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The Laws of War in the War on Terror¹

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Introduction

The laws of war—the parts of international law explicitly applicable in armed conflict—have a major bearing on the “war on terror” proclaimed and initiated by the United States following the attacks of 11 September 2001. They address a range of critical issues that perennially arise in campaigns against terrorist movements, including discrimination in targeting, protection of civilians, and status and treatment of prisoners. However, the application of the laws of war in counter-terrorist operations has always been particularly problematical. Because of the character of such operations, different in

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important respects from what was originally envisaged in the treaties embodying the laws of war, a key issue in any analysis is not just whether or how the law is applied by the belligerents, but also its relevance to the particular circumstances of the operations. It is not just the conduct of the parties that merits examination, but also the adequacy of the law itself. Thus there is a need to look at the actual events of wars involving a terrorist adversary, and at the many ways in which, rightly or wrongly, the law is considered to have a bearing on them.

The present survey critically examines not only certain statements and actions of the US administration, but also those of the International Committee of the Red Cross (ICRC) and certain other bodies concerned with humanitarian and human rights issues. While touching on many ways in which the laws of war impinge on policy, the main focus is on the following four core questions.

1. Are the laws of war, according to their specific terms, applicable to counter-terrorist military operations?

2. In the event that counter-terrorist military operations involve situations different from those envisaged in international agreements on the laws of war, should the attempt still be made to apply that body of law to such situations?

3. Are captured personnel who are suspected of involvement in terrorist organizations entitled to prisoner-of-war (POW) status? If they are not considered to be POWs, does the law recognize a different status, and what international standards apply to their treatment?

4. Is there a case for a revision of the laws of war to take into account the special circumstances of contemporary counter-terrorist operations?

The answers to these questions may vary in different circumstances. The US-led “war on terror” involves action in many countries, with different legal and factual contexts. By no means does all action against terrorism, even if part of the “war on terror,” involve military action in any form, let alone armed conflict of the kind in which the laws of war are formally applicable. The war’s most prominent military manifestation to date, and the focus of this survey, is the coalition military action in Afghanistan that commenced on 7 October 2001 and still continues. While certain phases and aspects of Operation ENDURING FREEDOM involved an international armed conflict, unquestionably bringing the laws of war into play, other phases and aspects are more debatable with respect to the application of this body of law.

The laws of war are not the only body of law potentially relevant to the consideration of terrorist and counter-terrorist actions. For example, in many cases terrorists acts would indeed be violations of the laws of war if they were conducted in the course of an international or an internal armed conflict. However, because they frequently occur in what is widely viewed as peacetime, the illegality of such acts has to be established first and foremost by reference to the national law of states; international treaties on terrorism and related matters;³ and other relevant parts of international law (including parts of the laws of war) that apply in peacetime as well as wartime, for example the rules relating to genocide, crimes against humanity and certain rules relating to human rights. All of these legal categories are relevant to consideration of the attacks of 11 September. For example, the attacks constitute murder under the domestic law of states, and at the same time can be regarded as “crimes against humanity,” a category which encompasses widespread or systematic murder committed against any civilian population.⁴

3. For texts of treaties and other international documents on terrorism, and useful discussion thereof, see *TERRORISM AND INTERNATIONAL LAW* (Rosalyn Higgins and Maurice Flory eds., 1997). For more recent treaties and UN resolutions see the information on terrorism on the UN website, at <http://www.un.org>.

4. Crimes against humanity, defined in the Charter and Judgment of the International Military Tribunal at Nuremberg in 1945–46, are more fully defined in Article 7 of the 1998 Rome Statute of the International Criminal Court, which entered into force on 1 July 2002. These crimes include any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid.

U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9 (1998) [hereinafter Rome Statute]. The Rome Statute does not apply retroactively and the United States

In an effort to answer the questions posed in this introduction, this survey is divided into six parts.

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The Laws of War

The laws of war (also referred to as “jus in bello” and “international humanitarian law applicable in armed conflict”) are embodied and interpreted in a variety of sources: treaties, customary law, judicial decisions, writings of legal specialists, military manuals and resolutions of international organizations. Although some of the law is immensely detailed, its basic principles are simple: the wounded and sick, POWs and civilians are to be protected; military targets must be attacked in such a manner as to keep civilian casualties and damage to a minimum; humanitarian and peacekeeping personnel must be respected; neutral or non-belligerent states have certain rights and duties; and the use of certain weapons (including chemical weapons) is prohibited, as also are certain other means and methods of warfare. The four 1949 Geneva Conventions—the treaties that form the keystone of the modern laws of war—are concerned largely with the protection of victims of war who have fallen into the hands of an adversary, as distinct from the conduct of military operations.⁵

has stated its intent to not become a party to this treaty. For a detailed treatment of US opposition to the ICC, see John Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 186 (2000); Michael Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001). 5. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter GC IV]. These four conventions are all *reprinted* in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts and Richard Guelff eds., 3rd ed., 2000) [hereinafter DOCUMENTS ON THE LAWS OF WAR]; and in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler and Jiri Toman eds., 3rd ed. 1988). Treaty texts are also available at the International Committee of the Red Cross website, at <http://www.icrc.org/eng> (Jan. 3, 2003).

Treaties on the laws of war are the product of negotiations between states, and reflect their experiences and interests, including those of their armed forces. For centuries these rules, albeit frequently the subject of controversy, have had an important function in the policies and practices of states engaged in military operations. With respect to international coalitions involved in combat, given the needs of the members to harmonize their actions on a range of practical issues, these rules have long had particular significance. Even in situations in which their formal applicability may be questionable, they have sometimes been accepted as relevant guidelines.

Scope of application

The laws of war have a scope of application that is not limited to wars between recognized states. They apply in a wide, but not infinitely wide, variety of situations. In the 1949 Geneva Conventions, Common Article 1 specifies that the parties “undertake to respect and to ensure respect for the present Convention in all circumstances.”⁶ Common Article 2, which deals directly with scope of application, specifies that the Conventions “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,” indicating that the existence or non-existence of a declaration of war, or a formal state of war, is not necessary for the application of the Conventions. Common Article 3 contains certain minimum provisions to be applied in the case of armed conflict not of an international character, concentrating particularly on treatment of persons taking no active part in hostilities.⁷ Certain other

6. For an authoritative account of the origins and meanings of Common Article 1, see Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. INT’L HUM. L. 1999, at 3-61 (2000).

7. Common Article 3 of the Geneva Conventions provides in part that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

agreements, especially those concluded since the early 1990s, apply in non-international as well as international armed conflicts.

The distinction that has traditionally been drawn in the laws of war between international and non-international armed conflict has come under challenge in the post-1945 era. This is not only because many wars have involved elements of both civil and international war, but also because of the nature of counter-terrorist operations. These have aspects that are similar to a civil war, particularly as they typically involve governmental forces combating non-governmental groups; but they may not meet all the criteria (such as the holding of territory by insurgents) required for the application of parts of the law governing non-international armed conflict; and they can also have aspects that are more closely akin to international war, especially if the terrorists operate in armed units outside their own countries.

Application of the law is not necessarily dependent on formal designation of a conflict as international or non-international. In some instances, as indicated below, the UN Security Council or particular belligerents have deemed the rules governing international armed conflict to be applicable even to a largely internal situation. The US armed forces have indicated their intention to observe the rules governing international armed conflicts, even in situations that may differ in certain respects from the classical model of an interstate war. The Standing Rules of Engagement issued by the US Joint Chiefs of Staff spell this out:

U.S. forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all other operations.⁸

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. . . .

See GC III, *supra* note 5, art. 3; DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 245.

8. CHAIRMAN JOINT CHIEFS OF STAFF INSTR 3121.01A STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, ENCLOSURE (A) A-9 [hereinafter CJCS INSTR 3121.01A]. A similar but not identical statement had appeared in the Standing ROE of 1 October 1994, which this document replaces. See CJCS INSTR, 3121.01 STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 OCT. 1994). A number of other US military-doctrinal statements are equally definite that US forces will always apply the law of armed conflict.

In certain inter-state conflicts, Western armed forces, engaging with adversaries showing at best limited respect for ethical and legal restraints, have managed to observe basic rules of the laws of war. This was the case in the 1991 Gulf War, in which Iraq mistreated prisoners, despoiled the environment and had to be warned in brutally clear terms not to engage in chemical or biological attacks and terrorist operations. The US-led Gulf coalition sought to observe the law not because of any guarantee of reciprocity, but because such conduct was important to the ethos of the armed forces; and because it contributed to the maintenance of internal discipline, and of domestic and international support. Similar conclusions could be drawn from the 1999 Kosovo War. In short, practice has provided some evidence in support of the legal position that reciprocity with one adversary in one particular conflict is far from being a necessary condition for observing the laws of war.

Whether all aspects of counter-terrorist operations fall within the scope of application of the laws of war will be explored further in Part 2 below.

Jus ad bellum and jus in bello

In any armed conflict, including one against terrorism, it is important to distinguish between the legality of resorting to force and the legality of the way in which such force is used. In strict legal terms, the law relating to the right to resort to the use of force (*jus ad bellum*) and the law governing the actual use of force in war (*jus in bello*) are separate. The *jus in bello* applies to the conduct of belligerents in international armed conflict irrespective of their right to resort to the use of force under the *jus ad bellum*. As regards the *jus ad bellum* issues raised after 11 September, my own views are in favor of the legality, and indeed overall moral justifiability, of the military action in Afghanistan. However, this survey's focus is on the *jus in bello* aspects of the US-led military operations.

Despite the lack of a formal connection between *jus ad bellum* and *jus in bello*, there are certain ways in which they interact in practice, especially in a war against terrorists. By observing *jus in bello*, a state or a coalition of states may contribute to perceptions of the justice of a cause in three related ways. First, in all military operations, whether or not against terrorists, the perception that a state or a coalition of states is observing recognized international standards may contribute to public support domestically and internationally. Second, if the coalition were to violate *jus in bello* in a major way, for example by the commission of atrocities, that would be likely to advance the cause of the adversary forces, arguably providing them a justification for their resort to force. Third, in counter-terrorist campaigns in particular, a basis for engaging in military operations is often a perception that there is a definite moral

distinction between the types of actions engaged in by terrorists and those engaged in by their adversaries. Observance of *jus in bello* can form a part of that moral distinction.

However, the *jus ad bellum* rationale that armed hostilities have been initiated in response to major terrorist acts can raise issues relating to the application of certain *jus in bello* principles. Two such issues are explored here: first, whether there is scope for neutrality in relation to an armed conflict in which one side is fighting in the name of opposing terrorism; second, whether those responsible for terrorist campaigns can be viewed as exclusively responsible for all the death and destruction of an ensuing war.

The right of states to be neutral in an armed conflict is a long-standing principle of the laws of war. Events of the past century, especially the obligations imposed by membership of international organizations, have exposed problems in the traditional idea of strictly impartial neutrality and have led to its modification and even erosion. In many conflicts there were states which, even while not belligerents, pursued policies favoring one side, for example joining in sanctions against a state perceived to be an aggressor. The UN Charter, by providing for the Security Council to require all states to take certain actions against offending states, added to the erosion of traditional concepts of neutrality, at least in those cases in which the Security Council has been able to agree on a common course of action (e.g., sanctions). The importance of new forms of non-belligerence, distinct from traditional neutrality, may help to explain the emergence of terms such as “neutral or non-belligerent powers” in post-1945 treaties on the laws of war.⁹ In many recent episodes, including the 1991 Gulf War and the 1999 Kosovo War, when the use of armed force by a coalition has been combined with the application of general UN sanctions against the adversary state, the scope for traditional (i.e., impartial) neutrality has indeed been limited, but certain forms of non-belligerence have survived. As outlined below in Part 3 on War in Afghanistan, the “war on terror” which began in 2001 with Operation ENDURING FREEDOM would confirm that in certain armed conflicts, particularly when the UN Security Council has given approval to one party, the scope for neutrality may be limited or non-existent.

9. See GC III, *supra* note 5, at articles 4(B)(2) and 122. See also the references to “neutral and other States not Parties to the conflict” in 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Articles 9, 19, 31 *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 1 [hereinafter GP I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR at 419, *supra* note 5.

Can those who initiated terrorist campaigns be held responsible for all the death and destruction of an ensuing war? When fighting terrorism is the basis for resorting to war under the *jus ad bellum*, there is sometimes a tendency for the general indignation caused by terrorist attacks to affect adversely the implementation of *jus in bello*. It is sometimes argued that because the terrorists started the war, they are responsible for all the subsequent horrors. In early December 2001, discussing civilian casualties, US Secretary of Defense Donald Rumsfeld said: "We did not start this war. So understand, responsibility for every single casualty in this war, whether they're innocent Afghans or innocent Americans, rests at the feet of the al Qaeda and the Taliban."¹⁰ Such a view, if it implies that the peculiar circumstances involved in the *jus ad bellum* might override certain considerations of *jus in bello* in the war that follows, has no basis in the law.

Proportionality

"Proportionality" is a long-established principle that sets out criteria for limiting the use of force. One of its meanings relates to the proportionality of a military action compared to a grievance, and thus constitutes a further link between *jus in bello* and *jus ad bellum*. It involves a complex balance of considerations, and it would be incorrect to interpret this principle to imply a right of tit-for-tat retaliation. For example, it would be legally unjustified for a military response to a terrorist act to have the objective of killing the same number of people, and there was no suggestion or indication that this was a coalition objective in Afghanistan. Nor does this principle prevent a response from taking into account a range of issues not limited to the size of the initial attack.¹¹

The other main meaning of proportionality relates to the actual conduct of ongoing hostilities. As a US Army manual succinctly interprets it, "the loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained."¹² This meaning of proportionality (which is not directly linked to *jus ad bellum*) is often difficult to apply in armed conflict, especially in counter-terrorist

10. Secretary of Defense Donald Rumsfeld, News Conference at the Pentagon (Dec. 4, 2001), available at http://www.defenselink.mil/news/Dec2001/t12042001_t1204sd.html (Nov. 6, 2002).

11. In an assessment of the events of 2001, Christopher Greenwood has argued that "proportionality in self-defence looks forward. The test is whether the force used is proportionate to the threat it is designed to meet, not to the events of the past." See Christopher Greenwood, *International Law and the "War Against Terrorism"*, 78 INT'L AFF'S 2, 313–314 (April 2002).

