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Publication Date

2003-08-27

THE STATUS OF TERRORISTS

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This paper will identify and discuss two legal questions raised by the war on terrorism that have generated significant controversy among academics and public commentators. First, did the September 11, 2001 attacks initiate a war, or “international armed conflict” to use the vocabulary of modern public international law? Second, what legal rules govern the status and treatment of members of the al Qaeda terrorist network and the Taliban militia that harbored and supported them in Afghanistan? In short, the United States government has concluded that the attacks of September 11 have placed the United States in a state of armed conflict,¹ to which the laws of war apply. It has also determined that members of the al Qaeda terrorist network and the Taliban militia are illegal combatants under the laws of war, and so cannot claim the legal protections and benefits that accrue to legal belligerents, such as prisoner of war status under the Third Geneva Convention of 1949.²

Critics of the administration’s actions in the war on terrorism take a very different approach to matters. First, some believe that the September 11 attacks were not the initiation of an armed conflict, but merely the latest eruption of a persistent social problem. Under this theory, the war on terrorism is no different than the war on drugs, and the former should be addressed by the same legal rules as the latter: those of domestic and international criminal law. Second, many critics have argued that if the laws of war apply to the conflict with al Qaeda and the Taliban, then they must be given the legal status of lawful belligerents, with all of the rights and privileges under the Geneva Conventions and the laws of war that attach.

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¹ See President’s Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 1(a), 66 Fed. Reg. 57,833 (2001), *also available at* www.whitehouse.gov/news/releases/2001/11/20011113-27.html (“Military Order”).

² Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364 (“GPW”); Press Briefing by Ari Fleischer, Feb. 7, 2002, *available at* www.whitehouse.gov/news/releases/2002/02/20020207-6.html; Katherine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. Times, at A1 (Feb. 8, 2002).

Decision of these questions has important implications for the war on terrorism. If, for example, September 11, 2001 were a crime and not war, then the laws of armed conflict do not apply to the actions of the United States and its allies against al Qaeda and the Taliban militia. That might mean, for example, that it is illegal under international law for the United States actually to use force against members of al Qaeda and the Taliban unless in self-defense, and that in general government authorities can only resort to arresting members of terrorist organizations when they have sufficient evidence of probable cause to believe they have violated a criminal law in the past. It might mean that captured terrorists could invoke *Miranda* rights to remain silent and demand a lawyer, rather than be interrogated for information that could lead to the prevention of future terrorist attacks. If al Qaeda and Taliban members are legal combatants, they could claim combat immunity for any deaths or destruction they have caused. Similarly, status as legal combatants would entitle al Qaeda and Taliban members to the legal status of prisoners of war under the Third Geneva Convention. This would require them to be housed in open barracks, where they would have, for example, the right to cook their own food and exercise together, rather than to be housed in the more secure individual units at Guantanamo Bay.

I.

On September 11, 2001, four coordinated terrorist attacks took place in rapid succession, aimed at critical government buildings in our nation's capital and the heart of our national financial system. Terrorists hijacked four airplanes. One crashed into the Pentagon in Arlington, Virginia and two into the World Trade Centers in New York City. The fourth, which was headed towards either the White House or Congress in Washington, D.C., crashed in Pennsylvania after passengers apparently attempted to regain control of the aircraft. The attacks caused about three thousand deaths and thousands more injuries, disrupted air traffic and communications within the United States, closed the national stock exchanges for several days, and caused damage that has been estimated to run into the billions of dollars.³

The President has found that these attacks are part of a violent terrorist campaign against the United States by groups affiliated with

³ See, e.g., Military Order § 1(b), 66 Fed. Reg. 57,833; United States Department of State, *Patterns of Global Terrorism 2001*, at 1 (May 2002), available at www.state.gov/s/ct/rls/pgtrpt/2001/pdf/ ("Global Terrorism"); Patrice Hill, *U.S. economy survives a 'body blow'*, Wash. Times, Sep. 10, 2002, at A01, available at 2002 WL 2917674.

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al Qaeda. Other al Qaeda-linked attacks against the United States prior to September 11 include the suicide bombing of the U.S.S. Cole in 2000, the bombing of American embassies in Kenya and Tanzania in 1998, the attack on a U.S. military housing complex in Saudi Arabia in 1996, and the bombing of the World Trade Center in 1993.⁴ Al Qaeda continues its terrorist campaign against the United States and its allies and interests abroad to this day. It is believed to have been responsible for, or connected with, numerous terrorist incidents following September 11, including the December 2001 attempt by al Qaeda associate Richard Colvin Reid to ignite a shoe bomb on a transatlantic flight from Paris to Miami, an April 2002 explosion at a synagogue in Djerba, an October 2002 explosion on a French oil tanker off the Yemeni coast, a series of bombs on the Indonesian resort island of Bali that same month, and two attacks on Israeli targets in Kenya in November 2002.⁵

In response, the federal government has engaged in a broad effort at home and abroad to counter terrorism. Pursuant to his authorities as Commander-in-Chief and Chief Executive, the President in October, 2001, ordered the United States military to attack al Qaeda personnel and assets in Afghanistan, and the Taliban militia that harbored them. That military campaign, although continuing to this day, has achieved significant success, with the retreat of al Qaeda and Taliban forces from their strongholds and the installation of a friendly provisional government in Afghanistan. Congress provided its support for the use of force against those linked to the September 11 attacks, and has recognized the President's constitutional power to use force to prevent and deter future attacks both within and outside the United States.⁶ One of us has argued elsewhere that the President has the constitutional power to use force unilaterally in response to the September 11 attacks.⁷ The Justice Department and the FBI have launched a sweeping investigation in response to the attacks, and in fall, 2001, Congress enacted legislation to expand the Justice Department's powers of surveillance against terrorists.⁸ By executive order, the President created a new Office for Homeland Security within the White House

⁴ See, e.g., Yonah Alexander & Michael S. Swetnam, *Usama bin Laden's al-Qaida: Profile of a Terrorist Network*, at 1 (2001); Global Terrorism at 105.

