at 401-03 (identifying criticisms resulting from employment of the simple combatant/civilian bifurcation).

367. See Geneva IV, *supra* note 26, arts. 4, 5, 42.

368. See *Ex parte Quirin*, 316 U.S. 1, 37-38 (1942); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

369. See Adam Liptak, *Justices To Rule on Detainee Held in U.S. in Terror Case*, N.Y. TIMES, Dec. 6, 2008, at A11.

370. Geneva IV, *supra* note 26, art. 147.

the international agreements calling for exactly that treatment for terrorists.³⁷¹

The final decision about which classification to select in dealing with al Qaeda and the Taliban should be based upon careful assessment of the comparative merits. It need not be a one-size-fits-all selection. Ryan Goodman's work shows that the option exists to classify al Qaeda fighters as combatants and detain them under the applicable rules for that category and concurrently detain others, who play only supporting roles but are nevertheless a danger to the United States, under the civilian paradigm.³⁷² The real key is that *good faith* adherence to one or more of these models should be much more acceptable to world public opinion than current U.S. conduct and should increase the practical effectiveness of American efforts to combat al Qaeda and the Taliban. But the combatant paradigm, as supplemented by the provisions of Protocol I, seems likely to be the best choice for those whom it logically fits.

It is ironic that Protocol I, which the Reagan administration declined to ratify on the ostensible ground that it would legitimize terrorist activity, is actually of more use to the United States in combating terrorists than to its adversaries. This highlights the pragmatic roots of most law of war provisions, demonstrating that negotiating states have been careful to protect perceived national interests in the treaty process.

IV. *JUS IN BELLO* IN A WAR AGAINST AL QAEDA

The United States can only expect international cooperation in the WAQT if it complies with the *jus in bello*—the law governing the conduct of hostilities. Unfortunately, U.S. actions arguably have fallen short in a number of areas even as it sought to prosecute detainees for alleged violations.

A. *Lawful Combatants and the Distinction Requirement*

Although the U.S. military has played the most visible role in the WAQT, press accounts document substantial participation by CIA

371. See *supra* Part I.A.

372. See Goodman, *supra* note 263, at 51-55, 70.

personnel, including both agency employees and contractors.³⁷³ Much was made, for example, of the “heroism” of Johnny Spann, a CIA paramilitary killed in Afghanistan in November 2001.³⁷⁴ But as a civilian “dressed in jeans and a black fleece jacket,”³⁷⁵ he had no legal right to participate in the conflict at all and would have had no claim to immunity from prosecution under Afghan law. The CIA is also launching Hellfire missiles from Predator drones to kill al Qaeda leaders in locations where capture is impractical.³⁷⁶ Although targeting enemy military leadership is a legitimate act in wartime and not a prohibited assassination,³⁷⁷ the CIA role undermines the legality of these actions. Daniel Benjamin and Steven Simon reported that the agency had to overcome significant internal reluctance before accepting the Predator mission, quoting director George Tenet’s statement that “[i]t would be a terrible mistake.”³⁷⁸ But did anyone consider that it would also be unlawful? Although the military has the same capability,³⁷⁹ the CIA was still performing these strikes under the Obama administration in mid-2009.³⁸⁰

Letting U.S. Special Forces personnel conduct operations in Afghanistan in civilian clothes early in the conflict was equally problematic, at least for a state denying the full applicability of Protocol I. Leading government law of war expert W. Hays Parks asserted that efforts were always made at distinguishing combatants from the general population³⁸¹ and that U.S. personnel wore “non-standard uniform[s]” rather than “civilian clothing.”³⁸² But

373. See, e.g., Douglas Jehl, *Two C.I.A. Operatives Killed in an Ambush in Afghanistan*, N.Y. TIMES, Oct. 29, 2003, at A12.

374. See, e.g., Katharine Q. Seelye, *Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. TIMES, Oct. 5, 2002, at A1.

375. Carlotta Gall, *Video Vividly Captures Prelude to Fortress Revolt*, N.Y. TIMES, July 16, 2002, at A15.

376. James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. To Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at 1.

377. See *id.*

378. DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR* 345 (2003).

379. See Eric Schmitt, *In the Skies over Iraq, Silent Observers Become Futuristic Weapons*, N.Y. TIMES, Apr. 18, 2003, at B8.

380. Pir Zubair Shah, *Drone Killed 13 at Taliban Camp, Pakistani Official Says*, N.Y. TIMES, June 19, 2009, at A8.

381. W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 496-97 (2003).

382. *Id.* at 497-98.

other accounts dispute this.³⁸³ Failure to faithfully comply with the letter and spirit of the law in these areas can only undermine international support and the credibility of any U.S. convictions of its adversaries for equivalent conduct. But if the United States accepts Protocol I as binding law, this could in fact be an example of a situation falling within the third paragraph of Article 44 when a combatant may be excused from wearing a uniform.³⁸⁴ It seems likely that both Northern Alliance and accompanying U.S. troops carried arms openly,³⁸⁵ and, if the U.S. failure to wear uniforms was not an attempt to hide among civilians but rather simply to blend in with the indigenous forces so that they could not be singled out for preferred targeting,³⁸⁶ then it could, in fact, have been lawful. Yet again, the United States would have to accept the provisions of Protocol I to which it has previously objected in order to have the right to engage in this conduct.

B. Location of Hostilities

Although geographic constraints undermine the piracy paradigm's useful application to the WAQT, the armed conflict approach is hardly a panacea in this regard. Wars traditionally are contested on the territory of the belligerents and the high seas, but as a nonstate actor al Qaeda has no territory. There is little dispute that the conflict can continue to be contested in Afghanistan. Logically, al Qaeda fighters also could be shot on New York City streets because that too is the territory of a party.³⁸⁷ But what of other locales where al Qaeda and Taliban remnants can be found? International studies expert Tom Farer suggests that the United

383. See, e.g., Carlotta Gall & Amy Waldman, *Under Siege in Afghanistan, Aid Groups Say Their Effort is Being Criticized Unfairly*, N.Y. TIMES, Dec. 19, 2004, at N20; Amy Waldman, *A Secured Kandahar is Now Safe Enough for Some Night Life*, N.Y. TIMES, Mar. 4, 2002, at A11.

384. Protocol I, *supra* note 206, art. 44(3).

385. See, e.g., Waldman, *supra* note 383.

386. Parks, *supra* note 381, at 496-97.

387. Although highly controversial among the government's critics, there also should be no issue with detaining "enemies" found in the United States, or anywhere else for that matter, if coherently based on combatant status.

States can seek acquiescence from the nation concerned or obtain U.N. Security Council authorization to use force in these cases.³⁸⁸

Once the Article 51 self-defense threshold is satisfied, however, as it was on 9/11, a nation has a closely circumscribed right to combat enemy forces sheltered in neutral territory if the neutral nation is unable or unwilling to terminate their presence.³⁸⁹ Although still controversial, and perhaps a political mistake given the opposition it unleashed, the Cambodian “incursion” during the Vietnam War was an exercise of this principle.³⁹⁰ This right is limited, however, to situations in which a neutral fails to prevent its territory from being used to a belligerent’s detriment. Pakistan has begun protesting U.S. operations within its borders,³⁹¹ and the law is on its side while Pakistan is making efforts to suppress these militants themselves.³⁹² Even in war, there are real limits on the lawful use of force,³⁹³ highlighting the importance of maintaining a climate in which international cooperation and reliance on law enforcement are given high priority wherever possible.

C. Detention Under the Law of War

One of the most controversial aspects of U.S. conduct of the WAQT has been the detention of “enemy combatants” at the U.S. Naval Station at Guantánamo Bay, Cuba. Two core legal issues are implicated: who is being held and the conditions of their detention.

1. The Legitimacy of Detaining Those Held at Guantánamo

Although the law of war allows indefinite detention of hostile combatants and civilians posing a serious threat,³⁹⁴ there is significant reason for doubt about whether many of those held at

388. FARER, *supra* note 271, at 77.

389. See Timothy Guiden, *Defending America’s Cambodian Incursion*, 11 ARIZ. J. INT’L & COMP. L. 215, 220-22 (1994).

390. See *id.*

391. Ann Scott Tyson, *Top Military Officer Urges Major Change in Afghanistan Strategy*, WASH. POST, Sept. 11, 2008, at A1.

392. See Jane Perlez & Pir Subair Shah, *Confronting Taliban, Pakistan Finds Itself at War*, N.Y. TIMES, Oct. 2, 2008, at A1 (describing Pakistan’s efforts against militants).

393. Guiden, *supra* note 389, at 224.

394. See *supra* Part III.A-B.

Guantánamo ever fell into either of these groups. First, the definition of “enemy combatant” that the government has previously employed is both imprecise and substantially overbroad, including an assertion that persons can be placed in this category for merely “supporting” al Qaeda.³⁹⁵ For the first several years after 9/11, enemy combatant apparently was defined on a case by case basis; at one point, a Justice Department official went so far as to inform a federal court that it would include “a little old lady in Switzerland who writes checks” to an al Qaeda front organization, even if she believed it was a legitimate charity.³⁹⁶ The MCA formalized the definition in 2006 but still included any person “who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful ... combatant.”³⁹⁷ The law of war does permit the detention of persons supporting military operations similar to combatants, but this is constrained to those providing actual physical support to the war effort, such as merchant marine crews, or those actually accompanying a fighting force in the field, such as supply contractors and accredited war correspondents.³⁹⁸ It does not include those providing more distant support, such as civilian headquarters employees, or financial contributors.