12. U.S. DEPT OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 41 (July 1956) [hereinafter FM 27-10].

operations. It may, but does not necessarily, limit the use of force to the same level or amount of force as that employed by an adversary. It exists alongside the principle of military necessity, which is defined in the US Army manual as one that “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”¹³ The principle of proportionality is therefore in tension, but not necessarily in conflict, with the current US military doctrine, which favors the overwhelming use of force in order to achieve decisive victory quickly and at minimum cost in terms of US casualties.¹⁴

Counter-Terrorist Military Operations

Counter-terrorism has been defined as “offensive military operations designed to prevent, deter and respond to terrorism.”¹⁵ Such operations, including those resulting from the events of 11 September, may involve inter-state armed conflict as principally envisaged in the laws of war: in such cases that body of law applies straightforwardly. However, such operations can also involve conflict with other characteristics—a fact that helps to explain why the laws of war have often proved difficult to apply in them. Six factors, all relating to the nature of the opposition, point to potential problems in the application of the laws of war in counter-terrorist operations:

- Neither all terrorist activities, nor all counter-terrorist military operations, even when they have some international dimension, necessarily constitute armed conflict between states. Terrorist movements themselves generally have a non-state character. Therefore, military operations between a state and such a movement, even if they involve the state’s armed forces acting

13. *Id.* at para. 3. A subsequent official US exposition of the principle states: “Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources may be applied.” ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 5-2 (A. Thomas and J. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).

14. For a brief discussion of United States and NATO strategic doctrine, see pages 191-208 *infra*.

15. By contrast, “antiterrorism” has been defined as “defensive measures to reduce the vulnerability of individuals and property to terrorist attacks.” See INTERNATIONAL AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK (2003), at 312–3 [hereinafter OPLAW HANDBOOK]. This annual publication is available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf> (Nov. 14, 2002).

outside its own territory, are not necessarily such as to bring them within the scope of application of the full range of provisions regarding international armed conflict in the 1949 Geneva Conventions and the 1977 Geneva Protocol I.¹⁶

- Counter-terrorist operations may assume the form of actions by a government against forces operating within its own territory; or, more rarely, may be actions by opposition forces against a government perceived to be committing or supporting terrorist acts. In both these cases, the conflict may have more the character of non-international armed conflict (that is, civil war) as distinct from international war. Fewer laws-of-war rules have been formally applicable to civil as distinct from international war, although the situation is now changing in some respects.

- In many cases, the attributes and actions of a terrorist movement may not come within the field of application even of the modest body of rules relating to non-international armed conflict. Common Article 3 of the 1949 Geneva Conventions is the core of these rules, but says little about the scope of application. The principal subsequent agreement on non-international armed conflict, the 1977 Geneva Protocol II, is based on the assumption that there is a conflict between a state's armed forces and organized armed groups which, under responsible command, exercise control over a part of its territory, and carry out sustained and concerted military operations. The protocol expressly does not apply to situations of internal disturbance and tension, such as riots, and isolated and sporadic acts of violence.¹⁷

- Since terrorist forces often have little regard for internationally agreed rules of restraint, the resolve of the counter-terrorist forces to observe them may also be weakened, given the low expectation of reciprocity and the tendency of some part of the public under attack to overlook any breaches by their own forces.

- A basic principle of the laws of war is that attacks should be directed against the adversary's military forces, rather than against civilians. This principle, violated in terrorist attacks specifically directed against civilians, can

16. In ratifying the 1977 Geneva Protocol I in 1998, the United Kingdom made a statement that the term "armed conflict" denotes "a situation which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation." See GP I, *supra* note 9, reprinted in DOCUMENTS ON THE LAWS OF WAR, at 510, *supra* note 5.

17. 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, reprinted in DOCUMENTS ON THE LAWS OF WAR, at 481, *supra* note 5 [hereinafter GP II].

be difficult to apply in counter-terrorist operations, because the terrorist movement may not be composed of defined military forces that are clearly distinguished from civilians.

- Some captured personnel who are members of a terrorist organization may not meet the criteria for POW status as set out in 1949 Geneva Convention III. (The question of prisoners is discussed in greater detail below.)

These six factors reflect the same underlying difficulty governments have in applying the laws of war to civil wars, namely, that the opponent tends to be viewed as criminals, without the right to engage in combat operations. This factor above all explains why, despite the progress of recent decades, many governments are doubtful about, or opposed to, applying the full range of rules applicable in international armed conflict to operations against rebels and terrorists.

For at least 25 years, the United States has expressed a concern, shared to some degree by certain other states, regarding the whole principle of thinking about terrorists and other irregular forces in a laws-of-war framework. To refer to such a framework, which recognizes rights and duties, might seem to imply a degree of moral acceptance of the right of any particular group to resort to acts of violence, at least against military targets.¹⁸ Successive US administrations have objected to certain revisions to the laws of war on the grounds that they might actually favor guerrilla fighters and terrorists, affording them a status that the United States believes they do not deserve. The strongest expression of this view was a letter of 29 January 1987 explaining why the administration was not recommending Senate approval of 1977 Geneva Protocol I. The letter mentioned that granting combatant status to certain irregular forces “would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.” It indicated a concern that the provisions would endanger US soldiers, and stated in very general terms that “the Joint Chiefs of Staff have also concluded that a number of the provisions of the protocol are militarily unacceptable.” United States repudiation of the protocol would be an important move against “the intense efforts of terrorist organizations and their supporters to promote the legitimacy of their aims and

18. For fuller discussion, and evidence that the concern about the hazards of coping with terrorism in a laws-of-war framework is not new, see ADAM ROBERTS, *TERRORISM AND INTERNATIONAL ORDER*, 14–15 (Lawrence Freedman et al. eds., 1986).

practices.”¹⁹ Whether all this was based on a fair interpretation of 1977 Geneva Protocol I is the subject of impassioned debate that is beyond the scope of this survey. The key point is the US concern—which has not changed fundamentally in the years since 1987—that the laws of war might be misused by some in order to give an unwarranted degree of recognition to guerrillas and terrorists.

Application of the law in previous operations

In many counter-terrorist campaigns since 1945 issues relating to the observance or non-observance of basic rules of law, including the laws of war, have perennially been of considerable significance. This has been the case both when a counter-terrorist campaign has been part of an international armed conflict, and when such a campaign has been a largely internal matter, conducted by a government within its own territory, in a situation which may not cross the threshold to be considered an armed conflict. In such circumstances the laws of war may be of limited formal application, but their underlying principles, as well as other legal and prudential limits, are important. Within functioning states, terrorist campaigns have often been defeated through slow and patient police work (sometimes with military assistance) rather than major military campaigns; for example, the actions against the Red Army Faction in Germany and the Red Brigades in Italy in the 1970s.

The British military and police operation against “Communist Terrorists” in Malaya after 1948 is an example (in a colonial context) of a long-drawn-out and patient counter-terrorist campaign that was eventually successful. One of the key military figures involved in that campaign, Sir Robert Thompson, distilling five basic principles of counter-insurgency from this and other cases, wrote of the crucial importance of operating within a properly functioning domestic legal framework:

Second principle. The government must function in accordance with law. There is a very strong temptation in dealing both with terrorism and with guerrilla actions for government forces to act outside the law, the excuses being that the processes of law are too cumbersome, that the normal safeguards in the law for the individual are not designed for an insurgency and that a terrorist deserves to

19. Letter of Transmittal from President Ronald Reagan, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), reprinted in 81 AM J. INT’L L. 910–912 (1988).

be treated as an outlaw anyway. Not only is this morally wrong, but, over a period, it will create more practical difficulties for a government than it solves.²⁰

The United Kingdom's long engagement against terrorism in Northern Ireland, although in an essentially internal situation, provides one precedent for affording treatment based on certain international rules to prisoners whose status is contested. This was one of many conflicts in which those deemed to be "terrorists" were aware of the value, including propaganda value, of making claims to POW status. While denying that there was an armed conflict whether international or otherwise, and strongly resisting any granting of POW status to detainees and convicted prisoners, the United Kingdom did come to accept that international standards had to apply to their treatment. The minority report of a UK Commission of Inquiry in 1972 which led to this conclusion is an interesting example of asserting the wider relevance, even in an internal conflict, of certain international legal standards, including some from the main body of the four 1949 Geneva Conventions.²¹ The UK government's acceptance of this approach was only a decision, not a complete solution to a matter that continued to be contentious.

Questions about the status and treatment of prisoners, some of whom were considered as terrorists, also arose during the US involvement in Vietnam. In 1967–8, the United States took a judiciously inclusive approach to the matter when it issued directives to classify Viet Cong main force and local force personnel, and certain Viet Cong irregulars, as POWs. This was despite the existence of doubts and ambiguities as to whether these forces met all the criteria in Article 4 of 1949 Geneva Convention III. Viet Cong irregulars were to be classified as POWs if captured while engaging in combat or a belligerent act under arms, "other than an act of terrorism, sabotage, or spying." There was provision for establishing tribunals, in accordance with Article 5 of the Geneva Convention, to

20. ROBERT THOMPSON, *DEFEATING COMMUNIST INSURGENCY: EXPERIENCES FROM MALAYA AND VIETNAM*, 52 (1966). From 1957 to 1961 the author was successively Deputy Secretary and Secretary for Defense in Malaya. As his and other accounts make clear, in the course of the Malayan Emergency there were certain derogations from human rights standards, including detentions and compulsory relocations of villages.

21. Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, Cmnd. 4901, Her Majesty's Stationery Office, London, 1972, at 1–2 and 11–23.

determine, in doubtful or contested cases, whether individual detainees were entitled to POW status.²²

One example of a counter-terrorist military campaign, the 1982–2000 Israeli presence in Lebanon, shows the importance of legal restraints in counter-terrorist operations, and the hazards that can attend a failure to observe them. This episode has certain similarities to the case of Afghanistan in 2001–2002, as well as some obvious differences. Israel's June 1982 invasion of Lebanon was explicitly in response to "constant terrorist provocations," including, since July 1981, "150 acts of terrorism instigated by the PLO, originating in Lebanon, against Israelis and Jews in Israel and elsewhere: in Athens, Vienna, Paris and London." Israel said that if Lebanon was unwilling or unable to prevent the harboring, training and financing of terrorists, it must face the risk of counter-measures.²³ The invasion led to the attacks on the inhabitants of Sabra and Shatila refugee camps outside Beirut in September 1982 by Israel's local co-belligerents, the Lebanese Phalangists. At the lowest estimates, several hundred Palestinians in the camps, including many women and children, were killed. This event aroused strong opposition internationally, and also in Israel. The Israeli authorities established a Commission of Inquiry, which concluded that, while the Phalangist forces were directly responsible for the slaughter, Israel bore indirect responsibility.²⁴ During the whole period of Israeli military involvement in Lebanon, the treatment of alleged terrorist detainees also caused controversy. Israel opposed granting them POW status on the grounds that as terrorists they were not entitled to it. The detainees were held in very poor conditions in notorious camps, including al-Khiam (run by the Israeli-created South Lebanese Army) and al-Ansar (run by the Israel

22. Two key directives issued by US Military Assistance Command, Vietnam, on the question of eligibility for POW status are (1) Annex A, "Criteria for Classification and Disposition of Detainees," part of Directive no. 381–46 of 27 December 1967; and (2) Directive no. 20-5 of 15 March 1968, "Inspections and Investigations: Prisoners of War – Determination of Eligibility," reprinted in 62 AM. J. INT'L L. 755, at 766–75 (1968).

23. See Yehuda Blum, Permanent Representative of Israel to the United Nations, Speech before the Security Council, U.N. SCOR, 36th Sess., Supp. 21, U.N. Doc. S/PV.2292 (1981). The Security Council unanimously demanded an end to all military activities and a withdrawal of Israeli forces from Lebanon in Resolutions 508 and 509 of 5 and 6 June 1982 respectively. See S. C. Res. 508, U.N. SCOR, 37th Sess., U.N. Doc. S/508/(1982); and S. C. Res. 509, U.N. SCOR, 37th Sess., U.N. Doc. S/509/(1982).

24. See Commission of Inquiry into the Events at the Refugee Camps in Beirut, Final Report at 53–54 (1983) [hereinafter Kahan Report], reprinted in 22 I.L.M. 3, at 473 (1983).

Defense Forces).²⁵ The Israeli military presence in Lebanon received extensive criticism internationally and in Israel, and cost many lives among the Israel Defense Forces, their adversaries and the civilian population. It ended with a unilateral Israeli withdrawal in May 2000.

Past evidence suggests that while the application of the law may be particularly difficult in counter-terrorist operations, it cannot be neglected. Some failures to observe legal restraints in past campaigns have been instructive. In military operations with the purpose of stopping terrorist activities, there has been a tendency for counter-terrorist forces to violate basic legal restraints. There have been many instances in which prisoners were subjected to mistreatment or torture. In some cases, excesses by the government or by intervening forces supporting the government may have had the unintended effect of assisting a terrorist campaign. Applying pressure on a government or army to change its approach to counter-terrorism, to bring it more into line with the laws of war and human-rights law, can be a difficult task.

In a counter-terrorist war, as in other wars, there can be strong prudential considerations that militate in favor of observing legal standards, which are increasingly seen as consisting of not only domestic legal standards, but also international ones, including those embodied in the laws of war. These considerations include securing public and international support; ensuring that terrorists are not given the propaganda gift of atrocities or maltreatment by their adversaries; and maintaining discipline and high professional standards in the counter-terrorist forces; and assisting reconciliation and future peace. Such considerations may carry great weight even in conflicts, or particular episodes within them, which differ from what is envisaged in the formal provisions regarding scope of application of relevant treaties. These considerations in favor of observing the law may be important irrespective of whether there is reciprocity in such observance by all the parties to a particular war. However, it is not realistic to expect that the result of the application of such rules will be a sanitized form of war in which civilian suffering and death is eliminated.

25. In a case concerning detainees in Ansar Prison on which the Israeli Supreme Court issued a judgment on 11 May 1983, the Israeli authorities asserted that the prisoners were “hostile foreigners detained because they belong to the forces of terrorist organizations, or because of their connections or closeness to terrorist organizations.” Israel, while refusing them POW status, claimed to observe “humanitarian guidelines” of the 1949 Geneva Convention IV on civilians. For details of the case see 13 ISR. Y.B. HUM. RTS. 360–64 (1983).

War in Afghanistan

In wars in Afghanistan over the centuries, conduct has differed markedly from that permitted by the written laws of war. These wars always had a civil war dimension, traditionally subject to fewer rules in the laws of war; and guerrilla warfare, already endemic in Afghanistan in the nineteenth century, notoriously blurs the traditional distinction between soldier and civilian that is at the heart of the laws of war. Some local customs, for example regarding the killing of prisoners and looting, are directly contrary to long-established principles of the law. Other customs are different from what is envisaged by the law, but are not necessarily a violation of it: for example, the practice of soldiers from the defeated side willingly joining their adversary rather than being taken prisoner. In some cases, conduct has been consistent with international norms: for example, the ICRC had access to some prisoners during the Soviet intervention. Overall, however, compliance with the laws of war has been limited.

