UNLAWFUL BELLIGERENCY AND ITS IMPLICATIONS UNDER INTERNATIONAL LAW

By LEE A. CASEY, DAVID B. RIVKIN, JR. & DARIN R. BARTRAM *

* Lee A. Casey, David B. Rivkin, Jr., and Darin R. Bartram practice law in the Washington, D.C., office of BAKER & HOSTETLER, LLP. They frequently write on constitutional and international law issues.

President Bush's Military Order of November 13 on the Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism ("November 13 Military Order"), [1] instructing the Secretary of Defense to establish one or more "military commissions" for the trial of captured al Qaeda members, has generally been accepted, in light of the Supreme Court's 1942 decision in *Ex parte* Quirin, [2] as legal under U.S. domestic law. Moreover, the use of such tribunals to process Osama bin Laden and his cohorts has received cautious endorsements from most commentators. [3] However, a number of individuals, on both the left and the right, remain implacably opposed to the idea, and some legal scholars continue to argue that the use of such tribunals is unlawful, asserting that the rule and reasoning of Quirin have been overtaken by changes in the law that have taken place since that case was decided nearly sixty years ago. [4]

In particular, claims have been made that international law no longer supports the classification of individuals like Osama bin Laden, or groups such as al Qaeda or the Taliban, as "unlawful belligerents" or "unlawful combatants, excluded from the rights of prisoners-of-war, and subject to the summary proceedings approved by the Quirin Court [5] Two sources of this alleged revision have been suggested, the Geneva Conventions of 1949, and the International Covenant on Civil and Political Rights (1967) ("ICCPR"). In fact, neither of these international instruments supports, let alone requires, the conclusion that "unlawful combatants" must now be treated more favorably than they were in 1942, when the Quirin case was decided. Indeed, the overall international legal regime for dealing with unlawful combatants remains essentially unchanged. Such individuals are not entitled to the rights and benefits associated with "prisoner-of-war" status under the Geneva Conventions, they can be processed through a military justice system instead of being tried by civilian courts, and, if found to be unlawful combatants, they can be punished (including the death penalty) for nothing more than the "acts which render[ed] their belligerency unlawful." [6] Moreover, both Osama bin Laden's al Qaeda group, and the Taliban, appear to fall squarely within the accepted international definition of "unlawful combatant."

I. Traditional Rules Regarding Unlawful Combatants

Under the traditional laws of war, jus in bello, a fundamental distinction was drawn between "lawful belligerency" and "unlawful belligerency." Individuals were considered to be "lawful combatants," accepting the burdens, and entitled to the benefits, of the laws of

war (in particular, the right to be treated as prisoners-of-war upon defeat or capture), if they served in the armed forces – regular or militia – of a sovereign state. In addition, four criteria, incorporated into Article I of the 1907 Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, were required to be satisfied before lawful belligerency was established:

> 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. [7]

Individuals who took up arms, or joined an armed force, that did not meet these criteria, were considered to be unlawful belligerents, and were subject to a severe legal regime. Unlawful belligerents were considered to be a threat to every civilized state and individuals falling into this category, including spies, saboteurs, and "guerillas" could be summarily punished, up to and including the death penalty. This rule can be traced well back into the 17th century and before. As the 18th century international law publicist Emmerich de Vattel explained:

> When a nation or a sovereign has declared war against another sovereign by reason of a difference arising between them, their war is what among nations is called a lawful war, and in form; and as we shall more particularly shew the effects by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers. The city of Geneva, after defeating the attempt of the famous Escalde hung up the Savoyards, whom they had made prisoners, as robbers who had attacked them without any cause, or declaration of war. Nobody offered to censure this proceeding, which would have been detested in a formal war. [8]

The rules with respect to unlawful belligerency, essentially as articulated by Vattel above, have been followed by the United States throughout its history. [9] They were reaffirmed by the Supreme Court in Ex parte Quirin, [10] in which the Court noted a number of uthorities for the proposition that "unlawful combatants" are generally considered to be subject to summary disposition. Although both the rule and reasoning of Quirin have been questioned (at least with respect to the treatment of unlawful combatants captured in the United States), it remains the leading American case on the use of military commissions during wartime. [11]

Moreover, the same rules have been applied consistently by other states, and particularly during the last "general" war involving all of the World's great powers, World War II (1939-1945). As explained in a classic international law treatise of the time:

Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals. But they cease to be private individuals if they organize themselves in a manner which, according to the Hague Convention, confers upon them the status of members of regular forces. [12]

And, indeed, during the war, both the Axis and Allied powers denied the rights and privileges of prisoner-of-war status to unlawful combatants. This was especially true of the Axis governments, which carried out policies under which local insurgency, resistance, or "partisan" movements were savagely repressed. After the war, Axis officers and soldiers often were prosecuted and punished for the mistreatment of prisoners-of-war, including individuals attached to resistance movements when they qualified as "lawful combatants" under the Hague Regulations. [13] However, the tribunals organized and established by the Allies after Germany's collapse accepted that unlawful belligerents were not entitled to the rights and privileges of prisoners-of-war, and that they could be punished simply for being unlawful combatants. [14] As the court in one such trial, involving some of the most brutal Axis-partisan warfare in the Balkans, explained:

> "The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian and Serbian uniforms were used to the extent they could be obtained. The Soviet Star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so. There is some evidence that various groups of the resistance forces were commanded by a centralized command, such as the partisans of Marshal Tito, the Chetniks of Draja Mihailovitch and the Edes of General Zervas. It is evident also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs." [15]

II. The Geneva Conventions of 1949

A. Substantive Rules Regarding "Unlawful Combatants"

In the wake of World War II, a renewed effort was made to craft international norms ensuring the rights of lawful combatants who were wounded and/or captured during wartime, and of civilians ("non-combatants") who found themselves in the power of a belligerent. Four separate treaties were agreed upon, commanding wide support among the members of the international community. These included the following instruments: (1) the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (2) the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; (3) the

Geneva Convention III Relative to the Treatment of Prisoners of War; and (4) the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

Arguments have been advanced by some critics of President Bush's November 13 Military Order that the Geneva Convention III Relative to the Treatment of Prisoners of War effectively eliminated the category of "unlawful combatant," requiring that all individuals captured in arms be accorded the rights of lawful prisoners-of-war. This is simply untrue. In fact, the third Geneva Convention of 1949 specifically reaffirmed the distinction between "lawful" and "unlawful" combatants, and in no manner suggested that "unlawful" combatants were entitled to be treated as prisoners-of-war, or as civilian non-combatants. In this regard, Article 4 of the Convention defined "prisoners-of-war" to exclude unlawful combatants, much as the Hague Convention had done forty years before. One important change was to make clear that members of ad hoc citizen militias and "volunteer corps," including the members of an "organized resistance movement," could be considered to be lawful combatants, entitled to the status of prisoner-of-war upon capture, but only if they met the four Hague Regulation conditions:

> Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> * * *
>
> (2) Members of other militias and members of other volunteer corps including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory . . . provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> * * *
>
> (6) 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 arms openly and respect the laws and customs of war. [16]

To emphasize, the clarification of the "lawful combatant" category was not done arbitrarily or driven by pure political considerations. [17] Rather, types of persons, e.g., members of ad hoc citizen militias, who participated in combat in increasing numbers during World War II, were given an opportunity to qualify for a lawful combatant status, provided that they brought themselves into compliance with the relevant jus in bello criteria. [18]

By contrast, under the third Geneva Convention of 1949, individuals who failed to meet the minimum criteria to be considered lawful belligerents, were excluded from the Convention's protections. As the International Committee of the Red Cross (ICRC) noted in its commentary on the treaty, generally considered to be "authoritative," at the 1949 Diplomatic conference "there was unanimous agreement about the necessity for partisans to fulfil the conditions laid down in Article 1 of the Hague Regulations and to have an adequate military organization so as to ensure that those conditions could be fulfilled, in order for them to qualify as 'prisoners-of-war.'" [19] Individuals, such as al Qaeda and the Taliban, who do not meet these minimum requirements, remain "unlawful" combatants, who do not receive the benefit of prisoner-of-war status under the 1949 Geneva Conventions. [20]

The survival of the status of "unlawful combatant," and of the harsh rules applicable to such persons, was again reaffirmed in 1977. At that time, two additional protocols were adopted for the Geneva Conventions of 1949, including Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts and Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts. These agreements (to which the United States is not a party) principally sought to provide additional protections for non-combatants, i.e., the civilian population. They did not purport to alter, in any significant manner, the pre-existing rules regarding unlawful combatants.

As in 1949, there were efforts in 1977, undertaken largely by developing nations with a history of colonialism and sympathy for "national liberation movements," to craft international rules that would be more protective of irregular combatants than the Hague Regulations or the Geneva Conventions of 1949. However, these efforts had only a very modest success, largely limited to securing a definition of lawful "combatant" in Protocol I that did not require the sanction of a government "recognized" by the adverse party:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities. [21]

Despite this change (which also has by no means been universally accepted), Protocol I at no point suggested that the other requirements for lawful combatant status, as set forth in the Hague Regulations and Article 4 of the Geneva Conventions of 1949, were no longer applicable. This was fully acknowledged by the ICRC commentary, which noted that "anyone who participates directly in hostilities without being subordinate to an organized movement under a Party to the conflict, and enforcing compliance with these rules, is a civilian who can be punished for the sole fact that he has taken up arms" and that "anyone who takes up arms without being able to claim this status [of a "lawful combatant"] will be left to be dealt with by the enemy and its military tribunals in the event that he is captured." [22]

Thus, claims that the customary status of unlawful belligerent, as codified in the 1907 Hague Convention, was eliminated by the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War are false. Those rules remain fully applicable, and the Hague Regulations and Geneva Convention are today the primary instruments regulating the treatment of combatants, lawful and unlawful, during armed conflict. Consequently, individuals or groups who fail to meet the requirements of lawful belligerency, as recited in both documents, remain franc-tireurs, who are not entitled to the status or privileges of prisoners of war.

B. Procedural Rules Regarding "Unlawful Combatants"

Although it is clear that the status of unlawful belligerents remains a viable and applicable concept in international law, the nature and scope of the procedural rights that must be accorded to unlawful combatants is less clear. Traditionally, at least in theory, unlawful combatants could be killed out of hand, entitled to little more than a blindfold by way of procedure [23] During World War II, unlawful combatants were often subject to summary disposition, and the war crimes tribunals established after the War acknowledged that their deaths would not justify later criminal charges against their executioners. [24] At the same time, these courts also suggested that some form of minimum due process was necessary, and this was consistent with practice dating at least to the late 18th Century. This process has usually taken the form of a military court or commission. [25] Such commissions were used extensively after World War II, and they have never been outlawed by treaty, nor forbidden based on international custom and practice. The procedures followed in such commissions need not meet the standards of civilian courts, as the Supreme Court's decision in Ex parte Quirin suggests, and has varied from country to country. The military commissions established, by the United States and its allies, after World War II generally provided for ad hoc procedures which often represented significant departures from ordinary practice in the regular, Article III Courts. [26] Most were established with a view to the normal procedures applicable in courts martial, but permitting derogations from those rules, especially with respect to rules of evidence.

For example, the Royal Warrant of 14 June 1945, establishing British military tribunals, provided that "except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals." [27] The American rules of procedure differed depending upon the theater of action, with the Mediterranean Regulations providing for "proceedings as may be deemed necessary for full and fair trial, having regard for, but not being bound by, the rules of procedure prescribed for General Courts Martial." [28] In the Far East, the equivalent regulations provided that each commission "shall confine each trial strictly to a fair, expeditious hearing of the issues raised by the charges, exclu[ing] irrelevant issues or evidence and prevent[ing] any unnecessary delay or interference." [29] The Canadian and Australian military courts also suggested that the ordinary rules applicable to courts martial were applicable, so far as they related to field general courts martial, and with relaxed evidentiary rules. [30]

The courts also varied in their composition, with French tribunals requiring at least five military judges, British military tribunals requiring at least two officers plus a president. United States military commissions also required at least three members, as did those of Canada and Australia. The accused was accorded an opportunity to present a defense, and generally permitted counsel. In its military tribunals, France permitted appeals to a military appeals tribunal. Great Britain, Australia, Canada and the United States permitted no

formal appeals, save to higher "confirming" officers. [31] In the case of the United States, death sentences were required to be confirmed by the Theatre Commander, and the writ of Habeas Corpus was available, at least on a limited basis. [32] Significantly, all of the Common Law powers permitted the use of a presumption that membership in a group held to be guilty of war crimes could be taken as prima facie evidence of an individual defendant's guilt. As articulated in the Royal Warrant:

Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court. [33]

To the extent that "customary" rules can be drawn from this post-World War II practice, it suggests that the accused must be accorded a regular hearing, before a court composed of at least three officers, permitted the opportunity to present a defense, and to be represented by counsel. No formal appeal process would be required, although review of any conviction by a higher authority, in the form of another military court or commanding officer, is clearly indicated. Whether any more elaborate process is, as a matter of customary international law, now required is debatable.

