Combatants

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Law school professors are known for devising complex, convoluted examination questions with factual situations at best remotely associated with reality. The following, for a fictitious law of war course final examination, might be viewed as representative:

State A is a sovereign State with a functioning government enjoying diplomatic relations with other nations. It is a member of the United Nations in good standing and since 1956 a State party to the 1949 Geneva Conventions. It is not a State party to the 1977 Protocols I and II Additional to the 1949 Geneva Conventions.

State B invades State A, displaces its government, and installs its own government. States C, D, E and others covertly provide funding and other support, including weapons, to indigenous resistance movements within State A, eventually forcing State B to withdraw. Subsequently, the puppet government installed by State B during its occupation is overthrown by a tribal faction ( Faction 1 ) covertly funded and supported by States C and D. Other tribes ( Faction 2 ), with limited support from outside sources, oppose rule by Faction 1. Neither replaces the previous government as the factions compete for control. The situation deteriorates into a civil war.

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Factions 1 and 2 are loose amalgamations of occasional if disparate indigenous tribal alliances. Following long-standing custom within State A, tribal groups change sides, and back again, as battle momentum shifts. Faction 1 replaces personnel casualties and tribal defections primarily from a pool of volunteer and dragooned men of the same tribe in neighboring State C, divided by an official but artificial border created by an unsuccessful colonial power a century earlier that bisects historic, common tribal territory.

Given their heavy financial investment in support of Faction 1 and, in the case of State C, for geopolitical reasons, States C and D decide they will recognize Faction 1 as the government of State A when Faction 1 gains control of the entire country. Each prematurely recognizes Faction 1 when it captures Faction 2's major city. Faction 1's success is short-lived. It suffers a significant military defeat, and retreats from Faction 2's major city and the territory Faction 2 controls. Resistance to Faction 1 continues with varying levels of intensity throughout State A except in its territory of origin, the southern one-third of State A.

Neither State C nor D withdraws its premature recognition of Faction 1. State F joins States C and D in recognizing Faction 1 in order to continue bird-hunting privileges its wealthy leaders enjoy in State A.

Faction 1 aggressively but unsuccessfully solicits recognition as the government of State A from the United Nations, the European Union or any of the remaining 190 nations. It hosts a transnational terrorist group, which trains and organizes foreign nationals within State A before the group attacks two embassies of State E in other nations, killing 224 civilians and injuring more than 4,000. State E responds with limited military action against training camps of the transnational terrorist group and requests that Faction 1 deliver to it the leader of the terrorist group. Faction 1 offers to do so if State E will recognize it. State E will not, and Faction 1 does not. State D support of and relations with Faction 1 deteriorate because of Faction 1's hosting the leader of the transnational terrorist group, a former citizen of State D. Faction 1 rapidly becomes an international pariah. Faction 1's power within the territory it controls declines.

Subsequently the transnational terrorist group hosted by Faction 1 launches a major attack on the territory of State E, a member of the North Atlantic Treaty Organization (NATO). Almost three thousand people, primarily civilians, representing more than ninety nations are killed or missing and presumed dead. The United Nations Security Council and NATO support military action against Faction 1 and the transnational terrorist group. State E joins with military forces of State G and those of other governments to engage in military operations in State A against tribal forces aligned with Faction 1 and the transnational terrorist group. States C, D and F withdraw their recognitions of Faction 1.
Throughout the fighting, Faction 1 tribes continue to operate in indigenous attire under tribal command and control rather than as conventional, highly structured, uniformed military forces. Members of the transnational terrorist group dress in all black or indigenous attire. Some special operations forces (SOF) from States E, G and other nations allied with them working with Faction 2 forces dress in Faction 2 tribal attire to avoid being targeted as high-value targets by Faction 1 and its transnational terrorist partners.

Tribal forces aligned with Faction 1 abandon their informal alliance with it to join with Faction 2 and military forces of States E and G to defeat Faction 1. The leaders of Faction 1 and the transnational terrorist group flee into tribal territorial areas in State C.

A new leader is identified to head a national, democratically elected government in State A. His government gains recognition from the United Nations and national governments (including States B, C, D, E, F and G) as the government of State A.

In the process of the military operations against Faction 1 and its transnational terrorist partner by States E and G, members of Faction 1 and the terrorist group are captured.

What is the law of war status of the members of Faction 1 and transnational terrorist group forces captured during operations by States E and G? Had States E and G special operations forces wearing Faction 2 attire been captured by Faction 1 forces or its transnational terrorist partners, would they have been entitled to prisoner of war status?

Before the al-Qaeda attack on the United States on September 11, 2001, and the military response of the United States against the Taliban and al-Qaeda, the scenario would have qualified as humorously improbable enough to have been a law school examination question. But it was precisely the situation faced by US and coalition military forces as they entered Afghanistan to commence offensive military operations against the Taliban and al-Qaeda in October 2001.

A simple—or perhaps better said, simplistic—approach would be to review the four 1949 Geneva Conventions to determine their applicability to Taliban and al-Qaeda fighters or to the SOF of States E and G wearing indigenous attire of the faction with which they were aligned. However, as the fictitious professor’s examination question suggests, the situation is far from simple. More information is necessary from factual, cultural and historical standpoints prior to determining the legal statuses of the individuals in question.

In an essay published in 2003, this author concluded that the Taliban was not the government of Afghanistan at the time coalition operations began against it in late 2001. Three highly respected colleagues argued that the Taliban was the de facto
government of Afghanistan. Subsequent scholarship by historians, regional experts, military officers who served in Afghanistan during the period in question, official military histories and others provide more information than did contemporary media reports, enabling a clearer picture from which to conduct a fresh analysis of Taliban status. Moreover, media accounts in large do not understand legal nuances, such as the distinction between physical presence of armed groups in an area, international law conditions for a group to be regarded as a government or law of war criteria for occupation. “Occupation” in media parlance is a general term significantly different from the latter.

Following is a summary of the situation that existed during the period in question; analysis of the Taliban’s status as a government and the combatant status of Taliban and al-Qaeda fighters; brief consideration of the law of war issue of US and other nations’ special operations forces’ wear of indigenous attire as they fought the Taliban and al-Qaeda; and analysis of the Bush administration’s legal rationale for denial of prisoner of war status to captured al-Qaeda and Taliban.

In considering the fact situation and legal determinations one may draw from it, two leading scholars have emphasized the importance of information beyond the face of applicable treaties. Writing in his classic 1911 War Rights on Land, James Moloney Spaight argued:

War law has never been presented to officers in an attractive form, as it might have been (I submit with diffidence) if the writers had insisted on the historical, human, and practical side rather than on the legal and theoretical one. But the difficulty of the subject, and the necessity for a careful study of it have not been brought home to officers; they underestimate its importance and complexity.4

More than eight decades later, Spaight’s view was shared by Sir Adam Roberts:

The laws of war are strange not only in their subject matter, which to many people seems a contradiction in terms, but also in their methodology. There is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice. Lawyers, academics, and diplomats have often been better at interpreting the precise legal meaning of existing accords or at generalizing about the circumstances in which they can or cannot work. In short, the study of the law needs to be integrated with the study of history: if not, it is inadequate.5

While the present author agrees with Spaight and Sir Adam as to the necessity to know and understand relevant history in order to apply the law, in cases such as the conflict in Afghanistan knowledge of more than history is necessary. An appreciation of a nation’s history, its culture, its geography and other local factors may be
necessary. Interpreting and applying the law of war is not always a matter of mirror imaging or “one size fits all.” These factors are relevant in interpreting nuances in law of war treaties in order to determine their application. Understanding Afghanistan’s regional and national history, its geography, its culture, political structure and law of war history are important in determining whether captured Taliban were entitled to prisoner of war status. So, too, are the history of the law of war and the history of (and therefore the meaning and intent of) specific treaty provisions.

There is no evidence any of these factors were considered by senior political leaders and legal advisers in providing advice to President George W. Bush with regard to prisoner of war entitlement for captured Taliban. Looking at the conflict in Afghanistan between the Taliban and the United States and its coalition partners as one might consider an armed conflict in (for example) Norway, Switzerland or Australia is akin to considering the most common way to core an apple while holding a baseball; each may have the same shape, but otherwise they are uniquely different. Political and military leaders and their legal advisers must be mindful of the risk of automatically assuming all opponents and all situations fit neatly within the same treaty template. In the opening stages of US operations in Afghanistan, ignorance and skepticism of the law of war by some within the Bush administration resulted in errors of law and judgment with respect to the legal basis for law of war protection for captured Taliban and al-Qaeda, and the legal rationale for denial of prisoner of war status to them.

In this regard this author has heard it said, “As all 194 nations are State parties to the 1949 Geneva Conventions, they have universal applicability.” This statement, while factually and legally accurate, fails to recognize that legal *applicability* differs from *application* in fact. The quoted statement tends to suggest a perfect mirror imaging in *application*. The title of the volume in which Sir Adam’s comments are contained—*The Laws of War: Constraints on Warfare in the Western World*—acknowledges not only the predominately Western European origins of the law of war but the challenges that may be faced in its application outside nations of Western European tradition.

It is in this context that the question of the statuses of combatants in the war fought by the United States and its allies against the Taliban and al-Qaeda in Afghanistan in late 2001 is examined. The specific time frame will be from the arrival of the first US military ground force elements in Afghanistan on October 20, 2001, to the signing of a memorandum by President George W. Bush on February 7, 2002 which, *inter alia*, accepted the conclusion of the Department of Justice denying prisoner of war status to captured Taliban and al-Qaeda.
Afghanistan has been described as having “three constants: perpetual internal fighting between tribal ethnic groups, the dominance of Islam in society, and intervention by external actors using this discord to achieve influence in the country.”

A nation divided by mountainous terrain, limited in modern transportation development and with few large cities contributes to emphasis on tribal loyalty, a highly decentralized form of government and strong resistance to central authority by its citizens. Understanding its culture and local dynamics is critical to understanding Afghanistan; in contrast to Western European nations, controlling Afghanistan’s capital city of Kabul does not necessarily equal control of the entire nation, for example. Even within tribes, rivalries and blood feuds were and are a constant.

Historian Louis Dupree observed, “No Pashtun [the ruling class in Afghanistan for more than two centuries] likes to be ruled by another . . . particularly someone from another tribe, sub-tribe, or section.”

As is the case in other tribal-centric nations, tribes in Afghanistan historically have been inclined to suspend tribal rivalries and blood feuds to resist foreign invasion, if only briefly enough to defeat them before returning to their internal competition. Shultz and Dew offer a Somali proverb that could be said to apply equally well to Afghanistan tribal warrior ways:

Me and my clan against the world;
Me and my family against my clan;
Me and my brother against my family;
Me against my brother.

In the same context, the same authors, while again referring to clan tradition in Somalia, quote I. M. Lewis’s observation that applies equally well to Afghanistan’s tribal traditions: “Although they esteem fighting so highly, the pastoralists have no standing military organization or system of regiments. Armies and raiding parties are ad hoc formations and while feuds often last for years, and sometimes generations, they are generally waged in guerrilla campaigns.”

Afghanistan’s history has included invasion by foreign powers and competition for its control as a commercial route or “buffer zone” by foreign governments, most commonly known for the nineteenth-century competition between England and Russia first named “The Great Game” by Captain Arthur Conolly of the Bengal Cavalry, later popularized by Rudyard Kipling in his 1901 novel Kim. In fighting one another or foreign invaders, alliances often were based on bargaining more than loyalties, and loyalties were fleeting. Tribal forces changed sides frequently as
each saw the tide of battle shifting or if offered “a better deal” by the opposing force or a better chance for post-conflict success.19

Interim History: The British Colonial Period

British military history in Afghanistan is long in period of time, extensive, but for the most part beyond the scope of this author’s topic.20 However, it contains one point germane to understanding the situation on the ground in October 2001 and through the period in question.

The artificiality of Afghanistan’s borders, particularly with respect to its eastern border with Pakistan, is the result of an arbitrary nineteenth-century colonial division of tribal territory for British security purposes. It is named for Sir Henry Mortimer Durand, who negotiated and drew a line dividing Wazari tribal territory to establish a border between Afghanistan and what today is Pakistan. In addition to the fact that a line drawn on a map seldom is easy to find with precision on the ground, particularly in terrain as rugged as that between Pakistan and Afghanistan, the “backdoor” it offered between the two nations played heavily in mujahidin support in fighting the Soviet occupation and Wazari support for the Taliban following the Soviet departure. Permanently resentful of the British-established border and accustomed to traveling unfettered by multiple footpaths between the two nations,21 tribal traditions and support in armed conflict against opposing forces—whether indigenous or foreign—meant more to determining the way the Taliban manned, formed and commanded its forces than Western concepts of defined and marked borders, their sanctity, and military command and control. Tribal loyalty remained paramount.22

Afghanistan enjoyed relative stability and modernization during the reign of King Muhammed Zahir Shah (1933–1973). A “constitutional monarchy” was established on October 1, 1963.23 On July 17, 1973, his cousin Daoud executed a bloodless coup during the king’s absence from the country to abolish the monarchy and become Afghanistan’s first president and head of the communist People’s Democratic Party of Afghanistan (PDPA). Unable to achieve nationwide economic and agricultural reform,24 he was murdered five years later by PDPA members. His assassination and other PDPA failures eventually led to the overt Soviet invasion on December 22, 1979.25

The Soviet occupation, Afghan resistance and US covert assistance to the latter against the former have been well told and became the subject of a popular movie.26 Soviet forces faced a mujahidin resistance repeating the historic practice of indigenous foes joining forces to resist a foreign invader.27 Unable to defeat the mujahidin resistance funded and supplied by China, Egypt, Iran, Pakistan and the
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United States and strongly supported by the indigenous population, the Soviet 40th Army withdrew on February 15, 1989.28

US and other foreign support to the mujahidin led to a case of unintended consequences, as it left heavily-armed forces in Afghanistan, described by one author as “a network of jihadis without a jihad.”29 Refugee male children from the Soviet war in Afghanistan were placed in Saudi-funded madrassas in Pakistan teaching the conservative Wahhabi rejection of “all modern interpretations of Islam as well as the mystical Sufi form of Islam,”30 in essence providing a “farm club” of holy warriors for the Taliban in its eventual effort to seize control of Afghanistan even before the Taliban existed in name. Foreign financing of the mujahidin resistance funneled through Pakistan’s Inter-Services Intelligence Directorate (ISID) reversed religious toleration and other modern, liberal practices that existed in the 1970s, replacing them with narrow Islamic views.31

Soviet military withdrawal from Afghanistan left in place remnants of the weak Afghan (PDPA) Army and the PDPA puppet regime headed by President Mohammed Najibullah. While the PDPA demise was regarded as inevitable, it was delayed until 1992 as mujahidin allies against the Soviet occupation endeavored to agree to a power-sharing agreement, without success. Following Afghan custom, they resumed fighting one another.32 Continued fighting led to a civil war between the various factions, collapse of the PDPA, and the replacement of the Najibullah government by one headed by President Burhanuddin Rabbani of the Islamic Council of Afghanistan. Tribal fighting continued and lawlessness increased, leading to Taliban emergence in 1994.33 President Rabbani’s departure in 1996 resulted in collapse of the remaining limited central government infrastructure, leaving Afghanistan in the position of a failed State, existing in name only.34

Taliban characteristics and origins arguably can be traced to the Wahhabi sect founded by Mohammed ibn Abd al-Wahhab in the eighteenth century,35 but its contemporary formation originated in 1994 in Pashtun-dominated southern Afghanistan.36 The Taliban sought to “work with the deep social grain of rural conservatism, not interfering with the power of tribal elders and landowners, as long as the people followed Taliban religious practices.”37 Its inability to gain international recognition, discussed infra, lay in part in the philosophy of its leader, Mullah Mohammed Omar, who departed from Afghanistan’s traditional international role, expressing indifference with respect to international relations and foreign policy and their necessity for Afghanistan.38 Equally important, Loyn observes,

[a]t the core of the new antimatter soul being formed for Afghanistan was “anti-education”, in which boys were taught not about culture or the natural world, and
certainly not to think for themselves—the bedrock of education in the developed world—but to believe that this was all taken care of for them by Islam.