From the start, the implementation of the laws of war posed a problem for Operation ENDURING FREEDOM.²⁶ Difficult practical issues facing the coalition included: the problem of conducting operations discriminately against elusive enemies; the possibility that adversary forces might mistreat or execute coalition prisoners; the possibility that some enemy personnel facing capture might be reluctant to surrender their weapons, and that they might not meet the criteria for POW status; the urgent need for humanitarian relief operations during ongoing war; and maintenance of order (and avoidance of looting and revenge killings) in liberated towns. These problems were exacerbated by the character of the coalition's local partner, the Northern Alliance.²⁷ The number of different forces involved, many of which were under the command

26. The name Operation ENDURING FREEDOM was announced by Donald Rumsfeld at a press conference on 25 September 2001. See Secretary of Defense Donald Rumsfeld News Conference at the Pentagon (Sep. 25, 2001), available at http://www.defenselink.mil/news/Sep2001/t09252001_t0925sd.html (Dec. 28, 2002). Operation ENDURING FREEDOM, he said, was not the "umbrella phrase" for the entire anti-terror campaign, but referred to a "broad, sustained multifaceted effort." It has been used to refer to the coalition military operations in and around Afghanistan that began on 7 October 2001. Operation ENDURING FREEDOM does not encompass the operations of the International Security Assistance Force in Afghanistan, mentioned below.

27. "Northern Alliance" is a colloquial term for the "United Islamic Front for the Salvation of Afghanistan." This organization was formed in 1996-7. See *Afghanistan and the United Nations* (Jan. 6, 2003), available at <http://www.un.org/News/dh/latest/afghan/un-afghan-history.shtml> (Jan. 6, 2003).

of local warlords, and the lack of clear structures of authority, decision-making and military discipline within them, militated against the implementation of international norms.

The active role of the media in this war ensured that many of these issues were heavily publicized. Reporters operated close to, and even in front of, the front lines, sending back reports and high-resolution pictures as events unfolded. Up to the end of January 2002, more reporters died while covering the war in Afghanistan than non-Afghan coalition military personnel.²⁸ As in other modern wars, the press played a critical role in repeatedly raising matters germane to the laws of war.

This part deals mainly with the war in Afghanistan after the beginning of major US military action there on 7 October 2001. It cannot explore all the issues relating to the laws of war that have cropped up in regard to Afghanistan. It considers the applicability of the laws of war to the various aspects of this armed conflict generally, glances at the limited scope for neutrality, and then surveys three specific issues that were raised in the war: bombing; gas; and humanitarian assistance and refugee matters. Prisoners are considered in Part 4.

Applicability of the laws of war to the armed conflict

An armed conflict in Afghanistan—principally between the Taliban and Northern Alliance forces—had been going on for many years before the events of 11 September 2001. The UN Security Council had called on both parties to comply with their obligations under international humanitarian law. Like a similar resolution on Bosnia six years earlier, a 1998 UN Security Council Resolution on Afghanistan reaffirmed:

that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949 and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.²⁹

28. Eight reporters died in the period October–December 2001, several of them due to banditry rather than military operations. Interview with Nik Gowing, BBC World Television Reporter (Jan. 26, 2002).

29. UN Security Council Resolution 1193 of 28 August 1998, passed unanimously. See S. C. Res. 1193, U.N. SCOR, 53d Sess., U.N. Doc. S/1193/(1998). Identical wording had been used in S. C. Res. 764 of 13 July 1992 on the war in Bosnia and Herzegovina. See S. C. Res. 764, U.N. SCOR, 47th Sess., U.N. Doc. S/764/(1992). This wording did not necessarily mean that the Security Council viewed these wars as international armed conflicts, but it did mean that international standards had to be observed in them. Nor did it indicate that the Council considered any prisoners taken in these wars to have the full status of prisoners of war; but it implied that they should receive humane treatment in accord with international standards.

The reference to grave breaches would appear to suggest that the Security Council viewed all the rules of the 1949 Geneva Conventions as applicable, and not just Common Article 3, which deals with civil war. Thus, three years before it became directly involved, the United States as well as other powers viewed the laws of war as applicable to the Afghan conflict.

Like the period of Soviet intervention of 1979–89, and indeed wars in many countries in the period since 1945, the armed conflict in Afghanistan from 7 October 2001 can perhaps be best characterized as “internationalized civil war.” This is not a formal legal category, but an indication that the rules pertaining to both international and civil wars may be applicable in different aspects and phases of the conflict.³⁰

Major aspects of the war in Afghanistan have been international in character. Following the attacks of 11 September 2001, the UN Security Council adopted Resolution 1368, recognizing the right of individual or collective self-defense and condemning international terrorism as a threat to international peace and security. This and the more detailed Resolution 1373 recognized the international dimensions of the struggle against terrorism.³¹ During the period October–December 2001, there was an international armed conflict between the US-led coalition on the one side, and the Taliban and al Qaeda on the other. Following the fall of the Taliban regime, and the accession to power of the Afghan Interim Authority on 22 December 2001, the coalition’s role was essentially that of aiding a government but in a struggle that was at least partly international. Even after the convening of the Loya Jirga in Kabul in June 2002 and the establishment of the Afghan Transitional Government on 19 June, coalition (including Afghan) forces were engaged not only against Taliban or other mainly Afghan forces, but also against certain non-Afghan forces, especially al Qaeda. Despite the fact that al Qaeda lacked the structure of a state, the continuing hostilities with it could still be understood as part of an international armed conflict. This coalition military action was separate from the assistance to the government in maintaining security in Kabul and surrounding areas through the International Security Assistance Force (ISAF).³²

30. See Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon*, 33 AM. U. L. REV. 1 at 145–61 (Fall, 1983).

31. S. C. Res. 1368, U.N. SCOR, 53d Sess., U.N. Doc. S/1368/(2001) and S. C. Res. 1373, U.N. SCOR, 53d Sess., U.N. Doc. S/1373/(2001).

32. ISAF was established in Afghanistan in January 2002 on the basis of UN Security Council Resolution 1386 of December 20, 2001, passed unanimously. See S. C. Res. 1386, U.N. SCOR, 53d Sess., U.N. Doc. S/1386/(2001). Details of the Military Technical Agreement between ISAF and the Interim Administration, plus annexes, are available at <http://www.operations.mod.uk/isafmta.doc> (Nov. 15, 2002).

On the technical legal question as to which of the main laws of war treaties were formally binding on the belligerents in the international armed conflict between the US-led coalition and the Taliban regime in Afghanistan in October–December 2001, the 1907 Hague Convention IV On Land Warfare applied because of its status as customary law, thereby being binding on all states whether or not parties to the treaty. In addition, Afghanistan and the main members of the international coalition were parties to the following agreements:

- the 1925 Geneva Protocol on Gas and Bacteriological Warfare;
- the 1948 Genocide Convention; and,
- the four 1949 Geneva Conventions.

Some of the states involved were, or later became, parties to certain additional agreements.³³ However, the above-named treaties provide the basic treaty framework for considering the application of the law in the armed conflict that commenced in October 2001. In addition, rules of customary international law applied. Apart from the provisions of customary law embodied in the agreements indicated above, certain provisions of some later agreements, including 1977 Geneva Protocol I, are accepted as having that status.

As regards civil-war aspects of the Afghan war, some but not all of the provisions of the agreements listed above apply. The 1907 Hague Land War Convention's Article 2 indicates that the convention and its annexed regulations apply only to wars between states. The 1925 Geneva Protocol is not formally applicable to civil wars.³⁴ The 1948 Genocide Convention is considered to apply to non-international as well as international armed conflict. In the 1949 Geneva Conventions, Common Article 3 lists certain minimum provisions for humane treatment of those taking no active part in hostilities that are to be applied in non-international armed conflict. However, the UN Security

33. On 11 September 2002, Afghanistan acceded to the Ottawa Convention on Anti-personnel Mines. See "UN Committed to Ridding World of Landmine Threat, Annan tells Treaty Meeting" (Sep. 16, 2002), available at <http://www.un.org/apps/news/storyAr.asp?NewsID=4724&Cr=mines&Cr1=> (Nov. 8, 2002).

34. Afghanistan is nonetheless bound by the complete prohibition on possession and use of biological weapons in the 1972 Biological Weapons Convention, which it ratified on 26 March 1975. See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 5, at 137. Afghanistan is not yet a party to the 1993 Chemical Weapons Convention, which it signed on 14 January 1993 but has not ratified. See The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, opened for signature January 13, 1993, 32 I.L.M. 800 (1993) [hereinafter Chemical Weapons Convention], available at http://www.opcw.org/html/db/members_frameset.html (Nov. 12, 2002).

Council's 1998 resolution had called for application of the Geneva Conventions more generally.

Following the events of 11 September 2001, when it was evident that an armed conflict between the coalition and the Taliban regime was likely, the ICRC, consistent with its general practice, sent messages to certain governments reminding them of their obligations under international humanitarian law. Unfortunately these messages contained some debatable interpretations of the law. They put less reliance on binding treaty law than on provisions of 1977 Geneva Protocol I, to which neither the United States nor Afghanistan was a party, and not all of the provisions of which that were cited can plausibly be claimed to be "recognized as binding on any Party to an armed conflict," as the messages optimistically asserted. Furthermore, in the first of what would be many clashes between humanitarian bodies and national governments in this crisis, the ICRC messages to the US and UK governments stated: "The use of nuclear weapons is incompatible with the provisions of International Humanitarian Law." Although beyond the scope of this survey, this was undoubtedly wrong as a statement of law. Following strong US objections a revised text was sent to the US government, in which the offending wording was changed to the bland formula: "On the subject of nuclear weapons, the ICRC confirms its position as expressed in its Commentary on the 1977 Additional Protocols."³⁵ In its message to the Afghan authorities the ICRC indicated that the civil war in Afghanistan was governed primarily by the provisions applicable to non-international armed conflicts.³⁶ This reflected the ICRC view that there were two conflicts in Afghanistan (Coalition v. Taliban; and Taliban v. Northern Alliance) to which two different branches of law applied. However, this was a surprising stance in view of the strong view about the application of the 1949 Geneva Conventions to the situation in Afghanistan that had been expressed by the UN Security Council in August 1998. The ICRC subsequently issued some public statements on the application of the laws of war in this crisis, reminding all the parties involved—the Taliban, the Northern Alliance and the US-led coalition—of their obligations to respect the law, and stating that the ICRC was continuing a wide range of activities inside Afghanistan. One ICRC statement was explicit that "combatants captured by enemy forces in the international armed conflict between the Taliban and the US-led

35. See Memorandum from ICRC to Governments of the US and the UK (Sep. 28, 2001). This memorandum was amended and corrected on October 5 by the ICRC. See Memorandum from ICRC to Governments of the US and the UK (Oct. 5, 2001).

36. See Memorandum from ICRC to Government of Afghanistan (Sep. 2001) (unpublished memorandum).

coalition must be treated in accordance with the Third Geneva Convention,” implying that other aspects of the war in Afghanistan did not rise to the level of international armed conflict, and that captured personnel in that aspect of the war would have a different and perhaps lesser degree of protection.³⁷

In November 2002, the ICRC communicated to concerned countries its conclusions that from 19 June 2002 onwards, the armed conflict in Afghanistan was no longer an international armed conflict but an internal one, covered by Common Article 3 of the 1949 Geneva Conventions rather than by the more comprehensive regime of the conventions as a whole. This conclusion was not persuasive. It appeared to ignore the continuing involvement of certain non-Afghan forces, especially al Qaeda, inside Afghanistan, and the possible continued involvement in terrorist attacks world-wide of that and other bodies operating in Afghanistan; it failed to note the implications in earlier UN Security Council Resolutions that the conflict was international, and/or that the Geneva Conventions were applicable to it; and its issuance marked a departure from previous ICRC practice of adopting a low profile approach to the legal characterization of situations with characteristics of both international and internal armed conflict.³⁸

Lack of scope for neutrality

The circumstances of the war against al Qaeda and the Taliban were such that little or no room was left for states to adopt a policy of traditional (i.e., impartial) neutrality, the stresses on which in wars in the twentieth century were already noted above. The lack of scope for neutrality was especially marked because al Qaeda operates in numerous states, and all states have been required by the UN to take a range of measures against it. The resolution passed by the UN Security Council in 1999 on the subject of the Taliban regime in Afghanistan,

37. Press Release 01/47, ICRC, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law (Oct. 24, 2001), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList74/0E80282C0A643B05C1256B6600607E00> (Nov. 12, 2002).

38. See ICRC, Aide-Memoire to US (Nov. 19, 2002) (Similar messages were addressed to Afghanistan and other concerned countries). This communication made no reference to UN Security Council Resolutions that might suggest the possibility of a different conclusion about the status of the conflict and the applicability of the 1949 Geneva Conventions. With questionable legal logic, it asserted that the Third and Fourth Geneva Conventions no longer provided a legal basis to continue holding without criminal charge persons who had been captured in Afghanistan between 7 October 2001 and 19 June 2002, and that if these persons are to be kept in captivity, criminal charges must be brought against them. On previous ICRC caution regarding the categorization of conflicts, see Gasser, *Internationalized Non-International Armed Conflicts*, *supra* note 30, at 157–159.

condemning its support of terrorism and its refusal to hand over Osama bin Laden, had already required all states to take action against the Taliban and against Osama bin Laden and associates.³⁹ The UN Security Council's resolutions of 12 and 28 September 2001 required all states to take a wide range of actions against terrorism.⁴⁰ In his 20 September address to Congress, President George W. Bush framed the obligations on states in blunter and more US centered terms:

Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.⁴¹

It is evident that the scope for traditional neutrality was implicitly understood by the Security Council, and explicitly proclaimed by the United States, to be very limited in the overall counter-terrorist campaign. Naturally, some states, including Iran, proclaimed that they were "neither with Bush nor bin Laden"; and not all states were willing to assist the US-led military action directly. It would be absurd to claim that all forms of non-belligerence are dead, but the particular understanding of neutrality in the written laws of war is further called in question by the character of the "war on terror."

Bombing

The development by US and allied forces of techniques of bombing that are more accurate than in previous eras has improved the prospects of certain air campaigns being conducted in a manner that is compatible with the long-established

39. See S. C. Res. 1267, U.N. SCOR, 54th Sess., U.N. Doc. S/1267/(1999). See also S. C. Res. 1076, U.N. SCOR, 51st Sess., U.N. Doc. S/1076/(1996); and S. C. Res. 1193, U.N. SCOR, 53d Sess., U.N. Doc. S/1193/(1998), which, in addressing the ongoing conflict in Afghanistan, refer to the problem of terrorism and call upon states to take specific actions, most notably to end the supply of arms and ammunition to all parties to the conflict.

40. See S. C. Res. 1368, U.N. SCOR, 53d Sess., U.N. Doc. S/1368/(2001) and S. C. Res. 1373, U.N. SCOR, 53d Sess., U.N. Doc. S/1373/(2001).