At the same time, Article 75 of Protocol I provides that individuals who are not entitled to the more favorable treatment accorded to lawful combatants or civilians, must nevertheless "be treated humanely in all circumstances" and, at a minimum, enjoy certain basic rights. With respect to criminal prosecution, these rights include, among other things, the opportunities:

To be informed of the charge;

To mount a defense;

To a presumption of innocence (although the standard of proof is not stated);

To be tried in his presence;

Not to be compelled to testify against himself or confess guilt;

To examine witnesses against him and to obtain the presence of witnesses on his own behalf;

To have the judgment publicly announced.

The United States, of course, is not a party to Protocol I, and is not bound by its requirements. However, these very basic protections are generally comparable to the rights and protections accorded in post-World War II military commissions, and would serve as a sound guide with respect to the procedures now being prepared pursuant to the President November 13 Military Order [34] . And, in fact, press reports suggest that these procedures will provide protections to the accused at least as expansive as those outlined in Article 75. [35]

C. The Status of Al Qaeda and the Taliban

There is little doubt that the members of al Qaeda are unlawful combatants under both the Hague Regulations and Geneva Conventions of 1949, as well as customary international law. Although al Qaeda has undertaken military-style attacks, against the United States and others, i.e., it has engaged in "belligerency," its fighters do not operate under a "responsible" command structure, [36] do not wear uniforms, do not carry arms openly, and do not conduct their operations in accordance with the laws and customs of war. Failure to meet any one of these requirements would be sufficient to cast al Qaeda's operatives into the category of unlawful combatant. They meet none of them.

Whether the Taliban meets the requirements of the Hague and Geneva Conventions is a more complicated question. The Taliban began as a guerilla movement well after the Soviet Union withdrew from Afghanistan in 1989. As is now well known, its initial recruits primarily came from Islamic schools, "madrassas," in Afghanistan and Pakistan. By late 1994, the group had gained control of the city of Kandahar in southern Afghanistan, and it captured the capital, Kabul, in 1996. Although the Taliban controlled most of Afghanistan's territory by 1997, and was eventually recognized as its legitimate government by a handful of states (including Pakistan and Saudi Arabia), there is a serious question whether the Taliban itself ever achieved the status of "lawful combatants." Their right to this status can, in fact, be disputed based on each of the qualifications for lawful belligerency, outlined in both the 1907 Hague Convention and the Geneva Convention III of 1949. Failure to comply with any one of these requirements would, of course, put the group in the category of "unlawful combatants," not entitled to the status of prisoners-of-war under the Geneva Conventions, and subject to trial in military commissions under both international law and the law of the United States.

As explained above, the first requirement for lawful belligerency is a regular and recognizable command structure, capable of imposing a military-style discipline. This requires, at a minimum, that hostilities be carried out by individuals subject to a "person responsible for his subordinates," in the same manner regular military officers are responsible for their troops. As the ICRC noted in its commentary on the Geneva Conventions, these commanders need not be regular military officers, but their authority "must be considered in the same way as that of a military commander." [37] Descriptions of the Taliban command structure vary, but some suggest that this requirement is not met in any meaningful way. As one author explained:

> The military structure of the Taliban is shrouded in even greater secrecy. The head of the armed forces is Mullah Omar although there is no actual definition of his position or his role. Under Omar there is a chief of general staff and then chiefs of staff for the army and air force. There are at least four army divisions and an armoured division based in Kabul. However, there is no clear military structure with a hierarchy of officers and commanders, while unit commanders are constantly being shifted around.
>
> * * * . . . [the Taliban's] haphazard style of enlistment . . . does not allow for a regular or disciplined army to be created. [38]

Military-style discipline, however, is the gravamen of this requirement. A "responsible" command structure must be capable of ensuring that the entire military organization complies with jus in bello strictures and that any malfeasance in this area is addressed and

punished. As the ICRC also has noted with respect to this condition: "[r]espect for this rule is . . . in itself a guarantee of the discipline which must prevail in volunteer corps and should therefore provide reasonable assurance that the other conditions [of lawful belligerency] referred to below will be observed." [39]

In this regard, commanders must have clear-cut obligations to inculcate respect for the laws of war in their subordinates, take active steps to ensure compliance, investigate and punish violations, and report to their own superiors. Failure to discharge these duties is itself considered a violation of the laws of war, subjecting the offending commander himself to harsh penalties [40] Given the importance of command responsibility, a command structure that is vague and, or, non-transparent, thereby insulating its members from responsibility for the actions of their subordinates, does not meet this requirement. This appears to have been the case with the Taliban, whose military forces were run by a constantly changing cast of local and regional commanders, with unclear lines of civilian and military authority above them.

The second requirement is that the group must conduct its operations in uniform. This requirement also is critical, and is one of the most important indicia of lawful belligerency. It is the uniform that permits opposing forces to identify other belligerents as lawful targets on the battlefield and, even more importantly, to distinguish them from civilians. Consequently, this rule is strictly enforced. An individual who otherwise would qualify as a "lawful combatant," as a regularly enrolled service member, or commissioned officer, in a state's armed forces, who is captured out of uniform may be treated as an unlawful combatant. [41] This was, in fact, the fate of Major John Andre, who was tried and condemned by a military commission, established by Commander-in-Chief George Washington, in 1780. Andre was not, strictly speaking, a spy, but had been captured in civilian dress, behind American lines, after having finished the negotiations whereby Benedict Arnold was to betray West Point to British forces.

A lawful combatant's uniform, of course, need not meet some standard of antique Napoleonic splendor. As defined in the Hague and Geneva Conventions, all that is necessary is "a fixed distinctive emblem recognizable at a distance." However, this emblem must, indeed, be "distinctive," i.e., it must "be the same for all the members of any one resistance organization, and must be used only by that organization." [42] It also "must be worn constantly, in all circumstances," and be fully distinguishable to enemy troops as they approach. [43] Thus, although wearing a "Soviet Star" was not considered to be a sufficient uniform to render partisans lawful belligerents during World War II (since it was not recognizable at a sufficient distance), [44] the use of the Tricolor by French resistance fighters, as an armband, for example, might have been sufficient. [45] In addition, according to the ICRC commentary, this symbol must be displayed on the groups' "engines of war," such as tanks, planes, ships or other vehicles. [46]

Although reports, again, differ, it seems doubtful that the Taliban's forces met this requirement in any consistent manner. The key questions would be whether they wore some emblem or article of clothing that would have permitted hostile forces to distinguish them from other forces, friend or foe, and from the civilian population. If this was not the case, then the Taliban and its members could not claim the status of lawful combatants.

