

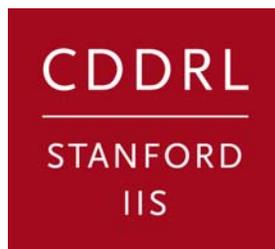
CDDRL

WORKING PAPERS

LAW, JUST WAR,
AND
THE INTERNATIONAL
FIGHT AGAINST
TERRORISM:
IS IT WAR?

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CDDRL was founded by a generous grant from the Bill and Flora Hewlett Foundation in October in 2002 as part of the Stanford Institute for International Studies at Stanford University. The Center supports analytic studies, policy relevant research, training and outreach activities to assist developing countries in the design and implementation of policies to foster growth, democracy, and the rule of law.

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1. Introduction

September 11 was not the first time the United States was victimized by terrorist attacks. In 1983, a truck bombing at the Beirut Airport in Lebanon killed 241 American Marines. In 1988, a bomb planted by Libyan intelligence officers detonated aboard Pan Am flight 103 as it passed over Lockerbie, Scotland, killing all 259 persons aboard. Truck bombings at the United States Embassies in Kenya and Tanzania in 1998 killed 225 people and injured thousands more. And in October 2000, suicide bombers maneuvered a small boat alongside the warship USS *Cole* in the port of Aden, Yemen, and triggered an explosion that killed seventeen U.S. sailors. Nor was September 11 the first major attack by foreign terrorists on American soil. In February 1993, a massive explosion in the parking garage of the World Trade Center in New York City killed six persons and wounded over 1,000 more.

Yet the magnitude of the events of September 11 fundamentally changed the United States Government's approach towards international terrorism. After September 11, the Bush Administration rejected the previous approach to counter-terrorism, which had employed the combined tools of diplomatic cooperation, economic sanctions, and internationally-coordinated law enforcement measures. Instead, the President declared in the aftermath of September 11 that the United States was engaged in a *war* on terrorism.¹

¹ On October 25, 2001, President Bush stated categorically: "As you all know, our nation is at war right now." President George W. Bush, Remarks by the President to the Students and Faculty at Thurgood

Subsequent statements and actions have made clear that President Bush's declaration that the United States would wage war against terrorism was not simply a spontaneous utterance, but is rather a formulation of national policy. Indeed, only a few days after recent press reports that administration officials would cease calling the conflict a "global war on terror,"² the President publicly overruled his top advisors, saying, "Make no mistake about it, we are at war."³

The characterization of the United States response to terrorism as "war" – or, in the parlance of international lawyers, "armed conflict" – has enormous implications for measures the United States may, as a legal matter, permissibly take in the course of the conflict. And yet whether the response to terrorism may properly be treated as "war" is far from clear. In this Essay, I argue that although the fight against terrorism does not qualify as war as a matter of positive international law, there are justifiable functional reasons for extrapolating from positive law and treating the conflict – or at least part of it – as war. But this is not the end of the inquiry. For even in war, substantive legal restraints apply. Moreover, just war theory demands reciprocity in wartime, such that the belligerents face each other with equivalent belligerent rights. Accordingly, assessing whether the exercise of wartime legal powers by

Marshall Extended Elementary School, Washington, D.C, [2001] 2 PUB. PAPERS 1301, available at <http://www.whitehouse.gov/news/releases/2001/10/20011025-2.html>.

² Eric Schmitt & Thom Shanker, *New Name for 'War on Terror' Reflects Wider U.S. Campaign*, N.Y. TIMES, July 26, 2005, at A7.

³ Richard W. Stevenson, *President Makes it Clear: Phrase is 'War on Terror,'* N.Y. TIMES, Aug. 4, 2005, at A12.

the United States in the struggle against terrorism is justifiable requires us to consider not only the *prima facie* functional basis for treating the conflict as war. We must also evaluate whether the United States has accepted the duties that apply in wartime and the related principle of reciprocity.

Because the conflict against terrorism does not satisfy the formal international law definition of war, the United States exercise of wartime legal authorities since September 11 is justifiable only on the basis of a functional extrapolation from positive law. Even if this move is defensible, however, the United States has been unwilling to accept important corresponding legal restraints that should flow from such a functional extrapolation. Nor has it been willing to confer upon its adversaries the rights to which they should be entitled as a matter of reciprocity under such an approach. This assertion of wartime rights without acceptance of corresponding wartime responsibilities undercuts the justification for United States effort to move beyond positive law in selecting a legal framework for the struggle against terrorism. In other words, the means by which the United States has conducted its campaign against terrorism undermines the justification for treating the conflict as “war.”