41. President George W. Bush, Address to a Joint Session of Congress and the American People, 37 WEEKLY COMP. PRES. DOC 1347-1351 (Sep. 20, 2001), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_presidential_documents&docid=pd17se01_txt-15 (Nov. 12, 2002). The peroration added that God is not neutral between freedom and fear, justice and cruelty.

laws-of-war principle of discrimination;⁴² and with the more specific rules about targeting—rules which themselves have changed, not least in 1977 Geneva Protocol I. This is a momentous development in the history of war, yet its effects, especially as regards operations against terrorists, should not be exaggerated, as it cannot guarantee either success or no deaths of innocents. Precision-guided weapons are generally better at hitting fixed objects, such as buildings, than moving objects that can be concealed, such as people and tanks. Civilian deaths will still occur, whether because certain dual-use targets are attacked, because of the close proximity of military targets to civilians, or because of faulty intelligence and human or mechanical errors. In addition, malevolence and callousness can still lead to attacks on the wrong places or people. A further problem with the new type of US bombing campaign is that, in the eyes of third parties, it can easily look as if the United States puts a lower value on the lives of Iraqis or Serbs or Afghans than it does on its own almost-invulnerable aircrews: a perception which can feed those hostile views of the United States that help to provide a background against which terrorism can flourish.

Announcing the start of military strikes against Afghanistan on 7 October 2001, President Bush stated: “[t]heir carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations and to attack the military capability of the Taliban regime.”⁴³ The principle that the bombing of Afghanistan should be discriminate was frequently repeated. On 21 October, General Richard B. Myers, the Chairman of the Joint Chiefs of Staff, said:

[t]he last thing we want are any civilian casualties. So we plan every military target with great care. We try to match the weapon to the target and the goal is, one, to destroy the target, and two, is to prevent any what we call “collateral damage” or damage to civilian structures or civilian population.⁴⁴

From the start of the campaign in Afghanistan, the United States was particularly sensitive about accusations that it acted indiscriminately. In late

42. The principle of discrimination, which is about the selection of weaponry, methods and targets, includes the idea that non-combatants and those hors de combat should not be deliberately targeted.

43. President George W. Bush, Address to the Nation, 37 WEEKLY COMP. PRES. DOC 1432–1433 (Oct. 7, 2001) available at http://frwebgate.access.gpo.gov/cgi-in/getdoc.cgi?dbname=2001_presidential_documents&docid=pd15oc01_txt-9.pdf (Nov. 12, 2002).

44. Interview by George Stephanopoulos of Chairman of the Joint Chiefs of Staff Richard Myers (ABC This Week television broadcast, Oct. 21, 2001), available at http://www.defenselink.mil/news/Oct2001/t10222001_r1021jcs.html (Nov. 12, 2002).

October Rumsfeld accused the Taliban and al Qaeda leaders of both causing and faking civilian damage: “they are using mosques for command and control, for ammunition storage, and they’re not taking journalists in to show that. What they do is when there’s a bomb. . . they grab some children and some women and pretend that the bomb hit the women and the children.”⁴⁵ What truth there was in all this remains difficult to determine.

About 60% of the 22,000 US bombs and missiles dropped in Afghanistan were precision-guided: the highest percentage in any major bombing campaign. If, as reported, only one in four bombs and missiles dropped by the United States on Afghanistan missed its target or malfunctioned in some way, the 75% success rate was higher than that achieved in the 1991 Gulf War and the 1999 Kosovo War.⁴⁶ This was a remarkable achievement.

The bombing aroused much international concern. There were reports of many attacks causing significant civilian casualties and damage. Accuracy in hitting the intended target area did not itself necessarily eliminate such problems. An ICRC warehouse in Kabul was hit twice, on 16 and 26 October, leading to serious questions about failure to ensure that target lists were properly prepared and, after the first well-publicized disaster, amended.⁴⁷ The episode was subsequently investigated by the Pentagon.⁴⁸ Some later incidents were even more serious. For example, according to press reports over a hundred villagers may have died in bombings on 1 December 2001 of Kama Ado and neighboring villages in eastern Afghanistan, not far from the cave

45. Secretary of Defense Donald Rumsfeld, *Remarks outside ABC TV Studio* (Oct. 28, 2001), available at http://www.defenselink.mil/news/Oct2001/t10292001_t1028sd3.html Oct. 28, 2001 (Nov. 12, 2002).

46. See Eric Schmitt, *A Nation Challenged: The Bombing; Improved US Accuracy Claimed in Afghan Air War*, N.Y. TIMES, Apr. 9, 2002, at A-16 (reporting on an uncited, detailed Pentagon assessment).

47. See, e.g., Vernon Loeb & Rajiv Chandrasekaran, *Red Cross Compound Mistakenly bombed; Pentagon Cites “Human Error in the Targeting Process” After Second Mishap*, WASH. POST, Oct. 28, 2001, at A16.

48. See Vernon Loeb, *“Friendly Fire” Probed in Death; Airstrike May Have Hit Afghan Convoy*, WASH. POST, Mar. 30, 2002, at A14. See also *Breaking News* (CNN television broadcast, Mar. 19, 2002) in which CNN reported that a preliminary Pentagon investigation into the bombings of the ICRC warehouse indicated that numerous clerical errors had led to the mistaken bombings, that the US commander in charge of the air campaign, Lt. Gen. Charles Wald, had “exceeded his authority in ordering the strike” of 26 October, and that a key issue was that, while the target had been placed on a “No Strike List” at the Pentagon, it was inadvertently left off a separate “No Strike List” maintained by the US Central Command in Tampa, Florida.

complex at Tora Bora.⁴⁹ On 1 July 2002, during an operation to hunt Taliban leaders, US aircraft attacked four villages around the hamlet of Kakrak. According to reports, this episode followed the firing of guns at two wedding parties, and resulted in killing over 50 people and injuring over 100. This led to another Pentagon investigation.⁵⁰ In several cases, bombings led to casualties among coalition forces: while this is not a laws-of-war issue as such, and is not uncommon in armed conflicts, it further confirms the fact that precision bombing can produce terrible disasters if the intended target is incorrectly identified.⁵¹

It is difficult to arrive at a reliable estimate of the overall number of civilian deaths caused directly by the bombing in Afghanistan. As in the 1991 Gulf and 1999 Kosovo wars, the Pentagon has been reluctant to issue figures. Whereas Iraq in 1991 and Yugoslavia in 1999 had reasonably effective systems of official record-keeping in place, Afghanistan in 2001 did not. As a result of these factors, estimates of Afghan civilian deaths have been unofficial.

Controversy was caused by an estimate of 3,767 as of mid-December 2001 made by Professor Marc Herold of the University of New Hampshire.⁵² There were substantial grounds for doubt about his methodology; and his figure, almost certainly a serious over-estimate, was later modified.⁵³ In response to

49. See, e.g., Richard Lloyd Parry & Justin Huggler, *Village Air Raid: Error or an act of terror?*, THE INDEPENDENT, Dec. 2, 2001, available at <http://www.independent.co.uk/story.jsp?story=107928>, (Nov. 13, 2002).

50. Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, Jul. 21 2002, at Sec. 1, p. 1, col. 5, available at <http://query.nytimes.com/search/abstract?res=F40813F83D5C0C728EDDAE0894DA404482> (Nov. 13, 2002).

51. On 13 September 2002 two US pilots who mistakenly bombed and killed Canadian troops in Afghanistan on 18 April 2002 were charged – the first criminal charges against US pilots in connection with the events in Afghanistan. Katy Kay & Richard Cleroux, *US pilots charged over “friendly fire” deaths*, THE TIMES, Sep. 14, 2002, at 16.

52. Marc W. Herold, *A Dossier on Civilian Victims of US Aerial Bombing of Afghanistan: A Comprehensive Accounting* (Dec. 19, 2001), at <http://pubpages.unh.edu/~mwhherold/AfghanDailyCount.xls> (Nov. 13, 2002).

53. Criticisms of Herold’s methodology included the following: (1) The calculations leading to the total figures were not transparent. The author has informed me that the December figure was not intended to suggest total accuracy. (2) Unavoidably, in view of time constraints, the study relied heavily on media reports, some of them extremely dubious. (3) Some incidents were counted twice in the December total, e.g., due to different place names being used in reports. (4) In some instances al Qaeda deaths, and possibly Taliban deaths, may have been reported as civilian deaths. On the other hand it is probable that some civilian casualties of bombing went unreported and were thus omitted from the report. For a strong critique, see Jeffrey C. Isaac, *Civilian Casualties in Afghanistan: The Limits of Herold’s “Comprehensive Accounting”* (Jan. 10, 2002), available at <http://www.indiana.edu/~iupolsci/docs/doc.htm>, (Nov. 13, 2002). In August 2002 Herold stated that “the figure for the October to December period should have been

Herold's December estimate, Rumsfeld stated in an interview on 8 January 2002:

there probably has never in the history of the world been a conflict that has been done as carefully, and with such measure, and care, and with such minimal collateral damage to buildings and infrastructure, and with such small numbers of unintended civilian casualties.⁵⁴

In 2002 a number of reports based on on-site examinations gave a more authoritative, but incomplete, picture. In July the *New York Times* published the results of a review of eleven of the "principal places where Afghans and human rights groups claim that civilians have been killed." It found that at these sites "airstrikes killed as many as 400 civilians."⁵⁵ A principal cause was poor intelligence. In September a San Francisco-based human rights group, Global Exchange, estimated on the basis of a survey conducted in Afghanistan that "at least 824 Afghan civilians were killed between October 7 and January 2002 by the US-led bombing campaign."⁵⁶ A Human Rights Watch report on civilian casualties in Afghanistan is in preparation.

While even an approximate figure for civilian casualties of the bombing in Afghanistan may never be known, it appears certain that the number of civilian deaths in the period October–December 2001 was far more than the 500 in Yugoslavia during the war over Kosovo in 1999, and probable that it was over one thousand. The question then is how this was possible given that twice the percentage of precision-guided munitions was used and the overall number of weapons dropped was much less. Of the many possible factors meriting investigation, two were the imperfections of the intelligence/targeting

between 2,650 and 2,970 civilian deaths," and that "between 3,125 and 3,620 Afghan civilians were killed between October 7 and July 31." Marc Herold, *Counting the Dead*, THE GUARDIAN, Aug. 8, 2002, at 17.

54. Interview of Secretary of Defense Donald Rumsfeld (CSPAN television broadcast, Jan. 8, 2002), available at http://www.defenselink.mil/news/Jan2002/t01082002_t0108sd.html (Nov. 13, 2002).

55. Filkins, *supra* note 50. This included reference to the Masuda Sultan survey mentioned immediately *infra*.

56. See Masuda Sultan et al., AFGHAN PORTRAITS OF GRIEF: THE CIVILIAN/INNOCENT VICTIMS OF US BOMBING IN AFGHANISTAN (2002), at 3, available at <http://www.globalexchange.org/september11/apogreport.pdf> (Nov. 13, 2002). This short (16-page) report was based on a survey conducted by a 5-person team between March and June 2002. It emphasizes that "it was impossible for our survey to be exhaustive and comprehensive," and that the figure of 824 "represents only a portion of civilian casualties." Finally, the report called on the US Government to establish an Afghan Victims Fund. *Id.* at 3, 6.

process, and the uncertain identity of the combatants—both of which are generic problems in counter-terrorist operations.

In legal terms, the incidence of civilian deaths per se does not always constitute a violation, absent other factors regarding the circumstances of such deaths. Wilful killings and intentional attacks against the civilian population as such or against individual civilians not taking part in hostilities are clearly illegal. In addition, the 1977 Geneva Protocol I, Article 57, spells out a positive obligation on commanders to exercise care to spare civilians and civilian objects.⁵⁷

There are strong reasons to believe US statements that civilian deaths in Afghanistan due to the US bombing were unintended. Some of the deaths appear to have resulted from errors of various kinds, and some may have been unavoidable “collateral damage.” One cause of civilian casualties in October–December 2001 may have been the fact that, in a legacy from the period of Soviet involvement in Afghanistan, many Taliban military assets were located in towns, where they were less vulnerable to raids from rural-based guerrillas, but where they were of course closer to civilians who risked getting hit in bombing attacks. While much of the bombing has been discriminate, questions have been raised about whether all appropriate measures have been taken to reduce civilian casualties and damage. Even if much of the civilian death and destruction is not a violation of the law, the resulting adverse public perception risks harming the coalition cause.

The air campaign in Afghanistan confirmed the lesson of earlier campaigns, especially the war over Kosovo in 1999, that there is tension between current US and NATO strategic doctrine and certain international legal provisions on targeting. The 1977 Geneva Protocol I, Article 52(2), opens with the words: “[a]ttacks shall be limited strictly to military objectives.” It goes on to indicate the types of objects that might constitute military objectives. This provision presents some difficulties, and has been the subject of interpretative declarations by a number of states.⁵⁸ The United States, although not bound by the Protocol, has indicated that it accepts this article.⁵⁹ However, even before the United States involvement in Afghanistan, a number of US legal experts had expressed serious concerns about the provision. For example, Major

57. GP I, *supra* note 9, at art. 57.

58. GP I, *supra* note 9, at art. 52(2) *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 5 at 450. Declarations made by states that have a bearing on their understanding of this article include those by Australia, Belgium, Canada, Germany, Ireland, Italy, Netherlands, Spain, and the United Kingdom. *Id.* at 500–511.

59. OPLAW HANDBOOK, *supra* note 15, at 11.

Jeanne Meyer, co-editor of the US Army's *Operational Law Handbook*, stated that this article "tries to constrict the use of air power to the specific tactical military effort at hand" and "ignores the reality that a nation's war effort is composed of more than just military components." While not suggesting total rejection of the provision, she urged the United States to "resist the pressure to accept restrictive interpretations of Article 52(2)."⁶⁰ In general, the United States is anxious to retain some legal justification for attacks on certain targets that may not themselves be purely military, but which may, for example, contribute to the military effort or constitute key parts of a regime's infrastructure.