⁵ See, e.g., Three decades of terror, *Fin. Times*, Feb. 7, 2003, available at 2003 WL 3918586; Global Terrorism at 105.

⁶ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁷ Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 *Harv. J. L. & Pub. Pol'y* 487 (2002).

⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

to coordinate the domestic program against terrorism.⁹ Congress subsequently enacted the President's proposal to establish a new cabinet-level Department of Homeland Security, which consolidates 22 previously disparate domestic agencies into one department in order to better protect the nation against security threats.¹⁰

There is little disagreement with the conclusion that if the September 11 attacks had been launched by another nation, an armed conflict under international law would exist. The September 11 attacks were a "decapitation" strike: an effort to eliminate the civilian and military leadership of the United States with one stroke. In addition to killing the nation's leaders, al Qaeda sought to disrupt the economy by destroying the main buildings in New York City's financial district. The attacks were coordinated from abroad, by a foreign entity, with the primary aim of inflicting massive civilian casualties and loss. Al Qaeda executed the attacks not in order to profit, but to achieve an ideological and political objective – in this case, apparently, changing U.S. foreign policy in the Middle East. Indeed, the head of al Qaeda, Usama bin Laden, declared war on the United States as early as 1996.¹¹ Finally, the scope and the intensity of the destruction is one that in the past had only rested within the power of a nation-state, and should qualify the attacks as an act of war.

President Bush has found the attacks to constitute an attack that has placed the United States in a state of armed conflict. In his November 13, 2001 order establishing military commission to try terrorists, the President found:

International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.¹²

As a matter of domestic law, the President's finding settles the question whether the United States is at war. In *The Prize Cases*, the Supreme Court explained that it was up to the President to determine

⁹ Establishing the Office of Homeland Security and the Homeland Security Council, Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (2001).

¹⁰ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat 2135.

¹¹ See, e.g., United States Department of State, *Fact Sheet: The Charges Against International Terrorist Usama bin Laden* (1999), available at <http://usinfo.state.gov/topical/pol/terror/99129502.htm>; Alexander & Swetnam, App.

¹² Military Order § 1(a), 66 Fed. Reg. 57,833.

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that a state of war existed that warranted, in regard to the southern States, the “character of belligerents.”¹³ The judiciary, the Court noted, would be bound by the President’s determinations in evaluating whether the laws of war applied to the blockade he had instituted:

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed¹⁴

President Bush is far from alone in his determination that the United States may lawfully use lethal or lesser degrees of military force in these circumstances. In enacting Public Law Number 107-40, authorizing the President to use military force in response to the attacks of September 11 Congress found that the United States would be justified in the use of force against al Qaeda as a matter of self-defense.¹⁵ In addition, various international bodies, such as the North Atlantic Treaty Organization (NATO),¹⁶ the Organization of American States (OAS),¹⁷ and the remaining parties to the ANZUS

¹³ 67 U.S. (2 Black) 635, 670 (1862).

¹⁴ *Id.* See also *The Protector*, 79 U.S. (12 Wall.) 700, 701-02 (1871) (relying on presidential proclamations to determine start and end dates for the Civil War); *Salois v. United States*, 33 Ct. Cl. 326, 333 (Ct. Cl. 1898) (stating that if the government had treated a band of Indians as at war, “the courts undoubtedly would be concluded by the executive action and be obliged to hold that the defendants were not in amity”).

¹⁵ Pub. L. No. 107-40, 115 Stat. 224 (authorizing use of force in response to September 11 attacks).

¹⁶ North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246. See also Statement of NATO Secretary General Lord Robertson (Oct. 2, 2001), available at www.nato.int/docu/speech/2001/s011002a.htm (“[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . .”).

¹⁷ Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3(1), 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95 (“Rio Treaty”) (“an armed attack by any State against an American State shall be considered as an attack against all the American States”). See also *Terrorist Threat to the Americas*, Meeting of Consultation of Ministers of Foreign Affairs, Organization of American States, available at www.oas.org/OASpage/crisis/RC.24e.htm (resolving “[t]hat these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal

pact¹⁸ have all found that the September 11 attacks activated the mutual self-defense clauses of their treaties involving the United States.

In light of these judgments, the question remains whether it makes sense to treat the September 11, 2001 attacks as a massive crime, rather than a war, despite the scope of the damage caused and the purposes behind the attacks. Perhaps the critical question for determining whether the laws of armed conflict apply here is whether the terrorist attacks were a sufficiently organized and systematic set of violent actions that they crossed a sufficient level of intensity to be considered “armed conflict.” There can be no doubt that, whatever the “level of intensity” required to create an armed conflict, the gravity and scale of the violence inflicted on the United States on September 11 crossed that threshold. To use the words of the 1996 Amended Protocol II to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, which provides one guidepost for determining when an armed conflict exists, the attacks are not properly likened to mere “riots, isolated and sporadic acts of violence and other acts of a similar nature,” which, according to that convention, do not constitute “armed conflict.”¹⁹ Rather, as explained above, the terrorists have carried on a sustained campaign against the United States, culminating on September 11 with a devastating series of coordinated attacks resulting in a massive death toll.