2. Is it really war?

2.1. War as metaphor

The United States response to terrorism is not the first time American leaders have invoked the concept of “war” in the face of challenges to the well-

being of the country. The metaphor of war has been employed previously to inspire comprehensive collective responses to major national crises. And so President Nixon launched a national “war against crime.”⁴ President Reagan initiated a “war on drugs.”⁵ And some years before that, of course, President Johnson declared “unconditional war on poverty in America.”⁶

In these cases, however, the metaphor of war was employed as just that: a metaphor. Even though some of the enemies against which American leaders declared war presented genuine security threats to the United States – including violence, murders, even challenges to governmental authority – these were not wars in the legal sense. The United States did not, in the context of the war on crime or the war on poverty, publicly claim the right to exercise the extraordinary measures permissible in a legal state of armed conflict, such as the right to invade other states or to kill one’s adversaries.

2.2. War as legal status

With respect to the war on terrorism, in contrast, the notion of war is not employed merely as a metaphor to mobilize the public. The United States characterizes the war against terrorism as a real war, a war in the legal sense,

⁴ President Richard M. Nixon, Annual Message to the Congress on the State of the Union, 1970 PUB. PAPERS 8, 12 (Jan. 22, 1970), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=2921#>.

⁵ President Ronald Reagan, Radio Address to the Nation on Economic Growth and the War on Drugs, [1988-1989] 2 PUB. PAPERS 1310, 1311 (Oct. 8, 1988), *available at* <http://www.reagan.utexas.edu/archives/speeches/1988/100888a.htm>.

⁶ President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, [1963-1964] 1 PUB. PAPERS 112, 114 (Jan. 8, 1964), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=26787>.

and it is exercising many of the extraordinary authorities that are available only during times of war.

First, in response to the September 11 attacks, the United States has claimed – and exercised – the right to use international armed force against both terrorist actors and governments that harbor them, notwithstanding the prohibition on the use of force that ordinarily applies in international relations. On October 7, 2001, the United States reported to the Security Council that it had initiated military action against the Al Qaeda terrorist organization and the *de facto* Taliban government in Afghanistan. It did so pursuant to Article 51 of the United Nations Charter, the provision that guarantees to states the right to use armed force in self-defense in the event of an armed attack.⁷

Second, the United States has exercised the right to kill persons outside Afghanistan as combatants in the war against terrorism. In November 2002, a missile launched from an unmanned American aircraft killed Al Qaeda leader Sinan al-Harethi and five associates traveling in a car in Yemen. Commenting on the killing, a United States official stated: “We’re at war, and we’ve got to use to the means at our disposal to protect the country.”⁸ Administration officials explained that the killing did not violate the longstanding Executive

⁷ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946, available at <http://www.un.int/usa/s-2001-946.htm>.

⁸ David Johnston & David E. Sanger, *Yemen Killing Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16.

Branch order prohibiting assassination⁹ because Al Qaeda operatives had been defined as “enemy combatants and thus legitimate targets for lethal force.”¹⁰

Third, the Executive Branch has relied on the wartime right to detain enemy soldiers for the duration of the conflict, without a judicial determination that they have committed crimes against the United States. Such detentions, in armed conflict, serve the preventive function of ensuring that enemy soldiers do not rejoin the conflict and participate in further battlefield action. In its briefs before the Supreme Court in the cases of enemy combatants detained at the Guantanamo Naval Station in Cuba and at military facilities in the United States, the Executive Branch justified its detention practice with specific reference to wartime legal authorities: “[T]he President’s war powers include the authority to capture and detain enemy combatants in wartime”¹¹ Such powers, the Bush Administration argued, include the right to detain such combatants, whether foreign or American, without trial, for the duration of the armed conflict.¹²

2.3. “War” and the war on terrorism: A positivist assessment

⁹ Executive Order 12,333, 3 CFR 200, § 2.11 (1982), *available at*: <http://www.dod.mil/atsdio/documents/eo1233.html>.

¹⁰ James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at A1.

¹¹ Brief for the Respondents at 14, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6996), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_03/03-6696Resp.pdf.

¹² *See* Brief for the Petitioner at 9, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (arguing that the President’s “wartime authority . . . to capture and detain enemy combatants” was “fully applicable” in the case of a U.S. citizen allegedly engaged in terrorist activity in the United States), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs_03/03-1027pet.pdf.