Did the concern over civilian casualties undermine the US bombing effort in Afghanistan in its most intense phase in October–December 2001? Its success against the Taliban would suggest not, but there were indications that the concern had serious effects. It was reported that the United States had deliberately slowed the pace of the campaign, and increased the risk to the people executing it, because of legal restraints and moral values. It was also stated that war planners frequently chose not to hit particular targets, even if they were militarily important, and pilots allegedly complained of lost opportunities. Yet the planners could not reveal their reasoning for ruling out certain targets, as it would give the adversary "a recipe book for not being bombed." The issue of civilian casualties also became ammunition for inter-service battles, particularly for Army arguments in favor of "boots on the ground."⁶¹

In addition to the direct casualties, there were also, inevitably, indirect casualties of the bombing. These appear to have come into two categories. First, the bombing caused thousands of Afghan civilians to flee their homes.⁶² Some died in the harsh conditions of flight and displacement. Second, the use of cluster bombs led to immediate and longer-term civilian casualties. Cluster bombs are air-dropped canisters containing numerous separate bomblets that disperse over a given area. The bomblets, which are meant to explode on impact or to self-deactivate after a specific period, can cause particularly severe problems if they fail to do so. There have been objections to their use, principally on the ground that they have a tendency, like anti-personnel landmines, to kill people long after the conflict is over. Reports from Kosovo and

60. Jeanne M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 166, 181 (2001).

61. William M. Arkin, *Fear of Civilian Deaths May Have Undermined Effort*, L.A. TIMES, Jan. 16, 2002, at A12, available at <http://www.latimes.com/news/nationworld/world/la-011602milmemo.story> (Nov. 13, 2002).

62. On those who fled from the intense fighting and bombing in Afghanistan in October–November 2001, see notes 74-75 and accompanying text *infra*.

elsewhere have confirmed the general seriousness of the problem.⁶³ The UN's Mine Action Programme for Afghanistan (MAPA) estimates that 1,152 cluster bombs were dropped by the United States, leaving up to 14,000 unexploded bomblets as a result.⁶⁴ According to the US State Department in July 2002, "the clearance of cluster munitions is being achieved at a rate faster than anticipated. All known cluster munition strike sites have been surveyed where access is possible and are in the process of being cleared."⁶⁵ As the law stands, there has been no agreement to outlaw cluster bombs, and while they are not illegal *per se*, their use does raise questions regarding their compatibility with fundamental principles of the laws of war. They are certain to be the subject of further pressures to limit or stop their use, or to ensure more effective safeguards against later accidental detonations.

A further issue concerns the use of bombing in the hunt for Taliban and al Qaeda personnel following the fall of the Taliban regime in early December 2001. In the preceding phase, bombing had been used primarily in support of Northern Alliance frontal operations aimed at capturing the main Taliban-held cities. Once this was achieved, a good deal of the bombing was directed against remnant al Qaeda mountain redoubts. It was also directed against Taliban and al Qaeda forces and their leaders, but many incidents were reported in the press in which those killed were apparently neither. The reports drew attention to the difficulty of distinguishing between civilians and these forces. They also raised the question of broader significance in counter-terrorist wars: to what extent can bombing remain an appropriate form of enforcement once a state is, to a greater or lesser degree, under the control of a new government that is opposed to the terrorists? At that point, can the focus be transferred to other forms of police and military action that may be less likely than bombing to cause civilian casualties? Here, the legal argument for greater reliance on the discriminate use of ground force merges into a practical argument that only such means can prevent the escape of the forces being targeted. United States civilian and military officials are reported to have concluded that Osama bin Laden had been present at the battle for Tora

63. According to the ICRC, in the year after the NATO bombing campaign over Kosovo ended in June 1999, more than 400 people were killed or injured by unexploded bomblets. See Ragnhild Imerslund, *In Action, When Toys Kill, Another Challenge in Kosovo*, ICRC MAGAZINE, 2000 available at http://www.redcross.int/EN/mag/magazine2000_2/Kosovo.html (Nov. 13, 2002).

64. Richard Norton-Taylor, *Afghanistan Littered with 14,000 Unexploded Bomblets Says UN*, THE GUARDIAN, Mar. 23, 2002, at 18.

65. US Department of State, *Fact Sheet: U.S. Humanitarian Demining Assistance to Afghanistan* (Jul. 30, 2002), available at <http://www.state.gov/t/pm/rls/fs/2002/12274.htm> (Nov. 13, 2002).

Bora in December 2001, and that failure to commit ground troops against him in this mountain battle was the gravest error of the war.⁶⁶ Whether or not this conclusion is correct, it does appear that the reliance of the United States on bombing and its reluctance to put its own troops in harm's way may have enabled Taliban and al Qaeda leaders to escape.

Gas

One long-standing prohibition in warfare is the rule against use of gas and bacteriological methods of warfare. The United States repeatedly expressed concern that al Qaeda might be preparing to use such methods in terrorist attacks. In addition, there were a few situations in Afghanistan in which there could have been pressures for the United States to use gas. When, in 1975, the United States had ratified the 1925 Geneva Protocol, it had indicated that it considered that certain uses of riot-control agents in armed conflict did not violate the protocol.⁶⁷ In early December 2001, Rumsfeld was asked at a press conference if the United States might use gas in the hunt for Taliban and al Qaeda personnel in mountain caves in Afghanistan. Rumsfeld's response contained no denial:

Well, I noticed that in Mazar, the way they finally got the dead-enders to come out was by flooding the tunnel. And finally they came up and surrendered, the last hard core al Qaeda elements. And I guess one will do whatever it is necessary to do. If people will not surrender, then they've made their choice.⁶⁸

Humanitarian relief and refugee issues

Humanitarian relief and refugee issues impacted upon all phases of operations in Afghanistan. The need for humanitarian relief is particularly likely to arise in counter-terrorist operations against a weak or failed state, because such states breed conditions in which, simultaneously, terrorist movements can operate and large-scale human misery and refugee flows can occur. The fact of a war being against terrorists, while it may affect the mode of delivery (since land convoys may be vulnerable to seizure) does not affect the law applicable to the provision of relief. The basic obligations of the various parties to an armed

66. Barton Gellman and Thomas E. Ricks, *U.S. Concludes Bin Laden Escaped at Tora Bora Fight*, WASH. POST, Apr. 17, 2002, at A1.

67. OPLAW HANDBOOK, *supra* note 15, at 15–16.

68. *Interview by Tim Russert of Secretary of Defense Donald Rumsfeld* (NBC Meet the Press television broadcast, Dec. 2, 2001), available at http://www.defenselink.mil/news/Dec2001/t12022001_t1202mtp.html (Nov. 13, 2002).

conflict to assist in and protect humanitarian relief operations are embodied in 1949 Geneva Convention IV, on civilians.⁶⁹

The US government put heavy emphasis on air-dropping of supplies. Announcing the start of Operation ENDURING FREEDOM, President Bush stated: “[a]s we strike military targets, we will also drop food, medicine and supplies to the starving and suffering men and women and children of Afghanistan.”⁷⁰ United States forces air-dropped considerable quantities of aid at the same time as the major bombing operations took place. In the first twenty-five days of the campaign more than one million “humanitarian daily rations” were delivered.⁷¹ Some human rights and humanitarian agencies expressed specific worries about the air-dropping of food. They were doubtful of the value of air-dropping supplies compared to the previous deliveries overland, and were concerned that the yellow wrapping of the food packages could lead Afghans to mistake yellow cluster bomblets for them. More generally, they were resistant to the use of military assets for humanitarian purposes, be it the dropping of supplies from the air, or shipping goods in military convoys to distribution points. They tended to be critical of the bombing campaign generally, and concerned also about the aggravated risks and obstacles to their relief and development work that resulted from the military operations, especially in view of the onset of winter. The unrealistic call for a bombing pause issued by the UN High Commissioner for Refugees (UNHCR) in October was indicative of the tension between some agencies and the US government.⁷² In any event, the collapse of the Taliban regime in early December 2001 and its replacement by the interim administration facilitated, but by no means guaranteed,

69. See GC IV, at arts. 13–26 reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 430–436. See also GP I arts. 69–71, *supra* note 9, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 5 at 324–5; GP II art. 18, *supra* note 17, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 491. The issue of humanitarian relief is only touched on briefly in this survey as, while of critical importance in Afghanistan, only to a limited extent does it raise problems specific to counter-terrorist military operations.

70. President George W. Bush, Address to the Nation, *supra* note 43.

71. Figures for humanitarian daily rations dropped in Afghanistan were given in many Pentagon news briefings. See, e.g., Gerry Gilmore, *Air Campaign Continues Against Taliban, Terrorist Targets* (American Forces News Service, Oct. 8, 2001), available at http://www.defenselink.mil/news/Oct2001/n10082001_200110085.html (Nov. 14, 2002); and Kathleen T. Rhem, *Fighters, Bombers, Not Only Planes Flying in Afghanistan* (American Forces News Service, Oct. 31, 2001), available at http://www.defenselink.mil/news/Oct2001/n10312001_200110314.html (Nov. 14, 2002).

72. *Interview with UN High Commissioner for Refugees* (Irish radio broadcast, Oct. 12, 2001); *Interview with UN High Commissioner for Refugees* (BBC-1 Breakfast with Frost television broadcast, Oct. 14, 2001).

the secure delivery of aid by land routes. A wide range of countries and organizations took part in the provision of aid.⁷³

The refugee problem was of massive proportions and could itself have constituted a possible ground for action over Afghanistan. As of the beginning of September 2001 there were about 3.5 million Afghan refugees in neighboring countries, mainly Pakistan and Iran. The intense hostilities and bombing in October–December led to an additional 200,000 or more fleeing from Afghanistan, as well as in an increase in the number of internally displaced persons (IDPs) by perhaps half a million.⁷⁴ Many of the internally displaced in, and refugees from, Afghanistan testified eloquently to the disastrous effects of the bombing on civilians and their property.⁷⁵

The subsequent return of refugees to Afghanistan was on a colossal scale. It started in January 2002, when 3,000 per day began returning to Afghanistan.⁷⁶ Not all who returned in 2002 chose to stay. By December some 300,000 were reported to have returned to Pakistan, disappointed by insecurity and economic hardship.⁷⁷ However, a total of 1.8 million Afghans had returned, 1.54 million of whom had come from Pakistan and resettled in Afghanistan in 2002. Playing a major role, the UNHCR reported in September that this was the

73. On the delivery of humanitarian aid after the collapse of the Taliban regime, see, e.g., Secretary of Defense Donald Rumsfeld and General Tommy Franks, DOD News Briefing (Aug. 15, 2002), *available at* http://www.defenselink.mil/news/Aug2002/t08152002_t0815sd.html (Nov. 14, 2002); and, Jim Garamone, *Humanitarian Success Story In Afghanistan* (American Forces News Service, Jan. 18, 2002), *available at* http://www.defenselink.mil/news/Jan2002/n01182002_200201185.htm (Nov. 14, 2002).

74. Figures current to Dec. 31, 2001 in UN HIGH COMMISSIONER FOR REFUGEES 2001 ED. OF REFUGEES BY NUMBERS, *available at* <http://www.unhcr.ch/cgi-bin/texis/vtx/home/> (Nov. 14, 2002).

75. See, e.g., THE DISPOSSESSED (documentary film by Taghi Amirani, Nov.–Dec. 2001). This television documentary is about the Makaki Camp in Nimruz Province near the Afghan–Iranian border. The camp was initially under Taliban and then Northern Alliance control.

76. See UNHCR Spokesman, UNHCR Press Briefing at Palais des Nations, Geneva (Jan. 25, 2002), *available at* <http://www.reliefweb.int/w/rwb.nsf/> (Nov. 14, 2002); and UN Office for the Coordination of Humanitarian Affairs Report No. 37 (Jan. 29, 2002), *available at* <http://www.reliefweb.int/w/rwb.nsf/> (Nov. 14, 2002). At that time there were also movements of ethnic Pashtun from Afghanistan to Pakistan.

77. Deutsche Presse Agentur Report of December 12, 2002, *available at* <http://www.reliefweb.int/w/rwb.nsf/> (Jan. 6, 2003).

largest refugee repatriation in 30 years—i.e., since the creation of Bangladesh.⁷⁸ Some non-governmental charities and NGOs were critical of the pressure to encourage refugees to return.⁷⁹ The principal improvements that created the conditions for this vast movement of people back to their country resulted from the conclusion of major hostilities, the end of the Taliban regime in December 2001, and the ending of a years-long drought. Observance of humanitarian norms during the war in Afghanistan may have played some part, especially insofar as it helped to limit the amount of destruction caused by the bombing.

Prisoners

From late November 2001, the status and treatment of prisoners taken in the “war on terror” (most but not all of whom had been captured in Afghanistan) became the subject of major international controversies. These centered on three inter-related issues: first, the extraordinary events relating to prisoners in Afghanistan in late 2001; second, the broader debate about the legal status and treatment of prisoners taken in the “war on terror” generally, including those held at Guantanamo; and third, the question of possible judicial proceedings against prisoners for pre-capture offenses. This part looks at these three issues in turn. (It does not look at the court cases in several countries in which related questions have been raised.)

Prison disasters in Afghanistan

Initially, international attention focused on one event: the killing of a large number of Taliban and al Qaeda prisoners who had been taken at Kunduz at around the time of its fall on 23–24 November 2001, and who were then involved in the revolt at Qala-e Jhangi Fort near Mazar -e-Sharif in the period 25 November–1 December. There had been very little sign of serious preparation for handling prisoners. The precise chain of events leading to the revolt has yet to be established, but the causes appear to include the following heady mix: Some of the prisoners were fanatical soldiers, for whom the whole concept of surrender would be anathema; the arrangements for receiving, holding and

78. Ron Redmond, UNHCR Press Briefing at Palais des Nations, Geneva (Sep. 3, 2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/> (Nov. 14, 2002); Nigel Fisher, UN Assistance Mission in Afghanistan Press Briefing (Dec. 12, 2002) available at <http://www.reliefweb.int/w/rwb.nsf>.

79. See, e.g., Jonathan Steele, *Going Home to Hunger and Death: Aid Agencies Fear for Families Persuaded to Leave Refugee Camps*, THE GUARDIAN, Apr. 4, 2002, at 17.

processing them were *ad hoc* and then casual; there was a failure to communicate to them that they would be treated in accord with international standards; a number of them had not surrendered all their weapons; they were held in a place where there was a large store of weapons, to which they gained access; some of them, according to reports, feared that they were about to be killed, so had nothing to lose by revolt; and some feared interrogation by those whom they understood to be CIA operatives, which changed the situation from an Afghan/Afghan equation.⁸⁰

The revolt at Qala-e Jhangi Fort was a desperate struggle in which not only many prisoners, but also a number of Northern Alliance troops in charge of the fort, died. United States bombing, and sharp-shooting by UK special forces, played a part in the defeat of the uprising. Public discussion in the United Kingdom and elsewhere focused on the events at the fort, including the question of whether the force used to quell the rebellion was excessive. If the situation was as desperate and threatening as reports indicated, the use of force was hardly surprising. Public discussion could more usefully focus on how prisoners should be received and dealt with. The real causes of the disaster were in the period before the prisoners arrived at the fort. There were failures to think the issue through, to make proper preparations, and especially to disarm all prisoners. The mix of Afghan and outside involvement in the handling of the prisoners may have further contributed to the outbreak of the revolt.