The madrasas became factories turning out Taliban fighters, many of them war orphans who knew no other life. “Talib” simply means “student”, although the word came to mean specifically “religious student”, and the madrassa system provided a formidable old-boy network, giving a sinuous strength and flexibility to the Taliban army, which otherwise lacked a formal command structure.39

In the battles of the mid- to late 1990s, momentum ebbed to and fro and, in Afghan tradition, tribal warlords and individual tribes switched sides frequently. Personnel replacements for Taliban lost in battle or through defections to anti-Taliban forces were drawn from volunteers from tribal areas in Pakistan and non-Afghan volunteers.40 Efforts in 1996 by the Pakistani interior minister to have the Taliban join in consolidated opposition to the Northern Alliance were rebuffed by Taliban leader Mullah Omar. As a result, when the Taliban eventually recaptured the Afghan capital of Kabul on September 26, 1996, “they had few friends, and never secured the international recognition they craved.”41

Taliban recapture of Kabul did not bring formal recognition from its primary financial backers, Saudi Arabia and Pakistan. It did result in a new warlord alliance called the “Supreme Council for the Defence of the Motherland” to oppose the Taliban.42 The following spring the Taliban began its advance north. Concentration of agriculture, industry, mineral and gas resources in northern Afghanistan made a Taliban offensive critical to its consolidation of power.43 Political leaders in Pakistan and Saudi Arabia agreed they would extend formal recognition to the Taliban as the government of Afghanistan when and if it controlled the entire country, then advanced recognition following Taliban seizure of the Northern Alliance city of Mazar-i-Sharif on May 24, 1997, optimistically but incorrectly concluding control of the entire country would follow soon thereafter.

In a set of circumstances reflecting the Byzantine nature of the Pakistani government and despite the fact that ISI/D agency Chief of Staff Ahmed Badeeb acknowledged that the Taliban “had no clue how to run a country,”44 at IS/D urging the Pakistani foreign ministry announced Pakistan’s recognition of the Taliban as the government of Afghanistan on May 25, 1997, a decision Pakistani Prime Minister Nawaz Sharif learned of from a television news announcement. His aide recalled Sharif was “furious,” wondering out loud who had made a decision that was his to make.45

The IS/D, heavily invested in the Taliban in part to provide a safe haven for Pakistan’s insurgency operations in Kashmir,46 pressed Saudi Arabia to join it in recognition of the Taliban. “Due to Pakistani [IS/D] insistence and to the lack of any
other options so as to fill the obvious vacuum” in Afghanistan, Saudi Arabia followed suit the next day. The United Arab Emirates (UAE), whose leadership enjoyed special hunting privileges in Pakistan and Taliban-controlled western Afghanistan, recognized the Taliban two days later.

These announcements were premature. Taliban seizure of Mazar-i-Sharif lasted only hours following Pakistan’s recognition announcement, and became a deathtrap for Taliban forces. Mazar-i-Sharif’s Uzbek/Shia population, joining forces with the Northern Alliance, killed three hundred Taliban and captured another thousand. Taliban killed or captured included its top ten leaders in the assault on Mazar-i-Sharif. Anti-Taliban forces increased in strength as warlords switched sides in an anti-Taliban offensive that killed, captured, or wounded another six thousand Taliban, including 250 Pakistani fighters killed and another 550 captured. The Taliban swiftly retreated toward Kabul, en route destroying crops and poisoning wells, relinquishing any claim to control of northern Afghanistan. The civil war intensified as aid and support to anti-Taliban forces increased from Iran, Turkey, India, Russia, Uzbekistan, Kazakhstan, Kyrgyzstan and Tajikistan.

Nonetheless, and bolstered by the premature recognition by Pakistan, Saudi Arabia and the UAE, the Taliban sought US recognition. The Clinton administration declined. Following a confrontation between pro- and anti-Taliban factions within the Afghanistan embassy in Washington in August 1997, the State Department ordered the embassy closed, informing its representatives that “[a]s far as the United States was concerned, Afghanistan’s existence as a government in the international system had been suspended.” No other nation joined Pakistan, Saudi Arabia and the UAE in their recognition of the Taliban as the government of Afghanistan. Taliban efforts to gain UN recognition were equally unsuccessful, in large measure due to its ignorance of “U.N. procedures and even the U.N. Charter” and its own counterproductive actions against UN agencies attempting to provide humanitarian aid in Afghanistan, such as the High Commissioner for Refugees and the World Food Program. An increase in funding by Pakistan and Saudi Arabia for the Taliban and drafts of young jihadists from tribal areas in Pakistan enabled the Taliban to reconstitute its forces and in 1998 commence another attack into northern Afghanistan, including a renewed effort to capture Mazar-i-Sharif. While militarily successful, international antipathy toward the Taliban increased owing to Taliban actions against UN officials and non-government organizations; massacres of Uzbek, Tajik and Hazaras civilians in Mazar-i-Sharif; murder of captured opposing-force fighters; and the murder of eleven Iranian diplomats taken from the Iranian consulate in Mazar-i-Sharif.
The Taliban had become an international pariah. Its status was exacerbated by the al-Qaeda attack on US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, on August 7, 1998, killing 213 civilians in the former and eleven in the latter, and wounding more than four thousand civilians in the two attacks. The US response included a cruise-missile attack on the suspected al-Qaeda training camp at Zawhar Kili on August 20, 1998 and an end of any further argument of pragmatism toward the Taliban within the State Department. International outrage increased with the Taliban’s September 18, 1998 destruction of the two thousand-year-old Buddha statues in Bamiyan. The murder of the Iranian diplomats led to Iran moving a military force of two hundred thousand to its border with Afghanistan; a meeting between Taliban leader Mullah Omar and UN envoy Lakhdar Brahimi in Kandahar on October 14, 1998; a strong UN Security Council resolution threatening and eventually imposing international sanctions against the Taliban; and Saudi Arabia’s withdrawal of its diplomatic representation in Kabul and its termination of official funding to the Taliban because of its protection of al-Qaeda leader Usama bin Laden. Additional UN Security Council resolutions condemning the Taliban and imposing sanctions followed through 1999, 2000 and into 2001 prior to the September 11 al-Qaeda attack on the United States as the Security Council “remain[ed] seized” with the matter. By 2000, Taliban support for Islamic fundamentalist groups from Central Asia, Iran, Kashmir, China and Pakistan had led to its further international isolation, increased support to anti-Taliban forces and increasing signs of the Taliban’s weakening grip on territory within Afghanistan. Reports by the United Nations Secretary-General in April and July 2001 requested by the General Assembly and Security Council, respectively, are revealing in their conclusions as to the Taliban’s failures to act in any way as a governing authority within Afghanistan.

Throughout the period in which the UN Security Council and the Secretary-General weighed or took actions against the Taliban, at no time did either refer to or suggest recognition of the Taliban as the government of Afghanistan.

The al-Qaeda attacks in the United States on September 11, 2001 brought a rapid military response by the United States, acting under the authority of UN Security Council Resolution 1368, and concurrent political reactions by the three nations previously aligned with the Taliban. The United Arab Emirates withdrew its recognition of the Taliban on September 22; Saudi Arabia, three days later; and Pakistan on November 22.

As previously noted, US offensive ground force operations against the Taliban and al-Qaeda formally commenced on the evening of October 19–20, 2001, with insertion of two US Army Special Forces detachments. In less than two months, Taliban and al-Qaeda resistance had collapsed. Usama bin Laden and his al-Qaeda
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fled into Pakistan. Taliban leader Mullah Omar survived, and fighting would continue, but the Taliban as a viable entity had disintegrated.

Was the Taliban Entitled Legally to Recognition as the Government of Afghanistan?

The actions of Pakistan, Saudi Arabia and the United Arab Emirates are illustrative of political recognition of a nation or a new government. But recognition by three nations out of the 185 members of the United Nations does not warrant the conclusion that the Taliban constituted the de facto much less the de jure government of Afghanistan for the following reasons:

- The Taliban was a faction in a civil war in a failed State, that is, a State in which no central authority existed capable of carrying out the duties and responsibilities of a national government to its citizens.
- As established in the preceding pages, the Taliban
  - Had no organized, uniformed military, no strategic military plans, and no formal command and control structure characteristic of a regular military;
  - Consisted of tribal forces with little to no formal military instruction;
  - Was composed of individuals loosely organized along tribal lines who rotated between civilian (tribal or family) obligations and serving as fighters on a daily or seasonal basis; and
  - Lacked the capacity to fulfill traditional responsibilities of a government, such as providing essential services (security, welfare and representation) to the people of Afghanistan.
- The United Nations, the European Union and 181 of the 185 nations declined to recognize the Taliban as the government of Afghanistan.
- The Afghanistan seat in the United Nations remained reserved for the government of Burhanuddin Rabbani which for all intents and purposes ceased to exist in 1994.
- The civil war did not end with the Taliban as a clear victor occupying, much less controlling, Afghanistan. At the time of commencement of US and coalition operations on October 20, 2001, the civil war continued, and Taliban power had eroded significantly.
- As the 2001 Secretary-General’s report observed, the Taliban was unable to consolidate its military successes outside the predominately Pashtun southern Afghanistan region from which it originated.
The Taliban refused to acknowledge Afghanistan’s pre-existing international obligations, such as those of being a member of the United Nations, or through its actions as a State party to the 1949 Geneva Conventions.\textsuperscript{73} International law requirements for existence as a State are historic:

First, there must be a people . . .

Second, there must be a fixed territory which the inhabitants occupy . . .

Third, there must be an organized government exercising control over, and endeavoring to maintain justice within, the territory.

Fourthly, there must be capacity to enter into relations with the outside world.

Fifthly, the inhabitants of the territory must have attained a degree of civilization such as to enable them to observe with respect to the outside world those principles of law which are deemed to govern the members of the international society in their relations with each other.\textsuperscript{14}

The State of Afghanistan previously joined and was accepted into the community of nations as a member of the United Nations. Its ratification of the 1949 Geneva Conventions in 1956 was accepted by Switzerland, the depositary. No State objected to its ratification of the 1949 Geneva Conventions. Hence it may be presumed that each State regarded Afghanistan as having met statehood criteria one and two. Were all other questions answered in the affirmative, a question would remain as to whether in its time as a failed State and with the ascendancy of the Taliban it continued to meet the third, fourth and fifth criteria. The third criterion does not say “exercise control over a substantial portion of” a nation’s territory, or suggest a percentage of territorial control as threshold criteria, but the territory as a whole. As to “maintaining justice within the territory,” Professors Goldman and Tittemore acknowledge “the Taliban exercised few, if any, of the traditional activities of government.”\textsuperscript{75} This cannot be dismissed entirely as a characteristic of Afghan culture; more likely it is affirmation of the fact that the resources for the Taliban to govern were unavailable because they had been diverted to fighting the continuing civil war. In turning inward under the leadership of Mullah Omar, the Taliban defaulted on the fourth. In the wholesale murder of foreign diplomats, representatives of non-governmental organizations, its civilians because of different religious beliefs, and captured fighters—violations of human rights law and the
law of war—there is no evidence the Taliban met the fifth criterion essential to its qualification as the government of Afghanistan.\textsuperscript{76}

Assuming for sake of argument the five criteria could be met for the failed State of Afghanistan to restore its place among its peers, there remains the question of whether the Taliban itself became the rightful government of Afghanistan at any time prior to its defeat and collapse in December 2001. Changes internal to a nation are regarded as matters of domestic concern.\textsuperscript{77} That said,

[i]nasmuch, however, as the government of a State is the instrument through which it has official contact with the outside world and undertakes to respond to official obligations, a change of government and the methods by which it is wrought are matters of concern to foreign countries. They are concerned primarily with a question of fact—whether the regime seeking recognition is in actual control of the reins of government. No difficulty presents itself when a change is wrought through normal processes and the result is accepted as a mere incident in the life or growth of the State concerned. The situation may be obscure, however, when a contest for governmental control is waged by force of arms or by other processes not contemplated by the local law; the completeness of the success of a contestant may be fairly open to doubt for a protracted period, and even after its adherents assume to exercise the functions of a government. In such case foreign States may, and oftentimes do, withhold recognition until they are themselves assured where the victory really lies. The sufficiency of such assurance depends obviously upon the circumstances of the particular case; and it may follow close upon the heels of a coup d'état. The matter is unrelated to the mode whereby the success of a régime is achieved, except in so far as recourse to a particular method may breed doubt as to the security or permanence of the control that has been won.\textsuperscript{78}

The decision as to whether or not to recognize a State, or a new government in a State, resides in governments of other sovereign nations, and, within a government, with the executive branch of each.\textsuperscript{79}

By analogy, the law of war provides a way in which to determine whether the Taliban had gained de facto or de jure status. State A invades State B. In doing so, its military forces physically seize a portion of State B's territory. Under the law of belligerent occupation State A becomes an occupying power only when the territory State A's forces physically occupy "is actually placed under the authority of the hostile army."\textsuperscript{80} Further, the occupation "extends only to the territory where such authority has been established and can be exercised."\textsuperscript{81} A claimant must be able to exercise effective control; that is, an occupying power must be in a position to enforce the authority he is asserting over the territory and meet the obligations of an occupying power, which includes governing and providing various services (such as security and welfare) to the civilian population necessary to meet
its day-to-day requirements. Assuming this analogy is reasonable, the history of the civil war between Taliban and anti-Taliban factions from 1994 to 2001 never resulted in a situation in which the Taliban was able to enforce the authority it may have asserted over the territory it physically occupied, much less all of Afghanistan. The Secretary-General’s July 13, 2001 report that “[a]ll regions of the country, with the exception of the southern [Pashtun] region, now include active conflict zones” confirms the conclusion that while the Taliban may have enjoyed a physical presence in a large portion of Afghanistan, it was unable to consolidate its military gains and exercise effective control over these areas, much less establish the infrastructure to govern them. These are critical legal distinctions that media reports failed to make.

The facts on the ground and international law do not support a conclusion that the Taliban was the de facto, much less de jure, government of Afghanistan at any time from its emergence in 1994 to October 20, 2001, when US and coalition military operations commenced against al-Qaeda and the Taliban.

**Combatant and Prisoner of War Status and the Taliban and Al-Qaeda**

Accepting *arguendo* the US position that its intervention in Afghanistan was an international armed conflict, entitlement to the combatant’s privilege and, therefore, prisoner of war status upon capture is determined by provisions contained in Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949 (hereinafter GPW). Relevant GPW provisions provide entitlement to humane treatment to captured individuals entitled to the combatant’s privilege.

*Combatants* are members of the established armed forces of a government who have a legal right to engage in combat operations. Combatants enjoy “combatant immunity” under international law, protecting them from prosecution for death or injury to persons or damage or destruction of property resulting from combat acts that otherwise comply with the law of war in an armed conflict. A combatant

- Has the right to carry out lawful attacks on enemy military personnel and military objectives;
- Is at risk of attack by enemy military forces at any time, wherever located, regardless of the duties or activities in which he or she is engaged;
- Bears no criminal responsibility (a) for killing or injuring (i) enemy military personnel or (ii) civilians taking a direct part in hostilities, or (b) for causing damage or destruction to property incidental to lawful military operations,
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provided his or her acts, including the means employed to commit those acts, have been in compliance with the law of war; and

- If captured:
  - Is entitled to prisoner of war status,
  - May be detained indefinitely until cessation of active hostilities,
  - Is entitled to humane treatment,
  - May be tried for violations of the law of war, and
  - May only be punished for violations of the law of war as a result of a fair and regular trial.

Limitations on entitlement to the combatant’s privilege are historic and an essential component of the equally historic law of war principle of discrimination. Although the origins of the modern law of war can be traced to classical Greek and Roman times, the Middle Ages provided its greatest development prior to the mid-nineteenth century. Today’s law of war began as an amalgamation of the *jus militaire*, recognized military practice contained in rules of chivalry, and canon law known as the just war tradition.87 Both *jus militaire* and the just war tradition included a requirement for “public war,” that is, war authorized by right (that is, competent) authority. In the *jus militaire*, “public war” was the “antithesis of perfidy and cowardly assassinations, actions repugnant to the conception of chivalry and the membership of the various knightly orders in which knights belonged.”88 Individuals engaging in unauthorized acts of war were acting outside “faith and the law of nations.” They were regarded as “marauders and freebooters,” treated as war criminals if captured, and usually summarily executed.89

Paralleling right authority was the principle of discrimination/noncombatant (civilian) immunity. In the conduct of military operations, commanders were obligated to exercise reasonable care to protect innocent civilians from the harmful effects of combat operations. It also obligated combatants to distinguish themselves from the civilian population, and obligated civilians not to engage in combatant acts.