In addition, the United States has determined that it is necessary to respond to the attacks with military force. That decision is significant because one element often cited for determining whether a situation involving a non-state actor rises to the level of an “armed conflict” (for example, for purposes of common article 3 of the

assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent”).

¹⁸ Security Treaty Between Australia, New Zealand and the United States of America, Sep. 1, 1951, art. IV, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86. *See also* Fact Sheet, White House Office of Communications, *Campaign Against Terrorism Results* (Oct. 1, 2001), available at 2001 WL 21898781, *1 (noting that “Australia offered combat military forces and invoked Article IV of the ANZUS Treaty, declaring September 11 an attack on Australia.”).

Although New Zealand has not formally withdrawn from the ANZUS pact, its 1985 refusal to allow U.S. nuclear-powered or nuclear-armed ships to enter its ports caused the United States to abrogate its ANZUS responsibilities toward New Zealand in 1986. *See generally*, e.g., Gary Harrington, *International Agreements: United States Suspension of Security Obligations Toward New Zealand*, 28 Harv. Int’l L.J. 139 (1987). Nevertheless, following the September 11 attacks, New Zealand offered an unspecified number of commandos to assist in America’s military efforts; as Foreign Minister Phil Goff explained, “[w]e don’t need a treaty to tell us what is right and what is wrong.” *World Reaction to Afghan Strikes*, AP, Oct. 14, 2001, available at 2001 WL 28752064.

¹⁹ Art. 1(2), S. Treaty Doc. No. 105-1, at 39 (1997).

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Geneva Conventions) is whether a state responds with its regular military forces. The United States has adopted this position in the past.²⁰ Here, this criterion is overwhelmingly satisfied. As outlined above, the United States has found it necessary to respond with a massive use of military force. The war in Afghanistan and ongoing military actions in other regions of the world establish that the situation here involves an armed conflict for purposes of international law.

Some believe, however, that war is only an armed conflict that occurs between states. Since al Qaeda is not a state, the reasoning goes, there can be no armed conflict and no application of the laws of war. To the extent this approach relies on the syllogism that, if a conflict is not between states it cannot be “war” and therefore the laws of war cannot apply, the conclusion is contradicted by the terms of the Geneva Conventions and consistent international practice. A provision common to all four Geneva Conventions, for example, creates certain minimum standards of treatment of prisoners of war and civilians that apply “[i]n the case of armed conflict not of an international character” occurring within the territory of a Party.²¹ This provision specifically applies certain laws of war to conflicts that are not between two states, but occur solely within a single state between contending parties. Later international agreements have further made this clear by specifying what the laws of war do *not* apply to. The 1996 Amended Protocol II to the 1980 UN Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons (to which the United States is a party), for example, explains that it does not apply to “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature,” because these are not “armed conflicts.”²² These provisions make it plain that the laws of armed conflict may apply to more intense levels of hostilities conducted by a non-state actor. They also illustrate that the trigger for applying these requirements is the crossing of a certain threshold of violence. Thus, it has long been recognized that formal concepts of “war” do not constrain application of the laws of armed conflict and that non-state actors are properly bound by certain minimum standards of international law when they engage in armed hostilities.

It is true that some international legal authorities have commented that war “must be between States.” In making that

²⁰ See 3 U.S. Practice § 2, at 3443 (1995). See also G.I.A.D. Draper, *The Red Cross Conventions* 15-16 (1958) (under common Article 3, “armed conflict” exists when the government is “obliged to have recourse to its regular military forces”).

²¹ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, 6 U.S.T. at 3518.

²² Art. 1(2), S. Treaty Doc. No. 105-1, at 39 (1997).

assertion, however, authors such as Oppenheim were suggesting only that for a conflict to be legitimate warfare it must be between states. It does not follow from that proposition that, if there is a conflict that amounts to warfare and non-state actors are involved, none of the rules of armed conflict apply. To the contrary, as Oppenheim recognized, a different conclusion follows – namely, that non-state actors who engage in warfare are engaged in a form of warfare that is illegitimate.²³ In other words, al Qaeda terrorists do not escape the laws of war because they are non-state actors. Instead, they are unlawful belligerents.

Finally, it is worth examining the incentive that would be created by defining the September 11 terrorist attacks only as crimes, rather than as acts of war. In the past, usually only a sovereign or quasi-sovereign entity with authority over a substantial territory could have the resources to mount and sustain a series of attacks of sufficient intensity to reach the level of a “war” or “armed conflict.” The terrorist network now facing the United States has found other means to finance its campaign while operating from the territory of several different nations at once. Indeed, as we have witnessed subsequent to September 11, 2001 – al Qaeda’s fielding of forces on the battlefield in Afghanistan; its efforts to develop or acquire weapons of mass destruction – terrorist organizations such as al Qaeda have now acquired the military power that once only rested in the hands of nation-states. That change, however, cannot be considered to somehow exempt terrorist networks from the standards demanded by the laws of armed conflict. Simply by operating outside the confines of the traditional concepts of nation-states, terrorists cannot shield themselves from the prohibitions universally commanded by the laws of armed conflict. If terrorists can wield the military power of a nation state, but are exempted from the laws of war, other groups with similar aims will be encouraged to follow the example of al Qaeda. International law does not and should not create such a perverse incentive.