Other reports about treatment of Taliban and al Qaeda prisoners, especially at Sebarghan in northern Afghanistan, confirm that the overall approach of the Northern Alliance was defective. By late December there had been numerous reports of prisoners dying in shipping containers and Afghan captors beating their detainees. The ICRC was reported as expressing concern that it had been able to register only 4,000 of the 7,000 prisoners that the United States said it and its Afghan allies had in custody.⁸¹ Long after most of the prisoners

80. Much valuable evidence about the outbreak and course of the prison revolt at Qala-e Jhangi Fort has emerged, including particularly video records. See, e.g., Carlotta Gall, *Traces of Terror: Prisoners; Video Vividly Captures Prelude to Fortress Revolt*, N.Y. TIMES (Jul. 16, 2002), at A15.

81. See, e.g., Carlotta Gall, *Long Journey to Prison Ends in Taliban Deaths: Many Suffocated in Sealed Ship Containers*, INT'L HERALD TRIBUNE, Dec. 11, 2001, at 4; Babak Dehghanpisheh et al., *The Death Camp of Afghanistan*, NEWSWEEK, Aug. 26, 2002, at 16-25; and Rory Carroll, *Afghan jailers beat confessions from men*, THE GUARDIAN, Dec. 28, 2001, at 13.

had been taken, conditions remained shocking, in violation of international standards.⁸² International inquiries into these events are ongoing.

Whether the United States and its coalition partners had any influence over Northern Alliance actions in such basic matters as protection of prisoners—and, if so, whether they used it—is open to question. Some US statements indicated that there could have been such influence. In his Pentagon press briefing on 30 November, Rumsfeld indicated—in general terms, not in connection with the prisoner question—that the United States does have influence with the forces with which it operated in Afghanistan:

[w]e have a relationship with all of those elements on the ground. We have provided them food. We've provided them ammunition. We've provided air support. We've provided winter clothing. We've worked with them closely. We have troops embedded in their forces and have been assisting with overhead targeting and resupply of ammunition. It's a relationship.⁸³

Legal status and treatment of prisoners generally

Within the Pentagon it was recognized as early as September 2001 that in the forthcoming military action questions relating to the legal status and treatment of prisoners could be difficult. An unpublished document circulated by the US Air Force's International and Operations Law Division contained the main outlines of an approach that would continue to be influential: terrorists were to be treated as "unlawful combatants;" it was "very unlikely that a captured terrorist will be legally entitled to POW status under the Geneva Conventions;" however, there was a "practical US interest in application of Law of Armed Conflict principles in the context of reciprocity of treatment of captured personnel." As regards treatment upon capture,

if a terrorist is captured, Department of Defense members must at the very least comply with the principles and spirit of the Law of Armed Conflict . . . A

82. Dexter Filkins, *3,000 Forgotten Taliban, Dirty and Dying*, INT'L HERALD TRIBUNE, Mar. 15, 2002, at 1.

83. Secretary of Defense Donald Rumsfeld and General Peter Pace, DOD News Briefing (Nov. 30, 2001), available at http://www.defenselink.mil/news/Nov2001/t11302001_t1130sd.html (Nov. 14, 2002). Compare an earlier statement of British Prime Minister Tony Blair, who when asked on 13 November, also in general terms, "what sanctions do we have over the Northern Alliance?" replied "None." Prime Minister Tony Blair, Press Briefing on Afghanistan (Nov. 13, 2001), available at <http://www.pm.gov.uk/output/page3852.asp> (Nov. 14, 2002).

suspected terrorist captured by US military personnel will be given the protections of but not the status of a POW.⁸⁴

Consideration of the legal status and treatment of prisoners taken by the US-led coalition must begin with the distinction that has been drawn between the two main groups: Taliban and al Qaeda. As indicated below, one key factor in determining the lawfulness of a combatant and therefore the entitlement to participate directly in hostilities, is the affiliation of the combatant to a party to the conflict. The Taliban had a material connection to a state (Afghanistan), whereas al Qaeda did not. A possible complicating factor is that in some cases non-Afghan units appear to have fought alongside Taliban forces and may have been under their control, which would strengthen a claim to POW status. In certain cases it may be difficult to determine whether an individual should be considered Taliban or al Qaeda, or belongs in some other possible category. At Guantanamo there has evidently been a tendency to classify only Afghan prisoners as Taliban. All non-Afghans (some of whom were arrested outside Afghanistan) appear to have been classified as al Qaeda. However, it may be doubted whether all foreigners drawn to support an Islamic cause in Afghanistan, Pakistan or elsewhere, and who ended up in Guantanamo, were necessarily members of al Qaeda.

The basic rules for determining who is a lawful combatant entitled to POW status are in Article 4 of 1949 Geneva Convention III (the POW Convention). This states, in part:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias and volunteer corps forming part of such armed forces.

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

84. Memorandum from the International and Operations Law Division of Headquarters, US Air Force on the Summary of Legal Issues Relevant to Terrorism Incidents of 11 Sep 01, at 5-6 (Sep. 21, 2001).

- (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 laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof . . . provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card.⁸⁵

The question as to whether, in order to qualify for POW status, members of a state's regular armed forces all have to meet the four conditions listed in Article 4(A)(2) specifically in respect to members of militias and resistance movements is not pursued here. The general assumption has been that states' regular forces should as a matter of course observe these conditions.⁸⁶ Even if this general assumption could be challenged, it is widely agreed that members of a state's forces must meet certain criteria. For example, they should wear uniforms when involved in military action—a rule that the United States views as applying even to commando forces and airborne troops operating singly.⁸⁷ There is also an obligation on parties to a conflict to supply identity documents to all their personnel liable to become POWs.⁸⁸

However the criteria for POW status are interpreted, states have often deployed certain personnel such as spies in a manner that does not meet the criteria, knowing that if they fall into enemy hands they are unlikely to be viewed or treated as POWs; and they have also deployed certain personnel whose

85. See GC III, *supra* note 5, at art. 4.

86. International Committee of the Red Cross, 3 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, COMMENTARY 48 (Jean S. Pictet ed., 1960) [hereinafter Commentary III]; Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 36–38 (Howard S. Levie ed., 1978) (Vol. 59, US Naval War College International Law Studies).

87. FM 27-10, para 63, *supra* note 12.

88. See GC III, art 17 and art. 4(A)(4), *supra* note 5. Article 4(A)(4), quoted above, indicates that civilian contracted personnel (who played a significant part in the US operations in Afghanistan in 2001–2) would appear to qualify for POW status provided that they have formal authorization. There is not a requirement that they wear uniform.

conformity with the criteria is debatable. With respect to the operations in Afghanistan in 2001, an argument could possibly be made that some US or coalition personnel did not meet one of the conditions: for example, members of US forces (including special forces or forward air controllers), if not wearing a uniform or fixed sign and not carrying arms openly. Such possibilities give the United States a potential interest in avoiding restrictive approaches to the granting of POW status and treatment.

All lawful combatants, if captured, are entitled to POW status and all of the rights set forth in the Geneva Convention III. They cannot be punished for the mere fact of having participated directly in hostilities, but they can be tried for violations of the detaining power's law, or of international law (including the laws of war) that they may have committed.⁸⁹

Questions regarding the status of a variety of detainees who may fail to meet one of the above criteria are not new. In previous wars, POW status was seldom given to those involved in resistance activities against occupation, or in cases of alleged terrorism. On the other hand, some captured personnel who arguably failed to meet one criterion or another applicable at the time were viewed as entitled to POW status.⁹⁰

A procedure for determining who is a lawful combatant, entitled to POW status, is addressed directly in two treaties. The first of these, 1949 Geneva Convention III, provides in Article 5 that, in cases of doubt, prisoners shall be treated as POWs "until such time as their status has been determined by a competent tribunal." This Article does not specify who has to have the doubt, nor the nature of the "competent tribunal." However, the general principle is clear and is accepted in US official manuals. For example, the US Army manual states unequivocally: "When doubt exists as to whether captured enemy personnel warrant continued POW [prisoner of war] status, Art. 5 Tribunals must be convened."⁹¹

The second treaty to address the procedure for determining who is a lawful combatant is 1977 Geneva Protocol I. Article 45 contains elaborations of 1949 Convention III's provisions on the status of detained persons. It suggests

89. *Id.* at arts. 99–104. The separate subject of sanctions in respect of offenses against prison camp discipline is covered in Articles 89–98. As regards judicial proceedings against detainees who do not have POW status, see text at notes 113–122 *infra*.

90. Professor Howard Levie, who has written extensively on the law relating to POWs, suggests that being of a different nationality from that of the army in which they serve would not prevent combatants from having POW status, but he is more doubtful about spies and saboteurs when not operating openly and in uniform. See Levie, *supra* note 86, at 74–84.

91. OPLAW HANDBOOK, *supra* note 15, at 22; see also ANNOTATED SUPPLEMENT, *supra* note 13, at paras. 11.7 and 12.7.1.

that a detainee has “the right to assert his entitlement to prisoner-of-war status before a judicial tribunal,” but allows for considerable leeway in the procedure by which a tribunal could reach a decision about POW status. The possibilities that the proceedings could take place *after* a trial for an offense, and also *in camera* in the interest of state security, are not excluded. This article recognizes in plain language that not all those who take part in hostilities are entitled to POW status, but they are entitled to certain fundamental guarantees discussed further below.

The uncertainties regarding the status and treatment of people who are involved in hostile activities in various ways, but who fail to meet the criteria for POW status, are reflected in muddled terminology. “Unlawful combatant,” the most common term, is generally used in this paper. The treaties that implicitly create the category do not offer any satisfactory term to describe such persons. The US Supreme Court, in its judgment in the July 1942 case, *Ex Parte Quirin*, used the terms “unlawful combatant” and “unlawful belligerent,” apparently interchangeably, to refer to one who, “having the status of an enemy belligerent enters or remains, with hostile purpose, upon the territory of the United States in time of war without uniform or other appropriate means of identification.”⁹² One term advanced in the early 1950s by a respected authority as the most appropriate to cover a wide range of combatants who do not meet the POW criteria is “unprivileged belligerents”—a term that carries the important implication that such persons while not meeting the criteria for POW status, have not necessarily committed a definite violation of the laws of war.⁹³ In current US military manuals four terms—“unprivileged belligerents,” “detainees,” “unlawful combatants” and “illegal combatants”—are used, again apparently interchangeably, to refer to those who are viewed as not being members of the armed forces of a party to the conflict and not having the right to engage in hostilities against an opposing party.⁹⁴ The variety of the terminology is not in itself a major problem. The key element of confusion in the debate was the tendency, especially marked in the press in late 2001 and early

92. *Ex parte Quirin*, 317 U.S. 1, 4–16 (1942) [hereinafter *Quirin*].

93. The classic article on the subject is by Richard R. Baxter. See Richard R. Baxter, *So-called “Unprivileged Belligerency”: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323–45 (1951). His key conclusion is that this large category of hostile conduct is not *per se* violative of any positive prohibition of international law, but it does expose those engaging in it to trial and punishment by the enemy, for example under the enemy’s own laws and regulations. In the years since he wrote this, many terrorist acts have been prohibited in international law, so the category is not necessarily appropriate for those suspected of involvement in terrorism.

94. OPLAW HANDBOOK, *supra* note 15, at 12, 22, see also ANNOTATED SUPPLEMENT, *supra* note 13, at para. 12.7.1.

2002, to refer to such terms as “unlawful combatants” and “battlefield detainees” as if they were entirely new, were freshly invented by the US government, and were completely outside the existing treaty framework.

The ICRC and others have argued that detained persons who do not qualify for POW status (i.e., those often called “unlawful combatants”) should be viewed as civilians and treated in accord with the 1949 Geneva Convention IV. This view would appear to be in conformity with the first paragraph of Article 4 of the Convention:

[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.⁹⁵

Pictet’s commentary on this Convention may appear to confirm that those who are not classified as POWs must be viewed as civilians when it refers to:

a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, 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.⁹⁶

Further ammunition for this view can be found in Article 50 of 1977 Geneva Protocol I. However, the view is open to several objections that are rooted in the terms of relevant treaties. (1) It is in tension with the specific terms of Article 4 of the 1949 Geneva Convention IV, which excludes from the Convention’s protection certain persons, namely nationals of neutral and co-belligerent states; and it is likewise in tension with Pictet’s statement that the Convention is basically about “on the one hand, persons of enemy nationality living in the territory of a belligerent State, and on the other, the

95. 1949 Geneva Convention IV, Article 4, first paragraph. For a strong assertion that enemy combatants, if denied POW status, must be considered as civilians, see Hans-Peter Gasser, ‘Acts of Terror, “Terrorism” and International Humanitarian Law,’ *International Review of the Red Cross*, vol. 84, no. 847, September 2002, at p. 568. He emphasizes that “civilian detainees suspected of having committed a serious crime can and must be put on trial.”

96. International Committee of the Red Cross, 4 GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR TREATMENT OF PRISONERS OF WAR, COMMENTARY 51 (Jean S. Pictet ed. 1960) [hereinafter Commentary IV].

inhabitants of occupied territories.”⁹⁷ (2) The four 1949 Geneva Conventions, Common Article 3, acknowledge that in civil wars detainees may have a different status from that of POW or civilian. (3) The 1977 Geneva Protocol I, Articles 45 and 75, acknowledges that even in international armed conflicts certain detainees may have a status that is distinct from those of POWs and civilians under the 1949 Geneva Conventions III and IV. (4) It risks eroding the key distinction between combatants and civilians that is fundamental to the laws of war, and is reflected in the 1977 Geneva Protocol I, Article 48.

The fact that certain detainees taken in the “war on terror” may be denied status as either a POW or a civilian does not mean that they have no legal rights. The provisions of Common Article 3 of the 1949 Geneva Conventions, although not specific to this category of person and formally applicable only in non-international armed conflict, may be viewed as minimum guarantees to be applied to all detainees.⁹⁸ In addition, Article 45 of 1977 Geneva Protocol I addresses the matter much more directly: “Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favorable treatment . . . shall have the right at all times to the protection of Article 75 of this Protocol.” The said Article 75 elaborates a range of fundamental guarantees that are intended to provide minimum rules of protection for all those who do not benefit from more favorable treatment under other rules.

Although neither the United States nor Afghanistan is a party to 1977 Geneva Protocol I, the rules in Articles 45 and 75 are relatively uncontroversial and it is long-standing US policy that they should be implemented.⁹⁹ However, US officials have repeatedly omitted to mention these articles in connection with the treatment of prisoners held in the “war on terror.” The omission may reflect the US general sensitivity to the 1977 Geneva Protocol I or specific doubts about certain provisions of these articles. Nonetheless the failure to mention the articles appears odd: reference to Article 75 would have been an

97. *Id.* at 45.