The question of whether it is justifiable to exercise wartime powers in the struggle against terrorism – whether the conflict is truly war in the legal sense – is a contested issue. Because the conflict has taken place largely abroad, it is useful in analyzing the question to look at the meaning of war under international law.

The key problem with treating the fight against terrorism as war in the legal sense, of course, is that under positive international law, armed conflict is a relationship between *states*. Yoram Dinstein explains that war, as a matter of customary international law, is “a hostile interaction *between two or more States . . .*”¹³ Under treaty law, the 1949 Geneva Conventions that govern international armed conflict stipulate that the legal regime of armed conflict – the “war regime” – is triggered in the case of “declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties*” to the Conventions.¹⁴ The war on terrorism falls outside these positive law definitions because the terrorist groups against which the conflict is being waged are neither states nor parties to the relevant treaties.¹⁵

¹³ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 15 (3rd ed. 2001) (emphasis added).

¹⁴ *See, e.g.*, Geneva Convention III Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III], art. 2. The three other Geneva Conventions of 1949 contain an identical provision (“Common Article 2”) setting out when a state of international armed conflict triggering the substantive provisions of the Conventions exists.

¹⁵ Traditional international law does recognize the existence of armed conflict between states and sub-state entities, but only in the context of civil or internal wars. Thus, Article 3 common to the 1949 Geneva Conventions (“Common Article 3”) provides certain minimal humanitarian law rules applicable in “the case of armed conflict not of an international character occurring *in the territory of one of the High Contracting Parties.*” Geneva Convention III, *supra* note 14, art. 3 (emphasis added). The 1977 protocol elaborating international humanitarian law norms applicable in such cases applies to “all armed conflicts . . . which take place *in the territory of a High Contracting Party* between its armed forces and dissident armed

2.4. “War” and the war on terrorism: A functional assessment

Even if the war on terrorism does not qualify as war under positive international law definitions, however, is it nevertheless justifiable to extrapolate from those definitions and to treat the war on terrorism as functionally equivalent to war? Is it justifiable, in other words, for the United States to exercise powers in the struggle against terrorism, such as the power to kill or indefinitely detain enemy combatants, that would not be legally permissible in non-war times?

On the face of it, the answer seems to be yes, at least with respect to the post-September 11 violence between the United States and the Al Qaeda organization. That struggle exhibits characteristics that strongly resemble traditional armed conflict between states, during which wartime legal powers may be exercised. On September 11, the United States sustained an assault that qualifies, in scale and effect, as an “armed attack” that would justify the use of force in self-defense under Article 51 of the United Nations Charter.¹⁶ It suffered extensive casualties and severe economic losses, comparable to those sustained during the worst military confrontations that have taken place on United States territory in over a century. In addition, the events of September 11 were only part of a series of significant armed attacks committed by Al

forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, art. 1, 1125 U.N.T.S. 609 (emphasis added).

¹⁶ Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41 (2002).

Qaeda that demonstrated its willingness and capacity to inflict substantial harm against the United States on an ongoing basis. In other words, Al Qaeda displayed the *capability* of inflicting on the United States the kind of harm that traditionally has been associated only with attacks by states.

Moreover, even though it is not a state, Al Qaeda arguably exhibits characteristics that, in the case of states, justify the application of the war regime – namely, the right to infringe the human and civil rights of their soldiers on a collective basis – during armed conflict. A state engaged in armed conflict need not establish that a given enemy soldier has engaged in conduct harmful to it before it may detain or kill him. The soldier’s association with the enemy state is sufficient; he is presumed to be an agent of a bureaucratically organized entity that is institutionally committed to committing violence against the first state to achieve some political goal.

Like a state, Al Qaeda seems to possess – or at least at the time of the September 11 attacks seemed to possess – clear, albeit decentralized, organizational and command structures.¹⁷ In addition, Al Qaeda had declared its intention, as an organization, to engage in violence against the United States for the political purpose of altering United States foreign policy on key issues. In 1998, Al Qaeda leader Osama bin Laden issued a “declaration of war” that called on Muslims to “kill the Americans” and to “launch the raid on Satan’s

¹⁷ See generally ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* (2002).

U.S. troops.”¹⁸ Unlike organized crime bosses in New York or drug lords in Cali, Colombia, the injury Al Qaeda seeks to inflict on the United States is direct and intentional, not merely incidental to some other activity like accumulating wealth or power through criminal activities.