Through the near century and a half of development of the modern law of war, governments have retained exclusive authority to wage war for practical, political and humanitarian reasons. First is the responsibility of a government to protect its citizens. Second, a desire for stability in international relations necessitates a prohibition of unilateral acts by a civilian or civilians that may lead to war between nations.90 Third, the prohibition on civilians engaging in combatant acts serves to implement and enforce the law of war principle of discrimination.91 The private citizen who engages in battle is not entitled to the combatant’s privilege and forfeits his or her protection as a civilian from direct attack for such time as he or she takes
a direct part in hostilities. If captured, he or she is not entitled to prisoner of war status and may be prosecuted for his or her actions.

Codification of the modern law of war and these distinctions originated in the midst of the US Civil War (1861–65). Dr. Francis Lieber, a Columbia College law professor, offered to draft a document for the Union Army delineating in practical terms existing law of war rules. President Lincoln accepted Lieber’s offer. Signed by President Lincoln on April 24, 1863, as US General Orders No. 100, Lieber’s Instructions for the Government of Armies of the United States in the Field became the primary source for treaty law developed over the next century.

Of direct relevance to the present discussion is a less-known product requested of Professor Lieber. On August 6, 1862, Henry Wager Halleck, General-in-Chief of the Union armies, wrote to Lieber seeking his advice and assistance in addressing the issue of private citizens engaging in unauthorized acts of war and Union law of war obligations toward captured Confederate guerrillas. General Halleck viewed partisans and guerrillas as synonymous. Professor Lieber made a distinction between the two in his essay reply, “Guerrilla Parties Considered with Reference to the Laws and Usages of War.” Lieber argued that partisans enjoy a formal association with a government and its military forces (and entitlement to prisoner of war status), while guerrillas were

self-constituted sets of armed men, in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (guerrilla) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will therefore generally give no quarter.

While Lieber does not identify opposing forces that might have been illustrative of each category, the Virginia cavalry unit commanded by Confederate Colonel John S. Mosby is regarded as meeting Lieber’s category of partisans, and therefore lawful combatants, while William C. Quantrill’s private group of raiders in Missouri were guerrillas (as he used the term in his analysis), and, as such, not entitled to the combatant’s privilege or prisoner of war status.

Lieber maintained this distinction in General Orders No. 100. Article 57 states, “[s]o soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses . . . ,” while acknowledging in Article 59 that “[a] prisoner of war remains answerable for his crimes committed against the captor’s army or people . . . .” Article 81 of General Orders No. 100 states:
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Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

In contrast, Article 82 declares:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

Franc-tireur actions in the Franco-Prussian War and the debate over military operations by Boer farmers dressed in civilian clothing in the Anglo-Boer War (1899–1902) brought the issue to international attention at the First International Peace Conference, held in The Hague in 1899.

Hague Convention II with Respect to the Laws and Customs of War on Land was among the treaties adopted by the 1899 Hague Peace Conference. Article 3 of its Annexed Regulations Respecting the Laws and Customs of War on Land states: “The armed forces of the belligerent parties may consist of combatants and non-combatants.” In case of capture by the enemy both have a right to be treated as prisoners of war.

Following Professor Lieber’s lead, recognition as armed forces was provided not only to the regular forces of a belligerent but also to other forces in Article 1:

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

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.
In countries where militia or volunteer corps constitute the army, or form a part of it, they are included under the denomination "army."

Entitlement to lawful combatant and prisoner of war status for organizations other than the regular forces of a nation was provisional. It was dependent upon these forces acting under government authority and complying strictly with the four conditions listed. Failure of compliance resulted in denial of the combatant's privilege. Individuals acting unilaterally outside an organization were not entitled to the combatant's privilege.

Development of railroads in the late nineteenth century facilitated rapid deployment of military forces, promoting fear by smaller nations such as Belgium and the Netherlands of threats posed by stronger powers such as France and Prussia. Article 2 of the Annex to the 1899 Hague II provided conditional combatant status to what is referred to as a *levée en masse*, as follows:

The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article 1, shall be regarded as belligerent, if they respect the laws and customs of war.

**The Martens Clause**

The participating nations appreciated that Hague Convention II was a first effort at international codification of the law of war for ground forces. Of particular importance to the topic of this chapter is language contained in the main treaty:

It has not . . . been possible to agree forthwith on provisions embracing all the circumstances which occur in practice. On the other hand, it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of the military commanders. Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.

This provision, referred to as the Martens Clause, was the result of a debate over the status of private citizens who took up arms following enemy occupation. Delegations representing major European military powers argued that such individuals should be treated as unlawful combatants subject to summary execution if captured. Smaller European nations argued that they should be regarded as lawful
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combatants as each citizen has a duty to his nation to resist enemy presence. The argument essentially was one for levée en masse "plus," a continuous resistance to enemy occupation. In the end, private citizens who took up arms in resistance to enemy occupation remained unprivileged combatants.99 This prompted incorporation of the Martens Clause.100

These provisions were repeated verbatim or without substantive change in Hague Convention IVRespecting the Laws and Customs of War on Land adopted by the Second International Peace Conference in The Hague, on October 18, 1907.101

A humanitarian basis existed for the decision taken by delegations to the two Hague Peace Conferences. As one international lawyer commented:

The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable.... But if populations have a war right as against armies, armies have a strict right against them. They must not meddle with fighting. The citizen must be a citizen and not a soldier.102

The law of war principle of discrimination prohibits military forces from engaging in direct attack of innocent enemy civilians and the enemy civilian population in general. In addition to obligating military forces to distinguish themselves physically and in appearance from the civilian population, the principle of discrimination obligates civilians to refrain from engaging in combatant acts, as such actions may place the general civilian population at risk. That said, the Martens Clause acknowledged the existence of unspecified but minimum standards of protection and humane treatment for unprivileged combatants upon capture. The Bush administration’s express rejection of Common Article 3 application in US operations in Afghanistan neglected to acknowledge that the United States, as a State party to the 1907 Hague Convention IV, was bound by the Martens Clause in the 1907 Hague Convention IV. The Bush administration’s focus solely on the last four (of six) criteria in Article 4A, paragraph 2, GPW, discussed infra, also neglected the possible legal significance of the Martens Clause.

World War II

The 1939 invasion of major portions of Europe by Germany that began with the German invasion of Poland on September 2, 1939, and of Asia by Japan following its attack on Pearl Harbor on December 7, 1941, eventually brought organized resistance against Axis occupation on a scale previously unseen. The resistance movement within the Soviet Union was massive and well organized by the Soviet
government.\textsuperscript{103} The British Special Operations Executive (SOE) and US Office of Strategic Services (OSS) provided organization, training, equipment and other support to indigenous resistance movements in twenty nations under Axis control.\textsuperscript{104} Resistance to enemy occupation argued for in 1899 by Belgium and other smaller nations, all victims of German or Japanese occupation in World War II, became reality. The World War II resistance experience prompted revisititation of the 1899 debate regarding law of war recognition of a levée en masse “plus” and a major change at the 1949 Geneva Diplomatic Conference in entitlement to combatant and prisoner of war status.

\textbf{1949 Geneva Diplomatic Conference}

The 1949 Geneva Diplomatic Conference met in 1949, completing (from drafts) and adopting four conventions:

- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949;\textsuperscript{105}
- Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;\textsuperscript{106}
- Geneva Convention (III) Relative to the Treatment of Prisoners of War;\textsuperscript{107}

and

- Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.\textsuperscript{108}

The Geneva Conventions are specific and exclusive in providing entitlement to protection. Thus the first convention provides protection for military wounded and sick and medical units, personnel, and transport, while the second convention protects military wounded, sick and shipwrecked and their associated facilities, units, and transport. Legal obligations with respect to protection of and care for civilian sick or wounded, civilian medical facilities, and civilian medical transport are not included.\textsuperscript{109}

Similarly, Article 4 of the GPW is specific in identifying and limiting individuals entitled to prisoner of war status, while the civilians convention is equally specific in identifying the circumstances in which civilians in enemy hands are entitled to protection. The prisoner of war and civilians conventions did not provide all-encompassing, seamless entitlement to protection, but are quite specific in their respective applications to particular individuals.

With respect to private civilians engaged in combat actions, the prisoner of war convention is directly relevant to the topic at hand.

The criteria for prisoner of war entitlement were reconsidered in light of the World War II experience with State-sponsored organized resistance movements.
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Paragraph 1 of Article 4A of the prisoner of war convention reconfirms entitlement to prisoner of war status for members of the regular armed forces and militias or volunteer corps of a government. Paragraph 2 amended the criteria for combatant and prisoner of war status for groups not falling within paragraph 1:

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

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

The International Committee of the Red Cross's (ICRC) Jean S. Pictet acknowledges that recognition of entitlement to combatant and prisoner of war status for State-sponsored resistance groups in enemy-occupied territory "was an important innovation which grew out of the... Second World War." Fully cognizant of the World War II resistance experience, government delegations to the 1949 diplomatic conference declined to expand protection to all private armed groups. The historic criteria of right authority remained fundamental to entitlement to combatant and prisoner of war status.

A common mistake by lay persons, non-international law lawyers, some international law lawyers and, in the case at hand, by senior legal advisers and policymakers in the Bush administration is to recite the four criteria in (a) through (d) of Article 4A(2) as the criteria for any armed group to be eligible for combatant and prisoner of war status. This is a fundamental misunderstanding of the law of war and, in particular, of Article 4A(2), GPW, and the rationale and history behind it. Extension of combatant and prisoner of war status in Article 4A(2) is intentionally and expressly narrower. Combining Articles 2 and 4A(2), there are seven criteria, all of which must be met:

First, there must be an international armed conflict, that is, an armed conflict between two or more nations.
Second, the individual who falls into enemy hands after engagement in combatant activities must be a member of an organized resistance movement, that is, he or she cannot be acting unilaterally or as a member of a levée en masse in which private citizens respond spontaneously.\footnote{114}

Third, the organized resistance movement to which the individual belongs must be operating under the authority and support of a government that is a party to the conflict, that is, it must have right authority. In World War II, this authority was manifested through training, logistical, communications and other support, provided by governments-in-exile with the assistance of the British SOE and American OSS, and military forces supporting them, such as with sealift and airlift for delivering supplies and agents,\footnote{115} as well as overtly through official pronouncements.\footnote{116}

The preceding criteria are prerequisites before the four remaining criteria in Article 4A(2) are applicable. The first two criteria in Article 4A(2) are a threshold that must be crossed before the last four can be considered.\footnote{117} If an armed group meets the threshold criteria, consideration must be given to whether or not the armed group meets each and every one of the remaining criteria listed in Article 4A(2).\footnote{118}

The 1949 change entitled members of an organized resistance movement operating under the authority of a government—but only organized armed groups operating under government authority—to prisoner of war status. The requirement for such movements to “conduct their operations in accordance with the laws and customs of war” confirmed the combatant’s privilege and provided lawful combatant status.

The change in entitlement reflected the experience of World War II resistance movements while codifying the distinction between organized, State-sanctioned partisans and private guerrillas made by Francis Lieber during the American Civil War. Equally important, delegates to the 1949 Geneva Diplomatic Conference declined to provide lawful combatant or prisoner of war status to private citizens acting without government authority.

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (GC) by its title and the language of Common Article 2 applies only in an international armed conflict between two or more nations. The GC filled a gap (that is, protection for civilians in enemy hands, including in enemy-occupied territory). Article 5, paragraph 3, provides limited protection to a civilian “suspected of or engaged in activities hostile to the State” in an international armed conflict as it is defined in Article 2. Private citizens who engage in combatant-like actions other than in occupied territory or enemy territory do not receive protection under the Geneva civilians convention. This excludes transnational terrorists from protection under that treaty.
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Governments participating in the 1949 diplomatic conference did not intend that the four 1949 Geneva Conventions provide a seamless “safety net” of protection for all persons, in particular private individuals or organizations who conduct armed attacks without government authority. The negotiating record of the 1949 Geneva Conventions is clear that the conventions were not intended to and do not provide protection to unprivileged belligerents. In the course of the 1949 diplomatic conference, the delegate representing the ICRC stated that “although the two conventions might appear to cover all categories concerned, irregular belligerents were not actually protected.”

Similarly, the representative of the United Kingdom stated “the whole conception of the...[Geneva civilians convention] was the protection of civilian victims of war, and not the protection of illegitimate bearers of arms.”

In the development of the law of war from the mid-nineteenth century through the four 1949 Geneva Conventions, combatant status and prisoner of war protection was extended to members of a levée en masse (as noted, limited in scope and time) and to organized resistance movements operating in enemy-occupied territory under the authority of a government provided each met rigid conditions for distinguishing themselves from the civilian population and carrying out their operations in accordance with the law of war. In keeping with the centuries-old standards that originated in jus militaire and the just war tradition, governments steadfastly have refused to provide legitimacy to or legal recognition for private armed individuals or groups acting without government authority and responsibility. The historic condemnation of private armed groups remains through their exclusion from combatant or prisoner of war status for the overall protection of the civilian population. Governments over the centuries consistently have given greater priority to the protection of their civilian populations and individual civilians over entitlement to prisoner of war status for private armed groups, in part to dissuade private citizens from taking up arms and waging war without government authority and in respect for the law of war principle of discrimination.

With this history in mind, the status of members of the Taliban and al-Qaeda may be weighed.

**Al-Qaeda**

The history of Afghanistan and the fighting in the two decades prior to al-Qaeda’s attack on the United States on September 11, 2001 focused on the Taliban. Al-Qaeda’s history within Afghanistan and overall is loosely intertwined with the Taliban. Al-Qaeda was founded by Usama bin Laden, scion of a wealthy Saudi family, in protest against Saudi Arabia’s consent to US bases in Saudi Arabia in the buildup to, and execution of, the 1991 coalition liberation of Kuwait from Iraq.
Bin Laden, a veteran of the mujahidin battles of the 1980s against Soviet occupation of Afghanistan, arrived in Jalalabad, Afghanistan, on May 18, 1996, an area not under Taliban control and without invitation from the Taliban. He had an agenda separate from, and broader than, the Taliban’s battle within Afghanistan: a transnational jihad against the West and, in particular, the United States.

An extended discussion of Usama bin Laden and al-Qaeda’s activities is unnecessary. Professors Goldman and Tittemore describe al-Qaeda as “a quintessential non-State actor,” stating, “President [Bush] and Defense Secretary [Rumsfeld] are unquestionably correct in their depiction of al-Qaeda as an international terrorist organization.” Professor Toman agrees with Professors Goldman and Tittemore with respect to their first conclusion, declaring, “On the basis of this very short practical analysis, we can easily conclude, that al-Qaeda members cannot benefit—in any circumstances—from the status of prisoners of war.” Nor does a law of war basis exist for al-Qaeda members to enjoy the combatant’s privilege.

The Taliban

Article 4 of the 1949 Geneva prisoner of war convention identifies persons entitled to prisoner of war status. Prisoner of war entitlement differs from combatant status, the latter being narrower in scope.

The preceding pages establish that the Taliban was not the government of Afghanistan. That said, it is necessary to review the relevant provisions in Article 4 to determine whether captured Taliban are entitled to prisoner of war status.

Article 4A(1)

Article 4A(1) provides prisoner of war status to “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”

In the 1949 Geneva Conventions, the term “Party to the conflict” means a “Contracting Party” or “High Contracting Party,” in each case referring to a government that has ratified or acceded to the conventions. As noted in the ICRC Commentary,

Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others. The motive of the Convention is so essential for the maintenance of civilization that the need is felt for its assertion, as much out of respect for it on the part of the signatory State itself as in the expectation of such respect from all parties.