98. On the broad scope of application of Common Article 3, see, e.g., Commentary IV, *supra* note 96, at 36, 40.

99. Articles 45 and 75 are among the many articles of GPI (*supra* note 9) that the United States views as “either legally binding as customary international law or acceptable practice though not legally binding.” See OPLAW HANDBOOK, *supra* note 15, at 11.

obvious way of indicating that the treatment of the detainees was still within an international legal framework.¹⁰⁰

After the status and treatment of prisoners taken in Afghanistan became urgent in November 2001, public statements of the US government were consistent and clear on one point. By referring to these prisoners generally as “battlefield detainees” and “unlawful combatants” the United States signalled its unwillingness to classify al Qaeda and Taliban prisoners as POWs. However, it was slow to give detailed reasoning, and to indicate the principles to be followed in the handling of the detainees. On 11 January 2002, when asked whether the ICRC would have any access to the prisoners who had just been taken to the US naval base at Guantanamo Bay in Cuba, Rumsfeld stated:

I think that we’re in the process of sorting through precisely the right way to handle them, and they will be handled in the right way. They will be handled not as prisoners of war, because they’re not, but as unlawful combatants. The, as I understand it, technically unlawful combatants do not have any rights under the Geneva Convention. We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate, and that is exactly what we have been doing.¹⁰¹

In the following weeks there were numerous expressions of concern in the United States and internationally about the status and treatment of detainees, and about the risk that US conduct would lead to a global weakening of the POW regime.¹⁰² There were also intense disagreements within the US administration.¹⁰³ The situation was made worse by the Pentagon’s seemingly inept issuance on 19 January 2002 of a photograph showing bound and shackled prisoners, heads and eyes covered, kneeling before US soldiers at Guantanamo. The photographs, which showed a transitional processing stage during the prisoners’ arrival, became a misleading symbol of how the Guantanamo camp was being operated.

100. One of the few US publications to note the potential applicability and value of Article 75 was by Lee A. Casey, David Rivkin and Darin R. Bartram. See Casey et al., *Detention and Treatment of Combatants in the War on Terrorism* (Fed. Soc. L. & Pub. Pol. Studies, 2002). This article was published in early 2002, before the White House announcement of 7 February.

101. Secretary of Defense Donald Rumsfeld, DOD News Briefing (Jan. 11, 2002), available at http://www.defenselink.mil/news/Jan2002/t01112002_t0111sd.html (Nov. 14, 2002).

102. See, e.g., Steven Erlanger, *Europeans Take Aim at U.S. on Detainees*, INT’L HERALD TRIBUNE, Jan. 24, 2002, at 4.

103. See Thom Shanker and Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12.

Certain conciliatory gestures were made by the US administration. International Committee of the Red Cross officials started interviewing detainees at Guantanamo on 18 January 2002, and were able to establish a permanent presence there. Rumsfeld's above-quoted suggestion that unlawful combatants have no rights under the Geneva Convention was modified when, on 22 January, he recognized that "under the Geneva Convention, an unlawful combatant is entitled to humane treatment."¹⁰⁴ On 7 February, the White House, in the first major policy statement on the issue, announced:

[t]he United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.

The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees.

Al Qaeda is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.

Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.

Therefore, neither the Taliban nor al Qaeda detainees are entitled to POW status.

Even though the detainees are not entitled to POW privileges, they will be provided with many POW privileges as a matter of policy.¹⁰⁵

The Fact Sheet, while containing numerous detailed assurances about the treatment of the detainees at Guantanamo, indicated that they would not receive certain specific privileges afforded to POWs by the Geneva Convention III, including:

104. Secretary of Defense Donald Rumsfeld, DOD News Briefing, (Jan. 22, 2002), available at http://www.defenselink.mil/news/Jan2002/t01222002_t0122sd.html (Nov. 14, 2002).

105. Office of the White House Press Secretary, *Fact Sheet: Status of Detainees at Guantanamo* (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (Nov. 14, 2002).

- access to a canteen to purchase food, soap and tobacco
- a monthly advance of pay
- the ability to have and consult personal financial accounts
- the ability to receive scientific equipment, musical instruments, or sports outfits.¹⁰⁶

This United States refusal to grant these particular privileges was justified in terms of the security risk posed by many detainees at Guantanamo to their guards and to each other. A specific indication of this kind can be compatible with an overall approach of respect for a legal regime, and can also contribute to change in that regime. The refusal of these privileges caused no outcry, and parts of the 7 February statement reassured international opinion.

However, the earlier part of the statement was incoherent in certain respects. The recognition that the Geneva Convention III did apply to the Taliban, followed by the blanket statement that the Taliban did not qualify as POWs, had the confusing appearance of simultaneous admission and retraction. In his accompanying statement, the White House Press Secretary indicated the reason why the Taliban detainees failed to qualify as POWs:

[t]o qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions. They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.

Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.¹⁰⁷

106. *Id.* at 2. The privileges cited are outlined in GC III, *supra* note 5, arts. 28, 60, 64–5 and 72.

107. White House Press Secretary Ari Fleischer, Press Briefing at the White House (Feb. 7, 2002), at 1–2, *available at* Lexis, Federal News Service (Jan. 6, 2003).

The argument about the Taliban appears to assume that the four conditions which are listed in Article 4(A)(2) specifically in respect of members of “other militias” and resistance movements must necessarily apply to the Taliban; and it then proceeds to interpret the four conditions in such a way that support for “unlawful terrorist objectives” becomes one basis for denial of POW status. As for the al Qaeda detainees, although certain of the stated reasons for not applying the Convention to them are well founded, the particular argument that because al Qaeda is not a party to the Convention it cannot benefit from it is far from correct. There was a curiously legalistic streak in an approach which put such emphasis on the purported distinction between the Taliban and al Qaeda detainees yet saw no practical consequences: “No distinction will be made in the good treatment given to the al-Qaida or the Taliban.”¹⁰⁸ A striking feature of the statement is its avoidance of any hint of doubt about status: none of the detainees, even the Taliban ones, could possibly qualify as POWs. In keeping with this, nothing was said about the tribunals provided for in Article 5 of 1949 Geneva Convention III and Article 45 of 1977 Geneva Protocol I. A further notable omission was the absence of reference to Article 75 of the 1977 Protocol. Despite certain merits, the US statement was less technically proficient, and less reassuring, than it could have been. Expressions of international concern regarding the status and treatment of detainees in Guantanamo and elsewhere continued.

In response to the White House statement of 7 February, the ICRC Press Office in Geneva maintained its position that “people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise.”¹⁰⁹ The ICRC emphasis on POW status contrasted with its statements in respect of prisoners in the wars in the former Yugoslavia in 1991–5: in these wars, which were partly internal but also had an international dimension, the ICRC generally avoided status questions, and variously used such terms as “captured combatants,” “prisoners” and “detainees.”¹¹⁰ The ICRC statement in respect of prisoners taken in Afghanistan is arguably in accord with Article 45 of 1977 Geneva Protocol I, but went well beyond Article 5

108. *Id.* at 3.

109. See ICRC, Press Release, Geneva Convention of Prisoners of War (Feb. 9, 2002), available at <http://www.icrc.org/> (Nov. 14, 2002).

110. See ICRC Compilation of Press Releases and Communications to the Press by the ICRC: Former Yugoslavia, Federal Republic of Yugoslavia, Republic of Croatia, Republic of Bosnia and Herzegovina, 2 July 1991 – 20 March 1998 (1998) (bound collection of photocopied texts on file with author).

of 1949 Geneva Convention III, which makes the more modest stipulation that *in cases of doubt* prisoners shall be *treated as* POWs. Presumably, there could be cases in which there is no doubt in the first place. In some statements ICRC press spokesmen went so far as to deny the existence of a legal category of unprivileged or illegal combatant. Since the category of unprivileged belligerent has a long history, is implicit in the criteria for POW status in 1949 Geneva Convention III, and is explicit in Article 45 of 1977 Geneva Protocol I, these statements were not well founded and they were modified in the course of 2002. The same basic stance, with the same weaknesses, was taken by Amnesty International in London and Human Rights Watch in New York.¹¹¹ These positions may have reinforced the reservations of the US administration about the advice they were receiving from outside bodies.

The fundamental US position that many of the detainees taken in Afghanistan should not be accorded the status of POWs appears to have been based on three main practical considerations: the first related to conditions of detention of prisoners, the second to their release, and the third to the conduct of judicial proceedings.

On conditions of detention, a main concern was that 1949 Geneva Convention III famously states that POWs are only obliged to give names, rank, date of birth and serial number.¹¹² The United States was anxious to obtain considerably more information from the detainees. There is nothing in the Convention that precludes questioning on other issues and whether a different classification actually improves the prospects of securing accurate information is debatable. The United States also wished to keep the detainees more segregated from each other, and with less access to means of committing harm, than full observance of all the POW Convention's articles would provide.

111. See, e.g., Kenneth Roth, Executive Director of Human Rights Watch, *Bush Policy Endangers American and Allied Troops*, INT'L HERALD TRIBUNE, Mar. 5, 2002, at 7. See also Amnesty International Memorandum to US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay (Apr. 15, 2002), available at <http://www.amnesty.org.uk/> (Nov. 14, 2002).

112. GC III, *supra* note 5, art. 17. This rule does not mean that a POW cannot be asked other questions, nor does it prohibit the POW from providing other information. In March 2002, Jakob Kellenberger, President of ICRC, pointed out that there is nothing in humanitarian law to stop a prisoner being questioned, but that he could not be forced to answer. "If he does not want to answer, that is his right. Under any system, you cannot do anything to people to make them speak. It is a non-issue." Jakob Kellenberger, *ICRC Rejects Talk of Geneva Conventions Review*, Reuters-Geneva (Mar. 21, 2002).

As regards release of prisoners, Geneva Convention III codifies a practice that is normally pursued after a war—releasing and repatriating POWs. Any such release of all the detainees from the “war on terror” would pose three problems. First, there may not be a clear end of hostilities: while the war in Afghanistan may be concluded at a definite date, it may be decades before the United States or other states can declare that the “war on terror” is over. Second, unlike POWs in a “normal” inter-state war, some of the prisoners concerned might continue to be extremely dangerous after release, given their training, their motivation to commit acts of terrorism, and lack of governmental control over them. Third, their countries of origin might refuse to accept them back, except perhaps as prisoners.

Judicial proceedings

As regards judicial proceedings in respect of pre-capture offenses, from early on in the war the United States reportedly intended to prosecute a number of al Qaeda and Taliban leaders, including Osama bin Laden if captured. However, it is unclear that the point of detaining the prisoners in Guantanamo is to try them.¹¹³ Insofar as the possibility of trials is envisaged, the United States appears reluctant to pursue the procedure laid down in Geneva Convention III, which specifies that any sentence of a POW must be “by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power.”¹¹⁴ If, following this provision, cases were handled through the normal US military courts, there could be problems, especially regarding the normal US military procedures for appeals.¹¹⁵ Moreover, if a pre-capture offense was of a type that would result in members of the armed forces of the detaining power appearing before a civil court, then it is implicit in the above-quoted terms of the Convention that a POW could appear before a civil

113. In a thorough and perceptive account of Camp Delta at Guantanamo datelined 10 October 2002, Joseph Lelyveld suggests that it is a holding camp for detainees who are not likely to be released or tried soon, and many of whom may be relatively minor figures who were in the wrong place at the wrong time. Joseph Lelyveld, *In Guantanamo*, 17 N.Y. REV. OF BOOKS (Nov. 7, 2002), at 62–68, available at <http://www.nybooks.com/articles/15806> (Nov. 30, 2002).

114. GC III, *supra* note 5, at art. 102. This appears to be the relevant article of the Convention so far as trials for crimes committed before capture are concerned. (The distinct subject of POW discipline issues is addressed in Article 82.) Commentary III, *supra* note 86, at 406 and 470-1. Unfortunately, Pictet fails to consider pre-capture crimes other than war crimes.

115. The normal appeal procedure for US armed forces is through the appellate court of each service, then through the US Court of Appeals for the Armed Forces, and then on to the US Supreme Court. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULES FOR COURT MARTIAL 1203–1205 (2000).

court. Such standard procedures, US officials feared, could provide opportunities for al Qaeda suspects and their lawyers to prolong legal processes and attract publicity. There was also concern that in cases involving defendants with no documents and no willingness to collaborate with any of the procedures, and where evidence might be largely based on intelligence sources, it could be difficult to provide evidence that met high standards of admissibility, and equally high standards of proof of direct personal involvement in terrorist activities. Further, al Qaeda might learn valuable information from evidence in open court, for example about its vulnerability to intelligence gathering.

It was because of such fears about normal judicial procedures that the administration made provision for trial by military commissions. There are numerous precedents for such provision: for example, President Roosevelt's Proclamation of 2 July 1942, bluntly entitled "Denying Certain Enemies Access to the Courts of the United States."¹¹⁶ In its decision of 31 July 1942 in the case of *Ex Parte Quirin* the US Supreme Court ruled in favor of the lawfulness of the Proclamation.¹¹⁷ The current status of such legal precedent is beyond the scope of this survey. President Bush's Military Order of 13 November 2001 provides for the option of trying certain accused terrorists by military commissions operating under special rules. It applies only to non-US citizens. It specifies that individual terrorists, including members of al Qaeda, can be detained and tried "for violations of the laws of war and other applicable laws," and that the military commissions would not be bound by "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." It also contains some extremely brief provisions for humane conditions of detention, and provides for the Secretary of Defense to issue detailed regulations on such matters as the conduct of proceedings of the military commissions.¹¹⁸

President Bush's Military Order was the subject of considerable legal and political debate in the United States and elsewhere as to its constitutionality, practicability and advisability. The controversy about the military

116. Denying Certain Enemies Access to the Courts of the United States, Proclamation No. 2561, 7 Fed. Reg. 5,103 (Jul. 2, 1942). On this and other cases of US established military commissions, see CONGRESSIONAL RESEARCH SERVICE, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 18–26, 46–48 (updated Dec. 11, 2001), available at <http://www.fpc.state.gov/documents/organization/7951.pdf> (Nov. 14, 2002).

117. *Quirin*, *supra* note 92, at 6.