Third, lawful combatants must carry arms "openly." This requirement, like that of a uniform or other distinctive emblem, is designed to ensure that belligerents can readily and easily distinguish other, hostile, combatants from non-combatants and friendly or allied

troops. Thus, it is not a requirement that all weapons be carried visibly on the person, but that the individual be seen as openly "in arms." As noted by the ICRC: "[t]he enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons. Thus, a civilian could not enter a military post on a false pretext and then open fire, having taken unfair advantage of his adversaries." [47]

Thus, whether the Taliban complied with this condition will be determined based upon whether they carried their arms in a manner that clearly distinguished them as combatants, and potential targets for their adversaries. This, admittedly, is a difficult requirement to meet in a society where males habitually carry firearms about their persons. It remains a requirement nonetheless.

Finally, and most importantly, to qualify for the status of lawful combatants, a military organization must subscribe to, and carry out its operations in accordance with, the laws and customs of war. In particular, as noted by the ICRC:

> Partisans are nevertheless required to respect the Geneva Conventions to the fullest extent possible. In particular, they must conform to international agreements such as those which prohibit the use of certain weapons (gas). In all their operations, they must be guided by the moral criteria which, in the absence of written provisions, must direct the conscience of man; in launching attacks, they must not cause violence and suffering disproportionate to the military result which they may reasonably hope to achieve. They may not attack civilians or disarmed persons and must, in all their operations, respect the principles of honour and loyalty as they expect their enemies to do. [48]

There is little doubt that the Taliban failed, as an institutional matter, to comply with this requirement. In fact, the Taliban openly rejected the constrains of international law, purporting to follow a purely "Islamic" approach to law and government, driven by its own interpretation of the Holy Koran. [49] As Mullah Omar is quoted as saying: "[w]e do not accept something which somebody imposes on us under the name of human rights which is contradictory to the holy Quranic law." [50] Consistent with this position, the Taliban's actual operations in the field were not conducted in accordance with even the most restrictive interpretation of the applicable norms. For example, reports from Afghanistan suggest that the Taliban routinely targeted civilian populations. In a July, 1998, offensive against the "Northern Alliance" forces of Ahmad Shah Masud (later murdered by an al Qaeda assassin days before the September 11, 2001, attacks on the United States), the Taliban "carried out intensive bombing of civilian targets." [51] A few days later, when Taliban forces entered Mazar-e-Sharif, Mullah Omar authorized his forces to put it to the sack:

The Taliban went on a killing frenzy, driving their pick-ups up and down the narrow streets of Mazar shooting to the left and right and killing everything that moved -- shop owners, cart pullers, women and children shoppers and even goats and donkeys. Contrary to all injunctions of Islam, which demands immediate burial, bodies were left to rot on the streets. "They were shooting without warning at everybody who happened to be on the street, without discriminating between men, women and children. Soon the streets were covered with dead bodies and blood. No one was allowed to bury the corpses for the first six days. Dogs were eating human flesh and going mad and soon the smell became intolerable," said a male Tajik who managed to escape the massacre. [52]

As another author noted, in reference to the Taliban and its allies:

> These non-Afghan fighters, along with the Taliban army, have not only broken the traditional norms of Afghan civil societies, they have also committed massive crimes against humanity by beheading and killing prisoners of war (POWs) and massacring thousands of civilians in different parts of the country. In 1998 to 1999, the International Red Cross reported that the Taliban and their non-Afghan army killed thousands of civilians in Bamyan and set fire to about 8,000 houses and shops. [53]

Similarly, according to reports by Amnesty International, the Taliban often treated women "as spoils of war. Many women were raped by armed guards during the period 1992-1995. Rape of women by armed guards appeared to be condoned by leaders as a method of intimidating vanquished populations and of rewarding soldiers." [54]

Killing prisoners-of-war, massacring civilians, the wanton destruction of civilian property, and treating women as "the spoils of war" violate both the customary laws of war, and treaty-based norms, including the Geneva Conventions of 1949 to which Afghanistan is, itself, a party. If these atrocities are carried on by individual elements in an armed force, they are considered to be war crimes and punished on an individual basis. However, when it is the policy of the group in question to undertake such activities, they may be considered unlawful belligerents, like Escalde's Savoyards who Vattel wrote had been justly hanged in long ago Geneva. [55] They are subject to summary disposition in military courts, and are not entitled to the benefit of prisoner-of-war status under the Geneva Conventions.

Overall, it appears that neither Osama bin Laden's al Qaeda organization, nor the Taliban itself, meet the qualifications for the status of lawful belligerents and may, therefore, be treated as unlawful combatants. This means that they are lawfully subject to trial in the military commissions established by the President's November 13 Military Order, and that they may be denied the status of prisoners-of-war, and the rights appurtenant to that status, under the Geneva Conventions of 1949. [56]

III. The International Covenant on Civil and Political Rights

In addition to citing (incorrectly) the Geneva Conventions of 1949, some commentators also have argued that the International Covenant on Civil and Political Rights ("ICCPR") would apply to trials of al Qaeda operatives by the United States, and that this treaty would foreclose the use of military commissions. The United States is a party to this convention (acceded 8 June 1992), and so is subject to its requirements to the extent that they may be applicable in these circumstances. Whether the ICCPR is applicable, however, is debatable. That document does not purport to displace, or even address, the issues covered by the Hague and Geneva Conventions, or the rights and obligations of individuals subject to the laws of war specifically, or the law of armed conflict in general [57] However, assuming that the ICCPR is applicable here, it nevertheless would not forbid the use of military commissions in appropriate cases.

Article 14 of the ICCPR provides that "all persons" shall be entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law." [58] In addition, a number of other procedural protections, similar to those listed in Article 75 of Protocol I, must be guaranteed to the accused. These include, among others:

> the presumption of innocence;
>
> the right to be informed of the charge;
>
> the right to adequate time and facilities for preparing a defense;
>
> the right to counsel of the accused's own choosing;
>
> the right to be tried without undue delay and in his presence;
>
> the right to examine, and to have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf; and
>
> the right to have his conviction and sentence reviewed by a higher tribunal according to law.

So long as these requirements are satisfied, the provisions of the ICCPR do not suggest that an individual, held as an unlawful combatant, cannot be tried before a military court. And, based both on the President's November 13 Military Order, and press reports [59] regarding the procedural rights to be provided in any military commission established pursuant to that order, it appears that each of these requirements would, in fact, be satisfied. With respect to the issue of "public" trials, for example, Article 14 itself provides that "[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society." This would clearly permit the closing of some or all of the hearings before military commissions based on national security concerns.