II.

Although the laws of war may apply to the conflict with al Qaeda, that does not automatically mean that al Qaeda members are entitled to the privileges and benefits of the laws of war. This part will discuss why the members of al Qaeda and the Taliban militia are not legally entitled to the status of prisoners of war under GPW, and are instead illegal combatants.

The case of al Qaeda members is relatively straightforward, that

²³ See, e.g., Oppenheim § 254, at 574.

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of the Taliban less so. Al Qaeda is not a nation-state, and as such cannot be a state party to the Geneva Conventions. Even if al Qaeda were capable of becoming a party to the treaties, it has not done so, nor has it ever declared an intention to accept their terms. Naturally, al Qaeda members cannot claim the benefits of a treaty to which their organization is not a party. Thus, while the conflict with al Qaeda is governed by the laws of war, al Qaeda is not a state party to one of the specialized codifications of those laws, the Geneva Convention.

In fact, al Qaeda members fall within the category of what are known as illegal combatants. Although “illegal combatant” is nowhere mentioned in the Geneva Conventions, it is a concept that has long been recognized by state practice in the law of war area. As the U.S. Supreme Court unanimously stated over 60 years ago, “[b]y universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations *and also between those who are lawful and unlawful combatants.*”²⁴ These two sets of distinctions each play a critical role in achieving the fundamental objective of the laws of war: to minimize the amount of human suffering and hardship necessitated by a state of war.²⁵

The customary laws of war minimize human suffering in wartime by limiting the suffering and hardship of war, to the maximum extent possible, to the participating combatants, and by keeping military hostilities away from civilians. This approach naturally requires the effective enforcement of a sharp distinction between civilians and combatants. Accordingly, customary law demands that combatants respect the distinction between civilians and themselves by imposing a variety of prohibitions and requirements. Customary law forbids the intentional targeting of civilians,²⁶ and encourages combatants to take measures to avoid

²⁴ Ex parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis added).

²⁵ See, e.g., W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int'l L. 39, 43 (1977) (“overriding, legal policy objective of the law of armed conflict is the minimization of the destruction of human and material values”); *The Law of War on Land, being Part III of the Manual of Military Law 2* (Great Britain, War Office 1958) (“The law of war is inspired by the desire of all civilised nations to reduce the evils of war by . . . protecting both combatants and non-combatants from unnecessary suffering”).

²⁶ See, e.g., Jean S. Pictet, ed., *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War*, at 61 (1960) (“GPW Commentary”) (under the laws of war combatants “may not attack civilians or disarmed persons”); Jean S. Pictet, ed., *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons In Time of War*, at 3 (1958) (“GC Commentary”) (noting the “cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity”); *Military Commissions*, 11 Op. Att’y Gen. 297 (1865) (“[Under] the laws of war . . . [n]on-combatants are not to be disturbed or interfered with by

unnecessary harm to civilians in their own military operations.²⁷ Customary law also requires combatants to distinguish themselves from the civilian population in order to help *enemy* soldiers avoid doing harm to civilians.²⁸ Naturally, in return for these various protections from hostilities, civilians are strictly forbidden under customary law from engaging in hostilities. The former cannot exist without the latter; combatants cannot fairly be told to refrain from using force against civilians if they regularly suffer attacks from such groups.

Al Qaeda violates the very core of the laws of war. Al Qaeda members are not under the control of a nation-state that will force them to obey the laws of war. They operate covertly by intentionally concealing themselves among the civilian population; they deliberately attempt to blur the lines between civilians and combatants. Most importantly, they have attacked purely civilian targets with the aim of inflicting massive civilian casualties. Thus, even if al Qaeda were a nation-state and a party to the Geneva Conventions, its members would still qualify as illegal belligerents due to their very conduct.

Unlike al Qaeda, the Taliban militia arguably constituted the de facto government of Afghanistan. Afghanistan is a party to the Geneva Conventions. Nonetheless, the Taliban militia, like al Qaeda, by their conduct did not meet the standards for legal belligerency that would have made its members legally entitled to prisoner of war status. GPW entitles captured members of regular and irregular armed forces to the status of, and legal protections enjoyed by, POWs if they belong to units that meet the requirements

the armies of either party except in extreme cases.”); *Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations*, at 5-10, NWP 9 (Rev. A), FMFM 1-10 (1989) (“it is forbidden to make noncombatants the object of attack”); *Military Prosecutor v. Omar Mahmud Kassem and Others*, 42 Int’l L. Rep. 470, 483 (1971) (“Immunity of non-combatants from direct attack is one of the basic rules of the international law of war.”).

²⁷ See, e.g., Lieber Code art. 19 (“Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences.”); *id.* art. 22 (“The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”); *id.* art. 23 (“the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war”); *id.* art. 25 (“protection of the inoffensive citizen of the hostile country is the rule”).

²⁸ See, e.g., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 527 (1987) (“1977 Protocols Commentary”) (noting “the fundamental rule that combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack”); R.C. Hingorani, *Prisoners of War* 48 (1982) (“It is one of the basic features of the laws of war that the combatants should be distinguished from non-combatants.”).