Thus, although the United States war on terrorism does not meet the definition of war under positive international law, the nature of the violence that has been inflicted on the United States, the character and goals of the Al Qaeda organization responsible for that violence, and the presence of an ongoing threat, together provided justifiable *prima facie* functional grounds for the United States to extend the war regime to the conflict with Al Qaeda.

3. The rejection of the restraints of law of war

The existence of a state of war does not imply only the applicability of belligerent rights, however. International law also imposes substantive legal *restraints* on the conduct of war. The restrictions of *jus ad bellum* regulate when a state may resort to international armed force and, as a consequence, claim the right to avail itself of those extraordinary powers that apply during war. The restraints of *jus in bello* restrict the means by which war is conducted and provide certain basic humanitarian protections to those who find themselves in the theater of war, whether as innocent civilians or as combatants.

¹⁸ “Declaration of War by Osama bin Laden, together with the leaders of the World Islamic Front for the Jihad Against the Jews and the Crusaders” (February 23, 1993), *quoted in* GUNARATNA, *supra* note 17, at 1.

As such, both the right to conduct war and the means by which it is prosecuted are subject to important substantive restraints.

In prosecuting the war on terrorism, however, the United States has been willing to apply its functional extension of the war regime only with respect to the assertion of belligerent *rights*. In several highly prominent instances, the United States has taken a vastly different approach with respect to accepting the *restraints* that bind parties to armed conflict. This inconsistency undermines the justification for the United States claim that the struggle against terrorism should be treated, in legal terms, as war.

3.1. Targets of the war on terrorism

The first manner in which the United States has ignored the restraints of the law of war concerns the issue of the targets against which force may permissibly be used. Even if there are defensible *prima facie* functional reasons for treating the conflict with Al Qaeda as war, the United States has asserted the right to extend the war regime to all terrorist organizations. “Our war against terror,” President Bush stated shortly after September 11, “begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”¹⁹

¹⁹ President George W. Bush, Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, [2001] 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

The justification for extending the war regime to the conflict with Al Qaeda, as noted above, turns on the nature and goals of that organization, the character of the attacks it had committed against the United States, and the ongoing threat it presented. These characteristics justify engaging in war against Al Qaeda as if it were a state. Beyond this context, however, the general threat presented by terrorism does not obviate the substantive restraints governing the use of force, under which a state may use force only in self-defense or where authorized by the United Nations Security Council acting under its Chapter VII collective security powers. The existence of a justifiable basis for extending the war regime to the fight against Al Qaeda does not justify the use of force against terrorist groups that are not part of that organization, or against entities for which there is no demonstrable link to the September 11 attacks against the United States.

In addition, the Bush Administration has claimed a right to use force not only against terrorist groups themselves, but against states that support terrorists. According to President Bush:

Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.²⁰

²⁰ *Id.* at 1142.

There can be no question that governments that harbor terrorists act in violation of international law. Nevertheless, unless the acts of terrorists are legally attributable to the supporting state under principles of state responsibility – that is, unless the terrorists are acting on the instructions or under the control of the supporting state – such violations do not justify the use of force against the supporting state.²¹ The international community has for this reason generally condemned as unlawful unilateral uses of force against terrorist targets in states allegedly harboring them, largely because of concerns about the territorial integrity of state where attack occurs.²²

As such, the United States has not accepted the limits on the use of force that would apply even under an approach that treats Al Qaeda as the functional equivalent of a state against which war may justifiably be waged. The Bush Administration’s position is analogous to an assertion by a state, in

²¹ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 8 (adopted by the United Nations International Law Commission in 2001), *reprinted in Report of the International Law Commission, Fifty-Third Session*, U.N. GAOR, 55th Sess., Supp. No. 10, at 45, U.N. Doc A/56/10 (2001), available at <http://www.un.org/law/ilc/reports/2001/english/chp4.pdf>.