Perhaps the most onerous provision of the ICCPR, in the context of the ongoing debate about military commissions and treatment of al Qaeda and the Taliban, is the requirement that the accused must be permitted to appeal both his conviction and sentence to a "higher tribunal according to law." Under the President's order (as was the case with the military tribunals established after World War II), no appeal would be permitted to the civilian courts, although the order itself would be subject to challenge on a Writ of Habeas Corpus, as was the case in Quirin. Nevertheless, it appears that anyone brought before a military commission will be permitted an appeal to an "appellate board." The ICCPR does not require that appeals be permitted to the civilian court system, and permitting an appeal to a military appellate board would be very similar to the system now followed in the ad hoc United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda, where appeals are permitted to Tribunal judges sitting as an "appeals panel." This arrangement would, therefore, clearly meet international standards.

Under the ICCPR, a tribunal also must be "independent and impartial." Some have argued that military commissions cannot met this requirements, because they invariably dispense "victors justice." However, the use of military commissions in these circumstances appears to meet prevailing international standards. The IMT, as well as other military tribunals held after World War II in German and Japan, were staffed by officers or officials of the victorious powers. These tribunals have occasionally been criticized, but the legality of their proceedings has generally been accepted. Moreover, in the case of the International Criminal Tribunal for the Former Yugoslavia, even today, citizens of NATO states sit in judgment of Slobodan Milosevic, even though their states were at war with him in 1999.

In any case, there is no evidence that the ICCPR was intended to prohibit the use of military commissions in appropriate circumstances. Indeed, the Human Rights Committee established pursuant to Article 28 of the ICCPR, specifically acknowledged the legality, as well as the exceptional nature, of such tribunals in its commentary on Article 14:

The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable impartial and administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. [60]

Finally, even assuming, arguendo, that the military commissions established pursuant to President Bush's order could not meet the requirements of Article 14 [61], the United States could nevertheless take advantage of the emergency authority provided in Article 4 of the ICCPR, which permits derogations from Article 14 "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." Whether and when a threat to the "life of the nation" exists, is a matter left by the ICCPR to individual states parties to determine [62] This authority has, in fact, been used by U.S. allies in the past. Great Britain, for example, notified the ICCPR states parties, on 17 May 1976, that it intended "to take and continue measures derogating from [its] obligations under the Covenant," with respect to the situation in Northern Ireland. Article 14 was among those provisions listed as having been derogated from.

Given the willingness, and desire, of al Qaeda to attack civilian targets, and its determination to obtain weapons of mass destruction, it would be difficult to argue that the United States did not have the right to invoke this provision. In fact, on September 14, 2001, the President proclaimed a state of national emergency. Although this proclamation (7463) did not recite that the "life of the nation" was at stake, the President's Military Order of November 13 reaffirmed this state of emergency, and further noted that:

> (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government. [63]

To the extent that a more specific statement regarding the invocation of Article 4 is deemed necessary, an additional proclamation to this effect can be made by the President. In addition, a notification that the United States intends to derogate from Article 14 must be provided to the U.N. Secretary-General.

Thus, if the Administration determines, in preparing the rules of procedure for military commissions, that some aspect of Article 14 cannot or should not be met, then it may derogate from the requirements of the ICCPR, based on a Presidential finding and proclamation that a state of emergency exists that threatens the life of the nation, and once the appropriate notification is made to the Secretary-General.

IV. Conclusion

At the dawn of the 21st century, the civilized world is once again seriously menaced by unlawful belligerency. The class of unlawful combatants, which includes al Qaeda and the Taliban, poses a formidable challenge. Judging from the tragic events of September 11 and al Qaeda's subsequent pronouncements, they intend to continue a policy of purposefully targeting civilian populations, and do not feel bound in the slightest by jus in bello norms. The fact that such combatants are actively seeking weapons of mass destruction heightens even further the threat they pose. Suppression of these unlawful combatants is an critical policy priority, and should be aggressively pursued by all law-abiding states. Strict enforcement of the prevailing international law norms, which provide that unlawful combatants are not entitled to the rights of prisoners of war, and can be tried and condemned by military tribunals, is a key aspect of this campaign. [64]

Indeed, to erode the distinction between lawful and unlawful combatants, which is to central to the jus in bello core tenets, would undermine the entire effort of subjecting warfare to some sort of normative and legal restraints and rules. [65] This enterprise is centuries old, and it would be ironic indeed if the 21st century witnessed the destruction of the achievements that have sought to limit, to maximum extent possible, the destruction and horror of war. [66]

Footnotes

1. 66 Fed. Reg. 57,833 (Nov. 16, 2001).

2. 317 U.S. 1 (1942). For an in-depth discussion of military commissions' history, prior practice and the constitutional issues implicated by them, see, e.g., David B. Rivkin, Jr., Lee A. Casey and Darin R. Bartram, "Bringing Al-Qaeda To Justice: The Constitutionality of Trying al Qaeda Terrorists in the Military Justice System," The Heritage Foundation Legal Memorandum No. 3, November 5, 2001.

3. For supportive accounts, see, e.g., Joseph Lieberman, "No Excuse for Second-Class Justice," Wash. Post, January 2, 2002; Lloyd Cutler, "Lessons On Tribunals - From 1942," Wall S.t J., Dec. 31, 2001, Stuart Taylor, Jr., "Military Commissions Need Not Be Kangaroo Courts," National Journal, Dec. 4, 2001; Robert H. Bork, "Having Their Day in (a Military) Court," National Review, Nov. 30, 2001; David B. Rivkin, Jr., and Lee A. Casey, "Why Military Commissions Are Justified," Wash. Times, Nov. 16, 2001; Douglas W. Kmiec, "War Crimes Are Different," Wall St. J., Nov. 15, 2001. For a contrary view, see, e.g., William Safire, "Kangaroo Courts," New York Times, Nov. 26, 2001; Harold H. Koh, "We Have the Right Courts for Bin Laden," New York Times, Nov. 23, 2001; Anne-Marie Slaughter, "al Qaeda Should Be Tried Before the World," New York Times, Nov. 17, 2001; Jonathan Turley, "Bush's Secret Court: Legal System in a Burka," L.A. Times, Nov. 15, 2001.

4. See, e.g., Letter from Charles D. Seigal, Chair, Human Rights Committee of the American Branch of the International Law Assoc., to Sen. Patrick Leahy and Sen. Dianne Feinstein, Senate Judiciary Committee (Dec. 3, 2001).