The second issue is factual. U.S. forces captured only a small number of the detainees; most were turned over by Afghans or Pakistanis, often in exchange for generous bounties.³⁹⁹ Many were unaccompanied by any credible evidence that they were legitimately detainable under the law of war.⁴⁰⁰ Initially the government had little concern for such subtleties. Early on, Secretary of Defense Donald Rumsfeld proffered the conclusory description of the detainees as “among the most dangerous, best-trained, vicious killers on the face of the earth,”⁴⁰¹ and many of his subordinates

395. Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES, Nov. 27, 2005, at 1.

396. *Id.*

397. 10 U.S.C. § 948a(1)-(2) (2006).

398. See Geneva III, *supra* note 26, art. 4A (4)-(5); Hague Regulations, *supra* note 29, art. 12.

399. MARGULIES, *supra* note 246, at 69, 168.

400. *See id.*

401. Garry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, AM. FORCES PRESS SERVICE, Jan. 27, 2002, <http://www.defenselink.mil/news/newsarticle.aspx?>

accepted it on face value.⁴⁰² Although Geneva III calls for tribunals to decide doubtful cases,⁴⁰³ no systematic effort was made to consider individual legal classifications until the Supreme Court held detainees had a statutory right to habeas corpus more than two years after detentions began.⁴⁰⁴ Only after the Supreme Court's July 2004 *Rasul* decision did

the Administration announce[] that it had created "Combatant Status Review Tribunals," or CSRTs, to determine whether the prisoners at Camp Delta were enemy combatants. Each tribunal would consist of three commissioned officers who would base their decision on information presented by the military and the prisoner. If he chose, the prisoner could testify before the panel. The panel's decision would then be reviewed by a senior officer.⁴⁰⁵

Despite widespread criticism, there is nothing inherently wrong with the CSRT structure; even Geneva III provides no detail as to tribunal operation. The Guantánamo process seems facially consistent with procedures of past "Article 5 tribunals" complying with that treaty.⁴⁰⁶

The real problem with the CSRTs and the periodic follow-up conducted by "Annual Review Boards"⁴⁰⁷ was the lack of good faith in obtaining all possible evidence to reach accurate status determinations and the reluctance to accept "unfavorable" decisions. Detainees frequently heard insufficient information about allegations against them to provide any meaningful rebuttal and had little opportunity to obtain favorable witnesses.⁴⁰⁸ Intelligence officers assigned to collect information held by other agencies were denied

id=43817.

402. See, e.g., ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE* 74 (2005).

403. Geneva III, *supra* note 26, art. 5.

404. *Rasul v. Bush*, 542 U.S. 466, 466 (2004).

405. MARGULIES, *supra* note 246, at 159.

406. See DEP'T OF DEF., *COMBATANT STATUS REVIEW TRIBUNAL PROCESS AT GUANTANAMO 1-5* (2004), <http://www.defenselink.mil/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf>.

407. See DEP'T OF DEF., *GUANTANAMO DETAINEE PROCESSES* (2007), <http://www.defenselink.mil/news/Sep2005/d20050908process.pdf>.

408. See, e.g., MARGULIES, *supra* note 246, at 163-69.

access to potentially exculpatory information.⁴⁰⁹ It was quickly apparent to personnel serving at Guantánamo that innocent persons were being detained,⁴¹⁰ but the government refused to admit any mistakes, speciously identifying those it released as “[n]o [l]onger [e]nemy [c]ombatants.”⁴¹¹ Apparently, some of those held are fighters in conflicts not involving the United States. The law of war authorizes U.S. detention of WAQT adversaries but not, for example, Uighers fighting for independence from China,⁴¹² unless the United States is prepared to recognize such conflicts as wars, establish formal neutrality, and faithfully detain combatants from either side found on its territory.⁴¹³ But it seems unlikely that this would be given serious consideration, particularly with the United States committed to pursuing military-to-military contacts with the Chinese People’s Liberation Army.⁴¹⁴ The magnitude of the classification issue is demonstrated by the fact that of 779 men and boys who have been held at Guantánamo, only 223 remained in U.S. custody by late September 2009 and 75 of those were approved for release pending efforts to find a place to send them.⁴¹⁵ No matter how these facts are spun, it seems that many of those held at Guantánamo did not pose a serious threat to the United States and should never have been detained at all.

2. Conditions of Detention

Guantánamo’s facilities have evolved substantially from Camp X-ray’s original wire cages, described as being “more like an animal

409. Reply to Opposition to Petition for Rehearing app. at i-vii, *Al Odah v. United States*, 128 S. Ct. 1923 (2008) (No. 06-1196), available at <http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf>.

410. See, e.g., SAAR & NOVAK, *supra* note 402, at 110, 114.

411. MARGULIES, *supra* note 246, at 169.

412. Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees* 21 (Seton Hall Pub. Law Research Paper No. 46, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885659.

413. See generally Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654, reprinted in 2 AM. J. INT’L L., 117, 117-27 (Supp. 1908).

414. See Al Pessin, *US Admiral Calls for Renewed US-China Military Talks*, VOICE OF AM., Mar. 19, 2009, <http://www.voanews.com/english/2009-03-19-voa63.cfm>.

415. Carol Rosenberg, *78 Guantánamo Detainees Cleared To Leave*, MIAMI HERALD, Sept. 28, 2009, available at <http://www.miamiherald.com/news/nation/story/1256375.html>.

shelter in a bad neighborhood than a place to keep people.”⁴¹⁶ Reports in mid-2008 indicated that about fifty “highly compliant” detainees were in Camp 4, which permits detainee interaction in communal living facilities.⁴¹⁷ The large majority of the detainees, however, were held in much more rigorous conditions in Camps 5 and 6, modeled after high security facilities,⁴¹⁸ while a few “high-value” detainees were kept at a secretive Camp 7.⁴¹⁹ Camp 6 consists of individual eight-by-ten foot cells in which detainees spent twenty-two hours a day, allowed out only for showers and exercise in “small wire cages.”⁴²⁰ It was said that these detainees could rarely even see one another, with communication limited to shouting through feeding slots.⁴²¹ Camp 5 may be better in that detainees can shout to one another through their cell walls, but they apparently cannot see any sunlight from their cells and exercise periods might be after dark.⁴²² Those viewing the detainees as hardened terrorists may discount these conditions as cause for concern since most

are housed in new buildings modeled after civilian prisons in Indiana and Michigan. Detainees receive three culturally appropriate meals a day. Each has a copy of the Koran. Guards maintain respectful silence during Islam’s five daily prayer periods, and medical care is provided by the same practitioners who treat American service members. Detainees are offered at least two hours of outdoor recreation each day, double that allowed inmates, including convicted terrorists, at the “supermax” federal penitentiary in Florence, Colo.⁴²³

416. SAAR & NOVAK, *supra* note 402, at 42.

417. William Glaberson, *Detainees’ Mental Health is Latest Legal Battle*, N.Y. TIMES, Apr. 26, 2008, at A1.

418. Kathleen T. Rhem, *Officials Decry Use of Outdated Images To Portray Gitmo*, AM. FORCES PRESS SERVICE., Nov. 29, 2005, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=18200>.

419. William Glaberson, *Man Held by C.I.A. Says He Was Tortured*, N.Y. TIMES, Dec. 9, 2007, at 28.

420. Tim Golden, *Guantánamo Detainees Stage Hunger Strike Despite Force-Feeding Policy*, N.Y. TIMES, Apr. 9, 2007, at A12.

421. *Id.*

422. Glaberson, *supra* note 417.

423. Morris D. Davis, Op-Ed., *The Guantanamo I Know*, N.Y. TIMES, June 26, 2007, at A21.

The problem, however, is that these detainees were never convicted of, or in most cases even charged with, anything.⁴²⁴ They were preventively detained under the law of war, and these conditions are a clear violation of international standards that the United States played a leading role in developing. U.S. leaders emphatically rejected the legality of the close confinement imposed on Americans held during the Revolution. A 1785 treaty with Prussia codified this view in language prohibiting prisoners of war from being “confined in dungeons, prisonships, nor prisons” but must instead be “disposed in cantonments, open & extensive enough for air & exercise, and lodged in barracks as roomly & good as are provided [for the detaining parties’] own troops.”⁴²⁵ Although a bold step forward for the eighteenth century, these rules came to be taken as a firm requirement in *all* conflicts before the end of the nineteenth century. The Institute of International Law’s 1880 Oxford Manual on the Law of Land Warfare declared that “[t]he confinement of prisoners of war is not in the nature of a penalty for crime It is a temporary detention only, entirely without penal character.”⁴²⁶ After citing this language approvingly in his 1896 military law treatise, William Winthrop, “the ‘Blackstone of American military [justice.]’”⁴²⁷ explained that prisoners of war can be “*confined* in a *building* only when such confinement is indispensable for their safe detention.”⁴²⁸

The Hague Land Warfare Regulations expressly mainstream this requirement into the customary law of war. Article 5 declares that “[p]risoners of war may be subjected to internment in a city, fortress, camp, or [other] place”⁴²⁹ but requires that they shall be on “the same footing, with regard to food, bed, and clothing, as the troops of the Government which has captured them.”⁴³⁰

424. LAUREL FLETCHER ET AL., *GUANTANAMO AND ITS AFTERMATH* 56-68 (2008).

425. Treaty of Amity and Commerce, *supra* note 143, art. 24.

426. INST. OF INT’L LAW, *THE LAWS OF WAR ON LAND* § 111.A. (1880), *reprinted in* THE LAW OF ARMED CONFLICTS 37 (Deitrich Schindler & Jiri Toman eds., 4th rev. ed. 2004) [hereinafter OXFORD MANUAL].

427. *Burns v. Wilson*, 346 U.S. 844, 849 n.1 (1953).

428. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 788, 791 (2d ed., rev. & enl. 1920) (citing OXFORD MANUAL provisions for the treatment of prisoners of war).

429. Hague Regulations, *supra* note 29, art. 5.

430. *Id.* art. 7.