As only governments may contract on behalf of a nation or, said differently, only governments may agree to become parties to the conventions, the term

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"Party to a conflict" refers to an armed conflict between the military forces of two or more nations. An armed private group may choose to participate in an international armed conflict on one side or another, but its participation does not make it a “Party to the conflict” in the sense that phrase is used in the 1949 Geneva Conventions.127

In the same vein, the term “armed forces” refers to “all members of the regular armed forces of a nation,”128 to include members of its reserve or militia forces. It is left up to each government to determine how its military is to be composed. In the United States, this includes the reserve component of each of its four military services and the National Guard when the latter have been activated by the President. The term “militia” in Article 4A(1) does not refer to private armed groups.

As the Taliban was not the government of Afghanistan in fact or in law, it was not a “Party to the conflict” as that term is used in the 1949 Geneva Conventions. Nor were the Taliban part of the military of Afghanistan, as it no longer existed. Neither a national government (other than perhaps in name only with respect to the Rabbani government) nor a national military force existed during the period in question.

Two issues arose in the debate over the Taliban and its status. As noted in the factual summary, the Taliban did not have the formal unit structure of a Western army. Similarly, some Taliban fighters (“non-Afghan Taliban”) were from Pakistani tribes, while other fighters came from other nations. Were this a case in which the Taliban had been the government of Afghanistan and its military the regular military of Afghanistan, and therefore members of its forces falling under Article 4A(1), neither issue would have been a basis for denial of entitlement to prisoner of war status. Other than in the most general terms, such as command responsibility, the GPW does not specify force structure requirements. Further, the GPW is silent and State practice extensive with respect to the national origin of a member of the regular military forces. For example, US citizens joined British Commonwealth military forces and served in World Wars I129 and II,130 and the US military routinely enlists foreign nationals residing in the United States in its armed forces, often through the enticement of US citizenship following completion of a successful initial enlistment tour.131 While Pakistan covertly supplied the Taliban with arms and ammunition and other support during the 1994–2001 Afghan civil war, and to a degree facilitated the movement of Pakistani tribesmen to join the Taliban, it was not an acknowledged party to the conflict in Afghanistan. As such, Pakistani and other non-Afghans who joined the Taliban were entitled to no greater status under the law of war than were Afghan members of the Taliban.
Article 4A(2)
As noted earlier, Article 4A(2), GPW, was an outgrowth of the World War II experience of organized resistance movements operating under the authority and with the support of the former governments of nations under Axis control. It does not provide entitlement to prisoner of war status to all private armed groups, but only to those operating with government authority. In this respect it repeated the formula articulated by Dr. Francis Lieber in his 1863 “Guerrilla Parties Considered with Reference to the Laws and Usages of War,” and proposed in the form of an extended levée en masse at the First Hague Peace Conference in 1899 by Belgium and other smaller military powers, without success. The World War II government-sanctioned resistance movement experience prompted reconsideration of the issue and a guarded and highly conditioned broadening of entitlement to prisoner of war status only to organized armed groups acting under government authority.

Assuming arguendo that there was an international armed conflict upon commencement of US and coalition offensive ground operations against the Taliban and al-Qaeda on October 20, 2001, the Taliban did not meet the six criteria in Article 4A(2). Arguably it was an organized armed group, but loosely organized along tribal lines. Prior to commencement of US and coalition military operations, the Taliban had been financially and to some extent logistically supported by the Pakistan ISID and Saudi Arabia in the civil war in Afghanistan. Saudi Arabia had withdrawn its support and Pakistan withdrew support. As noted, neither was a “Party to the conflict” in the Afghan civil war. The Taliban were not entitled to prisoner of war status under Article 4A(2), as it failed to meet all six criteria therein.

Article 4A(3)
Article 4A(3) entitles “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power” to prisoner of war status and entitlement.

This provision, new in the 1949 Convention, was based upon the experience of World War II, as members of the armed forces of nations conquered and occupied by Germany continued the fight under their respective governments-in-exile. Jean S. Pictet, in the Commentary on the GPW he edited on behalf of the International Committee of the Red Cross, makes it clear that the point of reference for Article 4A(3) was the Free French: “This provision must be interpreted, in the first place, in the light of the actual case which motivated its drafting—that of the forces of General de Gaulle which were under the authority of the Free French National Liberation Committee.”
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Pictet continues:

The expression “members of the regular armed force” denotes armed forces which differ from those referred to in subparagraph (1) of this paragraph[138] in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a Party to the conflict. These “regular armed forces” have all the material characteristics of armed forces in the sense of subparagraph (1): they wear uniform[s], they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in subparagraphs (2) (a), (b), (c), and (d).[139]

The distinguishing feature of such armed forces is simply the fact that in view of their adversary, they were not operating or are no longer operating under the direct authority of a Party to the conflict in accordance with Article 2 of the Convention.[140]

One solution in order to bring these armed forces legally within the scope of the Convention was to associate them with a belligerent fighting against the Power concerned. During the Second World War the German authorities accepted this solution and stated they would consider the Free French Forces to be “fighting for England”. The conference of Government Experts also supported this solution.[141]

Another procedure which was proposed by the [ICRC] was that the forces should be recognized provided they were constituted in a regular manner “irrespective of the Government or authority under whose orders they might claim to be.” In order to preclude any abusive interpretation which might have led to the formation of armed bands such as the “Great Companies” of baneful memory,[142] the drafters of the 1949 Convention specified that such armed forces must “profess allegiance to a Government or authority not recognized by the Detaining Power.” It must be expressly stated that this Government or authority must, as a minimum requirement, be recognized by third States, but this condition is consistent with the spirit of the provision, which was founded on the specific case of the forces of General de Gaulle.

It is also necessary that this authority, which was not recognized by the adversary, should either consider itself as representing one of the High Contracting Parties, or declare that it accepts the obligations stipulated in the Convention and wishes to apply them.[143]

The Taliban did not meet the criteria contained in Article 4A(3) inasmuch as it was never the de jure government of Afghanistan. Throughout the Taliban era and the period in question, the government of Afghanistan recognized by the United Nations, the United States and by all nations other than Pakistan, Saudi Arabia and the United Arab Emirates was that of Burhanuddin Rabbani.[144] His regime retained
“title” to the Afghanistan seat in the United Nations throughout the ensuing events in Afghanistan set forth in this article. As previously noted, Saudi Arabia, the UAE and Pakistan withdrew their recognition of the Taliban as the United States and its coalition partners commenced military operations in Afghanistan.

A distinction exists between the “Free French” case as envisioned by Article 4A(3), GPW, and the situation in Afghanistan. For Article 4A(3) to have applied to captured Taliban, the Taliban at some point would have had to have been the de jure government of Afghanistan, a status it never achieved.

Article 4A(6)
Article 2 of the Annex to the 1907 Hague Convention IV entitled citizens “who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves” into regular armed forces to status as a levée en masse and to prisoner of war status if captured provided its members “carried their arms openly” and respected the law of war. Article 4A(6), GPW, reconfirmed the Hague provision, though Pictet acknowledges that a levée en masse “almost never occurred during the Second World War.” Entitlement to levée en masse exists only in territory not under enemy occupation. Pictet also notes that a levée en masse “can only be considered to exist during a very short period of time, that is, during the actual invasion period.” Thereafter, such individuals are entitled to prisoner of war status only if they meet the six criteria in Article 4A(2), GPW.

The Taliban, however loosely structured, was an armed faction engaged in a civil war with other warlords or factions. Its resistance to the initial US/coalition assault would not have been a spontaneous, informal taking up of arms by individual private citizens of the sort contemplated by the language either of the 1907 Hague Convention or the 1949 GPW.

Special Operations Forces in Non-Standard Uniforms
Entry of US and allied SOF into Afghanistan in October 2001 brought to the fore the law of war issue of dress of some SOF in indigenous attire. It is a matter this author examined at length, but which by necessity must be addressed briefly here. In addition to the legal issue as such, it exposes an inconsistency in the Bush administration’s arguments for denial of prisoner of war status to captured Taliban.

US and allied SOF were members of the regular forces of their nations and, consistent with Article 4A(1), GPW, entitled to prisoner of war status if captured by military forces of an enemy nation. The entitlement to prisoner of war status of individuals who fall within Article 4A(1) is absolute; it is not conditional, as is the
combatants and organized resistance endeavoring to gain prisoner of war entitlement under Article 4A(2), GPW.\textsuperscript{149}

As noted, governments involved in drafting the 1949 GPW were fully cognizant of the World War II resistance experience. It was the basis for broadening the protection contained in Article I, Annex to the 1907 Hague Convention IV and Article 1, paragraph 1, Geneva Convention Relative to the Treatment of Prisoners of War of July 27, 1929,\textsuperscript{150} to include members of State-sponsored organized resistance movements as individuals entitled to prisoner of war status provided they met the four criteria contained in each of those treaties and in Article 4A(2) of the 1949 GPW. Had governments in 1899, 1907, 1929 or 1949 regarded the wearing of a uniform a prerequisite for captured regular forces’ entitlement to prisoner of war status, it would not have been difficult to have said so. They did not.\textsuperscript{151} That said, a general assumption exists that members of a State’s armed forces (as that term is used in the GPW), including SOF, will meet the four criteria contained in Article 4A(2) in their operations. In practical terms, this has been accomplished by regular forces, including SOF.\textsuperscript{152}

A distinction exists, however, between the requirement in Article 4A(2)(b) to have a “fixed distinctive sign recognizable at a distance” and an assumption that regular forces, including SOF, must wear full uniforms in order to remain entitled to prisoner of war status. This distinction is not supported by treaty text or State practice, as this author has shown.\textsuperscript{153}

Several problems arise with an assumption that uniforms are required for entitlement to prisoner of war status: (a) no such requirement exists in the 1899 Hague Convention II, 1907 Hague Convention IV, 1929 GPW, nor in the 1949 GPW; (b) the term “uniform” is not used in any of these treaties;\textsuperscript{154} (c) “uniform” is undefined in the law of war;\textsuperscript{155} and (d) requiring SOF to wear a complete uniform would impose upon them a higher standard than that imposed upon members of an organized resistance movement entitled to prisoner of war status under Article 4A(2), GPW.

The issue was clarified in the diplomatic history of the 1974–77 diplomatic conference that produced the 1977 Additional Protocol I and II. The criteria for combatant and prisoner of war status were relaxed in Articles 43(1) and 44(3), for non-State actors in conflicts of the type defined in Article 1(4). As neither the United States nor Afghanistan is a party to Additional Protocols I and II, these provisions are not directly germane to the issue at hand. However, Article 44(7) and its legislative history are. Article 44(7) states “[t]his Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.”
An authoritative commentary on this provision, prepared by individuals directly involved in its drafting and negotiation, explains the meaning of this provision:

Within the Working Group the initial enthusiasm for a single standard applicable both to regular and independent armed forces was dampened when concern was expressed that the [new] rules . . . might encourage uniformed regular forces to dress in civilian clothing. . . Accordingly, para. 7 was developed to [overcome this concern]. . . The report of the Working Group, however, states that "regulars who are assigned to tasks where they must wear civilian clothes, as may be the case . . . with advisers assigned to certain resistance units, are not required to wear the uniform." The implication of para. 7, construed in the light of the Working Group report is that uniforms continue to be the principal means by which members of regular uniformed units distinguish themselves from the civilian population . . . but that members of regular armed forces assigned or attached to duty with the forces of resistance or liberation movements may conform to the manner in which such irregulars conform to the requirements of para. 3.156

The situation US and other coalition SOF faced upon entry into Afghanistan was not new. Special operations forces working with indigenous resistance forces frequently find themselves singled out as high-value targets by opposing forces.157 With the precedent of the consequences of the 1993 Battle of Mogadishu, following which US forces were withdrawn from Somalia, and fearing a similar withdrawal in the event of US casualties, Northern Alliance warlords insisted on US and other SOF wearing indigenous attire in the opening phase of operations against al-Qaeda and the Taliban so they would blend in with the forces with whom they served.158 Opposing sides generally had no difficulty identifying one another as fighters.159

The issue at hand with respect to al-Qaeda, the Taliban and coalition SOF in Northern Alliance dress was twofold: first, whether they met any of the criteria in Article 4, GPW, for entitlement to prisoner of war status, and second, if they were lawful combatants, whether they engaged in "treacherous killing," prohibited by Article 23(e), Annex to the 1907 Hague Convention IV,160 and otherwise referred to as perfidy. In the case at hand the prohibition on perfidy is defined in part in Article 37, 1977 Additional Protocol I, as follows:

1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

(c) the feigning of civilian or non-combatant status . . . .161

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With the exception of acts by individual members of al-Qaeda or the Taliban, perfidy was not an issue in the course of the operations during the time frame in question. As noted, both sides readily identified opposing forces.

President Bush’s Decision
On February 7, 2002, President George W. Bush signed a memorandum to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Director of Central Intelligence, Chairman of the Joint Chiefs of Staff and others concerning humane treatment of al Qaeda and Taliban detainees. The memorandum, by acknowledgment based upon a legal opinion rendered by the Attorney General, concluded:

1. None of the provisions of the 1949 Geneva Conventions apply to “our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party.”

2. While the Attorney General advised the President that he has the constitutional authority to “suspend [sic] Geneva as between the United States and Afghanistan,” President Bush declined to do so with respect to the conflict with the Taliban.

3. The conflict with al Qaeda and the Taliban was an international armed conflict in which Common Article 3 to the four 1949 Geneva Conventions (non-international armed conflicts) did not apply.

4. Taliban detainees are unlawful combatants. Neither Taliban nor al-Qaeda detainees are entitled to prisoner of war status.

5. Detainees will be treated “humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”

The President’s decision was preceded by considerable interagency debate, primarily between the Departments of Justice and State. Professors Goldman, Tittemore and Toman provide analyses of the President’s decision and details of the views taken within the executive branch to the extent they were available at the time each article was written. The details of the debate are worthy of separate analysis beyond the scope of this article and, moreover, have been resolved more by decisions of the US Supreme Court since February 7, 2002, than by the President’s
February 7 memorandum.\textsuperscript{165} It is sufficient to note that the Department of Justice and the Attorney General aggressively sought suspension of the 1949 Geneva Conventions, while the Secretary of State argued for a decision consistent with longstanding US practice of providing humane treatment to individuals captured on the battlefield consistent with the GPW, even where an individual’s precise status may not always be clear.\textsuperscript{166}

In the debate between the Departments of Justice and State over the law of war status of captured Taliban, disagreements over facts played a large role. When Justice Department officials offered as one option the conclusion that Afghanistan was a failed State,\textsuperscript{167} Secretary of State Colin L. Powell’s response did not disagree, but contained an attachment with a diplomatically obscure and factually evasive rebuttal that “any determination that Afghanistan is a failed State would be contrary to the official US government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions.”\textsuperscript{168} Similarly, White House Counsel Alberto R. Gonzales argued that “[t]he argument that the United States has never determined that GPW did not apply is incorrect. In at least one case (Panama in 1989) the United States determined that GPW did not apply even though it determined for policy reasons to adhere to the convention.”\textsuperscript{169} This assertion was incorrect as the US position during Operation Just Cause was that Article 3 Common to the 1949 Geneva Conventions applied at a minimum. Panamanian Defense Forces captured during Operation Just Cause were provided prisoner of war protections pending formal determination by individual Article 5, GPW, tribunals, if deemed necessary.\textsuperscript{170}

A memorandum prepared by the late Edward R. Cummings, a senior and highly respected Department of State lawyer with extensive law of war experience, notes that his consultations determined that “[t]he lawyers involved [Departments of Justice, State, and Defense, White House Counsel, Office of the Vice President, and Legal Counsel to the Chairman, Joint Chiefs] all agree that al Qaeda or Taliban soldiers are presumptively not POWs [prisoners of war].”\textsuperscript{171} However, it emphasized that Department of Defense, Joint Chiefs of Staff and Department of State

lawyers believe that, in the unlikely event that “doubt should arise” as to whether a particular detainee does not qualify for POW status, we should be prepared to offer additional screening on a case-by-case basis, either pursuant to Article 5 of GPW (to the extent the convention applies) or consistent with Article 5 (to the extent it does not).\textsuperscript{172}

The memorandum notes that lawyers at the Department of Justice, White House Counsel and Office of the Vice President did not agree.
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The President’s decision attempted to split the difference, but in a way that was less politically and legally defensible than had the law been strictly applied, as has been the long-standing practice of the United States in armed conflicts in which captured enemy personnel may not have met the criteria contained in Article 4, GPW, for entitlement to prisoner of war status.