5. See, e.g., "Critics' Attack on Tribunals Turns to Law Among Nations," N.Y. Times, December 26, 2001 (noting criticism about expanding scope of unlawful combatant status). The term "unlawful belligerent" was the traditional designation of individuals whose right to resort to arms was not recognized by the laws of war, although the term "unlawful combatant" is more often used today, and was used by the Supreme Court in Quirin. These terms are synonymous, and will be used interchangeably throughout this memorandum.

6. Quirin, 317 U.S. at 31.

7. Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) [hereinafter "Hague Convention" or "Hague Regulations"]

8. Emmerich de Vattel, The Law of Nations 481 (Luke White ed. Dublin 1792). (From the point of view of U.S. constitutional analysis, Vattel is highly important. He was probably the international law expert most widely read among the Framers. See generally Daniel G. Lang, Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power 11 (1985)) ("Alexander Hamilton [for example] referred to Vattel as 'perhaps the most accurate and approved of the writers on the laws of Nations' and regularly invoked his authority in cabinet opinions and public defenses of administration policy.").

9. See Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, reprinted in 7 John Moore, A Digest of International Law §174 (1906) ("[m]en, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army, and without sharing continuously in the war, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates") [hereinafter, Moore's Digest]

10. 317 U.S. at 35-36 & n.12.

11. The use of such commissions overseas, even for lawful combatants, has also been approved by the Supreme Court. See In re Yamashita, 327 U.S. 1 (1946) (permitting Japanese general Tomoyuki Yamashita to be tried and condemned by a military commission established by General Douglas MacArthur as supreme U.S. commander in the Far East).

12. 2 Lassa Oppenheim, International Law 454 (H. Lauterpacht, 6th ed. 1940).

13. .Resistance or "partisan" fighters were required to meet the qualifications under Article 1 of the Hague Convention, or those under Article 2, which provides lawful belligerent status to "inhabitants of a territory not under occupation, [who] on the approach of the enemy spontaneously take up arms without having had time to organize themselves in accordance with Article 1." Whether a territory was occupied or contested was, therefore, an important issue in some cases. See, e.g., Trial of Carl Bruner, Ernst Schrameck and Herbert Falten (Case No. 45), 8 L.Rpts. of Trials of War Criminals 15, 16-19 (U.N. War Crimes Comm. 1948) (quoting Permanent Military Tribunal at Dijon (completed 18th Oct. 1945)).

14. The German High Command Trial: Trial of Wilhelm von Leeb and Thirteen Others, (Case No.72), 12 L.Rpts. of Trials of War Criminals 1, 85 (U.N. War Crimes Comm. 1949) ("A failure to meet these requirements [the Hague Regulations on lawful combatancy]

deprives one so failing on capture of a prisoner-of-war status.") (quoting United States Military Tribunal, Nuremberg, 30th Dec. 1947-28th Oct. 1948)).

15. See The Hostages Trial: Trial of Wilhelm List and Others (Case No. 47), 8 L.Rpts. of Trials of War Criminals 34, 57 (U.N. War Crimes Comm. 1948) (quoting U.S. Military Trib., Nuremberg 8th July, 1947, to 19th February, 1948) (emphasis added). This rule applied regardless of whether the "unlawful belligerent" was a spy, saboteur, or guerilla fighter. As this court also noted:

> "Guerilla warfare is said to exist where, after the capitulation of the main part of the armed forces, the surrender of the government and the occupation of its territory, the remnant of the defeated army or the inhabitants themselves continue hostilities by harassing the enemy with unorganised forces ordinarily not strong enough to meet the enemy in pitched battle. They are placed much in the same position as a spy. By the law of war it is lawful to use spies. Nevertheless, a spy when captured, may be shot because the belligerent has the right, by means of an effective deterrent punishment, to defend against the grave dangers of enemy spying. The principle therein involved applied to guerrillas who are not lawful belligerents. Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured."
> Id. at 58 (emphasis added).

The term "franc-tireur," used by the court in the List Case, is merely another term for unlawful belligerent. It dates to the Franco-Prussian War (1870-71), during which a number of irregular rifle companies, who did not wear uniforms or observe military discipline, were formed by the French to harass Prussian forces. These individuals generally were shot out of hand when captured.

16. See Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War, Art. 4, 6 U.S.T. 3316, T.I.A.S. No. 3364.

17. For example, the fact that partisans were largely drawn from populations who resisted Nazi occupation, and frequently cooperated with the Allies, was not advanced as the primary justification for according them lawful combatant status.

18. In fact, this arguably was already the customary international law rule. See Oppenheim, supra note 12, at 454 ("they cease to be private individuals [and, therefore, unlawful combatants] if they organize themselves in a manner which, according to the Hague Convention, confers upon them the status of members of regular forces.").

19. International Committee of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War 54 (1960) [hereinafter ICRC Commentary on Geneva Convention III] This commentary also noted that "if resistance movements are to benefit by the Convention, they must respect the

four special conditions contained in sub-paragraphs (a) to (d) which are identical to those stated in Article 1 of the Hague Regulations." Id. at 59. The ICRC reaffirmed this in its commentary on the 1977 Protocol I Additional, in describing the state of the law following World War II:

Both during the conflict [Second World War], and thereafter, the law as laid down in The Hague prevailed. During the conflict resistance fighters were often executed summarily, i.e., without formalities. After the conflict such summary executions were only disclaimed in exceptional cases, and when they were, it was at the price of arguing the illegality of the invasion or occupation. Thus there was no one who maintained that the Hague Regulations of 1907 had lapsed on this point. In this way the four conditions of 1907 were eventually reaffirmed in 1949 in Article 4 of the Third Convention: a responsible commander, a fixed distinctive sign, carrying arms openly, observing the laws and customs of war. The only concession consisted of recognizing the right to continue fighting when under occupation, provided that such guerrilla fighters belonged to a Party to the conflict.

See International Committee of the Red Cross, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 383 (1987) (emphasis added) [hereinafter ICRC Commentary on Protocol I]

20. In cases where there is doubt regarding an individual's status, he or she must be accorded the protection of the Convention "until such time as their status has been determined by a competent tribunal." See Geneva Conventions III, supra note 16, Art. 5. The ICRC commentary for this article indicates a limited application. For instance, the ICRC noted that this provision would apply to "deserters, and to persons who accompany the armed forces and have lost their identity card." It does not mention other classes of beneficiaries.

21. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 43, 16 I.L.M. 1391 (1977).

22. ICRC Commentary on Protocol I, supra note 19, at 514 (emphasis added).

23. This rule was specifically altered, in the case of spies, by the 1907 Hague Convention which required that "[a] spy taken in the act shall not be punished without previous trial." Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Art. 30, supra note 7..