If the Third Geneva Convention does not apply to detainees as treaty law, then some of the obscure provisions, over which Alberto Gonzales provoked an uproar by describing as quaint,⁴³¹ such as Article 60's call for advance pay of eight French francs per month, may well be optional. But those who deride the extension of rights accorded by international law to Guantánamo detainees as “offensive” or “unjust”⁴³² ignore the simple reality that these benefits are part and parcel of the legal authority to detain individuals preventively in the first place. According to the judgments of the U.S. WWII military tribunals, detaining POWs without access to sunlight is a violation of the customary law of war.⁴³³ If one desires to see “terrorists” confined in supermax cells rather than living in communal facilities with free access to library materials and meaningful recreation activities, they need only be tried and convicted of a recognized offense before a lawfully constituted court. No legitimate twenty-first century legal system permits punishment based on a unilateral executive declaration that an individual is a wrongdoer.

The Guantánamo approach of requiring detainees to earn their way up to accommodations roughly comporting with POW detention standards is also legally backwards. Detainees may be given punitive detention for up to thirty days for violating disciplinary rules⁴³⁴ or criminally tried for serious offenses committed in captivity.⁴³⁵ But they cannot be required to *earn* the treatment mandated by law.

The same basic criteria should apply to detention conditions if the detainees are classified as civilians. International law did not explicitly address civilians with much specificity prior to Geneva IV.⁴³⁶ The Hague Land Warfare Regulations, for example, which initially codified occupation law, have no specific provisions about detaining civilians. But Geneva IV commentary on civilian deten-

431. John Cornyn, *In Defense of Alberto R. Gonzales and the 1949 Geneva Conventions*, 9 TEX. REV. L. & POL. 213, 220 (2005).

432. *See id.*

433. UNITED NATIONS WAR CRIMES COMM'N, 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 101 (1949).

434. *See, e.g.*, Geneva III, *supra* note 26, arts. 89-90.

435. *See, e.g., id.* art. 82.

436. *See* DOCUMENTS ON THE LAWS OF WAR 299-300 (Adam Roberts & Richard Guelff eds., 3d. ed. 2000).

tion states that it is not punitive and cannot be based on prison models, and the treaty's prescriptions about camp conditions are intended to conform with, or exceed, those specified for prisoners of war.⁴³⁷

The open-ended nature of preventive detention under the law of war has been a concern for many critics, particularly given efforts to cast the current conflict as an ambiguous struggle against unbounded "terror networks of global reach"⁴³⁸ or term it "the Long War."⁴³⁹ There is also concern that al Qaeda is such a loose coalition that there may be no central authority that can surrender to definitively end the conflict.

As a legal matter, these concerns should not be dispositive. No one has ever known how long a conflict would last *ex ante*—the Thirty Years and Hundred Years Wars were named only after the fact. Under U.S. law, the political branches have the authority to determine when a conflict ends,⁴⁴⁰ not the adversary. Past wars legally ended when the Executive concluded a formal peace agreement or declared the conflict at an end, not when the enemy surrendered. As long as the administration is properly limited in defining the conflict to the scope actually authorized by Congress, there will be a time when hostilities against al Qaeda and the Taliban are recognized as over, even if years or decades from now.

In the interim, international law does provide for individual dangerousness determinations. Geneva IV is explicit with respect to civilians.⁴⁴¹ Although Bush administration supporters asserted that the annual review it provided Guantánamo detainees is unprecedented,⁴⁴² it provides exactly half of what the law requires for civilians.⁴⁴³ And it is incorrect to think that no nation does more. Even while denying the applicability of Geneva IV to "the Occupied Territories,"⁴⁴⁴ Israel's statute authorizing preventive detention of

437. See Geneva IV Commentary, *supra* note 337, at 383-87.

438. Remarks on the Six-Month Anniversary of the September 11th Attacks, *supra* note 185.

439. See James Westhead, *Planning the US 'Long War' on Terror*, BBC NEWS, Apr. 10, 2006, <http://news.bbc.co.uk/2/hi/americas/4897786.stm>.

440. *Baker v. Carr*, 369 U.S. 186, 213 (1962).

441. See Geneva IV, *supra* note 26.

442. KYNDRA MILLER ROTUNDA, *HONOR BOUND* 139 (2008).

443. See Geneva IV, *supra* note 26, art. 43.

444. See Amnesty Int'l, *Israel and the Occupied Territories: Respect of Fourth Geneva*

“unlawful combatants” requires semiannual judicial review.⁴⁴⁵ Despite the “unlawful combatant” nomenclature, the law’s provisions, recently upheld by Israel’s Supreme Court,⁴⁴⁶ comply with Geneva IV’s requirements for treatment of civilians, including defining its applicability to persons not covered by Geneva III.⁴⁴⁷

Individual dangerousness determinations are not as explicitly mandated for POWs. They may be inferred, however, from provisions like Geneva III’s call for the repatriation of prisoners “whose mental or physical fitness seems to have been gravely and permanently diminished”⁴⁴⁸ and optional repatriation of those “who have undergone a long period of captivity.”⁴⁴⁹ Since preventive detention is permitted solely to incapacitate members of the enemy from harming the detaining power, logic clearly dictates that *any* individual who no longer poses a credible threat should be released.

The largely forgotten historic practice of paroling prisoners of war remains a legal option, even in the Geneva era,⁴⁵⁰ that could be employed to potential U.S. advantage in the WAQT. This might be of little value in dealing with hardcore al Qaeda members, who presumably would resume hostile activities with little regard for a pledge extracted by western infidels. But violating a parole was historically considered a capital offense.⁴⁵¹ If biometric data and DNA samples were collected before release, it should be a straightforward matter to convict any detainee found to have rejoined the fight for “breach of parole,”⁴⁵² with no need to prove any separate substantive offense. This approach could reduce the risk of releasing

Convention Must be Insured by High Contracting Parties Meeting in Geneva, Dec. 4, 2001, <http://www.amnesty.org/en/library/info/MDE15/108/2001/en/> (follow “Download: PDF” hyperlink).

445. Incarceration of Unlawful Combatants Law, 5762-2002 (Isr.), *reprinted in* 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 389-92 (2002).

446. CrimA 6659/06 Anonymous v. State of Israel [2008], *available at* http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf. A helpful summary is Roger Alford, *The Ten Principles of Detention*, OPINIO JURIS BLOG, July 31, 2008, <http://opiniojuris.org/2008/07/30/the-ten-principles-of-detention/>.

447. *Compare* Incarceration of Unlawful Combatants Law, *supra* note 445, *with* Geneva IV, *supra* note 26.

448. Geneva III, *supra* note 26, art. 110.

449. *Id.* art. 109.

450. *See id.* art. 21.

451. LIEBER CODE, *supra* note 148, art. 124.

452. U.K. MINISTRY OF DEF., *supra* note 130, § 8.107.

less threatening individuals, such as David Hicks and Salim Hamdan, Osama bin Laden's driver, particularly if the process included a formal oath administered by a Muslim cleric for additional deterrent effect.⁴⁵³

Curiously, the United States took a partial step in this direction, asking, but apparently not insisting, that each detainee sign a "release agreement" stating, inter alia, that he would "not in any way affiliate himself with al Qaeda or its Taliban supporters."⁴⁵⁴ The agreement stated that failure to fulfill its promises could result in immediate detention "consistent with the law of armed conflict" but made no mention of liability to punitive sanctions.⁴⁵⁵ Breach of parole is not one of the twenty-eight specific offenses made triable by the MCA nor is it included among the war crimes defined by the War Crimes Act of 1996.⁴⁵⁶

D. Interrogation Under the Law of War

The law of war confers tangible advantages over ordinary criminal law in the area of interrogation. Whether through deliberate security practices or the practical reality of being a low-tech organization functioning under austere conditions largely in primitive regions, al Qaeda seems relatively impervious to high-tech data collection. Despite offers of monetary rewards, human sources have not been forthcoming either,⁴⁵⁷ placing a premium on obtaining information from captured members.

One reason that the Bush administration sought to avoid invocation of the Geneva Conventions was the belief that they would limit interrogation flexibility.⁴⁵⁸ But, in reality, the most effective means of questioning prisoners are consistent with longstanding

453. Religious oaths were included as part of the paroles issued to Mexican soldiers by General Scott. WINTHROP, *supra* note 428, at 795.

454. FLETCHER ET AL., *supra* note 424, at 59-60.

455. *Id.*

456. See Military Commissions Act of 2006, 10 U.S.C. §§ 948a et seq. (2006); War Crimes Act of 1996, 18 U.S.C. § 2441 (2006).

457. Craig Whitlock, *In Hunt for Bin Laden, a New Approach*, WASH. POST, Sept. 10, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/09/AR2008090903404.html>.

458. SALES, *supra* note 248, at 37-38.

law of war rules, which are codified by both the Geneva Conventions and almost certainly customary law.

Geneva III mandates that

[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.⁴⁵⁹

The same basic limitations are implied in Geneva IV's provision that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."⁴⁶⁰ But neither Convention has any prohibitions on the length or subject matter of questioning, any suggestion that a detainee has a right to counsel or to terminate an interrogation, or any bar to providing incentives to cooperate that exceed the basic standard of care owed all POWs or civilian detainees. One of the Luftwaffe's leading WWII interrogator's successful tactics was to take captured allied fliers for a walk in the woods, sometimes including a meal at a local coffee shop.⁴⁶¹ The tactic of plying detainees with hamburgers, reportedly used effectively at Guantánamo on David Hicks,⁴⁶² would be perfectly legal as long as he was not deprived of regular meals to increase his vulnerability.