Public statements offering a rationale for President Bush’s decision contained a flawed law of war analysis. On February 7, 2002, the following White House announcement explained the legal basis for President Bush’s decision:

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.173

At a White House press briefing that same day, White House Press Secretary Ari Fleischer stated:

[T]he national security team . . . has always said that these detainees should not be treated as prisoners of war, because they don’t conform to the requirements of Article 4 of the Geneva Convention, which detailed what type of treatment would be given to people in accordance with POW standards. That’s a very easily understood legal doctrine of Article 4. For example, the detainees in Guantanamo did not wear uniforms. They’re not visibly identifiable. They don’t belong to a military hierarchy. All of those are prerequisites under Article 4 of the Geneva Convention, which will be required in order to determine somebody is a POW.174

The following day Secretary of Defense Donald H. Rumsfeld repeated Fleischman’s comment, stating the GPW “requires soldiers to wear uniforms that distinguish them from the civilian population.”175 Continuing, he stated, “The Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas.”176
The Fleischer and Rumsfeld statements contain two fundamental discrepancies. First, each fails to articulate the primary threshold for entitlement to prisoner of war status: al-Qaeda and the Taliban were private armed groups lacking any authorization or support from a State party to the armed conflict. Failing this, the four criteria cited by Fleischer and Rumsfeld are not relevant; they and the balance of the GPW do not apply to al-Qaeda, the Taliban or any other armed private group. As explained, the concept of right authority dates back more than eight centuries; it is expressly stated in Article 4A(2), GPW; yet it is missing from the Gonzales memorandum to President Bush, the Bush memorandum, and the Fleischer and Rumsfeld statements. The key element (right authority) was completely missed or ignored in the official decision-making process and explanations of the Bush administration.

Second, emphasis on captured al-Qaeda and Taliban not wearing a “uniform” not only was factually incorrect, but ignored the fact that US forces fought alongside anti-Taliban forces who also did not wear a “uniform” in the Western European tradition. Moreover, the term “uniform” is not the prerequisite in Article 4A(2), GPW, which is “having a fixed distinctive sign recognizable at a distance.” As previously noted, “uniform” is neither used nor defined in the relevant law of war treaties. The distinctive apparel worn by Taliban and anti-Taliban forces and, in the case of the latter, by some US special operations forces working with them, met the “distinctive sign recognizable at a distance” test contained in Article 4A(2).

Finally, in emphasizing the erroneous “uniform” test while ignoring the “organized resistance movement of a Party to the conflict” requirement, Fleischer and Rumsfeld not only ran afoul of the treaty provision but appeared to suggest that al-Qaeda and the Taliban represented the government of Afghanistan, contrary to the President’s decision that “[b]y its terms, Geneva applies to conflicts involving ‘High Contracting Parties,’ which can only be states.” This inconsistency was not missed by critics of the administration’s approach to law of war application with respect to captured members of these two organizations. Whether one agrees or disagrees with President Bush’s decision, these statements were an incredible stumble given the degree to which this issue was discussed within the executive branch prior to the President’s February 7 decision.

President Bush’s principal conclusion that neither al-Qaeda nor the Taliban was entitled to combatant or prisoner of war status was legally correct, but its supporting statements were contradictory and factually and legally incorrect, as follows:
<table>
<thead>
<tr>
<th>Bush administration rationale for denial of prisoner of war status to captured al-Qaeda and Taliban</th>
<th>Factual or legal discrepancy, or contradictory statements or actions by the Bush administration</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;The President has determined that the [GPW] applies to the Taliban detainees, but not to the al-Qaida detainees.&quot;</td>
<td></td>
</tr>
<tr>
<td>Legally incorrect and contradictory. As noted in subsequent statements and the six conditions contained in Article 4A(2), GPW, captured Taliban were not entitled to prisoner of war status. Therefore GPW did not apply to Taliban detainees.</td>
<td></td>
</tr>
<tr>
<td>&quot;[T]he President has determined that the Taliban are covered by the [GPW], . . . . [H]owever, the Taliban detainees do not qualify as POWs.&quot;</td>
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<tr>
<td>Inconsistent with the President's statement that &quot;[b]y its terms, [GPW] applies to conflicts involving 'High Contracting Parties,' which can only be states.&quot;</td>
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<td>The first implies that the Taliban was the de jure government. The second contradicts the first.</td>
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<td>&quot;Al Qaeda is not a High Contracting Party.&quot;</td>
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<tr>
<td>Legally vague and inaccurate. It would have been more accurate to say &quot;al-Qaeda is a private armed group that meets none of the GPW categories for POW status.&quot;</td>
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<tr>
<td>&quot;Al Qaeda is not a state party to the [GPW]; it is a foreign terrorist group. As such, its members are not entitled to POW status.&quot;</td>
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<tr>
<td>Inconsistent with first statement (above) that &quot;GPW applies to Taliban detainees.&quot; GPW applies to captured individuals who meet one of the categories contained in Article 4. If captured personnel do not fall within one of those categories, GPW is legally inapplicable.</td>
<td></td>
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<tr>
<td>&quot;Under the terms of the [GPW], neither the Taliban nor al-Qaida detainees are entitled to POW status.&quot;</td>
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<tr>
<td>Contradictory statements. First statement is not supported factually.</td>
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<tr>
<td>&quot;We never recognized the Taliban as the legitimate Afghan government.&quot;</td>
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<td>&quot;The Taliban was not the government of Afghanistan.&quot;</td>
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</table>
**Bush administration rationale for denial of prisoner of war status to captured al-Qaeda and Taliban**

Captured al-Qaeda and Taliban “did not wear uniforms. They’re not easily identifiable.”

GPW “requires soldiers to wear uniforms that distinguish them from the civilian population. The Taliban did not wear distinctive signs, insignias, symbols, or uniforms.”

Assuming reference by each was to Article 4A(2), GPW, there is no requirement to wear uniform, but to wear “a fixed distinctive sign recognizable at a distance.”

“Distinctive sign” one of six requirements in Article 4A(2), GPW, all of which must be met.

Factually incorrect: SOF reported both al-Qaeda and Taliban wore distinctive attire and by and large were easily identifiable when assembled as fighting units.

US/coalition SOF worked with and wore indigenous (Northern Alliance) attire that met the “distinctive sign” criteria.

Hypocritical to emphasize “failure to wear uniform” as the basis for denial of POW status when coalition forces were similarly attired in non-standard (Northern Alliance) uniforms.

**Al-Qaeda and Taliban “don’t belong to a military hierarchy.”**

Statement is factually incorrect, ambiguous, incomplete.

Taliban had tribal hierarchy. GPW establishes no specific organizational criteria.

Statement fails to emphasize that there are six criteria in Article 4A(2), GPW, each of which must be met for entitlement to POW status.

**Taliban hid in mosques.**

Taking up position in a mosque is not a violation of the law of war. It may result in the mosque relinquishing its normal status as a civilian object and becoming a military objective, but is not necessarily a law of war violation or a basis for denial of prisoner of war status.

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**Conclusions and Lessons to Be Learned**

This author’s remit was to examine the issue of al-Qaeda and the Taliban entitlement to combatant and prisoner of war status. As concluded herein, neither al-Qaeda nor the Taliban were entitled to lawful combatant or prisoner of war status.
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The author believes the paper would be incomplete if it did not identify lessons to be learned from the actions taken by the Bush administration and others with respect to this process. Several conclusions or lessons may be drawn from the situation as it existed and the decision-making process related to the law of war status of al-Qaeda and Taliban captured in Afghanistan between the beginning of US/coalition offensive operations in October 2001 and President George W. Bush’s decision memorandum of February 7, 2002:

- President George W. Bush was legally correct in concluding that neither al-Qaeda nor the Taliban met the prerequisites for prisoner of war status, but for the wrong reasons.
  - Both al-Qaeda and the Taliban were private armed groups. Neither operated as an agent of a government. As such, both groups lacked right authority, the centuries-old prerequisite for entitlement to lawful combatant and prisoner of war status that is continued in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. This point was completely overlooked or ignored in the Bush administration’s rationale for denial of prisoner of war status to captured al-Qaeda and Taliban.
  - The Taliban was one faction in a civil war in a failed State. It had achieved neither status nor international recognition as the de facto or de jure government of Afghanistan. As was the case with captured al-Qaeda, Taliban fighters did not meet any of the categories within Article 4, GPW, for entitlement to prisoner of war status.
  - The Bush administration rationale for denial of prisoner of war status to captured Taliban was fundamentally flawed in its focus exclusively on the last four criteria of the six criteria contained in Article 4A(2), GPW, and inconsistent given US active support of and alliance with Northern Alliance forces that did not meet the same four criteria.
  - Arguments by administration officials to “suspend” or minimize GPW application, and language used to accomplish this in the administration’s rationalization for denial of prisoner of war status, ignored the historic leadership the United States has exercised in law of war application in general and in providing humane treatment for captured personnel, even those not entitled to prisoner of war status.
  - The law of war is a highly esoteric subject. It requires careful research, reading and understanding of treaty texts, their diplomatic history and State practice, rather than cursory reading and selective use of treaty phrases in a manner inconsistent with their meaning. No competent lawyer would cite a case
without reading it in its entirety nor would he or she cite to a court a statutory provision without researching its law of war history. Making decisions related to law of war issues requires the same level of research, diligence and competence. This was not manifested in administration documents related to the determination of the status of al-Qaeda and the Taliban.

- The flawed arguments offered in support of the President's February 7, 2002 decision were politically based rather than based on the law. They ignored the fact that the 1949 Geneva Conventions were submitted to the Senate for its advice and consent to ratification by a Republican president who, as a military officer, led the Allied campaign to victory against Germany in World War II; that the 1949 Geneva Conventions have been applied in every armed conflict since their ratification without hesitation by successive administrations (four Republican and four Democrat), even where questions existed as to their formal application, because of US leadership in applying the law of war; and that these decisions did not hinder US military operations or place national security at risk.

- While his decision on the key point may have been correct, President Bush erred in accepting the advice of individuals who lacked military experience and in-depth knowledge of the law of war, but possessed skepticism, if not disdain, for the law of war, over that of individuals with military, combat and substantial law of war expertise and experience. This error affected the credibility of the decision and damaged the public diplomacy aspect of fighting the transnational terrorist threat posed by al-Qaeda and other terrorist groups associated with it.

- The executive branch possesses the subject-matter expertise capable of producing a legally accurate, credible and correct document to explain the rationale for denial of lawful combatant and prisoner of war status to private armed groups like al-Qaeda and the Taliban. The unnecessarily secretive decision-making process leading up to the President’s February 7, 2002 memorandum failed to utilize the expertise available to it, to its detriment.

- The assertion of “universal applicability” of the 1949 Geneva Conventions (by virtue of their ratification or accession by all governments) is in sharp conflict with the significant failure of their application and implementation by the majority of State parties. The fundamental inconsistency of Afghanistan’s tribal warfighting culture and history of abuse of innocent civilians and persons hors de combat with the law of war should have been apparent to and recognized by the International Committee of the Red Cross in eliciting Afghanistan’s ratification of the 1949 Geneva Conventions, and by the government of Switzerland, as the depositary of the Geneva Conventions, in accepting Afghanistan’s instrument of ratification or accession. Law of war treaty ratification should be a matter of
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quality of and capability for implementation, respect and adherence, rather than mere quantity of State parties. “Universal applicability” means nothing if there is not universal application.

• Afghanistan’s cultural history does not relieve it of its treaty obligations. If the law of war is to have any relevance, State parties must be held accountable for their failures to take steps beyond merely being a name on the list to implement them.

• If the International Committee of the Red Cross is to maintain its claim as the “guardian of the Geneva Conventions,” it must do more to gain “universal application” of law of war treaties to which each State is a party.

Notes


4. JAMES MOLONEY SPAIGHT, WAR RIGHTS ON LAND 17 (1911).


6. For an analysis of the basis for the Bush administration philosophy, see Stephanie Carvin, Linking Purpose and Tactics: America and the Reconsideration of the Laws of War During the 1990s, 9 INTERNATIONAL STUDIES PERSPECTIVES 128 (2008).

7. See, e.g., RICHARD H. SHULTZ JR. & ANDREA J. DEW, INSURGENTS, TERRORISTS, AND MILITIAS 5 (2006), where the authors correctly comment that “the Somali clan warriors that took on Task Force Ranger in 1993 either did not agree with or had never heard of strategist [Karl von] Clausewitz or international lawyer [Hugo] Grotius,” referring to the Battle of Mogadishu on October 3–4, 1993, between the forces of local Somali warlord Mohammad Fawiz Aidid and US Army and Navy personnel. Accounts of the battle are KENT DELONG & STEVEN TUCKEY,
Sir Adam Roberts acknowledged this problem in his 2003 Naval War College International Law Studies analysis:

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.


8. The first US military ground forces to arrive in Afghanistan following the September 11, 2001 al-Qaeda hijacking of four commercial airliners and their use in attacks on the twin towers of the World Trade Center, the Pentagon and an unconfirmed third target were US special operations forces (SOF) who engaged in ground reconnaissance missions preceding US and British air and cruise-missile attacks against Taliban communication and air-defense targets on October 7, 2001. STEPHEN BIDDLE, AFGHANISTAN AND THE FUTURE OF WARFARE: IMPLICATIONS FOR ARMY AND DEFENSE POLICY 8 (2002). Offensive ground operations began with arrival of US Army Special Forces Operational Detachments Alpha 555 and 595, 5th Special Forces Group, which were inserted on the night of October 19-20, 2001. CHARLES H. BRISCOE ET AL., WEAPON OF CHOICE: U.S. ARMY SPECIAL OPERATIONS FORCES IN AFGHANISTAN 96 (2003). Their entry was preceded by US and British air and cruise-missile attacks on Taliban positions on October 7, 2001. GARY BERNTSEN & RALPH PEZZULO, JAWBREAKER 77 (2005). During the period covered, US SOF were joined by SOF from Australia, Canada, Denmark, the Netherlands and the United Kingdom. The role of British SOF is described in DAMIEN LEWIS, BLOODY HEROES (2006).


10. BRISCOE ET AL., supra note 8, at 2.

11. Id. Professor Frank L. Holt observes:

The long rhythms of Afghan history do show some periods of relative calm during which cities grew, trade routes pulsed, irrigated agriculture expanded, and the arts flourished, but between each renaissance we find an era of ruin brought on or exacerbated by the parochialism, tribalism, fierce independence, and mutual hostility .... These social conditions, not to mention physical challenges of a harsh terrain and environment, stretch back as far as our earliest written sources will carry us. In these
respects, the twenty-first century C.E. differs very little from the fifteenth or fifth C.E. or even the fourth B.C.E.

FRANK L. HOLT, INTO THE LAND OF BONES: ALEXANDER THE GREAT IN AFGHANISTAN 9–10 (2005). See also BYRON FARWELL, QUEEN VICTORIA’S LITTLE WARS 143 (1973); JOHN H. WALLER, BEYOND THE KYBER PASS: THE ROAD TO BRITISH DISASTER IN THE FIRST AFGHAN WAR IX (1990); DAVID LOYN, BUTCHER & BOLT: TWO HUNDRED YEARS OF FOREIGN ENGAGEMENT IN AFGHANISTAN xxxvii, 12, 20, 46, 57, 238 (2008); AHMED RASHID, TALIBAN 9–10 (2001); STEVE COLL, GHOST WARS 110–11 (2004); DALTON FURY, KILL BIN LADEN 139 (2008). In explaining tribal allegiance and its sustenance in today’s world, Shultz and Dew offer the following:

[Sir Edward] Evans-Pritchard’s segmentary-lineage theory was particularly applicable when the tribal setting was egalitarian. Such tribal groupings are decentralized and relatively small, numbering no more than several thousand. Building larger units was difficult because such tribes did not accept the authority of an outside chieftain. Leader status was gained through charisma, military prowess, negotiation skills, and moral status. Consequently, establishing larger tribal organizations in a segmentary-lineage system was likely only in the event of an external threat. Otherwise, larger political units existed, at best, as quasi-states. A ruling lineage can come to be recognized as providing leadership for a larger group consisting of other lineages—subtribes or clans. However, the establishment of such a centralized political relationship is complicated and delicate. Tribal organizations are based on kinship ties and patrilineal descent, making more centralized political organizations atypical.