²² See, e.g., U.N. Security Council Res. 262, U.N. Doc. S/RES/242 (1968) (condemning Israeli attacks against the Beirut Airport in response to Lebanon’s harboring to Palestine Liberation Organization terrorist groups); U.N. Security Council Res. 509, U.N. Doc. S/RES/509 (1982) and U.N. Security Council Res. 517, U.N. Doc. S/RES/517 (1982) (demanding that Israel withdraw from Lebanon following its invasion aimed at destroying Palestinian terrorist organizations and “censur[ing]” Israel for its failure to do so); U.N. Security Council Res. 573, U.N. Doc. S/RES/573 (1985) (“condemn[ing]” Israel’s bombing of the Palestine Liberation Organization headquarters in Tunis as “act of armed aggression . . . against Tunisian territory”); U.N. Security Council Res. 1234, U.N. Doc. S/RES/1234 (1999) and U.N. Security Council Res. 1304, U.N. Doc. S/RES/1302 (2000) (deploring the presence by foreign forces in the Democratic Republic of the Congo, including Rwandan forces that attacked refugee camps from which terrorist camps against Rwanda were launched, and demanding the withdrawal of those forces); Report of the 4836th Meeting of the U.N. Security Council, U.N. SCOR, 58th Sess., U.N. Doc. S/PV.4836 (Oct. 5, 2003) (during which most states condemned Israel’s bombing of alleged terrorist training camps in Syria), available at <http://daccessdds.un.org/doc/UNDOC/PRO/N03/541/94/PDF/N0354194.pdf?OpenElement>.

the context of traditional armed conflict, of a right to use force not only against the state that had attacked it, but also against other unfriendly states that had not yet engaged in belligerent acts. In this way, the United States has claimed wartime rights that go well beyond what would be justified even by a functional extrapolation of the war regime to the conflict with Al Qaeda. The undefined nature and scope of the conflict creates a too tempting invitation to swallow up the limits on the use of force, and to allow the use of force against all would-be adversaries of the United States as part of a single war.

3.2. The detention of enemy combatants

Beyond the issue of the legally permissible range of targets against which force may be used, the United States has also disregarded legal restraints that should govern the *means* by which it conducts war, even under a view that justifies the extension of the war regime in the struggle against terrorism on functional grounds. Of particular concern in this regard is the treatment by United States authorities of persons detained in Afghanistan (and elsewhere) and held at the Guantanamo Naval Station in Cuba (and elsewhere) as enemy combatants in the war on terror.

In non-wartime circumstances, both international law and U.S. law strictly limit the capacity of the government to deprive persons of their liberty. Under the International Covenant on Civil and Political Rights, the United States has agreed, as a matter of international law, that no person in the United

States or subject to United States jurisdiction may be “deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”²³ It further agreed that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”²⁴ Such protections were long enshrined, as a matter of domestic law, in our own Due Process clause, which permits imprisonment only on the basis of a judicial order – not merely an Executive Branch determination – following proceedings with formal allegations of wrongdoing, a hearing before an impartial tribunal, and ultimately conviction and judgment.²⁵

In wartime, of course, states may free themselves from these restraints, at least with respect to the detention of enemy soldiers and, in some cases, enemy aliens. If the war on terror may justifiably be deemed war, the Executive Branch is right that it may detain members of the enemy force not because they have been convicted by a court of having committed criminal acts, but merely to remove them from the field of battle so as to prevent them from further combat against the United States. It was on this basis that the United States transferred over 700 persons detained during the combat in Afghanistan

²³ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, art. 9(1), 999 U.N.T.S. 171, 6 I.L.M. 368.

²⁴ *Id.*, art. 9(4).

²⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2661 (Scalia, J., dissenting).

to Guantanamo, where approximately 520 persons – none of whom has been convicted of a criminal offense – remain in United States custody.

Even as it has claimed the right to detain those held at Guantanamo by invoking the war regime, however, the United States has been unwilling to apply the legal restraints regulating the treatment of detainees that apply in armed conflict. Ordinarily, opposing soldiers captured during international armed conflict must be treated as prisoners of war, in accordance with the Third 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Under the Third Geneva Convention, a prisoner of war is defined as any “[m]ember[] of the armed forces of a Party to the conflict” who has “fallen into the power of the enemy.”²⁶ The United States, however, has concluded categorically that none of the detainees captured during combat against the Taliban and Al Qaeda in Afghanistan are entitled to be treated as prisoners of war. With regard to members of Al Qaeda, the United States eschewed the functional approach it has taken in asserting wartime powers in the fight against terrorism. It has instead relied on a positivist interpretation of the law to conclude that Al Qaeda fighters are not covered by the Third Geneva Convention because Al Qaeda is not a state. As for Taliban fighters, the White House concluded that they did not meet certain requirements for prisoner of war status under Article 4(A)(2) of the Third Geneva Convention because they: (a) were not part of a military hierarchy; (b) did not wear uniforms or other

²⁶ Geneva Convention III, *supra* note 14, art. 4.

distinctive signs; (c) did not carry their arms openly; and (d) did not conduct operations in accordance with the law of war.²⁷ As such, the United States has concluded that both the Al Qaeda and Taliban fighters, although they are combatants in what the United States characterizes as war, may not claim the protections that ordinarily apply to captured enemy fighters in wartime. They have been treated as unprivileged, or unlawful, combatants.