Both the allies and the Germans were able to establish highly effective interrogation centers during WWII that complied with these rules mandating noncoercive treatment. The American center built specifically for this purpose at Fort Hunt, Virginia placed detainees in two-person rooms based on the belief that useful information could be obtained by monitoring conversations between prisoners.⁴⁶³ The Germans elected to detain their interrogatees in isolation from one another to keep them from coordinating resis-

459. Geneva III, *supra* note 26, art. 17.

460. Geneva IV, *supra* note 26, art. 31.

461. See RAYMOND TOLIVER, THE INTERROGATOR 98-110 (1997).

462. SALES, *supra* note 248, at 86.

463. Maj. Steven M. Kleinman, The History of MIS-Y: U.S. Strategic Interrogation During World War II (Aug. 2002) (unpublished M.S. thesis, Joint Military Intelligence College), available at <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA447589&Location=U2&doc=GetTRDoc.pdf>.

tance.⁴⁶⁴ Today, the western democracies comprising the NATO alliance agree that even Geneva III allows for isolating captives to enhance the success of interrogations for at least a short period after capture.⁴⁶⁵ The governing NATO agreement provides no specific time limit that POWs can be held at special interrogation units but directs that it be “the minimum time consistent with the effective exploitation of the POW intelligence potential.”⁴⁶⁶

A variety of nuanced psychological techniques were employed by leading interrogators in past conflicts, such as persuading detainees that the information sought was already known. The common feature of these measures is that they center on rapport building, not coercion.⁴⁶⁷ Today, leading experts on interrogation concur with the historical perspective on the value of noncoercive interrogations, agreeing that coercion is counterproductive, leading to stiffened resolve and misinformation.⁴⁶⁸ Many of the techniques authorized for use by the U.S. Army’s manual governing interrogation would be permissible even under the constitutional standards applied to regular U.S. domestic law enforcement.⁴⁶⁹

It thus seems virtually incomprehensible that U.S. officials would adopt coercive practices for the “war on terror” based on those from the military’s Survival, Evasion, Resistance, and Escape (SERE) training and the CIA’s KUBARK Manual.⁴⁷⁰ As the military’s SERE manual points out, America’s enemies apply these techniques to our service personnel in violation of the law of war.⁴⁷¹ And it does not

464. TOLIVER, *supra* note 461.

465. See Interrogation of Prisoners of War (PW), NATO Standardization Agreement (STANAG) 2033 (on file with author).

466. *Id.*

467. See TOLIVER, *supra* note 461, at 190; Kleinman, *supra* note 463.

468. See, e.g., INTELLIGENCE SCI. BD., EDUCING INFORMATION, at vii-ix (2006); MAYER, *supra* note 4, at 155-57 (documenting success of FBI noncoercive approach on Abu Zubadaya); Steven Kleinman, *The Flawed Thinking of the Administration’s Torture Advocates*, NIEMAN WATCHDOG, Aug. 7, 2008, http://www.niemanwatchdog.org/index.cfm?fuseaction=ask_this.view&askthisid=00355.

469. Compare U.S. ARMY, FIELD MANUAL (FM) 2-22.3, HUMAN INTELLIGENCE COLLECTION OPERATIONS, available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>, with FRED E. INBAU, CRIMINAL INTERROGATION AND CONFESSIONS 489-98 (2001).

470. MAYER, *supra* note 4, at 157-64 (describing the origins of the CIA’s post 9/11 interrogation program and its linkages to the military’s SERE program and CIA KUBARK Manual).

471. U.S. NAVY AND MARINE CORPS, SURVIVAL, EVASION, RESISTANCE AND ESCAPE STUDENT HANDBOOK 4 (1999).

require the Geneva Conventions to reach this result. The 1863 Lieber Code declared that “the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information, or to punish them for having given false information.”⁴⁷² The 1907 Hague Regulations extend this protection to civilians, making it “forbidden to compel the inhabitants of an occupied territory to furnish information concerning the army of the other belligerent or concerning his means of defense.”⁴⁷³

Furthermore, the techniques at issue were not developed to be truth seeking but rather for exactly the opposite purpose. The KUBARK techniques were those used by the Soviets to elicit false confessions from political prisoners to justify their convictions in Stalin’s “show trials.”⁴⁷⁴ The SERE program was intended to expose American personnel considered most at risk of capture, such as aircrew and special forces, to the techniques used by post-WWII adversaries seeking false confessions or propaganda admissions.⁴⁷⁵ As former Navy SEAL, SERE graduate, and Minnesota Governor, Jesse Ventura colorfully declared to CNN’s Larry King, “you give me a water board, Dick Cheney and one hour, and I’ll have him confess to the Sharon Tate murders.”⁴⁷⁶ SERE debriefs revealed to the students that the harsh treatments they were subjected to generally stiffened the resolve to be unforthcoming but warned that they were at much greater risk of revealing useful information during noncoercive encounters.⁴⁷⁷

The experiences of Americans subject to enemy mistreatment bears this out. Despite a Code of Conduct strictly limiting U.S. personnel to providing only the required Geneva Convention information, virtually no one could resist the coercive pressures to tell the enemy what they wanted to hear, including false admissions of wrongdoing.⁴⁷⁸ But few, if any, gave up any information of actual intelligence value, instead fabricating fictional details to satisfy the interrogators. Pressed for the names of fellow pilots, for example,

472. LIEBER CODE, *supra* note 148, art. 80.

473. Hague Regulations, *supra* note 29, art. 44.

474. MAYER, *supra* note 4, at 159.

475. *Id.* at 157-59, 164.

476. Larry King Live (CNN television broadcast May 11, 2009) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0905/11/lkl.01.html>).

477. See Scott Shuger, *Hurts So Good*, WASH. MONTHLY, May 1, 1988, at 11, 20.

478. See STUART I. ROCHESTER & FREDERICK KILEY, HONOR BOUND 144-65 (1998).

John McCain instead offered the names of the Green Bay Packers' offensive line.⁴⁷⁹ Under more intense torture, he made a false confession to war crimes and recorded a tape broadcast for propaganda purposes.⁴⁸⁰ Why would anyone think that al Qaeda members would be more truthful under coercion when the U.S. government insists that they were trained to resist interrogation?⁴⁸¹ Given the limited capabilities to verify detainee statements, U.S. national interests would be better served by obtaining a lesser quantity of accurate information volunteered by detainees than by inducing noncooperative detainees to make up a substantial volume of misinformation to stop harsh treatment. The torture of alleged al Qaeda operative Abu Zubaida, for example, reportedly resulted in his providing information that "sent hundreds of CIA and FBI investigators scurrying in pursuit of phantoms" and the expenditure of "millions of dollars chasing false alarms."⁴⁸² Further, such detainee abuse has severely damaged American credibility, may ultimately render some detainees effectively untriable, and could even subject American personnel to war crimes prosecution.

E. Trial

The Guantánamo military commissions have generated tremendous controversy since President Bush first authorized their use in November 2001, largely because they were intended to take deliberate shortcuts from the procedural due process provided by civilian courts and courts-martial.⁴⁸³ The MCA enacted in 2006 improved the tribunal's basic fairness and arguably resolved the domestic legal issues underlying the Supreme Court's 2006 *Hamdan* decision,⁴⁸⁴ but it still left substantial grounds for criticism.⁴⁸⁵ Although President Obama suspended these trials upon assuming

479. JOHN MCCAIN, FAITH OF MY FATHERS 194 (1999).

480. *Id.* at 242-46.

481. George W. Bush, Speech Discussing the Creation of Military Commission To Try Suspected Terrorists (Sept. 6, 2006) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>).

482. Peter Finn & Jody Warrick, *Detainee's Harsh Treatment Foiled No Plots*, WASH. POST, Mar. 29, 2009, at A1 (quoting former intelligence officials).

483. See Glazier, *supra* note 18, at 132-35, 147.

484. See *id.* at 174-77 (describing the *Hamdan* holding and MCA contents).

485. *Id.* at 185-93.

office,⁴⁸⁶ he subsequently announced they could be used for prosecution of law of war violations.⁴⁸⁷ Although the President unilaterally directed some additional improvements to the commission process,⁴⁸⁸ and Congress made further enhancements in the Military Commissions Act of 2009 (MCA 2009),⁴⁸⁹ which serves as a complete replacement for the 2006 MCA, significant flaws remain.

Like many aspects of the “war on terror,” fundamental elements of the commission process still lack essential definition or remain problematic under international law, including whether the commissions can validly exercise personal and subject matter jurisdiction in their intended role. First, it is questionable whether military commissions can properly exercise personal jurisdiction over any detainees when they depart from national due process standards and exclude all U.S. citizens from their jurisdiction. This issue is complicated by the concurrent U.S. failure to clearly locate the detainees in any recognized law of war category. If the detainees are held to be combatants, for example, Geneva III, and quite likely contemporary customary international law, limits their trials to the same courts as the detaining nation’s own service personnel, which would bar the use of these commissions.⁴⁹⁰ Courts-martial would be the preferred forum, although federal courts could try violations of the War Crimes Act.⁴⁹¹ If, on the other hand the detainees are “unlawful combatants,” then their lack of combatant immunity should call for trial in domestic courts under the full scope of domestic U.S. criminal law,⁴⁹² not ad hoc military tribunals applying reduced due process standards.⁴⁹³ The same is logically true if the detainees are considered civilians; lacking combatant immunity, they also should be prosecuted in ordinary criminal courts.⁴⁹⁴

486. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/.

487. Statement on Military Commissions, *supra* note 17.

488. *Id.*

489. Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801-1807, 123 Stat. 2190 (2009) [hereinafter MCA 2009].