118. Military Order of 13 November 2001 - Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, secs. 1(e), 1(f), 3, 4(b), 4(c), 66 Fed. Reg. 57,833 (Nov. 16, 2001), available at <http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi> (Nov. 14, 2002).

commissions was part of a larger debate about which particular approach to the prosecution and trial of alleged terrorists should be pursued. Possibilities that were raised in public discussion included US federal courts, foreign national courts, a UN ad hoc international criminal tribunal, a coalition-based criminal tribunal, and a special Islamic court.¹¹⁹

The controversy about the proposed military commissions abated somewhat over time. On 30 November 2001, the President's Counsel offered several assurances, including that military commissions are one option, but not the only option.¹²⁰ On 21 March 2002 the Pentagon issued the long-promised detailed regulations on the conduct of proceedings of the projected military commissions, the terms of which went some way to meet the expressions of concern regarding President Bush's Military Order of the previous November.¹²¹ As far as the laws of war are concerned, a key issue (not explicitly addressed in the Pentagon document) is whether the provisions regarding the trial procedure conform with the ten recognized principles of regular judicial procedure outlined in 1977 Geneva Protocol I, Article 75, which relates to persons not entitled to POW status. The Pentagon's detailed regulations appear to conform with almost all these principles apart, arguably, from the final one, which is that "a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised."¹²²

A problem regarding the prisoners held by the United States is the uncertainty regarding whether and when they will be tried, and whether they will be held indefinitely or released. Nearly 600 suspects of many different nationalities are held at Guantanamo, but at the time of this writing, there is no sign of

119. For a useful exploration of these and other possibilities, see DAVID SCHEFFER, *OPTIONS FOR PROSECUTING INTERNATIONAL TERRORISTS* (US Institute of Peace, Nov. 14, 2001).

120. President's Counsel Alberto Gonzalez, Address to American Bar Association Meeting, (Nov. 30, 2001) cited in AM. SOC. INT'L L. NEWSLETTER, at 12 (Nov–Dec 2001).

121. DOD Military Commission Order No.1 - Procedures for Trials by Military Commissions of Certain Non-United States Citizens In the War Against Terrorism (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (Nov. 14, 2002) [hereinafter DOD Military Commission]. For a response claiming that these procedures, if not per se violative of international law, are highly problematic, see Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure Courting Illegality*, 23 MICH J. INT'L L. 677 (Spring 2002).

122. GP I, *supra* note 9, at art. 75(4)(j). The Pentagon's detailed regulations provide for a post-trial Review Panel to which the defense can make written submissions, not for a full-blown appeal procedure. A further reservation about the regulations concerns the role of the defense counsel, who would be excluded with the accused from closed sessions, at which only an "assigned" defense counsel would be present who would be forbidden to speak with the co-counsel or the accused. See DOD Military Commission, *supra* note 119, at 8, 14.

the military commissions becoming operational. The United States has indicated that the judicial process may have to wait until after “the war on terror is won,” at which distant point the detainees may be tried or released.¹²³ Their indefinite detention, without any charge or trial, would violate fundamental standards of human rights and be hard to justify. Yet when the main problem with potential suicide bombers is not what they have done, but what they might do in the future, the resort to judicial procedures does not address the essence of the problem.

Further Development of the Law

The phenomena of global terrorism and the response thereto, while by no means wholly new, pose many challenges to existing legal provisions, from matters as large as the meaning of “armed conflict” to those as detailed as the conditions of detention. Thus it is not surprising that there were several suggestions that the existing laws of war might need to be revised, updated, supplemented or reinterpreted to take into account new forms of conflict. The case for such reconsideration, which basically arose in connection with the war in Afghanistan and the many related issues, may have been reinforced by events elsewhere, especially the numerous cases of Palestinian suicide bombings in 2001–2. In February 2002, following the furor over the detainees at Guantanamo, Pierre-Richard Prosper, the US Ambassador-at-Large for War Crimes Issues, stated: “[t]he war on terror is a new type of war not envisioned when the Geneva Conventions were negotiated and signed.”¹²⁴ He also said at that time: “[w]e should look at all international documents to see whether they are compatible with this moment in history.”¹²⁵

Such suggestions that the law might need to be revised are vulnerable to four obvious lines of criticism. (1) In several statements on the matter, Ambassador Prosper gave little indication of what particular revisions might be made to the 1949 Geneva Conventions. (2) There was naturally a suspicion in certain humanitarian organizations that suggestions that existing law was out of date or irrelevant to the terrorist problem might be a way of trying to evade

123. War Crimes at Large Ambassador Richard Prosper Address in London (Sep. 20, 2002) *cited in* Owen Boycott, *Guantanamo Britons Still a Threat, says US*, THE GUARDIAN, Sep. 21, 2002, at 23.

124. War Crimes at Large Ambassador Richard Prosper Address at the Royal Institute of International Affairs in London (Feb. 20, 2002).

125. Kim Sengupta and Andrew Buncombe, *Change Geneva Convention Rules, Says Bush Envoy Rules of Warfare Legal Foundation for the Red Cross has Helped Maintain Humanity and Dignity in Combat for 140 Years*, THE INDEPENDENT, Feb. 22, 2002, at 1–2.

obligations to implement existing law fully. (3) Proponents of change failed to mention that the negotiators at Geneva in 1949 had addressed a closely related issue, namely the activities of resistance movements during the Second World War, and that Articles 4 and 5 of the Geneva Convention III are among the provisions that already reflect this. (4) There was also a failure to mention in this context the revisions that had already been made to the 1949 Geneva Conventions. Proponents of change were notably reluctant to mention even the title of 1977 Geneva Protocol I although it constitutes the most important actual updating of the 1949 conventions. It contains the clearest prohibitions in the laws of war of certain actions in which many terrorist movements engage, such as attacks on civilians. It also introduces some constructive provisions that are germane to the “war on terror.” Such provisions that the United States has in principle accepted include those on targeting, and on the treatment of detainees who do not qualify as POWs.

Although such criticisms have considerable force, the fact is that the law is bound to evolve in response to the new problems of a new age. Much of that evolution may take the form, not of new conventions, but rather of evolving state practice some of which may have, or acquire, the status of customary law. However, some of the legal evolution may involve international conferences.

Of the many issues related to the “war on terror” that could come up in any exploratory process with a view to further change in the law, five of the candidates for consideration could be: (a) the conditions of application of the laws of war; (b) the classification and treatment of detainees; (c) legitimate means of responding to suicide bombers who by definition cannot be deterred by normal means, and whether reprisals can ever be justified in this context; (d) the interpretation of the rules on targeting in the light of the experience of recent wars in Afghanistan and elsewhere; and (e) remnants of war, a problem that includes but is by no means restricted to cluster bombs, and is in any case the subject of separate negotiation in a UN framework in Geneva.

Partly because of the salience of such issues, there continued to be some demand for an exploration of how the law relates to certain aspects of contemporary conflicts. In September 2002 the Swiss Foreign Ministry announced that it “wishes to support an informal process and provide a space for debate on the reaffirmation and development of international humanitarian law in light of the new and evolving realities of contemporary conflict situations.” Representatives of certain governments and international bodies, as well as independent experts, were to be invited to contribute to an informal meeting to be held in January 2003. Cautiously, the Swiss note announcing this stated that one of the purposes of the exercise was “if necessary, the consideration of

the development of new rules.” The potential topics listed were at this stage general and imprecise.¹²⁶

Conclusions

There are ample grounds for questioning whether military operations involving action against terrorists constitute either a new, or a wholly distinct, category of war. The coalition operations in Afghanistan, and the larger war against terrorism of which they are a part, are not completely unlike earlier wars. Many forms of military action and issues raised are similar to those in previous military operations, and concern issues already addressed by the laws of war.

Events in Afghanistan have confirmed that there are particular difficulties in applying the laws of war to counter-terrorist operations. A war that has as a purpose the pursuit of people deemed to be criminals involves many awkward issues for which the existing laws of war are not a perfect fit. In addition, the use of local forces as proxies (a common feature in counter-terrorist wars) risks creating a situation in which major powers fail to exercise responsible control over their local agents, whose commitment to the laws of war may be slight. More fundamentally, any war against a grand abstraction, as the “war on terror” undoubtedly is, risks creating a mentality in which adversaries are seen as dehumanized, and the cosmic importance of the struggle may be thought to outweigh mundane legal or humanitarian considerations.

However, treating, or appearing to treat, the law in a cavalier manner risks creating new problems. If a major power is perceived as ignoring certain basic norms, this may have a negative effect within a coalition, or on enemies. It may involve severe risks to any of its own nationals who may be taken prisoner. It may also affect the conduct of other states in other conflicts. In that wider sense, the principle of reciprocity in the observance of law retains its value.

In particular, the United States’ handling of questions relating to the treatment and status of prisoners has caused widespread concern and criticism. As regards those under Northern Alliance control, practical arrangements, around the time of the rebellion at Mazar -e-Sharif and also subsequently, were inadequate. More generally, although many key US positions were defensible, especially that certain prisoners did not qualify for POW status, aspects of US policy and procedures were poorly presented, and in some cases did not appear to be fully thought-out. The prisoner issue—always sensitive

126. See Diplomatic Note, Switzerland-US, Sep. 13, 2002. See also Unknown Author, *Swiss Call a Meeting to Re-examine the Geneva Conventions*, N.Y. TIMES, Oct. 6, 2002, at sec. 1, 15.

anyway—was especially significant in this war: if the coalition were perceived to have treated prisoners inhumanely, or to have regarded their status and treatment as being in an international legal limbo, there would be risks of a general weakening of the prisoner regime, including for any coalition personnel taken prisoner in the ongoing war on terrorism. The handling of this issue was a potential threat to coalition unity. The controversies over the prisoner question had a special resonance because of the concern of other countries that the United States had been moving towards unilateralism generally, on a wide range of matters. In this perspective, fairly or unfairly, the United States reluctance to accept the full application of 1949 Geneva Convention III to those particular prisoners was seen as one more example of a selective approach to international law.

In the course of the first year of its “war on terror,” and especially in the early handling of prisoner issues in Afghanistan and at Guantanamo, the Bush Administration’s expression of policies on certain laws-of-war issues was at times hesitant and unskillful. It would be easy to attribute this to the administration’s alleged general ideological hostility towards international agreements. However, some other explanations may carry more weight. The United States had a record of concern stretching back decades about the ways in which international humanitarian law has been developing, especially as regards terrorism, and also in regard to the rules on what is a legitimate target. The administration was right that certain aspects of the law, including aspects of the POW regime, were not appropriate for the treatment of alleged terrorists. Part of the explanation of the administration’s failure to handle the particular question of the status of detainees effectively may lie quite simply in the fact that it was proceeding in a reactive manner. In addition, there appears to have been insufficient consultation with the military’s own legal specialists.

Whatever the defects of the Bush Administration’s response, the professionalism of the US armed forces, coupled with the effect of criticism within and beyond the United States, led to policy and practice on the prisoner issues evolving in a generally sensible direction. This evolution has been ad hoc and incomplete. In general, there have been no major public doctrinal statements from the US government on how the laws of war apply to the “war on terror”—perhaps because the application of those laws can indeed be complicated and policy-makers do not wish to foreclose options.

This war occasioned a greater degree of tension between the United States on the one hand, and international humanitarian and human rights bodies on the other, than any of the wars of the post-Cold War period. The handling of certain laws-of-war issues by the ICRC and various other humanitarian

organizations left much to be desired. It was natural that they should be nervous about the US administration's view of international humanitarian law and that they should press for full implementation of that law, especially in relation to prisoners. However, they were on legally dubious ground when they pressed on the United States to view detainees as being entitled to be POWs, and in their insistence that if they were not given POW status then they must be classified as civilians. They missed a major opportunity to point out publicly the relevance of certain provisions of 1977 Protocol I to persons not entitled to POW status. It was odd and out of character for the ICRC to deny the applicability of the law governing international armed conflict to certain aspects of the Afghan conflict including the phase from June 2002 onwards. Overall, the stance of such bodies, while leading to certain useful clarifications of US policy, may also have had the regrettable effect of reinforcing US concerns (well publicized in debates about the International Criminal Court) about zealous international lawyers standing in unsympathetic judgement on the actions of US forces.

Returning to the four questions set out at the beginning of this survey, the foregoing account suggests these responses:

First, according to a strict interpretation of their terms, the main treaties relating to the conduct of international armed conflict are formally and fully applicable to counter-terrorist military operations only when those operations have an inter-state character. Where counter-terrorist operations are simply part of a civil war, the parties must apply, as a minimum, the rules applicable to civil wars. Where operations are simply part of a state's policing, and not part of an armed conflict such as to bring the laws of war into play, the laws of war are not formally in force.

Second, in counter-terrorist military operations, certain phases and situations may well be different from what was envisaged in the scope of application and other provisions of the main treaties on the laws of war. They may differ from the provisions for both international and non-international armed conflict. Recognizing that there are difficulties in applying international rules in the special circumstances of counter-terrorist war, the attempt can and should nevertheless be made to apply the law to the maximum extent possible. At the very least, it has considerable value as a blueprint or template that the principles embodied in the laws of war should be applied in a wide variety of situations. This conclusion is reinforced by decisions of commissions of inquiry, certain resolutions of the UN Security Council, some doctrine and practice of states (including the United States), and considerations of prudence. In the "war on terror," while there have been shortcomings in the interpretation and application of existing law by governments and by

humanitarian organizations, much of what has been done has been within the framework of the law and has confirmed its relevance.

Third, although the great majority of prisoners taken in war are viewed as qualifying for POW status, in a counter-terrorist war, as in other armed conflicts, there are likely to be individuals and even whole classes of prisoners who do not meet the treaty-defined criteria for such status. A procedure outlined in the 1949 POW Convention and in US military manuals is that in case of doubt about their status such people should be accorded the treatment, but not the status, of a POW until a tribunal convened by the captor determines the status to which the individual is entitled. However, in a struggle involving an organization that plainly does not meet the criteria (and especially where, as with al Qaeda, it is not in any sense a state) it may be reasonable to proclaim that captured members cannot be considered for POW status. In cases where it is determined that certain detainees are not POWs, they may be considered to be “unlawful combatants.” It is doubtful whether such persons should be classified as “civilians.” However, there are certain fundamental rules applicable to their treatment, including those outlined in Article 75 of 1977 Geneva Protocol I; and there is a tradition of applying basic norms of the POW regime. Any prisoner, whether classified as a POW or not, can be tried for offenses, including those against international law.

Fourth, there is a case for consideration of further revision of the existing law. Suggestions that the existing laws of war are generally out of date in the face of the terrorist challenge are wide of the mark. However imperfect, the law has played, and will continue to play, an important part in influencing the conduct of the “war on terror.” There has neither been a serious suggestion that the existing legal framework should be abandoned, nor substantial proposals for an alternative set of rules. However, some modest evolutionary changes in the law can be envisaged, for example regarding conditions of application, the classification and treatment of detainees, the difficult problem of how to respond to suicide bombers, the problems of targeting, and possible new rules regarding remnants of war. The application of the law to non-international armed conflicts is another area in which there has been much development since 1990 and more may be anticipated. Some changes in some of these areas may require a formal negotiating process. Some, however, may be achieved—indeed, may have been achieved—by the practice of states and international bodies, including through explicit and internationally accepted derogations from particular rules that are manifestly inappropriate to the circumstances at hand; and also through the application of rules in situations significantly different from inter-state war.