SHULTZ & DEW, supra note 7, at 50, citing EDWARD EVANS-Pritchard, THE NUER, A DESCRIPTION OF THE MODES OF LIVELIHOOD AND POLITICAL INSTITUTIONS OF A NILOTIC PEOPLE (1940) and EDWARD EVANS-Pritchard, THE SANUSI OF CYRENAICA (1949). Continuing:

Why, despite the crushing forces of modernity, do [traditional societies] continue to endure? The answer lies in what Ibn Khaldun, writing in the fourteenth century, said about asabiyah. The strength of that solidarity depends on the extent to which a tribe was segmentary, egalitarian, decentralized, and autonomous. Thus, the underlying foundation for those forces is the social principle of kinship, which is central to a tribal society’s maintenance of its union. Tribes endure when the ties that bind them endure.

Id. at 51.

With respect to Afghanistan in particular, Shultz and Dew note that “[t]he Afghan tribes have tolerated state power for the advantages it provides over other tribal rivals. However, the state does not command the Afghan tribes and in the best of times has only limited authority over them.” Id. at 157.

12. RASHID, supra note 11; SCHUEBER, supra note 7, at 108; LOYN, supra note 11, at xxxiv, xxxvii, 12, 20. David Loyn offers an example of the philosophy of decentralized rule in relating that in 1838, following British support for Shah Shuja as king, “[n]o one could give a response to Jabar Khan when he said, ‘If Shah Shuja is really a king . . . leave him now with us Afghans, and let him rule if he can.’” Continuing, Loyn declares: “Afghans would make similar challenges in the wars that followed, up to and including the appointment of President [Hamid] Karzai by the U.S.” Id. at 46.

13. See SHULTZ & DEW, supra note 7, at 150–54, for an excellent description of the tribal system within Afghanistan and the critical distinctions within and between tribes. See also FARWELL, supra note 11, at 147–48.

14. LOUIS DUPREE, AFGHANISTAN 316 (1973), as cited in BRISCOE ET AL., supra note 8, at 3.
As Loyn (supra note II, at 147) notes:

The ability of Muslims with different views of Jihad and various political ends to join against a common enemy would have profound importance when the frontier again became the front line, a crucible of violence, in the conflict that began in the late twentieth century. The frontier villages in Waziristan and Tirah that gave the best support to the Taliban and the foreign fighters in al-Qaeda were the same ones that had supported the mujahidin a decade before in the US-backed fight against the Soviet Union, and had been the quickest to rise against Britain in the nineteenth century—finding common cause against a common enemy—first Britain, later the USSR, then the US-led invasion.

Similarly, Stephen Tanner, Afghanistan: A Military History from Alexander the Great to the Fall of the Taliban 243 (2002), states: “The Soviet invasion achieved that rarity in Afghanistan history: a unifying sense of political purpose that cut across tribal, ethnic, geographic, and economic lines.” On the concept in general, see Shultz & Dew, supra note 7, at 154; Farwell, supra note 11, at 5, 47, 153–54. On Afghanistan and its history, see Shultz & Dew, supra note 7, at 151–54; Waller, supra note 11, at x; Loyn, supra note 11, at 145–47; Briscoe et al., supra note 8, at 11. See also Anon., The Liberation of Maziar-e Sharif: 5th SF Group Conducts UW [Unconventional Warfare] in Afghanistan, Special Warfare, June 2002, at 34, which reports with respect to the US Special Forces experience:

The situation on the ground presented challenges… Although the major factions were united in their opposition to the Taliban, they had significant differences with each other, and they felt no allegiance to anything higher than their own party or ethnic group. At one time or another during the previous decade, the groups had taken up arms against one another or supported each other’s rival factions. Although none of these events were uncommon in internal Afghan politics, they created a significant level of distrust between the factions….

Id. at 39. The anonymous authors are members of 5th Special Forces Group.


17. Id. at 62, quoting Joan M. Lewis, A Pastoral Democracy 27 (1999). Professor Toman recognizes this with respect to the Taliban, acknowledging, “Knowledgeable experts consider the Taliban’s armed forces were not comparable to an organized army, since they had no strategic military plans, or decision-making power and they resorted to guerrilla tactics.” Toman, supra note 3, at 284.

18. Peter Hopkirk, The Great Game (1992); Tanner, supra note 15, at 129–54; Waller, supra note 11, at x; Farwell, supra note 11, at 153–54; Loyn, supra note 11, at 145–47; Briscoe et al., supra note 8, at 34.

19. Rashid, supra note 11, at 9–10; Loyn, supra note 11, at xxxvii, 249; Fury, supra note 11, at 105–06, 124, 129, 139; Anon., supra note 15, at 38. An example is General Abdul Rashid Dostum, who rose to power after the Soviet invasion in 1979, forming a militia made up mainly of Uzbeks, who had grown to respect his leadership supporting union workers in the oil fields. He supported the communist-run government in Kabul until 1992, when he flip-flopped and joined his former opponent Ahmad Shah Massoud. Mr. Massoud, known as the “Panshjer Lion” and head of the Northern Alliance, convinced Gen. Dostum that the communists were losing ground and that he should fight for the winning side….

In 1994, Gen. Dostum again switched sides, joining Gulbuddin Hekmatyar, a mujahaddeen accused of fighting his own people more than the Soviets and who is now wanted by the
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U.S. for supporting al Qaeda and the Taliban. . . Gen. Dostum's decision to join Mr. Hekmatyar was a major factor in the collapse of a government led by Burhanuddin Rabbani and Mr. Massoud. Yet, less than two years later, Gen. Dostum switched again, realigning with Mr. Rabbani and Ismail Khan, the warlord from Herat, to fight the ascendant Taliban regime. However, Gen. Dostum was betrayed by one of his own commanders, who sided with the Taliban. The general fled to Turkey in fear for his life.

Gen. Dostum returned in April 2001 at the urging of Mr. Massoud and reconstituted his militia to attack the Taliban in the north.


19. Readers with greater curiosity or interest would benefit from Shultz & Dew, supra note 7, at 159–66; Farwell, Waller and Loy, each supra note 11; Hopkirk, supra note 18; and Tanner, supra note 15, at 129–54.

20. Loy, supra note 11, at 23; Scheuer, supra note 7, at 113; Rashid, supra note 11, at 54. These footpaths afforded al-Qaeda leader Usama bin Laden, his forces and Taliban the opportunity to enter Pakistan, evading capture in late 2001; Fury, supra note 11, at 277–78; Tanner, supra note 15, at 218–19.

21. See Shultz & Dew, supra note 7, at 166: “The British presence in Afghanistan had an important impact on the modern state of Afghanistan because the British left a legacy of political boundaries based on their strategic interests rather than on the historical location of tribal peoples.” Similarly, Rashid, supra note 11, at 187, describes the Durand Line as “the disputed boundary line between the two countries [Pakistan and Afghanistan] created by the British and which no Afghan regime has recognized.” Interpretations are being offered today by Afghan Pashtun nationalists that the Durand Line agreement is good for only one hundred years; Loy, supra note 11, at 145–47, 167, 182.

22. BRISCOE ET AL., supra note 8, at 8–9.

23. Id. at 188–93; Shultz & Dew, supra note 7, at 167–68.

24. Id. at 186–188.

25. SHULTZ & DEW, supra note 7, at 168–69.

26. GEORGE CRILE, CHARLIE WILSON’S WAR (2003), and the very entertaining 2008 movie of the same name. See also RUSSIAN GENERAL STAFF, THE SOVIET-AFGHAN WAR (Lester W. Grau & Michael A. Gress trans., 2002); Coll, supra note 11; Shultz & Dew, supra note 7, at 168–76; and Loy, supra note 11, at 194–207.

27. Shultz & Dew, supra note 7, at 177–79, identify and describe in detail four major factions as the mujahidin who allied themselves to fight the Soviets: “(1) fundamentalist Sunni clerics, (2) moderate and radical Sunni Islamists affiliated with the Muslim Brothers, (3) Wahhabis, and (4) Shi’i Islamists,” citing OLIVIER ROY, AFGHANISTAN: FROM HOLY WAR TO CIVIL WAR 43–46 (1995). Nonetheless the war lasted almost a decade in part owing to factional differences within the mujahidin, illustrating again the primacy of tribal loyalties; Loy, supra note 11, at 202. The term mujahidin has been traced to the holy man and “religious adventurer” Sayyid Ahmed Shah Brelwi, who returned from a pilgrimage to Mecca to preach war against infidels. Forming a sect called Mujahidin, he and his followers captured Peshawar in 1829. He was killed in 1831. The sect continued, but mujahidin eventually evolved into a term to describe indigenous fighters. Farwell, supra note 11, at 150. In the war against Soviet occupation, the mujahidin were not limited to Afghan resistance but included volunteers from Chechnya and most Arab nations.
See at 182, 238-39; Command, conflict that began in a traditional tribal assess the situation occurred with regard to the forcibly taken by the Taliban from the counterinsurgency operations. For a critique of the Army in the Vietnam War and, more recently, in the first four years of Operation Iraqi Freedom as it failed to recognize it was faced with an insurgency, seeking to apply and unsuccessfully applying conventional war tactics against its "asymmetrical" threat, then waited until it had written and published new doctrine jointly with the Marine Corps before beginning to conduct counterinsurgency operations. For a critique of the Army in the Vietnam War and the Iraq conflict that began in 2003, see John A. Nagl, Counterinsurgency Lessons from Malaya and Vietnam: Learning to Eat Soup with a Spoon (2002). The new doctrine is contained in Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, Counterinsurgency (2006). The same failure to properly assess the situation occurred with regard to the Bush administration's rationale for its determination as to the legal status of the Taliban, discussed infra.

28. Crile, supra note 26, at 504; Shultz & Dew, supra note 7, at 171, 176; and Coll, supra note 11, at 185. Shultz and Dew's observation that "[t]he Red Army's...conventional military doctrine and analysis was of no help in analyzing or fighting the asymmetrical guerrilla tactics of a traditional tribal culture" (supra note 7, at 149) applies equally well to the US Army in the Vietnam War and, more recently, in the first four years of Operation Iraqi Freedom as it failed to recognize it was faced with an insurgency, seeking to apply and unsuccessfully applying conventional war tactics against its "asymmetrical" threat, then waited until it had written and published new doctrine jointly with the Marine Corps before beginning to conduct counterinsurgency operations. For a critique of the Army in the Vietnam War and the Iraq conflict that began in 2003, see John A. Nagl, Counterinsurgency Lessons from Malaya and Vietnam: Learning to Eat Soup with a Spoon (2002). The new doctrine is contained in Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, Counterinsurgency (2006). The same failure to properly assess the situation occurred with regard to the Bush administration's rationale for its determination as to the legal status of the Taliban, discussed infra.

29. Loyn, supra note 11, at 208.

30. Rashid, supra note 11, at 32-33; Briscoe et al., supra note 8, at 19; Loyn, supra note 11, at 182, 238-39; Shultz & Dew, supra note 7, at 177-78; Coll, supra note 11, at 283-84.

31. Loyn, supra note 11, at 215.


Of all of the foreign attempts to control Afghanistan in the two centuries after [British envoy Mountstuart] Elphinstone's first meeting in 1808, the Soviet invasion in 1979 was the one that came closest to success. And when the Soviet-backed government finally crumbled, the disunity of the forces that had ousted it flared into open civil war. Power had spun out of Kabul, and could not be drawn back. In Afghanistan imposing power from the center has always been temporary—like gathering together sand or water—since local loyalty outweighs any other.

See also Shultz & Dew, supra note 7, at 179-80; Coll, supra note 11, at 262-63.

33. Loyn, supra note 11, at 211-46, 253-54. In the 1994 battle for Kabul, Najibullah was forcibly taken by the Taliban from the United Nations compound in Kabul where he sought asylum in 1972. He and his brother were tortured and castrated before being hanged. Briscoe et al., supra note 8, at 95; Coll, supra note 11, at 333; Holt, supra note 11, at 44.

34. Rabbani remained the recognized ruler of Afghanistan, entitled to Afghanistan's seat in the United Nations during the Taliban period. He formally handed over power to an interim government headed by Hamid Karzai on December 22, 2001. See Burhanuddin Rabbani, Globalsecurity.org, http://globalsecurity.org/military/world/afghanistan/rabbani.htm (last visited Feb. 27). Rashid, supra note 11, at 10, observes:

Afghanistan was in a state of virtual disintegration just before the Taliban emerged at the end of 1994. The country was divided into warlord fiefdoms and all the warlords had fought, switched sides and fought again in a bewildering array of alliances, betrayals and bloodshed. The predominantly Tajik government of President Burhanuddin Rabbani controlled Kabul, its environs and the north-east of the country, while three provinces in the west centring on Herat were controlled by Ismael Khan. In the east on the Pakistan border three Pashtun provinces were under the independent control of a council or Shura (Council) of Mujaheddin commanders based in Jalalabad. A small region to the south and east of Kabul was controlled by Gulbuddin Hikmetyar.
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In the north the Uzbek warlord General Rashid Dostum held sway over six provinces and in January 1994 he had abandoned his alliance with the Rabbani government and joined with Hikmetyar to attack Kabul. In central Afghanistan the Hazaras controlled the province of Bamiyan. Southern Afghanistan and Kandahar were divided up amongst dozens of petty ex-Mujahedin warlords and bandits who plundered the population at will. With the tribal structure and the economy in tatters, no consensus on a Pashtun leadership and Pakistan’s unwillingness to provide military aid to the Durranis as they did to Hikmetyar, the Pashtuns in the south were at war with each other.

35. RASHID, supra note 11, at 90–92. See also SHULTZ & DEW, supra note 7, at 180–81.
36. SHULTZ & DEW, supra note 7, at 86, 208, 235–36. Not all Talibans were Pashtun, nor were all Pashtun aligned with the Taliban. For example, Afghanistan’s President, Hamid Karzai, is Pashtun. Dr. Stephen Biddle’s excellent study of Operation Enduring Freedom identified three major components of enemy fighters facing the US-led coalition: (a) native Afghan Taliban, (b) predominantly foreign al-Qaeda and (c) non-al-Qaeda foreign allies of the Taliban. BIDDLE, supra note 8, at 13. For law of war purposes and as will be explained, only two categories existed: al-Qaeda and Taliban, and in cases where al-Qaeda served with or led Taliban elements, arguably only one.
37. SHULTZ & DEW, supra note 7, at 238.
38. Id. at 236.
39. LOYN, supra note 11, at 239 [emphasis provided]. In this regard, see the quotation from BIDDLE, supra note 15, at 15. See also Anon., supra note 15, at 36:

Few of the factional commanders, at any level, possessed any experience in the conduct of large coordinated offensives. Most were extremely proficient at performing small-unit actions. But combining their forces (three separate and distinct major formations and numerous subordinate commands) into a coordinated offensive under one major formation was clearly uncharted territory and a distinct challenge.

On the Afghan practice of switching sides, the article continues:
The Afghan tradition of surrender and transfer of loyalty is not unlike what the US experienced during the Civil War [1861–65], with prisoner exchanges, paroles and pardons. The Afghans, in keeping with their custom, expect soldiers who have surrendered to abide by the conditions of their surrender agreement and to behave honorably. But the vast numbers of Arabs, Pakistanis, Chechens, Uighers and other foreign nationals who were members of al-Qaeda ignored the Afghan custom. They used individual surrenders as a means of furthering their cause, often creating treacherous conditions.

Id. at 38.
41. SHULTZ & DEW, supra note 7, at 253.
42. RASHID, supra note 11, at 52–53.
43. Id. at 54.
44. COLL, supra note 11, at 349.
45. Id.
The UAE’s Afghanistan western hunting camp played a key part in target selection for the August 20, 1998 US cruise-missile strike against al-Qaeda training camps in response to the al-Qaeda attacks on the US embassies in Nairobi and Dar es Salaam, discussed infra. Despite its relationship with the Taliban, the UAE royal family was cooperative with US planners in providing information to facilitate identification of the royal family western Afghan hunting camp, while disavowing its use by al-Qaeda leader Usama bin Laden. Id. at 448-49.