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of one of several applicable categories. GPW protections are available for members of militia under certain conditions. Article 4(A)(1) extends POW status to “members of militias or volunteer corps forming part of” the “armed forces of a Party to the conflict.”²⁹ Article 4(A)(2) extends GPW protections to

[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.³⁰

At best, it appears that Taliban fighters are members of a militia. The Central Intelligence Agency, for example, has recognized that Afghanistan has no national military, but rather a number of tribal militias factionalized among various groups.³¹ Thus, because members of the Taliban militia, like members of al Qaeda, do not comply with the four conditions of lawful combat expressly incorporated into article 4(A)(2) of GPW, they are not entitled to the protections of that convention.

Even if the Taliban were able to claim status as a “regular armed force[],” rather than as a militia, it still could not qualify for POW status under GPW article 4(A)(1) or (3) without first satisfying the four customary conditions of lawful combat expressly enumerated in article 4(A)(2). Article 4(A)(1) extends POW status to “[m]embers of the armed forces of a Party to the conflict, as well

²⁹ 6 U.S.T. 3320.

³⁰ *Id.*

³¹ See Central Intelligence Agency, *The World Factbook 2000*, at 3 (complete entry for military branches of Afghanistan states: “NA; note – the military does not exist on a national basis; some elements of the former Army, Air and Air Defense Forces, National Guard, Border Guard Forces, National Police Force (Sarandoi), and tribal militias still exist but are factionalized among the various groups”). See also www.bartleby.com/151/a116.html (listing similar entry in 2001 edition of CIA *Factbook*).

as members of militias or volunteer corps forming part of such armed forces.”³² Article 4(A)(3) gives GPW protections to “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.” *Id.* Unlike article 4(A)(2), the text of article 4(A)(1) and (3) does not expressly enumerate the four traditional conditions of lawful combat. Both provisions simply extend POW status to members of the regular “armed forces” of a party to the Convention.

It has long been understood, however, that regular, professional “armed forces” must comply with the four traditional conditions of lawful combat under the customary laws of war, and that the terms of article 4(A)(1) and (3) of GPW do not abrogate customary law. To facilitate compliance with, and enforcement of, the bedrock distinction between civilians and combatants, customary law developed these four basic conditions of lawful combatancy that all regular fighters must meet. Those conditions of customary law were later spelled out in a written text, when delegates at an 1874 Conference in Brussels drafted a declaration stating the four conditions as follows: (1) “[t]hat they have at their head a person responsible for his subordinates,” (2) “[t]hat they wear some fixed distinctive badge recognizable at a distance,” (3) “[t]hat they carry arms openly,” and (4) “[t]hat in their operations they conform to the laws and customs of war.”³³ As recently noted by a federal district court, these “four criteria [which] an organization must meet for its members to qualify for lawful combatant status” were originally “established under customary international law” and “were first codified in large part in the Brussels Declaration of 1874.”³⁴ Commentators have similarly noted that article 9 of the Brussels Declaration was “merely declaratory of the existing customary law . . . applicable to regulars.”³⁵

The four conditions under customary law play an essential role in enforcing the fundamental distinction between civilians and combatants. The second and third conditions are practical provisions to help soldiers recognize the distinction between members of enemy

³² 6 U.S.T. 3320.

³³ Translation of the Draft of an International Declaration concerning the Laws and Customs of War adopted by the Conference of Brussels, 27th August, 1874, art. 9, reprinted in A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries* 274 (1909).

³⁴ *Lindh*, 212 F. Supp. 2d at 557 & n.34.

³⁵ Mallison & Mallison, 9 Case W. Res. J. Int'l L. at 44. See also Jean S. Pictet, ed., *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War*, at 47 n.1 (1960) (“GPW Commentary”) (Brussels Declaration “was the first international instrument specifying the customs of war”).

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forces and civilians during the conduct of military operations.³⁶ The first and fourth conditions help ensure that the substantive rules of conduct respecting this fundamental distinction, such as the prohibition on targeting of civilians and the requirement of distinguishing oneself as a combatant, are effectively enforced.³⁷

Taken together, these four conditions, aimed at facilitating the bedrock customary distinction between combatants and civilians, also establish a second fundamental distinction under customary law, that between lawful and unlawful combatants. Only lawful combatants – that is, members of fighting units that comply with all four conditions – are licensed to engage in military hostilities.³⁸ The customary laws of war immunize only lawful combatants from prosecution for committing acts that would otherwise be criminal under domestic or international law.³⁹ And only those combatants

³⁶ See, e.g., Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* 341 (1976) (stating that purpose of these two conditions is “the need to protect the civilian population from attack and to ensure a certain fairness in fighting”).

³⁷ See, e.g., U.S. Department of the Navy, Office of the Judge Advocate General, *Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations*, at 11-13 n.49, NWP 9 (Rev. A), FMFM 1-10 (1989) (purpose of four conditions of lawful combatancy is to reduce “risk to the civilian population within which [some forces would otherwise] often attempt to hide”).