There are several fundamental difficulties with the United States conclusion that all the combatants in Afghanistan were unprivileged belligerents with no entitlement to prisoner of war status. First, the Third Geneva Convention specifically contemplates the possibility of disputes as to whether an individual combatant is entitled to prisoner of war status; in such cases, Article 5 of the Convention requires that there be an individualized hearing before a tribunal to make a status determination.²⁸ Such hearings could enable a detainee to establish that he had not taken part in armed conflict in Afghanistan, i.e., that he was not, in fact, a combatant. It is notable in this regard that many of those in custody at Guantanamo were detained not by United States forces, but by our Northern Alliance allies, on grounds that may have been unclear when they were transferred to United States custody. Alternatively, a hearing could explore whether a detainee in fact failed to meet

²⁷ *Id.*, art. 4(A)(2).

²⁸ “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Geneva Convention III, *supra* note 14, art. 5.

the requirements of Article 4(A)(2) of the Third Geneva Convention, as the United States has asserted is the case for Taliban fighters.

Despite the requirements of Article 5 of the Third Geneva Convention, which requires a hearing whenever there is “any doubt” about the status of a detainee, the United States refused, for over two and one half years, to conduct such proceedings. Eventually, in July 2004, the Defense Department announced that the United States would establish a “Combatant Status Review Tribunal” to enable detainees to contest their status as enemy combatants.²⁹ According to the order establishing the Tribunal, however, an individual will be deemed an “enemy combatant” if he “was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”³⁰ It is significant that the Combatant Status Review Panels do not entitle detainees to argue that they were lawful combatants entitled to prisoner of war status, either on the theory, in the case of Taliban fighters, that they complied with the Geneva Convention Article 4(A)(2) requirements or, in the case of Al Qaeda fighters, that they should be deemed lawful combatants under the functional extension of the war regime that the United States has embraced to justify waging war against them. In short, the United States continues categorically to reject the possibility of

²⁹ News Release No. 651-04 , U.S. Department of Defense, Combatant Status Review Tribunal Order Issued (July 7, 2004), *available at* <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>.

³⁰ Memorandum from the Deputy Secretary of Defense for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

treating the detainees at Guantanamo as prisoners of war, even though their indefinite detention is justified solely by the United States claim to be at war with them.

There is a second major problem with the Administration's selective application of the law of war. Even if the Administration is right that the detainees are not prisoners of war within the meaning of the Third Geneva Convention, it is not the case that they are entitled to no more than "humane treatment"³¹ and otherwise exempt from protection under the laws of war. For even if these individuals are not prisoners of war within the meaning of the Third Geneva Convention, then they are persons protected by the Fourth 1949 Geneva Convention Relative to the Protection of Civilians in Time of War, which applies generally to all persons who "at a given moment and in any manner whatsoever, find themselves, in the case of a conflict . . . in the hands of a Party to the conflict . . . of which they are not nationals."³² The protections of the Fourth Geneva Convention are admittedly limited; the treaty grants states considerable discretion to exercise measures of control over protected persons on security grounds, including internment. But it prohibits at a minimum subjecting protected persons to "physical or moral coercion . . . to obtain information from them."³³ It also ensures that even interned persons may

³¹ White House Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

³² Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, adopted Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 4.

³³ *Id.*, art. 31.

communicate with the outside world. The United States has not accepted any obligation to comply with these provisions, or the obligation to grant review by a court or administrative board, at least twice a year, of the original decision to intern a person protected by the Convention.³⁴

A third difficulty with the Administration's selective application of the war regime in the case of the Guantanamo detainees concerns the question of when such persons must, under the law of war, be released. Although the United States initiated an international armed conflict against Afghanistan in October 2001, that conflict is no longer an international armed conflict within the meaning of Geneva Conventions. Once the government of President Karzai was established, either as the Interim Government in December 2001 or as the Transitional Government in June 2002, the United States and Afghanistan were no longer at war. Since then, the government of Afghanistan, with United States assistance, has been seeking to suppress an internal rebellion of residual Taliban and Al Qaeda forces.