The government of President Burhanuddin Rabbani continued to hold Afghanistan’s United Nations seat during the Taliban period.
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1. A reprisal is an act which would be unlawful if not committed for the purpose of a reprisal.
2. It must be done for the purpose of compelling the other belligerent to observe the law of war.
3. It must not be done before other means have been reasonably exhausted.
4. It may be executed only on the express order of higher authority.
5. It must be committed against persons or objects whose attack as a reprisal is not otherwise prohibited.
6. It must be proportional to the original wrong.

W. Hays Parks, *A Few Tools in the Prosecution of War Crimes*, 149 MILITARY LAW REVIEW 73, 84 (1995). See also UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 65, ¶ 5.18 and 418–19, ¶¶ 16.16, 16.17 (2004) [hereinafter UK MANUAL]. As noted in this author’s article, the term “reprisal” often is misused when other terms, such as “retaliation,” “retorsion” or even “lawful attack of a military objective,” might be more accurate.

In the case of Taliban conduct in 1998 in Mazar-i-Sharif, the substantial delay between anti-Taliban forces in 1997’s and Taliban actions does not suggest its actions were taken “for the purpose of compelling the other belligerent to observe the law of war,” but were more in line with tribal acts of revenge in blood feuds. See SHULTZ & DEW, supra note 11, at 157. In this respect Taliban actions manifest the distinction between a “soldier” and a “warrior” made by Professor Hugh Turvey-High in his classic *PRIMITIVE WAR* 149–52 (1949) in describing the revenge mode of a warrior, a trait discussed in the context of Somalia and Afghanistan in SHULTZ & DEW, supra, at 5–7, 57–100, 147–95.

60. Rashid reports:

Not surprisingly, Iran, Turkey, India, Russia and four of the five Central Asian Republics—Uzbekistan, Kazakhstan, Kyrgyzstan and Tajikistan—have backed the anti-Taliban Northern Alliance with arms and money to try and halt the Taliban’s advance. In contrast Pakistan and Saudi Arabia have backed the Taliban. . . . The Taliban victories in northern Afghanistan in the summer of 1998 . . . set in motion an even fiercer regional conflict as Iran threatened to invade Afghanistan and accused Pakistan of supporting the Taliban. . . .

RASHID, supra note 11, at 5.

65. *Id.* at 80; COLL, supra note 11, at 513–15; Report of the Secretary-General on the humanitarian implications of the measures imposed by the Security Council resolutions 1267 (1999)

66. U.N. Doc. A/55/907–S/2001/384, supra note 65; U.N. Doc. S/2001/695, supra note 65. Within Afghanistan, the Taliban did not enjoy popular support. BIDDLE, supra note 8, at 16. Continuing, Dr. Biddle notes that the Taliban was (a) poorly trained, (b) had poor morale and (c) had a cultural willingness to defect. Id. at 13.

67. See, e.g., S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999), demanding that “the Taliban turn over Osama bin Laden without further delay to appropriate authorities in a country where he has been indicted,” and further actions by UN members, which refer only to “the Taliban.” See also S.C. Res. 1333, supra note 63, which refers to “areas of Afghanistan under the control of the Afghan faction known as Taliban, which also calls itself the Islamic Emirate of Afghanistan (hereinafter known as the Taliban’’); S.C. Res. 1363, supra note 63, refers to “States bordering the territory of Afghanistan under Taliban control.” U.N. Doc. A/55/907–S/2001/384, supra note 65, reporting on the Secretary-General’s visit to South Asia and his meeting with Taliban Foreign Minister Wakil Ahmad Mutawakki, refers to the Taliban only and not as the Taliban “regime,” much less as the government of Afghanistan.


69. Northern Alliance warlords Dostum and Atta Mohammed renewed offensive operations one day later; BIDDLE, supra note 8, at 8–10.

70. BRISCOE ET AL., supra note 8, at 188–89; FURY, supra note 11, at 275. Biddle states that “[o]n the night of December 6, Mullah Omar and the senior Taliban leadership fled the city [Kandahar] and went into hiding, ending Taliban rule in Afghanistan,” then continues:

Allied forces subsequently tracked a group of al Qaeda survivors thought to include Osama bin Laden to a series of redoubts in the White Mountains near Tora Bora. The redoubts were taken in a 16-day battle ending on December 17, but many al Qaeda defenders escaped death or capture and fled across the border into Pakistan.

BIDDLE, supra note 8, at 11.

71. BRISCOE ET AL., supra note 8, at 203–16; generally, SEAN NAYLOR, NOT A GOOD DAY TO DIE (2005) and PETE BLAER, THE MISSION, THE MEN, AND ME 262–95 (2008), describing Operation Anaconda, March 2–13, 2002. Taliban restoration and resurgence and the present situation in Afghanistan are beyond the scope of this article. As noted, this article considers the status of the Taliban from the time of commencement of US military operations on October 20, 2001, to February 7, 2002, when President George W. Bush issued his memorandum concerning the law of war status of captured al-Qaeda and Taliban. The issue of treatment of captured al-Qaeda and Taliban is the subject of separate articles in this volume by Stephane Ojeda, Matthew Waxman and Ryan Goodman.

72. Captured aircraft, tanks and anti-aircraft equipment had become inoperable due to the Taliban’s inability to maintain them. In disbanding the PDPA army, the Taliban also disbanded the PDPA units responsible for their maintenance and operation. BLAER, supra note 71, at 161.

73. David Loyn offers this following anecdote related to the Taliban’s Mullah Omar and his refusal to accept the basic obligations of UN membership:
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The UN made an effort to engage with the new administration, taking a copy of the UN Charter translated into Pashto to Kandahar to show the Taliban what it meant to be a country. An envoy went through it page by page, sitting cross-legged on the ground, as he was asked what it meant when it talked of “human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.” But Mullah Omar refused to meet the UN envoy then or at any other time.

LOYN, supra note 11, at 253.
74. Id. at 22-23; see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 66-67 (1966).
75. GOLDMAN & TITTEMORE, supra note 3, at 24 n.84.
76. The Taliban was not alone in its failure to follow the law of war in Afghanistan’s civil war, a point acknowledged by Colonel John Mulholland, 5th Special Forces Group commander, in advising his command that “[n]o one [the Afghan warlords] here is clean.” BRISCOE ET AL., supra note 8, at 95. This demonstrates this author’s earlier point of a distinction between legal applicability of law of war treaties and application in fact.
77. CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 158-59 (2d rev. ed. 1951).
78. Id. at 159-60.
79. Id. at 156-57.
81. Hague IV Annex, supra note 80, art. 43.
82. SPAIGHT, supra note 4, at 327; UK MANUAL, supra note 56, at 275, ¶ 11.3, states:
To determine whether a state of occupation exists, it is necessary to look at the area concerned and determine whether two conditions are satisfied: first, that the former government has been rendered incapable of publicly exercising its authority in that area; and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government.

Applying by analogy this test to the Taliban, while the Taliban may have physically occupied substantial areas of Afghanistan, persistent resistance to the Taliban—as acknowledged in UN reports—precluded it from meeting the second part of the test. The first part occurred through the meltdown of the PDPA between 1992 and 1994. The second part never took place.

The challenge the Taliban faced has historical precedent. A Russian analysis of British failures in its Second Anglo-Afghan War concluded, “English commanders understood that they had not gained possession of all these strips of country over which the troops had passed, but only of the actual ground on which their forces were encamped.” LOYN, supra note 11, at 114. This was the predicament the Taliban faced and suggests the media’s failure to appreciate the distinction between physical presence and control sufficient to govern.
83. Supra note 65.
84. The present author may have contributed to Professor Toman’s conclusion that the Taliban was the de facto government. As he notes in his article, supra note 3, in reply to an e-mail from Professor Toman, the present author stated, “An argument might be made that the Taliban was the de facto government of Afghanistan until early October 2001, as it occupied 80%
of Afghanistan." This informal response was based entirely on media reports, as the present author had not been involved in Operation Enduring Freedom issues or had access to official reports or analyses. The additional information obtained in research for and presented in this article presents a substantially different and more accurate picture.

Even were one to argue that at the time of Taliban recognition by Pakistan, Saudi Arabia and the UAE the Taliban was the de facto government, Professor Brownlie notes that "[i]t is sometimes said that de jure recognition is irrevocable while de facto recognition can be withdrawn." BROWNIE, supra note 74, at 87.


87. The just war tradition is an historic articulation of when (jus ad bellum) it is justifiable for a State to resort to arms, and what (jus in bello) use of force is legally permissible. See JAMES TURNER JOHNSON, JUST WAR AND THE RESTRAINT OF WAR (1981).


89. KEEN, supra note 88, at 50.

90. The classic example is the assassination of Archduke Franz Ferdinand, heir to the Austrian throne, by the Slav Gavrilo Princip, in Sarajevo on June 28, 1914, generally regarded as the spark that ignited World War I. This principle is made clear in the US Constitution, which vests in the President of the United States the authority to act as commander in chief of US armed forces (Article II, § 2) and in the US Congress the authority to raise armies and navies and to declare war (Article I, § 8). 18 U.S.C. § 960 (2000) (Neutrality Act) makes it a criminal offense for a person within the United States to begin, set on foot, provide for or prepare "a means for or [furnish] the money for, or [take] part in, any military or naval expedition or enterprise to be carried on against the territory or dominion of any foreign . . . state . . . with whom the United States is at peace . . ." See, e.g., United States v. Stephen E. Black and Joe D. Hawkins, 685 F.2d 132 (5th Cir. 1982), a case in which US citizens were convicted of violation of the Neutrality Act. A narrative history of the case is STEWART BELL, BAYOU OF PIGS (2008).

91. HYDE, supra note 77, at 1692, 1797; LAUTERPACHT, supra note 80, at 203–05.

92. Additional Protocol I, supra note 1, art. 51(3); Additional Protocol II, supra note 1, art. 13(3).

93. Denial of quarter includes refusal to accept an offer to surrender and summary execution upon capture.

94. Mosby’s unit operated under a commission issued by the Governor of Virginia. State commissions were a practice common for Union and Confederate forces. Receipt and retention of a governor’s commission were dependent upon a unit carrying out its operations in uniform under a commander responsible for its actions, and compliance with the law of war. JEFFRY D. WERT, MOSBY’S RANGERS 62–63, 69–71, 76, 77–78, 124, 151, 157 (1990).

95. MICHAEL FELLMAN, INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE CIVIL WAR (1989), describes Quantrill’s actions and modus operandi.
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96. See Richard Hartigan, Lieber’s Code and the Law of War 2–16, 31–44, 56, 60 (1983). A traditional term is unprivileged belligerent, meaning a private individual not entitled to the combatant’s privilege. Other commonly used terms are unprivileged combatant and unlawful combatant. The term adopted by the Bush administration—enemy combatant—was counter to its own arguments, as it incorrectly equated captured Taliban and al-Qaeda to lawful enemy combatants. The term “unlawful enemy combatant” is potentially misleading, as it suggests a member of regular military forces of a government may be denied prisoner of war status because he or she has acted in a manner inconsistent with the law of war or committed other criminal acts. In accordance with Article 85, GPW, a pre-capture offense does not provide a basis to deny prisoner of war status to an individual who meets any of the categories in Article 4. As was the case with many law of war decisions by Bush administration officials during the period in question, “enemy combatant” was selected more for political purposes than for legal accuracy.

97. As used in Article 3, “noncombatants” refers to military medical personnel and chaplains rather than civilians.


99. The debate was limited to a form of extended levée en masse following enemy occupation. A private citizen who took up arms against his or her own government or against another government with which his or her nation was at peace remained an unprivileged combatant.

100. Frits Kalshoven, Constraints on the Waging of War 14 (1987). Professor Kalshoven notes that “[t]his phrase, although formulated especially with a view to the thorny problem of armed resistance in occupied territory, has acquired a significance far exceeding that particular problem.” Continuing, he says that “[i]t implies no more and no less than that, no matter what States may fail to agree upon, the conduct of war will always be governed by existing principles of international law.”

101. The Laws of Armed Conflicts, supra note 1, at 70. Article 2 providing lawful combatant status to members of a levée en masse was amended to require that its members carry their arms openly in addition to respecting the laws and customs of war.

102. Spaight, supra note 4, at 37.


107. Supra note 85.

109. The absence of treaty protection for civilian medical facilities and transport and wounded, sick or shipwrecked civilians was corrected in the 1977 Additional Protocols I and II. See, e.g., Additional Protocol I, supra note 1, arts. 8-31; MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 89-167 (1982).

110. In the United States, this includes activated reserve and National Guard forces.

111. GPW Convention, supra note 85, art. 4A(2) (emphasis provided).

112. COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 50 (Jean S. Pictet ed., 1960) [hereinafter Pictet GPW].

113. Article 2 Common to the four 1949 Geneva Conventions states in part: "[T]he present Convention shall apply to all cases of declared war or 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." "High Contracting Parties" means nations who are State parties to the Geneva Conventions. "High Contracting Parties" distinguished between nations who had ratified or acceded to the Geneva Conventions and those who were not yet party to and bound by the Geneva Conventions. As all 194 nations are now parties to the 1949 Geneva Conventions, they have universal applicability. As this author notes herein, applicability does not necessarily translate into application by State parties.

Article 2 Common to the four 1949 Geneva Conventions does not define war. It establishes the threshold for application of the four Conventions to, inter alia, "all cases of declared war or 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." In contrast, the judgment in United States v. Wilhelm von Leeb et al. (The High Command Case, XI TWC 485 (1948)) defines war more broadly as "the exerting of violence by one state or politically organized body against another. In other words, it is the implementation of a political policy by means of violence." There are two points of significance to the current discussion. First, the authors of the 1949 Geneva Conventions, and particularly the prisoner of war convention, were very deliberate in declining to recognize combat operations by a government against a private, politically organized body such as the Taliban as an armed conflict in which the Geneva Conventions technically or formally applied. Second, ignorance of history by the Bush administration resulted in faulty analysis and justification for its actions with respect to captured Taliban and al-Qaeda.

114. Prisoner of war entitlement for actions as a levée en masse cease following enemy occupation. Article 4A(6), GPW, expressly states, "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry their arms openly and respect the laws and customs of war." Thereafter members of a levée en masse cease to exist as such and must meet each of the six criteria in Article 4A(2), GPW, to receive entitlement to prisoner of war status.

115. Pictet GPW, supra note 112, at 57, states, "It is essential that there should be a de facto relationship between the resistance organization and the party [sic] to international law which is in a state of war, but the existence of this relationship is sufficient," commenting further that such a relationship "may be indicated by deliveries of equipment and supplies, as was frequently the case during the Second World War, between the Allies and the resistance networks in occupied territories." In addition to the general histories noted supra note 104, British and US sealift and airlift support to organized resistance movements in Axis-occupied nations is described in DAVID HOWARTH, THE WESTERN BUS (1951); III THE ARMY AIR FORCES IN WORLD WAR II EUROPE: ARGUMENT TO V-E DAY, JANUARY 1944 TO MAY 1945, at 493-524 (Wesley Frank Craven & James Lea Cate eds., 1951); GIBB MCCALL, FLIGHT MOST SECRET: AIR MISSIONS FOR SOE AND
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OSS (1981); BEN PARNELL, CARPETBAGGERS: AMERICA'S SECRET WAR IN EUROPE (1987);
BROOKS RICHARDS, I SECRET FLOTILLAS: CLANDESTINE SEA OPERATIONS IN BRITTANY, 1940-
1944 (2004); BROOKS RICHARDS, II SECRET FLOTILLAS: CLANDESTINE SEA OPERATIONS IN THE

116. Picte GFW, supra note 112, at 57 n.2, offers the example of the July 15, 1944 declaration
by US General Dwight D. Eisenhower, Supreme Headquarters, Allied Expeditionary Force
(SHAPE) commander, recognizing the Free French Forces of the Interior and taking them under
his command.

117. Toman, supra note 3, at 290–94; Draper, The Status of Combatants and the Question of
Guerrilla Warfare, supra note 88, at 176.