490. See, e.g., Geneva III, *supra* note 26, art. 87.

491. See 18 U.S.C. § 2441 (2006).

492. See *supra* Part I.A.

493. See *supra* note 234 and accompanying text.

494. See *supra* Part III.B.

There are also real questions about the commissions' subject matter jurisdiction over most of the offenses that have been charged to date. There is no known precedent, for example, for considering the provision of material support to terrorism to constitute a law of war violation, but there is substantial precedent holding that inchoate offenses such as conspiracy are not war crimes.⁴⁹⁵ Overall, those responsible for implementing the commission process have shown little concern for legal coherency. Omar Khadr, for example, is charged with spying even while his charge sheet recites a chronology of events that constitutes a *prima facie* bar to prosecution for that offense.⁴⁹⁶

Even if the jurisdictional hurdles are met, procedural due process concerns remain. The MCA 2009 has resolved most previous concerns about the use of statements coerced from defendants by instituting a voluntariness standard,⁴⁹⁷ which is consistent with both civilian and U.S. military law, as well as pre-WWII military commission practice.⁴⁹⁸ But the continued admissibility of hearsay creates real concern that the government might circumvent MCA 2009's prohibitions on admission of evidence obtained by torture or cruel, inhuman, or degrading treatment⁴⁹⁹ by depriving the defense of the opportunity to question the declarant about the circumstances surrounding his statement.

Although the rules imply the judge will be the gatekeeper against tainted evidence, in reality an adversarial system puts a *de facto* burden on the defendant to show that statements resulted from unlawful treatment, even though the government holds all the information necessary to do so. The commissions' discovery rules remain heavily biased against the defendant, with one prosecutor, the fifth overall to do so, resigning in late 2008 because exculpatory evidence was being withheld from the defense.⁵⁰⁰ A sixth prosecutor

495. See Glazier, *supra* note 18, at 185-87.

496. *Id.* at 187.

497. See MCA 2009, *supra* note 489, § 948r(c).

498. See NAT'L INST. OF MILITARY JUSTICE, BACKGROUND: PROPOSED CHANGES TO THE MILITARY COMMISSION MANUAL, available at <http://www.nimj.com/display.aspx?base=MilitaryCommissions&ID=246> (noting voluntariness standard in civilian courts and courts-martial); Glazier, *supra* note 204, at 53-54 (noting voluntariness standard applied in Philippine Insurrection military commissions).

499. See MCA 2009, *supra* note 489, § 948r(a).

500. Eric Umansky, *The Six Gitmo Prosecutors Who Protested*, PRO PUBLICA, Oct. 1, 2008,

refused to try a case because the key evidence against the defendant was a group of statements obtained under what the prosecutor determined had been unlawful coercion.⁵⁰¹ What prosecutor is going to seek the admission of evidence and then inform the judge that this evidence cannot lawfully be heard?

The procedural problems with the commissions are likely to result in an objective finding that they violate international law. Even *if* the Bush administration was correct that “war on terror” detainees fall outside other recognized law of war categories, they would fall within the protections of the catch-all Protocol I Article 75, which U.S. officials have previously acknowledged as declaratory of customary international law.⁵⁰² Article 75 provides “fundamental guarantees” for persons “in the power of a Party to the conflict ... who do not benefit from more favourable treatment” under specific protections enumerated elsewhere in IHL.⁵⁰³ Among Article 75’s provisions calling into question the military commission’s legitimacy are prohibitions on *ex post facto* law, a requirement for the defense to have the same access to witnesses as the government enjoys, and categorical bans on not only torture but also on “humiliating and degrading” treatment.⁵⁰⁴ This last provision provides additional support for concluding that President Obama’s admissibility bar based on inhuman, cruel, and degrading treatment is too low.

Although largely overlooked in public discussion to date, a fairly substantial body of post-WWII war crime jurisprudence clearly establishes denial of a fair trial as a war crime, with cases addressing trials of both POWs and civilians who had no claim to lawful combatant status.⁵⁰⁵ Trials of both German and Japanese officials clearly rejected compliance with national law as a defense against failure to provide treatment meeting international legal mandates.⁵⁰⁶ The unhappy U.S. experience with the Malmédy trial, in

<http://www.propublica.org/article/the-six-gitmo-prosecutors-who-proteted-1001/>.

501. *Id.*

502. Glazier, *supra* note 27, at 116.

503. Protocol I, *supra* note 206, art. 75.

504. *Id.*

505. *See, e.g.*, UNITED NATIONS WAR CRIMES COMM’N, 5 LAW REPORTS OF TRIALS OF WAR CRIMINALS 25-26, 30-31 (1948) (reporting trial of Japanese soldiers for denial of fair trial to unlawful combatants); *id.* at 66 (reporting trial of Japanese officers for denial of fair trial to captured U.S. pilot).

506. *See, e.g.*, UNITED NATIONS WAR CRIMES COMM’N, 6 LAW REPORTS OF TRIALS OF WAR

which German soldiers were convicted of massacring captured Americans, demonstrates how use of coerced testimony can eventually result in public concerns about the unfair trial outweighing the desire to see retribution against even perpetrators of a serious outrage.⁵⁰⁷

Continued use of the Guantánamo commissions seems certain to further undermine the credibility of the U.S. government's commitment to the rule of law. It is likely to both provide negative publicity helpful to the nation's adversaries and further dissipate international legal cooperation in the conflict.

V. THE WAY FORWARD

President Obama has committed the United States to putting the excesses of the Bush administration's counterterrorism policies behind it, but he has elected to continue the application of measures authorized by the law of war in the fight against al Qaeda. In order to place this effort on sound legal footing, it is necessary to locate detainees within a recognized legal classification, establish credible procedures to ensure that only those legitimately detainable are held both now and in the future, and conform detention, interrogation, and trial standards to international legal mandates. This requires much more effort than simply closing Guantánamo—it is not the location but rather the unlawful conduct that took place there that is the real issue.

Indeed Guantánamo is probably the ideal location for holding WAQT detainees. Access is exclusively controlled by the U.S. government, and the base is secure and free of curiosity seekers. It is in the same time zone as and just three hours flying time from Washington, D.C., and any litigation can be conveniently limited to courts in the national capital since Cuba is outside the territorial jurisdiction of any state or other federal circuit. Unfortunately, Guantánamo was selected for the wrong reason—avoiding *any* judicial oversight.⁵⁰⁸ This fact, combined with a steady stream of

CRIMINALS 1 (1948) (reporting on “the Justice Trial” of German legal officials); UNITED NATIONS WAR CRIMES COMM’N, *supra* note 433, at 1 (denying compliance with Japan’s “Enemy Airmen’s Act” as absolving failure to comply with the law of war).

507. See Glazier, *supra* note 18, at 145-47.

508. MARGULIES, *supra* note 246, at 45-48.

public relations disasters, from the first images of blindfolded detainees in orange jumpsuits kneeling in wire cages to leaked details of abusive interrogations and questionable detention decisions, may well render Guantánamo's continued use politically untenable.⁵⁰⁹ Although President Obama has ordered its ultimate closure,⁵¹⁰ virtually all alternatives proposed to date have practical or legal flaws.

Proposals to move detainees to continental U.S. facilities such as the military prison at Fort Leavenworth⁵¹¹ fail to address the fundamental issue of detention conditions and actually make the violation more flagrant by placing preventive detainees in an actual prison. Solutions proposed by several nongovernmental organizations involve keeping only those who will actually be tried in U.S. custody, with all others to be either released or transferred to third countries.⁵¹² This sounds appealing but can only work if all those who pose actual threats can be tried in the United States. If the U.S. lacks admissible evidence necessary to convict a detainee, there is little reason to believe he can be fairly prosecuted abroad. Unlike the United States, countries not actually attacked lack the belligerent's right of preventive detention. So transfer only makes sense when the detainee is held essentially in error. In other words, transfer is synonymous with release, except in the rare case in which credible evidence supports the detainee's conviction for a crime punishable by a third country not also prosecutable by the United States. Otherwise, transfers would be transparent efforts to circumvent law by having another nation engage in egregious conduct on behalf of the United States. Defense Secretary Robert Gates estimated in Spring 2009 that there would likely be fifty to one hundred detainees who cannot be fairly convicted anywhere yet pose significant danger to the United States and therefore should be

509. DAVID ROSE, *GUANTÁNAMO* 2-7, 10 (2004).

510. Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4898 (Jan 22, 2009), *available at* http://whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/

511. Martha T. Moore, *Guantanamo Bay Puzzles Candidates*, USA TODAY, June 19, 2007, *available at* http://www.usatoday.com/news/politics/2007-06-18-gitmo-candidates_N.htm.

512. SARAH E. MENDELSON, CTR. FOR STRATEGIC & INT'L STUDIES, *CLOSING GUANTÁNAMO: FROM BUMPER STICKER TO BLUEPRINT* 10-11, 13-16 (2008), *available at* http://csis.org/files/media/isis/pubs/080905_mendelson_guantanamo_web.pdf; HUMAN RIGHTS FIRST, *HOW TO CLOSE GUANTÁNAMO* 2, 4, 6, 8 (2008), <http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf>.

preventively detained.⁵¹³ But this should be done in full compliance with the law of war. Bringing U.S. conduct within the law requires several actions, most of which fall within a realistic assessment of the President's Commander in Chief authority.

A. Classifying the Enemy

The first step is to explicitly locate the WAQT detainees within a recognized law of war category, either as combatants or civilians. This is a prerequisite for determining when force can be used against them, establishing detention review requirements, and defining the scope of permissible criminal jurisdiction. If they are broadly categorized as combatants, the United States is still free to evaluate units and individual detainees as being "unlawful combatants" entitled to treatment equivalent to POWs but denied combatant immunity and liable to ordinary criminal trial.⁵¹⁴ Air Force JAGs reportedly recommended this approach in September 2001.⁵¹⁵ Both the courts and Congress would likely defer to a good faith Executive determination on how detainees should be categorized if their subsequent treatment conformed to the applicable standards. Given that this approach offers the greatest flexibility in targeting, detention, and trial, this seems to offer substantial practical advantages over treating al Qaeda members as civilians unlawfully participating in hostilities.