³⁸ See, e.g., *Military Commissions*, 11 Op. Att’y Gen. 297 (1865) (“The laws of war demand that a man shall not take human life except under a license from his government; and under the Constitution of the United States no license can be given by any department of the Government to take human life in war, except according to the law and usages of war. Soldiers regularly in the service have the license of the government to deprive men, the active enemies of the government, of their liberty and lives”); Mallison & Mallison, 9 Case W. Res. J. Int’l L. at 41 (“both regular and irregular combatants who comply with the legal criteria, including the central criterion of adherence to the laws and customs of war, are entitled to exercise controlled violence while they are militarily effective”); Michael Bothe, Karl Josef Partsch & Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* at 232, 234-35 (1982) (“Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities. . . . [R]egular armed forces are inherently organized, . . . are commanded by a person responsible for his subordinates and . . . are obliged under international law to conduct their operations in accordance with the laws and customs of war.”); *Kassem*, 42 Int’l L. Rep. at 480 (“Only members of the armed forces have the right to engage in the actual fighting, that is, to kill, wound or otherwise disable members of the opposing armed forces.”) (quotations omitted).

³⁹ See, e.g., *Lindh*, 212 F. Supp. 2d at 553-54 (“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. . . . Importantly, this lawful combatant immunity is not automatically available to anyone who takes up arms in a conflict. Rather, it is generally accepted that this immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants.”); see also

who comply with the four conditions are entitled to the protections afforded to captured prisoners of war under the laws and usages of war.⁴⁰ Indeed, denial of protected status under the laws of war has been recognized as an effective method of encouraging combatants to comply with the four conditions.⁴¹ Unlike lawful combatants, unlawful combatants have no right to engage in hostilities and enjoy no immunity from prosecution for their military activities,⁴² nor do they receive the protections afforded under the laws of war to captured prisoners of war.⁴³ And of course, unlawful combatants – unlike *civilians*, and like combatants – are vulnerable to direct attack and targeted military hostilities,⁴⁴ as common sense would clearly

Dow v. Johnson, 100 U.S. 158, 165 (1879) (“When . . . our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy’s country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account.”); *Freeland v. Williams*, 131 U.S. 405, 416 (1889) (“for an act done in accordance with the usages of civilized warfare under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority”); Lieber Code art. 57 (“So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.”); Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 Case W. Res. J. Int’l L. 205, 212 (1977); James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 Am. J. Int’l L. 70, 73 (1920).

⁴⁰ See Mallison & Mallison, 9 Case W. Res. J. Int’l L. at 41 (only “combatants who comply with the legal criteria . . . have the legally privileged status of prisoners of war . . . upon capture”).

⁴¹ See, e.g., Rosas at 344 (“the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status”).

⁴² See *Quirin*, 317 U.S. at 31 (“Unlawful combatants are . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”); *Lindh*, 212 F. Supp. 2d at 554 (“only [lawful combatants are] eligible for immunity from prosecution”); Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* 419 (1976) (“persons who are not entitled to prisoner-of-war status are as a rule regarded as unlawful combatants, and can thus be prosecuted for the mere fact of having participated in hostilities”); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int’l L.J. 145, 184-85 (2000) (“Furthermore, because the terrorists would not qualify under Article 4 of Geneva Convention III as Prisoners of War, they would not have immunity for their actions. They could, therefore, be charged with crimes such as murder, assault, and others.”); *Kassem*, 42 Int’l L. Rep. at 480 (describing the “rights and obligations of civilians” as the right “not to be intentionally killed and wounded” and the obligation “not to kill and wound”) (quotations omitted); *id.* (“[I]t is a serious offense, in some cases punishable by death, for a person who does not belong to the armed forces unlawfully to assume the quality of combatant.”).

⁴³ See Ingrid Detter, *The Law of War* 148 (2d ed. 2000) (“Unlawful combatants . . . are not, if captured, entitled to any prisoner of war status.”).

⁴⁴ See *id.* at 148 (“Unlawful combatants . . . are a legitimate target for any belligerent action . . .”).

dictate.⁴⁵

Customary law requires combatants to respect the distinction between civilians and combatants, and mandates that combatants comply with the four conditions of lawful combat as a condition of their status as legitimate belligerents entitled to engage in war on behalf of their sovereign. When various efforts were initiated, beginning in 1874, to codify customary law into written form, drafters saw no need to enumerate the four conditions with respect to regular, professional armies; that was already provided for under customary law. Explicit reference to the four conditions was necessary only in order to achieve certain innovations in the laws of war: namely, to extend the rights and duties of lawful combatants beyond fighters in *regular* armies, to include members of militia, volunteer corps, and other *irregular* forces.⁴⁶ The four customary conditions of lawful combat were codified into a legally binding treaty for the first time in 1899, when the First Hague Peace Conference drafted article 1 of the Hague Convention Annex. Ratified by the United States in 1902,⁴⁷ the 1899 Hague Convention constitutes the first multilateral attempt to legislate in this area.⁴⁸ This successful effort to establish binding international law governing the treatment of prisoners of war, like subsequent efforts, tracked closely the text of article 9 of the Brussels Declaration, both with respect to its express application of the four conditions of lawful combat to irregular forces, and its implicit incorporation of the customary legal principle that all regular forces by definition must satisfy precisely those same four conditions. The 1907 version of the

⁴⁵ It has been contended by some that unlawful combatants, if not protected under GPW, are entitled to the rights guaranteed under GC, even though the very title of that convention indicates that it protects only “civilians.” We find this contention absurd; taken to its logical conclusion, it would actually *forbid* lawful combatants, for example, from conducting military hostilities against unlawful combatants, pursuant to the requirements of GC article 27, which forbids “all acts of violence or threats thereof” against persons covered by GC, whether or not they are held in custody.