Under the Third Geneva Convention, prisoners of war must be released and repatriated "without delay" after the cessation of active hostilities.³⁵ Although hostilities continue in Afghanistan, the legal character of those hostilities has changed. Consequently, the United States may no longer assert rights with respect to detainees from Afghanistan derived from the existence of

³⁴ *Id.*, art. 43.

³⁵ Geneva Convention III, *supra* note 14, art. 118.

a state of international armed conflict. A state may of course charge a prisoner of war with a crime committed before he was detained, and it may require him to serve a prison sentence even after the conflict has ended. (In the case of Guantanamo, even though many detainees have been held there for nearly four years, criminal trials have been initiated before military commissions against only four persons, and none of these has moved beyond the pretrial stage, much less resulted in a conviction.) But once the international armed conflict has ended, the *preventive* justification for the United States to detain combatants from Afghanistan disappears.

The Administration would presumably respond to this critique by arguing that the international armed conflict has not in fact ended, because that the international war against terrorism continues. Focusing on the conflict in Afghanistan, the Administration might continue, is the wrong frame of reference. Here, however, it is important to stress the limits beyond which the extension of the war regime to the conflict against terrorism cannot be justified. Even if we accept the possibility of a state of war against some terrorist groups, a substantial number of those held at Guantanamo appear *not* to be combatants in that war. Press reports based on interviews with officials familiar with the Guantanamo facility have revealed that military investigators “have struggled to find more than a dozen [detainees] they can tie directly to significant terrorist acts.”³⁶ One United States officer, a member of the original military legal team

³⁶ Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

assigned to work on the prosecutions, observed: “It became obvious to us as we reviewed the evidence that, in many cases, we had simply gotten the slowest guy on the battlefield.”³⁷ More recent press accounts suggest, based on reviews conducted by the United States military, that “40 percent of those penned up at Guantanamo never belong there in the first place.”³⁸

Indeed, the very definition of “enemy combatant” in the Defense Department order establishing the combatant status review panels as a person who was part of forces associated with Al Qaeda or the Taliban “engaged in hostilities against the United States” reinforces the likelihood that many of those at Guantanamo are being detained not by virtue of their involvement in the war on terrorism, but simply for their role in the battle for Afghanistan. They engaged in a conventional, ultimately unsuccessful, campaign against United States efforts to topple the Taliban regime on behalf of which they fought. To the extent these detainees were combatants in a conventional international armed conflict, and not the broader war on terror, their war is over. Under a proper application of the Geneva Conventions, they should be repatriated to Afghanistan, where the national government would be empowered to apply provisions of Afghan law to prevent or punish insurrectionary acts.

³⁷ Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1. See also Tim Golden & Don Van Natta, *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 (suggesting that none of the detainees at Guantanamo “ranked as leaders or senior operatives of Al Qaeda” and that “only a relative handful – some put the number at about a dozen, others more than two dozen – were sworn Qaeda members or other militants able to elucidate the organization’s inner workings”).

³⁸ Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, § 6 (Magazine), at 36.

4. The rejection of the reciprocity of war

Substantive legal rules do not represent the only means by which the law constrains war. A second constraint, arising from just war theory, is the notion of *reciprocity*. Each party to an armed conflict is ordinarily aware and accepts that once it invokes its authority to wage war against an adversary, its adversary has the right to wage war back. Thus, a state whose soldiers claim the combatant's privilege to kill enemy soldiers, to destroy enemy property, and to capture and detain prisoners of war, ordinarily accepts that soldiers on the opposing front are entitled to exercise comparable wartime authorities. Once war begins, the reciprocal status of belligerents applies, without regard to the lawfulness or morality of the initial resort to force.³⁹

Such reciprocity serves not only the moral requirements of just war theory. It also serves as an important disincentive for states to engage in war in the first place. Leaders know that the price of invoking wartime powers is to subject their own state's soldiers, citizens, and property to the wartime powers of the other side. Preserving the moral equivalence of warring parties, once a

³⁹ MICHAEL WALZER, *JUST AND UNJUST WARS* 127 (2d ed. 1992) (noting that in wartime, opposing soldiers "face one another as moral equals" regardless of the justice of their cause); *see also id.* at 137 (the "war convention," *i.e.*, the moral regime governing the means by which war is fought, "stipulates [combatants'] battlefield equality").

state of armed conflict exists, thus serves to deter the descent into the barbarism that accompanies war.