24. There is some authority suggesting that even a lawful combatant, if "accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war." See Trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six Others (Case No. 13), 3 L.Rpts. of Trials of War Criminals 23, 50 (U.N. War Crimes Comm. 1948). At the same time, a number of individuals were tried and condemned, after World War II, for having charged Allied soldiers and airmen with "war crimes," without permitting minimum procedural rights. See, e.g., Trial of General Tanaka Hisakasu and Five Others (Case No. 33), 5 L.Rpts. of Trials of War Criminals 66 (U.N. War Crimes Comm. 1948) (The commentary on this case noted that: "[t]he accused were in fact found guilty of the denial of certain basic safeguards which are recognized by all civilized nations as being elements essential to a fair trial, and of the killing or imprisonment of captives without having accorded them

such a trial. Whether the rights whch they denied to the captive airmen are regarded as arising from Article 2 of the Geneva Convention or from that customary international law of which that Article is commonly regarded as being declaratory, it is clear that these three United States trials constitute valuable precedents as to the precise nature of the rights which international law requires to be afforded in the trial of prisoners of war accused of having committed offenses before capture.").

25. See generally Ex parte Quirin, 317 U.S. at 35-36 & n.12; Digest of Laws and Cases, 15 L.Rpts. of Trials of War Criminals 112 (U.N. War Crimes Comm. 1949).

26. For example, The Rules of Procedure and Outline of Procedure for Trials of Accused War Criminals, promulgated for the Pacific Theatre on February 5, 1946, provided that the commission "may draw such inference from [the accused's] failure to testify as may seem fair and competent to a reasonable mind, after taking into consideration all the competent evidence in the case." See Annex III United States Law and Practice Concerning Trials of War Criminals by Military Commissions, Military Government Courts and Military Tribunals, 3 L.Rpts. of Trials of War Criminals 105, 107 (U.N. War Crimes Comm. 1948) [hereinafter Annex III United States Law and Practice] This would be a clear violation of the Fifth Amendment in any civilian U.S. court.

27. See Annex I British Law Concerning Trials of War Criminals by Military Courts, 1 L.Rpts. of Trials of War Criminals 103 (U.N. War Crimes Comm. 1947) [hereinafter Annex I British Law]

28. See Annex III United States Law and Practice, supra note 26, at 109.

29. Id.

30. See Annex, Canadian Law Concerning Trials of War Criminals by Military Courts, 4 L.Rpts. of Trials of War Criminals 125, 127 (U.N. War Crimes Comm. 1948) [hereinafter Annex Canadian Law]; .Annex, Australian Law Concerning Trials of War Criminals by Military Courts, 5 L.Rpts. of Trials of War Criminals 94, 99 (U.N. War Crimes Comm. 1948) [hereinafter Annex Australian Law]

31. See generally, Annex II, French Law Concerning Trials of War Criminals by Military Tribunals and by Military Government Courts in the French Zone of Germany, 3 L.Rpts. of Trials of War Criminals 93 (U.N. War Crimes Comm. 1948); Annex III United States Law and Practice, supra note 26, Annex I British Law, supra note 27, Annex Australian Law, supra note 30, and Annex Canadian Law, supra note 30.

32. See Annex III United States Law and Practice, supra note 27, at 113.

33. See Annex I British Law, supra note 27, at 108-09 (quoting Royal Warrant of 14 June 1945, Reg. 8(ii)).

34. Article 45 of Protocol I, provides that a captured combatant shall be "presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner-of-war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power." The commentary to this article recognizes, however, that this is a

new procedural right, not supported by custom. ICRC Commentary on Protocol I, supra note 19, at 555. Since the United States has not become a party to Protocol I, it would not be bound by this provision.

35. See generally, Charles Lane, "Terrorism Tribunal Rights are Expanded," Wash. Post, p. A1 (Dec. 28, 2001).

36. This requirement refers to a regular, military-style chain of command, with recognized officers responsible for, and capable of, issuing orders to their subordinates, and in a position to discipline them in accordance with accepted military practices. The organization of al Qaeda, at least as it is evidenced from public documents, is rather that of the criminal conspiracy or terrorist organization.

37. ICRC Commentary on Geneva Convention III, supra note 19, at 59.

38. Ahmed Rashid, Taliban 99-100 (2000). See also Kamal Matinuddin, The Taliban Phenomenon Afghanistan 1994-1997 59 (1999) ("The Taliban are not to be compared to an organized army. Their commanders do not carry out a military appreciation. There are no assembly areas, forming-up places, or start lines before an attack is launched. No fire plans are made. A large number of rockets are fired in the general direction of the objective, accompanied by a hail of bullets from automatic weapons, and hopefully the rival militia surrenders. The war booty so obtained helps them to fight another day.").

39. ICRC Commentary on Geneva Convention III, supra note 19, at 59.

40. See generally, In re Yamashita, 327 U.S. 1 (1946).

41. See Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, reprinted in 7 Moore's Digest, supra note 9, at §174 ("Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.").

42. ICRC Commentary on Geneva Convention III, supra note 19, at 60.

43. Id.

44. See The Hostages Trial: Trial of Wilhelm List and Others, supra note 15, at 57.

45. See Trial of Carl Bruner, et al., supra note 13, at 19.

46. ICRC Commentary on Geneva Convention III, supra note 19, at 60.

47. Id. at 61.

48. Id.

49. See also "General Assembly hears Afghanistan Claims of Pakistan Support of Taliban," M2 Presswire, Sept. 30, 1998) ("the Taliban refer to elections as 'un-Islamic' and when told to respect human rights, they refer to their own human rights standards") (quoting Abdullah

Abdullah, Vice-Minister for Foreign Affairs of Afghanistan); "Afghanistan Public Executions and Amputations on Increase," www.amnesty.org (Feb. 5, 1998) ("Taleban officials have been quoted as saying 'The Islamic Emirate (of Afghanistan) will bow under no kind of influence in the implementation and enacting of Shari'a punishment and divine orders.'"). It should be emphasized that this unique interpretation of Islam is the Taliban's own. Most Islamic countries, including Afghanistan in better days, fully subscribed to the laws and customs of war as set forth, among other places, in the Geneva Conventions of 1949. See Louis Henkin, Richard Crawford Pugh, Oscar Schachter, & Has Smit, Basic Documents Supplement to International Law Cases and Materials 366-67 (3d ed. 1993). The following are states with predominant Muslim populations who are parties to these conventions: Algeria, Bahrain, Bangladesh, Egypt, Indonesia, Iran, Iraq, Libya, Oman, Saudi Arabia, Syria, Tunisia, Turkey, United Arab Emirates, and Yemen.