⁴⁶ See, e.g., Mallison & Mallison, 9 Case W. Res. J. Int’l L. at 44 (“The new juridical concept is the provision which applies the same rights and obligations to militia and volunteers if they comply with the specified four conditions”).

⁴⁷ The Senate gave its advice and consent to ratification on March 14, 1902. See 35 Cong. Rec. 2792 (1902). The President soon ratified the convention on March 19, 32 Stat. 1803, and proclaimed the convention on April 11, 32 Stat. 1826.

⁴⁸ See GPW Commentary at 4 (“it was not until the Peace Conferences of 1899 and 1907 that States first agreed to limit as between themselves their sovereign rights over prisoners of war”); *id.* at 46 (explaining that it was not until “the Hague Convention of 1899 . . . before prisoners were granted their own statute in international law”); see also Howard S. Levie, *Enforcing The Third Geneva Convention On The Humanitarian Treatment of Prisoners of War*, 7 U.S. Air Force Academy J. of Legal Stud. 37 (1997), reprinted in Michael N. Schmitt & Leslie C. Green, eds., *Levie on the Law of War*, 70 Int’l Legal Stud. 459 (Naval War College 1998).

Hague Convention reflects the same approach.

It would not be long before new international texts would be introduced to govern the laws of war, given the inherent weaknesses of the 1899 and 1907 Hague Conventions. Those two conventions required state parties merely to instruct their armed forces of the principles articulated in the Annex, including the four customary conditions of lawful combat enumerated in article 1. The four conditions were finally given full legal force in 1929, when a Diplomatic Conference held that year in Geneva drafted an entirely new set of protections for POWs. Ratified by the United States in 1932, the Geneva Convention Relative to the Treatment of Prisoners of War (“1929 GPW”)⁴⁹ itself did not articulate the four conditions. It instead incorporated by reference the categories of protected persons contained in article 1 of the 1907 Hague Convention Annex.⁵⁰ Thus, like the 1899 and 1907 Hague Conventions, 1929 GPW did not explicitly require armies to comply with the four traditional conditions of lawful combat. Once again, however, there was no indication that the drafters intended to abrogate customary law, under which armies have long been required to meet those conditions. To the contrary, all of these agreements tracked closely article 9 of the 1874 Brussels Declaration. As previously noted, article 9 was well understood to maintain the customary rule that regular armies must comply with the four conditions of lawful combat, even though that article did not explicitly say so. That same customary rule was also preserved in the 1899 and 1907 Hague Conventions and 1929 GPW.

Many provisions of GPW were drafted to provide more generous rights and protections to POWs than was afforded under earlier conventions governing the conduct of war and the treatment of prisoners of war. But there is no indication that the drafters intended GPW to abrogate the customary rule that regular armies must satisfy the four traditional conditions of lawful combat in order to enjoy the protections afforded by the laws of war. To the contrary, article 4 of GPW, governing eligibility for international legal protection, was drafted “in harmony” with customary legal principles embodied in the Hague Regulations, not to rescind or abrogate them.⁵¹

⁴⁹ July 27, 1929, 47 Stat. 2021.

⁵⁰ 47 Stat. 2030.

⁵¹ GPW Commentary at 49 (“Article 4 . . . was discussed at great length during the 1949 Diplomatic Conference and there was unanimous agreement that the categories of persons to whom the Convention is applicable must be defined, in harmony with the Hague Regulations.”). *See also id.* at 5 (“The [1929] Convention was closely related to the Hague Regulations, since prisoner-of-war status depended on the definition of a belligerent as stipulated in Articles 1, 2 and 3 of those Regulations. Thus neither the 1929 Convention, nor indeed the present [1949] Convention, rescinded the Hague Regulations”); *id.* at 51

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The drafters of GPW held two basic understandings in common with their predecessors. First, under customary law, organized armed forces were already required to satisfy the four conditions of lawful combat. There was accordingly no need for article 4 to apply those conditions explicitly to such regular forces.⁵² By contrast, there was a perceived need to continue to state expressly that *irregular* forces must comply with those conditions to trigger the protections afforded to POWs, as was stated in earlier codifications of the laws of war. The drafters of GPW thus explicitly enumerated the four conditions of lawful combat only in the text of article 4(A)(2), using language virtually identical to that of the Hague Regulations.⁵³ The provisions of GPW respecting the legal status of legitimate combatants thus track closely those of its predecessors. As previously explained, article 4(A)(2) expressly enumerates the four conditions with respect to irregular forces, such as militias and volunteers corps, not forming a part of a regular armed force of a party.⁵⁴ Those four conditions do not appear, by contrast, in either article 4(A)(1) or (3), the provisions governing regular armed forces.⁵⁵ However, like the Brussels Declaration, the two Hague Conventions, and 1929 GPW, there is no indication that article 4 of GPW was drafted to abrogate the long established customary rule that regular forces by definition must comply with the four

(“Article 4 is independent from the laws and customs of war as defined in the Hague Conventions, but there was never any question when the Convention was drafted of abrogating the Hague law. In other words, the present Convention is not limited by the Hague Regulations nor does it abrogate them, and cases which are not covered by the text of this Convention are nevertheless protected by the general principles declared in 1907.”); S. Exec. Rep. No. 9, 84th Cong., 1st Sess., at 5 (1955) (GPW article 4 “does not change the basic principle” of the 1907 Hague Convention).