In its war on terrorism, however, the United States has been unwilling to recognize reciprocal belligerent rights on the part of those we have identified as our adversaries. Although United States forces have claimed the combatant's privilege to kill both Al Qaeda and Taliban combatants in Afghanistan, we have rejected the notion that members of those groups may claim their own combatant's privilege, even when they engage in traditional, non-terrorist forms of armed combat. And so Guantanamo detainee David Matthew Hicks has been charged before a United States Military Commission with, among other offenses, "attempted murder by an unprivileged belligerent." The charge specifically alleges that Hicks attempted to murder American and other coalition "forces," through conventional military means and in the context of armed conflict, "while he did not enjoy combatant immunity."⁴⁰ Similarly, the indictment against American John Walker Lindh, which charges him with conspiracy to murder United States nationals, states that it was "part of the conspiracy that members and associates of al Qaeda and the Taliban would violently oppose and kill American military personnel and other United

⁴⁰ *U.S. v. Hicks* (U.S. Military Commission) ("Charge Sheet" approved June 10, 2004), available at <http://www.defense.gov/news/Jun2004/d20040610cs.pdf>.

States Government employees serving in Afghanistan after the September 11 attacks.”⁴¹

The refusal to accord reciprocal combatant rights to our adversaries in the war on terrorism is not limited to Afghanistan. Press accounts indicate that Ziyad Hassan, an insurgent in Iraq, was charged with the crime of terrorism, and ultimately convicted of murder, for killing an American soldier through a roadside bombing.⁴² Despite having invoked the war regime in the struggle against terrorism, the United States treats violence by our adversaries – even when directed against what would be permissible military targets in wartime – not as acts of war, but as simple criminal acts, unprivileged by the existence of a state of armed conflict.

I should stress that I am in no way suggesting that acts of terrorism, as such, would be privileged if belligerent rights were applied reciprocally in the context of a justifiable extension of the war regime to the struggle against terrorism. To the contrary, acts of terrorism – the intentional killing of civilians by sub-state groups for political purposes – are prohibited means of conducting war. Recognizing belligerent rights under the law of war for terrorist groups against which the United States might justifiably wage war does not enable such groups to kill the very noncombatants the law of war is meant to protect.

⁴¹ *U.S. v. Walker Lindh*, Crim. No. 02-37A (E.D. Va.) (grand jury indictment issued Feb. 5, 2002), Count One, ¶ 4, available at <http://www.usdoj.gov/ag/2ndindictment.htm>.

⁴² Jonathan Finer & Andy Mosher, *For Soldier, a Posthumous Day in Iraqi Court*, WASH. POST, June 28, 2005, at A11.

Combatants who intentionally target civilians violate international humanitarian law and are subject to prosecution as war criminals. Detainees at Guantanamo, if they in fact committed terrorist acts prior to their detention by the United States, are perfectly susceptible to prosecution, even if they are recognized as combatants entitled to belligerent rights under the war regime.

5. Conclusion

A time of “war” is an exceptional state, one in which barbarism and the subordination of human rights is legally accepted. Soldiers in wartime may kill their adversaries, or they may detain them without trial simply by virtue of their membership in the opposing force. It is the emergence of an existential threat to a state or its citizens, emanating from an organized foe – and not some lesser state of emergency – that justifies such derogation from normal restraints of law.

The United States’s claim that it is engaged in a state of war – war in a legal sense – in the struggle against terrorism does not comport with positive law conceptions of war. Justifying the assertion of war powers in the context of the war against terrorism accordingly requires a functional extrapolation of the law. This is defensible at least with respect to part of the struggle against terrorism, namely, the use of force against an organized political entity – the Al Qaeda terrorist network – that has launched an armed attack against the United States. But the United States has refused to engage in a comparable

extrapolation in construing the restraints that apply in wartime. It has not accepted that the United States right of self-defense extends only to the entity that attacked it, but asserts the right to use force against all entities we deem terrorist or all states that support them. The Administration has claimed that affiliation with a terrorist organization is sufficient to render a person a legitimate target for wartime killing, but not for such a person to claim status as a lawful combatant, even when he engages in conventional forms of armed conflict.

This one-sided approach – claiming the legal rights associated with a state of war but refusing to recognize the full range of associated restraints – undermines the justification for the United States effort to move beyond positive international law and to extend the war regime to the struggle against terrorism. In the context of a conflict that does not satisfy a positivist definition of war, a state cannot justifiably invoke war powers and authorities unless it is prepared to recognize both the associated constraints and the reciprocal rights of its adversary.