50. "Women in Afghanistan: Pawns in Men's Power Struggles," www.amnesty.org (Jan. 11, 1999) [hereinafter "Women in Afghanistan"]

51. See Rashid, supra note 38, at 79.

52. Id. at 73.

53 Neamatollah Nojumi, The Rise of the Taliban in Afghanistan: Mass Mobilization, Civil War, and the Future of the Region 229 (2002). See also Women in Afghanistan, supra note 50 ("In the context of the ongoing fighting there have been reports of the Taleban militia carrying out indiscriminate killings and deliberate and arbitrary killings on a mass scale.").

54. See Women in Afghanistan, supra note 50 (emphasis added). A policy of "rape" during wartime has been held to constitute a violation of the laws and customs of war. See The Prosecutor v. Furundzija (Trial Chamber Judgement), 163-66 (ICTY 10 Dec. 1998).

55. See supra note 8 and accompanying text.

56. While the above-described analyses fully supports the conclusion that Taliban members were unlawful combatants, there have been other arguments raised that would reach the same conclusion. For example, some have suggested that, because Afghanistan under the Taliban was a "failed state," and that the Talibs were an illegitimate and repressive government, they may be treated as unlawful combatants. However, the question of whether an individual or group's belligerency is lawful or unlawful is, under current law, entirely a function of whether or not they have met the criteria established for lawful belligerency under the Hague Regulations and the Geneva Conventions. If the group has met those criteria, then the fact that it may have served (or run) a repressive government, would not appear to alter their status. For example, during the Second World War, the United States and its allies accorded to the armies of the Third Reich the rights and privileges then obtaining under the 1929 Geneva Convention, and the applicable Hague Convention. They did this having no illusions as to the nature of Hitler's government. Similarly, it was never suggested that the Red Army, which clearly met the requirements of the Hague and Geneva Conventions for lawful combatant status, could be considered an unlawful belligerent merely because the government it served was detestable. Likewise, there appears to be no authority suggesting that merely because a group, which otherwise qualifies as a lawful combatant, operates in a state where effective central government has disintegrated, its belligerency may be considered unlawful.

In addition, some have argued that the Taliban, even if it initially qualified as a lawful belligerent, lost that status by virtue of consorting with, and aiding and abetting unlawful combatants, i.e., al Qaeda. Obviously, a lawful combatant who joins a group of unlawful belligerents, discards his uniform, conceals his weapons, or renounces the laws and customs of war, himself becomes an unlawful combatant. However, a regular military or intelligence organization, which tolerates unlawful combatants, and even uses them in certain circumstances as spies or saboteurs, does not thereby lose its lawful combatant status. In certain circumstances, regular armed forces are, in fact, entitled to use the services of unlawful belligerents. See Oppenheim, International Law, supre note 12, at 454 (Espionage and war treason . . . bear a two-fold character. International Law gives a right to belligerents to use them. On the other hand, it gives a right to belligerents to consider them within their lines, as acts of illegitimate warfare, and consequently punishable as war crimes.").

57. In this regard, the closest the covenant comes to addressing such issues is a provision in Article 8 that "service of a military character" does not constitute forbidden "forced or compulsory labour."

58. The meaning of the requirement that a tribunal be "established by law" is in dispute. See generally The Prosecutor v. Tadic, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 41-47 (ICTY 2 Oct. 1995). However, past practice suggests that military tribunals, even those used to try lawful combatants accused of war crimes, may be lawfully established in a number of different ways. The IMT at Nuremberg was established through agreement among the Allied Powers, acting in their capacity as the conquerors of Nazi Germany. See The Nurnberg Trial, 6 F.R.D. 69, 107 (1946). The military tribunals established by Britain to try captured Nazis in Europe were based on a Royal Warrant, issued pursuant to King George VI's prerogative. See Annex I British Law, supra note 27. Those created by Australia, to try war crimes in the Pacific, were based on a statute. See Annex Australian Law, supra note 30, at 94. The military tribunals established by Canada during and after World War II were based first on the King's prerogative, in the form of Orders in Council, and later upon an act of Parliament. See Annex Canadian Law, supra note 30, at 125. In this case, the President's November 13 Military Order arguably meets even the most restrictive interpretation of the term "established by law," requiring a statutory basis. In this regard, the Supreme Court found statutory authority for the establishment of military commissions in sections 12 and 15 of the Articles of War, now codified at 10 U.S.C. §§ 818, 821, 904. Quirin, 317 U.S. at 27.

59. See supra note 35.

60. UN Human Rights Committee, General Comment 13. Equality before the courts and the rights to a fair and public hearing by an independent court established by law (Article 14), 13 April 1984. Here is should be noted that the Committee's reservations regarding these courts were expressed with respect to "civilians." This, in itself, suggests that the ICCPR is not applicable at all in cases involving individuals, who are not civilians, and subject to the laws of war.

61. The question of whether any military commissions established pursuant to President Bush's November 13 Military Order, would fully comply with the ICCPR requirements, cannot be definitely answered until the Department of Defense issues detailed regulations, spelling out how these commissions would operate. However, based upon various

published reports, it appears highly likely that these commissions would be fully ICCPR-compliant.

62. See www.unhchr.ch/html/menu3/b/treaty5_asp.htm

63. 66 Fed. Reg. 5783 (Sept. 16, 2001).

64. Significantly, unlawful combatants, be they al Qaeda, Hamas or any other organization, always have an opportunity to regularize their status, at least for laws of war-related purposes, by beginning to adhere to the relevant jus in bello norms.

65. This blurring of distinctions between lawful and unlawful combatants would be tantamount to concluding that there is no difference in the legal rules, applicable to police officers, who discharge their firearms or use other types of force, and criminals, who engage in similar activities. Without a doubt, this blurring of distinctions between a privileged and illegal use of force would destroy an entire "law and order" system and would undermine the viability of any body polity that permitted it.

66. The literature dealing with both the reasons, ethical, religious and utilitarian, for applying legal norms to combat, and the precise nature of such norms is voluminous. For a few representative accounts, see, e.g., William O'Brien, "Just War Theory," in The Ethics of War and Nuclear Deterrence (J.P. Sterba, ed 1985); Michael Walzer, Just and Unjust Wars (1977); William O'Brien, The Conduct of Just and Limited War (1981); James Turner Johnson, Just War Tradition and the Restraint of War (1981); Robert L. Holmes, On War and Morality (1989).

* * *

Lee A. Casey, David B. Rivkin, Jr. & Darin R. Bartram, *Unlawful Belligerency and its Implications Under International Law*, Federalist Society white paper (2003?); available at:

http://www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm

[PEGC · 2005.07.14 · CBG]