B. Determining Who Can Be Held

The second step is to implement a credible process for making detention decisions given the absence of the uniforms and identification cards relied upon in "conventional" conflicts. While the Obama administration has established a high-level interagency process to perform a comprehensive one-time review of the status of current detainees,⁵¹⁶ it is appropriate to consider how a more systematic

513. Elisabeth Bumiller & William Glaberson, *Gates Says Up to 100 Detainees May Be Held in U.S.*, N.Y. TIMES, May 1, 2009, at A16.

514. See *supra* Part III.D.

515. Adam Roberts, *The Laws of War*, in ATTACKING TERRORISM, *supra* note 18, at 186, 202.

516. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/.

approach could be institutionalized to deal with future captures. Under the law of war, such decisions traditionally are made by tribunals comprised of military officers.⁵¹⁷ The fundamental flaw with the CSRT process has been a demonstrated bias in favor of decisions to continue to detain, including lack of a good faith effort to provide exculpatory evidence, and even directed “do-overs” in some cases where hearing panels voted for release.⁵¹⁸ But Hamdan’s military commission verdict, including acquittal of some charges and sentence to less than six months additional confinement, shows that military officers are quite capable of reaching objective judgments about the detainees’ culpability and dangerousness.⁵¹⁹

Most lawyers critical of the current CSRTs process have proposed a more adversarial system, including assigning counsel to represent each detainee and having judges serve as the decision makers.⁵²⁰ Based on my own military experience, I believe that a nonadversarial proceeding conducted primarily by line officers that resembles the nonjudicial punishment process specified by Uniform Code of Military Justice (UCMJ) Article 15⁵²¹ would be a better means of reaching accurate decisions. Officers assigned to these tribunals would almost certainly have substantial experience with Article 15 hearings and this approach would be generally consistent with past U.S. implementation of the Article 5 tribunals called for by Geneva III in cases of doubt about a detainee’s legal classification.⁵²²

The single most important improvement to the current CSRT process would simply be a clarification to all participants that U.S. national interest is best served by an accurate determination, *not* a decision to detain. Releasing terrorist-affiliated individuals poses the risk of their rejoining hostilities, but detaining innocents only further alienates world populations and will result in additional

517. See, e.g., U.K. MINISTRY OF DEF., *supra* note 130, § 8.21.

518. See Reply to Opposition to Petition for Rehearing, *supra* note 409, at iii-iv, vi-vii.

519. Jim Miklaszewski, *Pentagon Quietly Celebrates Hamdan Sentence*, DEEP BACKGROUND, NBC NEWS INVESTIGATES, Aug. 7, 2008, <http://deepbackground.msnbc.msn.com/archive/2008/08/07/1254366.aspx>.

520. See, e.g., Brief of United States Senator Arlen Specter as Amicus Curiae in Support of Petitioner at 14-17, *Boumediene et al. v. Bush*, 18 S. Ct. 2229 (2008) (Nos. 06-1195 and 06-1196), 2007 WL 906694 (arguing military officers lacked sufficient independence and impartiality to make final detention decisions).

521. 10 U.S.C. § 815 (2006).

522. See FREDERIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM 33-34 (2003), *available at* <http://www-cgsc.army.mil/carl/download/csipubs/jag.pdf>.

financial support and recruiting successes for al Qaeda. As a practical matter, restoring procedural credibility calls for a new governing directive and tribunal nomenclature. If the detainees are classified as “civilians,” then the periodic review needs to be semiannual.

I recommend the following specific enhancements:

(1) The governing directive should explicitly identify the desired outcome to be an accurate decision about the liability of the detainee to continued detention via a nonadversarial fact-finding proceeding.

(2) The tribunals should consist of at least three officers who have had command at the O-5 (Lieutenant Colonel/Commander) level or above and are already retirement eligible. Preference should be given to those who have significant experience imposing nonjudicial punishment through the Article 15 process⁵²³ and who have been involved in formal fact-finding, such as aircraft accident investigations, boards of inquiry, or Judge Advocate General’s Manual investigations. Panel members should be cleared for access to Special Compartmented Intelligence information.

(3) Each detainee should have a personal representative possessing qualifications and rank equivalent to tribunal members. This individual’s role should be to aid the detainee in identifying and obtaining any relevant information that would assist the tribunal in reaching an accurate determination. If the detainee already has a lawyer, that lawyer should assist in the process as well. Because the tribunals’ goal is to reach an accurate determination, however, a primary representative who would be ethically obligated to advocate for his client rather than seek truth is not desirable for this purpose.

(4) Another officer of equivalent rank but with substantial intelligence experience should be assigned to collect and present to the tribunal all information held by the government relevant to establishing the liability *vel non* of the detainee to continued detention. To achieve this, the President should issue an Executive Order directing *all* federal agencies to provide *any* relevant information they hold or have knowledge of, regardless of classification, to facilitate accurate decision making. While President Obama

523. See 10 U.S.C. § 815 (2006) (authorizing commanders to impose nonjudicial punishment).

has incorporated this provision into his order directing review of the current detainees,⁵²⁴ it would need to be explicitly extended to cover any additional persons detained in the future. A responsible senior official from each government agency that could have relevant information about detainees should be required to certify that the agency has conducted a thorough search of its records and provided all information held.

(5) To foster public credibility in the process, panel sessions should be open to representatives of the media, nongovernmental organizations such as the ICRC, and watchdog groups like Human Rights First and Amnesty International, except for those limited periods, if any, when legitimately classified information is actually being discussed.

(6) Detainees should have the right to meet with consular representatives from their country of citizenship and/or residence in preparation for their tribunals and to have these representatives present during unclassified sessions. This participation should help convince the world public of the tribunals' objectivity and provide a vehicle by which additional relevant evidence might be obtained.

(7) Tribunals should be chaired by the senior member with sessions focused on fact-finding by the panel rather than adversarial presentation of evidence and arguments by government and detainee representatives. Each panel member must have equal opportunity to ask all the questions he or she desires, and the panel should be free to request any additional information it considers relevant. It should be able to summon additional witnesses and to reconvene as often as necessary to hear them or pose follow-up questions that arise in the course of its investigation or deliberations.

(8) The panel should have three options for its initial determination, employing the "preponderance of the evidence" standard used in military nonjudicial punishment:

(a) the detainee is validly subject to preventive detention under the law of war;

(b) the detainee is not validly subject to preventive detention and should be released; or,

524. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/Closure_Of_Guantanamo_Detention_Facilities/.

(c) the available evidence is insufficient to reach a clear decision.

If detainees are classified as combatants, then the panel should make a further determination as to whether they are lawful combatants entitled to immunity from domestic prosecution or unlawful combatants properly denied that immunity. The panel should make a further recommendation as to whether release on parole is an acceptable risk.

(9) If the tribunal determines that the available evidence is insufficient to reach a clear decision, it should allow a period of forty-five to sixty days for additional evidence gathering. A rehearing then should be held with a presumption in favor of release unless the panel finds that a preponderance of the evidence now supports finding the detainee validly subject to preventive detention.

(10) Individuals found to be detainable should receive periodic reviews to verify that they continue to pose a threat. The procedure should be essentially the same as that of the original hearings, with the detainee given the opportunity to present any newly available evidence challenging the original detention decision. The panel should have four decision options:

(a) the detainee poses a continuing threat and should remain in detention;

(b) the detainee poses a continuing threat but parole is now an acceptable risk;

(c) the detainee no longer poses a sufficient threat to justify detention; or,

(d) new evidence calls for reversing the original detention decision.

These reviews must be conducted at least every six months if the government adopts the civilian classification. There is no specific timing required for detainees classified as combatants, but an annual assessment seems reasonable given that this should not end up being a very large population.

C. Conforming Detention Conditions to International Standards

Criticism of Guantánamo to date has focused more on questions of who is being held and interrogation procedures than detention

conditions. But confinement conditions will inevitably become a larger issue as the population is reduced to those to be held indefinitely. Of the current facilities, only the “medium security” Camp 4 seems even close to complying with customary international law standards for preventive detention of either combatants or civilians.⁵²⁵

Despite Guantánamo’s advantages, President Obama’s direction to close it dictates an impending requirement to move the detainees elsewhere. This requires selection of a suitable location in the United States and construction of secure facilities complying with lawful standards. Congressional appropriations will likely be needed. Given legitimate security concerns and the “not in my backyard” views reflected in the Senate’s resolution that “detainees housed at Guantanamo Bay ... should not be transferred stateside into facilities in American communities and neighborhoods,”⁵²⁶ a remote location on a large military base seems essential. There are many potential choices, such as the Army’s White Sands Missile Range⁵²⁷ or the Naval Air Weapons Station at China Lake.⁵²⁸ Or perhaps the secretive Air Force facility at Groom Lake, Nevada, better known as Area 51,⁵²⁹ would be a fitting place for holding dangerous aliens.

Legally, the important issue will be to pattern the primary detention facility on the required “camp” vice “prison” model, with actual cells only for disciplinary punishment and pretrial or postconviction confinement.⁵³⁰ A facility within the United States places a premium on clarifying the precise legal regime under which the detainees are held. Since habeas venue traditionally lies both

525. See, e.g., GlobalSecurity.org, Guantanamo Bay - Camp Delta, http://www.globalsecurity.org/military/facility/guantanamo-bay_delta.htm (last visited Nov. 22, 2009) (describing detention facilities).

526. S. Amendment 2351, 153 CONG. REC. S9577-78. The amendment passed by a vote of 94-3 on July 19, 2007. *Id.* at S9579.

527. See GlobalSecurity.org, White Sands Missile Range (WSMR), <http://www.globalsecurity.org/space/facility/wsmr.htm> (last visited Nov. 22, 2009) (describing the 2.2 million acre White Sands facility).