118. The four criteria were relaxed in Articles 43(1) and 44(3) of 1977 Additional Protocol I,
the latter requiring only that an individual entitled to combatant status under that treaty “carry
his arms openly (a) during each military engagement, and (b) during such time as he is visible to
the adversary while he is engaged in a military deployment preceding the launching of an attack
in which he is to participate.” This change is not relevant to the current discussion, as neither
Afghanistan nor the United States is a party to Additional Protocol I.

119. 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 433. Other
delegations offered similar comments.

120. See generally, YOSSF BODANSKY, BIN LADEN: THE MAN WHO DECLARED WAR ON
AMERICA (2001); ROHAN GUNARATNA, INSIDE AL QAEDA (2002); BRISCOE ET AL., supra note 8,
at 23; Toman, supra note 3, at 287–89. YAROSLAV TROFIMOV, THE SIEGE OF MECCA 7, 246–47
(2007), attributes Saudi Arabia’s attack on Muslim extremists, led by Juhayman al Uteyhi, who
seized the Grand Mosque in Mecca on September 20, 1979, as the point at which Usama bin
Laden began to separate himself from the Saudi royal family.

121. LOYN, supra note 11, at 262–63.

122. GOLDMAN & TITTEMORE, supra note 3, at 29.

123. Toman, supra note 3, at 294. Professor Toman characterizes al-Qaeda through the fol-
lowing words of other experts:

A question under the Hague Regulations and the Third [Geneva] Convention involves
the status of an independent force, which has no factual link to a Party to an
international armed conflict. In general, it may be said that such a force would probably
be viewed as waging a private war. In any event, it would have no status better than that
of insurgents in a non-international armed conflict, unless the movement they
represent has such de facto objective characteristics of belligerency that the movement
itself could be recognized as a Party to an international armed conflict.

Id. at 291–92, quoting BOthe, PARTSCH & SOLE, supra note 109, at 235. Professor Toman’s
conclusion is that al-Qaeda does not meet the objective characteristics of belligerency. Id. at 294.

124. For example, civilians who accompany the armed forces are entitled to prisoner of war
status under Article 4, paragraph 4, GPW, but do not enjoy the combatant’s privilege.

125. In such an analysis, the first question should be whether there is an international armed
conflict, as defined in Article 2 Common to the four 1949 Geneva Conventions (“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”). Failing to meet the
prerequisites in Common Article 2, there is no basis for considering provisions contained in
Article 4, GPW.

126. Picte GFW, supra note 112, at 18.

127. “Party to the conflict” was broadened to include a limited range of private armed groups
in Articles 1(4) and 43(1) of the 1977 Additional Protocol I, supra note 1. As noted supra note 1,
as neither Afghanistan nor the United States is a party to Additional Protocol I, the change is not applicable. Had it been applicable, the Taliban would not have qualified as a party to the conflict as it met none of the criteria in Article 1(4). Since Additional Protocol I's entry into force on December 7, 1978, no private armed group has qualified as a "Party to the conflict."


129. See, e.g., HERBERT W. MCBRIDE, A RIFLEMEN WENT TO WAR (1935), detailing the account of a US citizen who joined and fought as a member of the 21st Battalion, Canadian Expeditionary Force, in World War I.

130. For example, on July 14, 1940, the New York Herald Tribune contained a British advertisement inviting individuals with aircraft experience to join the Royal Air Force (RAF); others already had joined and fought in the RAF in the Battle for France. Others quickly followed. RICHARD HOUGH & DENIS RICHARDS, THE BATTLE OF BRITAIN 187–88 (2008). In total, 547 men from thirteen nations, including seven US citizens, served as aircrew with the RAF during the 1940 Battle of Britain. Id. at 191. Similarly, Draper Kauffman attended the US Naval Academy but was screened out as the result of his pre-commissioning eye examination. Seven years later, as an ambulance driver in the American Volunteer Ambulance Corps of the French Army, he was captured by invading German forces. Eventually released, he was commissioned in the Royal Navy, where he served as a bomb disposal officer. That he was an American citizen serving first with French military and later with British naval forces would not have been a basis for German denial of prisoner of war status. (Returning to the United States on convalescent leave, he received a commission in the US Navy. He earned a Navy Cross as a result of his clearing Japanese bombs dropped during the December 7, 1941 attack on Pearl Harbor, then was assigned to establish training for and to form up naval combat demolition units, forerunner of the Navy’s underwater demolition teams and today’s SEALs.) See ELIZABETH KAUFFMAN BUSH, AMERICA’S FIRST FROGMAN: THE DRAPER KAUFFMAN STORY ix, x, 1–12, 19, 23–25, 32–43, 62–63, 78–82 (2004).


132. Picket GPW, supra note 112, at 53–58, contains an excellent summary of the negotiating history.

133. FELLMAN, supra note 95.

134. Parks, supra note 85.

135. BIDDLE, supra note 8, at 22, states that the ISID ceased its logistical support to the Taliban on October 12, 2001, while acknowledging that it may have continued after that date.


137. Picket GPW, supra note 112, at 62. While ICRC focus was on the Free French, actual practice was far broader. See, e.g., POLISH AIR FORCE ASSOCIATION, DESTINY CAN WAIT: THE POLISH AIR FORCE IN THE SECOND WORLD WAR (1949).

138. GPW Convention, supra note 85, art. 4A(1).

139. Id., art. 4A(2).

140. Id., art. 2.

Combatants

142. A specific reference/mention of "[m]ercenaries who devastated France in the XIVth century, during the peaceful periods of the Hundred Years War." Pictet GPW, supra note 112, at 63 n.3.

143. Id. at 62-64.

144. See supra note 34 and accompanying text.


146. Id. at 68.

147. Having resolved the issue that prompted the original Martens Clause in the 1907 Hague IV, the Martens Clause was relegated to the article common to the four 1949 Geneva Conventions dealing with denunciation of (withdrawal from) the Geneva Conventions by a State party. See, e.g., GPW Convention, supra note 85, art. 42(4); Pictet GPW, supra note 112, at 648.

148. Parks, supra note 2.

149. Yoram Dinstein, Unlawful Combatants, in INTERNATIONAL LAW AND THE WAR ON TERROR, supra note 7, at 159, discussed infra. However, under Article 85, GPW, they retain their entitlement to prisoner of war status.

150. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343, reprinted in THE LAWS OF ARMED CONFLICTS, supra note 1, at 421. Article 1, paragraph 1 states: "The present Convention shall apply without prejudice . . . (I) To all persons referred to in Articles 1, 2 and 3 of the Regulations to the Hague Convention (IV) of 18 October 1907 . . . who are captured by the enemy."

151. A legal requirement that regular forces wear uniforms in order to enjoy entitlement to prisoner of war status would have exceeded the requirement in the 1899 and 1907 Hague treaties and Article 4A(2), GPW, which does not specify a "uniform" but merely "a fixed distinctive sign recognizable at a distance." As indicated in the previous discussion of Lieber's 1863 analysis and the argument put forward by Belgium and other nations in 1899, delegates were aware of the existence of irregular forces based upon the experience of the Franco-Prussian War and Anglo-Boer War. Expansion of special operations forces in World War II brought the issue to the fore.

152. Dinstein, supra note 149, at 164; Roberts, supra note 7, at 212.

Department of the Army, FM 27-10, The Law of Land Warfare para. 63 (1956) states: "Commando forces and airborne troops, although operating by highly trained methods of surprise and violent combat, are entitled, so long as they are members of the organized armed forces of the enemy and wear uniforms, to be treated as prisoners of war upon capture, even if they operate singly." That language is ambiguous in its failure to explain what constitutes a "uniform," and potentially more restrictive than the text contained in earlier editions of the US manual. For example, Chief of Staff, Department of War, Rules of Land Warfare, at 22, para. 33 (1914) states: "The distinctive sign. This requirement will be satisfied by the wearing of a uniform or even less than a complete uniform." This text was deleted, apparently for brevity, in the 1940 edition; the 1914 edition contained 221 pages, while the 1940 edition was reduced to 123. The necessity for paragraph 33 of the 1914 edition may have not been recognized in light of the US World War I experience in fighting uniformed enemy forces in conventional military operations on well-defined fronts; nor is it likely organized resistance movements were contemplated. The 1940 US manual contains an official publication date of October 1, 1940. The British SOE was established under highly classified circumstances on July 22, 1940; the US OSS did not follow until two years later, on July 21, 1942. Parks, ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, supra note 2, at 84 and 85 n.69. As SOE historian M.R.D. Foot points out, "A dense veil of secrecy was indispensable to SOE, a body for mounting surprise attacks in unexpected places: no secrecy, no surprise. The fact that the body existed at all was for long a closely guarded secret." Michael R.D. Foot, SOE in FRANCE 13 (2d rev. ed. 2004). That SOE and OSS
operations and tactics, techniques and procedures were highly classified may have played a part in incorporation of the erroneous language contained in paragraph 63 of the 1956 edition of the manual. But its author(s) should have been cognizant of the change made in article 4A(2), GPW, and the rationale for it.

Due to its ambiguity and inconsistency with State practice, including US practice in World War II, the 1956 text is clarified in the forthcoming Department of Defense Law of War Manual.


154. See, e.g., ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 349 (1976) ("The concept of uniforms has never been explicitly defined in international law).

155. Id. at 78–81. As noted therein, the ICRC Commentary on the 1977 Additional Protocols I and II states:

What constitutes a uniform, and how can emblems of nationality be distinguished from each other? The Conference in no way intended to define what constitutes a uniform. . . . [A]ny customary uniform which clearly distinguished the member wearing it from a non-member should suffice.” Thus a cap or an armlet etc. worn in a standard way is actually equivalent to a uniform.


156. Bothe, Partsch & Solé, supra note 109, at 257.

157. See, e.g., Jeremy Wilson, LAWRENCE OF ARABIA 1043 (1990), relating the death of British Army captain William H.I. Shakespear, easily identified, targeted, and killed in 1915 by a sniper in the forces of pro-Turkish leader Ibn Rashid, as Shakespear insisted on wearing his British uniform rather than dressing in indigenous attire to appear like the forces to which he was assigned. This prompted British Army Captain T.E. Lawrence to don Arab clothing as he led the Arab revolt against Ottoman rule. Id. at 1043 n.4, and further discussion in Parks, ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, supra note 2, at 100–01 n.5.

158. Parks, ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, supra note 2, at 101 n.6; Fury, supra note 11, at 167.

159. According to one SOF commander, Taliban wore black on black, with turbans; al Qaeda, all black, with hoods to mask their faces; Northern Alliance, a pakol (chitraili hat) and the Massoud scarf; US SOF, partial US uniform and Northern Alliance attire. Fury, supra note 11, at 119, 167; see also Parks, ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, supra note 2, at 101; Blaber, supra note 71, at 243, 247 for the US SOF rationale, which did not involve perfidy. Anon., supra note 15, at 36, acknowledged, “[B]ecause the disparate forces lacked any semblance of a uniform, visual identification, particularly at long distances, was virtually impossible. The tasks of preventing fratricide and synchronizing multiple combat elements fell to the SF [Special Forces] detachments” (emphasis supplied). A distinction existed in Taliban operations when a single or a few Taliban would conceal himself/themselves within a crowd of innocent civilians in order to carry out an attack; such an act would be perfidy. US SOF wear of Northern Alliance attire, though much publicized, was limited as to time, unit, specific unit personnel, location of operations and mission. Parks, supra, at 84.

160. Hague IV Annex, supra note 80, art. 23 states, “In addition to the prohibitions provided by special Conventions, it is especially forbidden: . . . (b) To kill or wound treacherously individuals belonging to the hostile nation or army.”
Afghanistan is not a State party to the 1907 Hague Convention (IV) nor its 1899 predecessor, Hague Convention II with Respect to the Laws and Customs of War on Land, which contained the same prohibition.

161. The official English text states "the feigning of civilian, non-combatant status." The official French text correctly states "feindre d'avoir le statut de civil ou de non-combatant," that is, "the feigning of civilian or non-combatant status," the two categories being distinctive. BOTHE, PARTSCH AND SOLE, supra note 109, at 206 n.21. As noted, neither the United States nor Afghanistan is a party to the 1977 Additional Protocol I. However, the definition of perfidy (using the French text) is consistent with State practice and has been applied by US military forces in conflicts since 1977.

As the present author has noted, the legal approach of the prerequisite of perfidy is not new; see Parks, ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS, supra note 2, at 82.


164. GOLDMAN & TITTEMORE, supra note 3; Toman, supra note 3.

165. See, e.g., Boumediene v. Bush, 128 S. Ct. 2229 (2008). The present author’s assignment was to establish the status of those persons captured during the specified time frame. Their treatment and US Supreme Court cases dealing with their treatment are beyond the scope of this author’s remit.

166. The US military provided prisoner of war protection (if not status per se) to individuals it captured on the battlefield in its operations in the Republic of Vietnam (1964–72), Grenada (1983), Panama (1989–90), Iraq (1990–91), Somalia (1992–94) and Haiti (commencing in 1994); personal knowledge of author, who was responsible for the legal aspects of this issue within the Office of the Judge Advocate General of the Army from 1979 to 2003.

167. Yoo, supra note 163, at 2; Ashcroft, supra note 163, at 1; Gonzales, supra note 163, at 1.

168. Powell, supra note 163, at “Comments on the Memorandum of January 25, 2002.” The statement undoubtedly is factually correct, but does not respond to the conclusion reached by Yoo, Ashcroft and Gonzales. The United States may have opted not to comment with regard to the situation in Afghanistan (a) for fear of jeopardizing the fragile status of the government of Burhanuddin Rabbani and its entitlement to the Afghan seat in the United Nations coveted by the Taliban, (b) to avoid interference in the civil war and/or (c) to resist the conclusion that a “failed State” would be relieved of its treaty obligations.
170. Powell, *supra* note 163, at "Comments on the Memorandum of January 25, 2002"; and personal knowledge of the present author, who was directly involved in issues related to prisoner of war treatment for captured members of the Panamanian Defense Forces; see *supra* note 166. Judge Gonzales' statement also errs in suggesting a separate policy decision was made for Operation Just Cause (Panama, 1989–90).
171. Taft, *supra* note 163, as attachment thereto.
172. *Id.*
176. *Id.*
177. The rationale offered by Bush administration officials incorrectly listing a uniform requirement neglects a key historical point from the Ronald Reagan and George H.W. Bush administrations—which included key participants in developing the erroneous "uniform" rationale for denial of prisoner of war status to captured al-Qaeda and Taliban—i.e., that both administrations supported (with weapons and funding) the mujahidin resistance against the Soviet occupation. The mujahidin wore the same or similar attire as the Taliban and the Northern Alliance, and in many instances were the same persons who fought for the Taliban or the Northern Alliance. As the United States was not a party to the conflict against the Soviet occupation, and the Soviet Union had established a belligerent occupation, the mujahidin were not entitled to prisoner of war status under Article 4A(2) (organized resistance movement of a party to the conflict) or 4A(6) (levée en masse). If one follows the natural logic of the George W. Bush administration regarding the status of the Taliban, then arguably it is condemning the support of the previous administrations for the mujahidin or acting with hypocrisy.
179. *Id.* at 496–98, 517, 522–23. US SOF who were involved in these operations and with whom the author has spoken have indicated there was no difficulty by either side in identifying opposing forces when operating as units.
182. *Id.*
186. *Id.*
187. *Id.*
188. White House Fact Sheet, *supra* note 173.
190. Rumsfeld, *supra* note 175.
191. See, e.g., FURY, *supra* note 11, at 93.
192. Fleischer, supra note 174.
193. Rumsfeld, supra note 175.
194. Article 52(2) of Additional Protocol I defines military objective as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." The same definition is contained in Article 2(6) of the Amended Mines Protocol (II), Convention on Certain Conventional Weapons (CCW) and Article 1(3) of CCW Protocol III (Incendiary Weapons). As the United States is a party to CCW Amended Mines Protocol, it accepts this definition. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended May 3, 1996, 2048 U.N.T.S. 133; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980, 1342 U.N.T.S. 171; both reprinted in THE LAWS OF ARMED CONFLICTS, supra note 1, at 196 and 210, respectively.