⁵² See, e.g., GPW Commentary at 63 (“The delegates to the 1949 Diplomatic Conference were . . . fully justified in considering that there was no need to specify for . . . armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).”).

⁵³ See GPW Commentary at 56 (“The . . . text [of article 4(A)(2)] corresponded to that in the Hague Regulations, since the conditions specified in (a), (b), (c), (d), were identical.”); *id.* at 58 (“the four conditions contained in sub-paragraphs (a) to (d) are identical with those stated in the Regulations”); *id.* at 59 (same).

⁵⁴ See GPW art. 4(A)(2), 6 U.S.T. 3320 (extending POW status to “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war”).

⁵⁵ See GPW art. 4(A)(1), 6 U.S.T. 3320 (extending POW status to “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces”); GPW art. 4(A)(3), 6 U.S.T. 3320 (extending POW status to “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power”).

conditions to enjoy the legal status of legitimate combatants under the laws of war.

Finally, subsequent international developments respecting the Geneva Conventions also reject the notion that there exist a category of combatants under GPW who are not required to comply with the four customary conditions of lawful combatancy. In 1977, delegates from various nations drafted two protocols to the 1949 Geneva Conventions. One of the primary purposes of Protocol I Additional to the 1949 Geneva Conventions was to expand the categories of individuals who would be protected under any of the four original 1949 Geneva Conventions. Article 44(3) of Protocol I, for example, would significantly dilute the traditional requirement under customary law and GPW that combatants must distinguish themselves from civilians and otherwise comply with the laws of war as a condition of protection under the Geneva Conventions. Specifically, that provision provides as follows:

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

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.⁵⁶

The Reagan Administration opposed this provision and refused to submit the first protocol to the Senate for its consideration, precisely because it opposed the idea of diluting the customary rule that combatants must comply with all four traditional conditions of lawful combatancy. As he explained to the Senate, President Reagan opposed Protocol I, in part, because it

would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to

⁵⁶ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 519 (1987) (“1977 Protocols Commentary”).

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distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form . . . [W]e must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.⁵⁷

The State Department likewise opposed ratification of Protocol I, noting that

Article 44(3), in a single subordinate clause, sweeps away years of law by “recognizing” that an armed irregular “cannot” always distinguish himself from non-combatants; it would grant combatant status to such an irregular anyway. As the essence of terrorist criminality is the obliteration of the distinction between combatants and non-combatants, it would be hard to square ratification of this Protocol with the United States’ announced policy of combatting [sic] terrorism.⁵⁸

A 1989 Department of the Navy publication similarly explains that, “[p]erhaps more than any other provision, [Article 44(3)] is the most militarily objectionable to the United States because of the increased risk to the civilian population within which such irregulars often attempt to hide.”⁵⁹ Commentators have made similar observations about the 1977 Protocol I. Most notably, Professor Howard S. Levie has noted that, “[b]ecause irregular troops, particularly members of national liberation movements, rarely meet the requirements of [GPW Article 4(A)(2)], a strong movement surfaced early at the first session of the 1977 Diplomatic Conference with the objective of legislating protection for these individuals *under practically any circumstances*. . . . Unquestionably, the intent [of Article 44] was to ensure that captured members of national liberation movements would fall within the definition of prisoners of

⁵⁷ S. Treaty Doc. 100-2, 100th Cong., 1st Sess., at 4 (1987).

⁵⁸ *Id.* at 9.

⁵⁹ U.S. Department of the Navy, Office of the Judge Advocate General, *Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations*, at 11-13 n.49, NWP 9 (Rev. A), FMFM 1-10 (1989).

war, *whatever their prior conduct may have been.*"⁶⁰ The specific grounds of opposition to article 44(3) of Protocol I by the United States thus further demonstrates that, under GPW, *all* combatants must comply with the four conditions expressly enumerated in article 4(A)(2) in order to enjoy the Convention's protections.

This is not the place to discuss whether the United States had the factual basis upon which to decide whether the Taliban militia actually met the four criteria for legal belligerency. It is enough at this point to conclude that President Bush had the legal basis to conclude that the Taliban militia had to meet those four criteria in order to be legally entitled to the status of legal belligerency, and, as a result, the protections accorded to prisoners of war under the Geneva Convention.

* * *

The United States is currently engaged in a state of armed conflict, not of its own choosing, with al Qaeda, a multinational terrorist organization whose leadership declared war on the United States as early as 1996, and the Taliban militia, which harbors and supports that organization. This state of armed conflict justifies the use of military force by the United States to subdue and defeat the enemy, separate and apart from any ordinary law enforcement objectives that may also justify coercive government action against members of al Qaeda and the Taliban militia. Moreover, to give legal recognition to the current armed conflict is not to confer upon members of al Qaeda or the Taliban militia the privileged status of lawful combatants. Quite the contrary, neither group complies with the four traditional conditions of lawful combat long established under the laws of war and recognized by GPW. Members of al Qaeda and the Taliban militia have chosen to fight in blatant disregard for the laws of armed conflict and are, accordingly, unlawful combatants.

⁶⁰ Howard S. Levie, 1 *The Code of International Armed Conflict* 13 (1986) (emphasis added). See also Rosas at 327 ("draft Protocol I submitted by the ICRC . . . is an attempt to loosen the four classical conditions").