528. See GlobalSecurity.org, China Lake, <http://www.globalsecurity.org/military/facility/china-lake.htm> (last visited Nov. 22, 2009) (describing the 1.1 million acre China Lake facility).

529. See Federation of American Scientists, Area 51, <http://fas.org/irp/overhead/groom.htm> (last visited Nov. 22, 2009) (describing the secret base and available satellite imagery).

530. See *supra* Part IV.C.

where an individual is confined and where officials ordering the detention can be found,⁵³¹ a U.S. site will expand the number of judges involved. Without an agreed legal basis for the detentions, habeas petitions will result in disparate rulings and potentially circuit splits, further clouding the detainees' legal status.

D. Interrogation Standards

Despite the government's assertion that detainees revealed several plots under coercive interrogation, a growing body of public information calls this into question.⁵³² In any event, it is probable that more helpful information still would have been obtained through the noncoercive approaches favored by virtually all experienced interrogation professionals.⁵³³ Any value gained from coercive means must also be balanced against the harm to America's reputation, concomitant loss of moral authority in addressing problematic foreign actions, reduced cooperation in the WAQT, and lost prosecution opportunities.

Although President Bush vetoed a statute limiting the CIA to the standards set for the Army,⁵³⁴ coercive interrogations violate the law of war and any Americans who engage in these practices can be prosecuted internationally even if not domestically.⁵³⁵ The President has indisputable authority to order U.S. employees to act in accordance with the law and so President Obama's direction that the CIA comply with the Army's interrogation field manual⁵³⁶ is an important step forward. There are, however, concerns that some field manual techniques may still exceed limits established by the law of war (particularly as the manual was rewritten during the

531. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 851 (3d ed. 1999).

532. Finn & Warrick, *supra* note 482, at A1; Steven Lee Myers, *Bush Vetoes Bill on C.I.A. Tactics, Affirming Legacy*, N.Y. TIMES, Mar. 9, 2008, at A14.

533. See Myers, *supra* note 532, at A1 (reporting the FBI "and other agencies" consider harsh interrogations "unnecessary or counterproductive"); *supra* Part IV.D.

534. Myers, *supra* note 532, at A14.

535. Craig Whitlock, *European Nations May Investigate Bush Officials over Prison Treatment*, WASH. POST, Apr. 22, 2009, at A4.

536. Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

Bush administration),⁵³⁷ so an independent review, and possible re-write, is clearly in order.

If questioning is conducted for the legitimate purpose of gathering actionable intelligence for use in the WAQT and complies strictly with procedures permitted by the law of war, it is quite likely that any resulting information would be admissible even in regular federal courts. Since the *Miranda* standard is explicitly applicable only to situations of custodial questioning for law enforcement purposes,⁵³⁸ information resulting from legitimate intelligence interrogation should have to meet only constitutional voluntariness standards.⁵³⁹ Current jurisprudence allows law enforcement personnel to use a wide range of psychological ploys without rendering confessions involuntary.⁵⁴⁰ Limiting interrogations to lawful techniques is thus likely to allow the use of any resulting statements in criminal prosecutions in addition to the other practical benefits from law of war compliance.

E. Conducting Fair Trials Meeting International Standards

Preventive detention of al Qaeda personnel should be lawful until the earlier of the time that they no longer pose an individual threat or the WAQT reaches an end. Nevertheless, detention based on a criminal conviction and sentence should be preferable for several reasons. First, “hard-core” individuals might remain willing to use violence against U.S. interests even after al Qaeda has ceased to exist as a recognizable entity or pose a credible threat. The sentence of a detainee convicted during an armed conflict is unaffected by the end of hostilities,⁵⁴¹ so trial for serious offenses can provide more reliable long-term incapacitation than mere preventive detention. Many Americans consider detainee living conditions mandated by the law of war too good for terrorists and strongly prefer actual

537. See, e.g., Center for Constitutional Rights, Close Torture Loopholes in the Army Field Manual, <http://ccrjustice.org/get-involved/action/close-torture-loopholes-army-field-manual> (last visited Nov. 22, 2009).

538. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

539. The current standard should be the “totality of the circumstances” approach from *Schneekloth v. Bustamonte*, 412 U.S. 218, 223-27 (1973).

540. See INBAU, *supra* note 469, at 484-89.

541. U.K. MINISTRY OF DEF., *supra* note 130, § 16.50, at 446-47.

imprisonment.⁵⁴² A guilty verdict also attaches substantial moral culpability to the detainee and may help bring closure to victims of terrorist violence.

Conviction following a criminal trial meeting internationally recognized standards of justice should result in the widest possible acceptance of the validity of any detainee's continued detention. Criminal trials applying standard American constitutional criminal procedure standards should thus be employed whenever adequate admissible evidence exists to support a good faith conviction. Federal trials not only enjoy the greatest legitimacy, but they also allow application of the broadest scope of possible charges, including specialized offenses such as providing material support to terrorism and the full range of inchoate offenses recognized under Anglo-American law.⁵⁴³ Detainees classified as either civilians or unlawful combatants are subject to prosecution under the full scope of U.S. domestic criminal law, whereas those classified as lawful combatants should at least be subject to trial for violations of the War Crimes Act.⁵⁴⁴

For those cases involving either offenses committed in captivity that are properly triable under the UCMJ, or any violations of the law of war that fall outside the scope of crimes triable under the War Crimes Act, trial by regularly convened general courts-martial should be used.⁵⁴⁵ Contrary to frequent public assertions by officials who really should know better,⁵⁴⁶ American military justice is no longer the "gold standard." A number of democracies have abolished separate military trials entirely,⁵⁴⁷ whereas other heirs of the

542. See, e.g., John Cornyn, Op-Ed., *In Defense of Judge Gonzales*, WASH. TIMES, Jan. 4, 2005, at A17.

543. See Glazier, *supra* note 18, at 199-200.

544. See 18 U.S.C. § 2441 (2006).

545. See 10 U.S.C. § 802(a)(9) (2000) (making prisoners of war subject to the UCMJ); *id.* § 802(a)(12) (making persons present at Guantánamo subject to the UCMJ); *id.* § 818 (including any persons subject to military trial under the law of war within the statutory jurisdiction of a general court-martial).

546. See, e.g., Maura Reynolds, *Messages Conflict on Detainee Trials*, L.A. TIMES, July 14, 2006, at A22 (quoting Marine Staff Judge Advocate Brig. Gen. Kevin Sandkuhler).

547. Examples include Germany and the Netherlands. See, e.g., Friedhelm Krueger-Sprengel, *The German Military Legal System*, 57 MIL. L. REV. 17, 18-19 (1972); Bart Damen, Address at the AOFA Conference: The 1991 Revision of the Military Jurisdiction System of the Netherlands (June 3, 2003), available at http://www.aofa.pt/actividades/ReformaJustMilitar_03Jun03/Intervencoes/ReportDamen_NL.AOFA.doc.

British military justice system, the U.K. and Canada, have had to eliminate the multiple roles still allowed the convening authority under U.S. practice.⁵⁴⁸ Nevertheless, the fact that trials under national military justice are specifically authorized by Geneva III should effectively mute criticism of detainee trials by actual courts-martial. But the fact that U.S. military justice no longer measures up to the standards of other leading democracies highlights the desirability of trials by actual federal courts whenever possible.

Although the MCA 2009 authorizes the President to try suspected terrorists before military commissions, nothing in the statute requires him to do so.⁵⁴⁹ While their early history shows that military commissions can be used to provide “full and fair” trials, the history of their use in the “war on terror” is irreparably flawed, and they should be abandoned. The Executive Branch has all the authority necessary to try any person over whom statutory jurisdiction can be obtained, either by regular Article III courts or courts-martial.

F. Habeas Corpus

One of the ways the so-called “war on terror” is perceived to differ from past conflicts is the amount of judicial involvement. The Supreme Court has thrice upheld federal court review of Guantánamo detentions. In its 2004 *Rasul* decision, handed down after the abuse at Abu Ghraib came to light, the justices held that Guantánamo detainees were entitled to pursue statutory habeas claims.⁵⁵⁰ The Bush administration responded by creating the CSRTs in an effort to provide an adequate habeas substitute while Congress included language in the Detainee Treatment Act (DTA) of 2005 purporting to foreclose habeas review.⁵⁵¹ The Supreme Court responded with its 2006 *Hamdan* decision, holding that the DTA did not terminate cases already pending as it overturned the military

548. Changes to Canadian military justice were directed by its Supreme Court’s interpretation of the 1982 Canadian Charter of Rights and Freedoms in *R. v. Généreux*, [1992] 1 S.C.R. 259 (Can.). The U.K. was required to modify its military legal system by a series of decisions of the European Court of Human Rights, beginning with *Findlay v. The United Kingdom*, App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997).

549. 10 U.S.C.S. app. § 948 (2009).

550. MARGULIES, *supra* note 246, at 151-53.

551. *Id.* at 245-46.

commission process as it stood at the time.⁵⁵² The administration returned to Congress again, this time getting statutory authorization to continue the commissions and more explicit habeas jurisdiction stripping in the MCA.⁵⁵³ After receiving a declaration about how flawed the CSRT process was from a U.S. military insider, the Court ended the seesaw duel with the President and Congress by holding that Guantánamo fell within the scope of constitutional habeas entitlement in *Boumediene v. Bush*.⁵⁵⁴ Unfortunately, *Boumediene* provided no clear guidance as to what substantive rules were to be used to judge the validity of Guantánamo detentions. Nevertheless, after years of litigation, the Federal District Court for the District of Columbia finally began reaching the merits of individual detainee cases late in the fall of 2008.⁵⁵⁵ By early September 2009, federal judges had ordered the release of thirty Guantánamo detainees, while upholding the continued detention of eight others.⁵⁵⁶

Although this habeas review has been criticized, federal judicial involvement in war is nothing new. From the start of George Washington's administration through 1918, the Supreme Court alone decided more than 190 cases arising from prize claims following wartime captures at sea.⁵⁵⁷ While many of these cases involved acts by private armed vessels acting under letters of marque, a substantial number passed judgment on the conduct of actual naval officers.⁵⁵⁸ Even more importantly, a number of these cases ruled upon core aspects of executive authority in time of war, including such seminal decisions as *Bas v. Tingy*, considering congressionally imposed limits on U.S. conduct of the quasi-war with France,⁵⁵⁹ and the *Prize Cases*, upholding President Lincoln's authority to invoke law of war authority during the Civil War.⁵⁶⁰

552. Glazier, *supra* note 18, at 174.

553. *Id.* at 174-75.

554. 128 S. Ct. 2229, 2262 (2008).

555. William Glaberson, *Rulings of Improper Detentions in Cuba as the Bush Era Closes*, N.Y. TIMES, Jan. 19, 2009, at A13.

556. *Guantánamo Timeline: Captives Sue for Release*, MIAMI HERALD, Sept. 7, 2009, available at <http://www.miamiherald.com/news/more-info/v-fullstory/story/1216218.html>.

557. See 1 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT, at ix-xiii (1923).

558. See, e.g., *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

559. 4 U.S. (4 Dallas) 37 (1800).

560. 67 U.S. (2 Black) 635 (1863).

The Court also upheld the personal liability of Army officers for civilian property damage ashore resulting from their exceeding lawful authority.⁵⁶¹ It would be odd if property rights provided a sufficient foundation for justiciable wartime cases but liberty interests did not.

There have, in fact, been a few habeas cases brought by aliens during past U.S. wars, including several well-known examples that reached the Supreme Court. These include what are probably the two cases most frequently cited by proponents of the Bush administration's conduct, *Ex parte Quirin*⁵⁶² and *Johnson v. Eisentrager*.⁵⁶³

Aside from claims that hearing habeas cases represents unwarranted judicial interference with the President's prerogatives as Commander in Chief, other objections are that such cases will interfere with military operations and that they could flood U.S. courts with litigation.⁵⁶⁴ The latter claim seems wholly overblown with respect to Guantánamo detainees given that less than 250 persons remain in custody while the federal court system currently entertains more than 21,000 habeas petitions a year.⁵⁶⁵ It seems more credible in postulated future large-scale conventional conflicts; more than 425,000 Germans and Italians were held as POWs in the continental United States during World War II.⁵⁶⁶ But even *if* the United States was involved in another conflict of similar magnitude, the potential habeas problem is greatly overstated. Correctly classifying detainees in a conventional conflict is generally straightforward, and so habeas challenges by the vast majority of detainees would be clearly frivolous. These cases could be readily discouraged by sanctioning any attorneys involved under the Federal Rules of Civil Procedure. Moreover, future POWs generally would have little incentive to contest their status. To do so, they would have to declare formally before U.S. courts that they were not combatants, which should then estop them from claiming combatant immunity

561. *Mitchell v. Harmony*, 54 U.S. 115 (1851).

562. 317 U.S. 1 (1942).

563. 339 U.S. 763 (1950). *Eisentrager* came after the end of actual fighting but while a state of war remained in effect pending agreement to formal peace treaties.

564. See, e.g., Editorial, *Terror and the Court*, WALL ST. J., June 29, 2004, at A14.

565. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF U.S. COURTS 147 tbl.C-2A (2008), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf>.

566. Jodi Wilgoren, *Some Captives Recall a War and Forget Hostilities*, N.Y. TIMES, Sept. 27, 2002, at A24.

in any future prosecution. Accordingly, detainees who had participated in hostilities would not be likely to contest their POW status because doing so would be an admission of liability to prosecution under ordinary criminal law for *any* act of violence they had committed.

In any event, the degree of judicial involvement in the “war on terror” should also be recognized as the result of a unique set of circumstances in which the Executive has sought actively to avoid any meaningful checks on its authority and has failed to ground its conduct on a coherent legal foundation. One can safely assume that federal judges would generally prefer to leave wartime detention decisions to the military and President. The real solution is for the government to adopt a legally sound course of conduct in dealing with its adversaries and to conduct serious good faith efforts to classify detainable individuals using a credible evidentiary basis. If this is done, military detention decisions would almost certainly receive a highly deferential standard of review, and habeas challenges would pose minimal interference with the conduct of the war. There is thus no need to proscribe these challenges; indeed it is probably unlawful to do so. The 1907 Hague Regulations declare that “it is particularly forbidden ... [t]o declare extinguished, suspended, or barred the rights and chooses in actions of the nationals of the adversaries.”⁵⁶⁷ Although the Regulations *in toto* have had status as customary international law since WWII, this commonly overlooked provision is found in Article 23.⁵⁶⁸ That is of particular significance because the War Crimes Act of 1996 makes any violation of that article a federal offense.⁵⁶⁹ Therefore, the best way to deal with habeas concerns is simply to ensure that preventive detention is squarely grounded in the law of war so that federal judges have no cause to interfere with executive conduct.

CONCLUSION

The 9/11 attacks demonstrated the destruction possible by men setting out with nothing more lethal than box cutters, while the

567. Hague Regulations, *supra* note 29, art. 23(h).

568. *Id.*

569. *See* 18 U.S.C. § 2441(c)(2) (2006).

Tokyo subway attacks proved that terrorists can acquire and use weapons of mass destruction. Today the bipartisan Partnership for a Secure America assesses that there is a very real threat “of a new, major terrorist attack on the United States” with the prospect of “[a] nuclear, chemical or biological weapon in the hands of terrorists ... the single greatest threat to our nation.”⁵⁷⁰ Government officials therefore must take the continuing al Qaeda threat extremely seriously.

The war paradigm provides useful tools that can aid in this effort, although actual military force can only play a small part in a struggle requiring “an effective grand strategy ... balancing positive and negative forms of power.”⁵⁷¹ Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff, recently admitted that “[w]e can’t kill our way to victory,” acknowledging the need for involvement by civilian officials and the international community, including experts in agriculture, education, commerce, and jurisprudence, if the United States is to succeed in its fight against al Qaeda and the Taliban.⁵⁷² Growing opposition to unilateral U.S. military operations in Pakistan⁵⁷³ highlights the practical limitations on the use of force against a nonstate adversary with no national territory. Ultimately, the greatest advantage provided by the law of war may be preventive detention authority rather than use of military force per se.

Terrorists operating outside the law have the key advantage of choosing the location, means, and moment of their attack. U.S. leaders should therefore seek offsetting advantages wherever they can be found, particularly in law. There is no reason to confine counterterrorism to the bounds of either criminal law or the law of war alone when tools from both can be synergistically combined to best advantage. Al Qaeda breached the threshold of armed attack on 9/11, and it would be foolish to surrender unilaterally the opportunity to employ elements of the armed conflict paradigm in response. But it is even more foolish to use force lawlessly, impair-

570. P'SHIP FOR A SECURE AM., WMD REPORT CARD 1 (2008), available at <http://www.psaonline.org/downloads/ReportCard%208-25-08.pdf>.

571. Audrey Kurth Cronin, *Toward an Effective Grand Strategy*, in *ATTACKING TERRORISM*, *supra* note 18, 285, 297.

572. Tyson, *supra* note 391, at A13.

573. See, e.g., Eric Schmitt, *U.S. and Pakistani Forces Clash at Volatile Border*, N.Y. TIMES, Sept. 26, 2008, at A8.

ing international cooperation and creating a backlash generating increased support for the adversary. Like *all* human beings, captured terrorists have the right to be treated in accordance with law. But it can and should be *our* choice as to which law that is.

Legitimate application of the law of war requires abandoning the nonsensical “war on terror” approach in favor of the serious identification of the adversary in terms of defined political groups, in this case al Qaeda and the Taliban. The ambiguous and overbroad “enemy combatant” nomenclature must be replaced by the application of a legally grounded classification for the adversary, from which legal rules governing killing, detaining, and trying logically flow. While the Obama administration is helpfully moving away from this terminology, there is still much work to do in putting the conflict on sound legal ground. Even if it is not mandatory, treating enemy fighters as combatants under the provisions of Geneva III and Protocol I, including the authority from the latter to deny combatant immunity and try them under ordinary criminal law for failure to distinguish themselves from the civilian population, seems to serve U.S. purposes best. Although the United States presumably can do this now by simply declaring that it accepts Protocol I as customary international law more broadly than it has in the past, it should go ahead and ratify the treaty to place itself on the strongest legal ground and to facilitate future military interoperability with allies who are virtually all treaty parties.

Faithful application of law of war rules to the WAQT can also help ensure the long-term preservation of American freedoms. If the only options are a regular criminal trial or release, courts will be placed on the horns of a dilemma, having to choose between letting dangerous individuals walk or departing from accepted judicial standards and allowing convictions based on evidence tainted by coercion. Even if constitutional, proposed “special” courts or a new preventative detention regime starts down a slippery slope of unprincipled departures from existing legal rules on the basis of expediency. Preventive detention in conformance with the law of war ultimately protects liberty by avoiding the need to corrupt the judicial system or create new rules that could become hard to cabin in the future.

For eight years the “war” on terror has been treated as falling outside the express mandates of any legal regime. But as the Supreme Court of Israel held:

The saying “when the cannons roar, the muses are silent” is well known. A similar idea was expressed by Cicero, who said: “during war, the laws are silent” Those sayings are regrettable Every struggle of the state—against terrorism or any other enemy—is conducted according to rules and law.... There are no “black holes.”⁵⁷⁴

America should recognize this truth as well and place the conduct of the WAQT on sound legal ground.

574. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. The Gov't of Isr. [2006], *available* at http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.