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There Is No Need to Revise the Laws of War in Light of September 11th

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There is No Need to Revise the Laws of War in Light of September 11th

Jordan J. Paust*

I. The September 11th Attacks by al Qaeda

On September 11, 2001, the United States suffered shocking terroristic attacks on the World Trade Center in New York and the Pentagon in Washington, D.C. Most agree that the attacks were perpetrated by Usama bin Laden and several of his al Qaeda followers and that these same nonstate actors had been behind previous attacks on the U.S.S. Cole and U.S. embassies in Kenya and Tanzania. On October 7, 2001, the United States used massive military force in self-defense against such ongoing processes of armed attack by bin Laden and members of al Qaeda in Afghanistan. At that time, the U.S. also used military force against members of the armed forces of the Taliban in Afghanistan, which created several legal complexities involving international law concerning permissible use of armed force and various laws of war applicable after the October 11th U.S. military response to terrorism. By November 13, 2001, President Bush had claimed that the September 11th attacks were acts of international terrorism of such an intensity as to create "a state of armed conflict" and amount to acts of "war" by bin Laden and his followers. A few have argued similarly that the laws of war should apply to the September 11th attacks as such or that, in any event, the laws of war need to be revised in view of bin Laden's use of terroristic tactics and U.S. responsive actions in Afghanistan and Guantanamo Bay, Cuba after October 7th. Despite manipulated rhetoric, did the laws of war apply to the September 11th attacks? If not, did they apply to the U.S. conflict with members of the armed forces of the Taliban after October 7th? What is the legal status under the laws of war of various types of persons detained or being prosecuted by the United States? Perhaps more importantly for the United States and the international community, is there a need to revise the laws of war in view of bin Laden's use of terrorism and various U.S. responses?

Contrary to the assertion of President Bush, the United States simply could not be at war with bin Laden and al Qaeda as such, nor would it be in the overall interest of the United States for the status of war to apply merely to conflicts between the United States and al Qaeda. Bin Laden was never the leader or member of a state, nation, belligerent, or insurgent group (as those entities are understood in

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international law) that was at war with the United States. Armed attacks by such nonstate, nonnation, nonbelligerent, noninsurgent actors like bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the United Nations Charter against those directly involved in an armed attack,[2] but even the use of military force by the U.S. against bin Laden and al Qaeda in foreign territory would not create a state of war between the United States and al Qaeda.

The lowest level of warfare or armed conflict to which the laws of war apply is an insurgency. For an insurgency to occur, the insurgent group would have to have the semblance of a government, an organized military force, control of significant portions of territory as their own, and their own relatively stable population or base of support within a broader population. Al Qaeda never met any of the criteria for insurgent status. Belligerent status under the laws of war is based on the same criteria for insurgent status plus outside recognition by one or more states either as a belligerent or a state.[3] Al Qaeda never met the criteria for insurgent status and certainly lacked any outside recognition as a belligerent, nation, or state. Indeed, al Qaeda is not known to have even purported to be or to have the characteristics of a state, nation, belligerent, or insurgent. In view of the above, any conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war.[4] Additionally, members of al Qaeda who were not otherwise attached to the armed forces of a belligerent or state, could not be "combatants," much less "enemy" combatants, as those terms are widely known in both international and U.S. constitutional law. Thus, "war" or "armed conflict," the laws of war, and "enemy combatant" status could not have applied to the September 11th attacks, although the attacks undoubtedly triggered other international laws involving criminal responsibility, including crimes against humanity in connection with the targeting of the World Trade Center.

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[2] *See, e.g.*, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. (2002).

[3] Concerning criteria regarding an insurgency or belligerency, *see, e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, MICHAEL SCHARF ET AL., INTERNATIONAL CRIMINAL LAW 809, 812-13, 815-16, 819, 831-32 (2d ed. 2000).

[4] *See also* Pan American Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1013-15 (2d Cir. 1974) (United States could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts as a nonstate, nonbelligerent, noninsurgent actor).

II. The October 7th International Armed Conflict

By using massive military force against the Taliban in Afghanistan on and after October 7th, however, the U.S. actually internationalized an armed conflict already in progress between the Taliban, the functioning *de facto* regime in control of most of Afghanistan (with outside recognition also as the *de jure* government of Afghanistan by a handful of countries, including Pakistan and Saudi Arabia), and the Northern Alliance (which had at least insurgent status and, with recognition by states like the United States, most likely belligerent status). There were also reports that several thousand Pakistani military were aiding the Taliban government in the war against the Northern Alliance, which also would have internationalized the local belligerency in Afghanistan into an armed conflict of an international character. All of the customary laws of war, including most of the rights and duties mirrored in the 1949 Geneva Conventions, apply to a belligerency (*e.g.*, the armed conflict between the Taliban government and the Northern Alliance) as well as to an armed conflict of an international character (*e.g.*, between the United States and the Taliban). Thus, on and after October 7, 2001, all of the customary laws of war, including the bulk of the Geneva Conventions, applied during the armed conflict in Afghanistan. On February 7, 2002, abandoning prior advice, President Bush finally recognized that the Geneva Conventions applied in the U.S. war against the Taliban and that Taliban detainees "are covered by" the Conventions, but claimed nonetheless that they are not entitled to pow status (an issue explored below). Indeed, the primary point of contention among certain writers is not whether the laws of war were applicable by October 7th, but whether there is any significant need to revise them in view of the nature of the armed conflict in Afghanistan, U.S. responses to terrorism there and elsewhere, and deleterious consequences that can occur if certain changes in the laws of war take place.

With respect to the September 11th attacks as such, any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of nonstate actor violence and targetings that otherwise remain criminal could become legitimate. Two such targetings would have been the September 11th attack on the Pentagon, a legitimate military target during armed conflict or war (except for the means used, an airliner with passengers and crew), and the previous attack on the U.S.S. Cole, another legitimate military target during armed conflict or war. Similarly, a radical extension of the status of war and the laws of war to terroristic attacks by groups like al Qaeda (and there are or predictably will be many such groups engaged in social violence) would legitimize al Qaeda attacks on the President (as Commander-in-Chief) and various U.S. "military personnel and facilities" in the U.S. and abroad—attacks of special concern to President Bush, as noted in

his November 13th Military Order. Applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution. No leader of any country other than the United States is known to have even suggested a need for such a radical change in the status of war, the threshold levels concerning applicability of the laws of war, and actual application of various laws of war (including an array of competencies, rights, immunities, and obligations thereunder) to terroristic targetings by groups like al Qaeda and selective and proportionate responsive measures against such groups which do not involve the use of military force against the military of some other *de facto* or *de jure* state. It is not clear that even President Bush contemplated the corrupting consequences of such an extension of the status of war or the laws of war. Moreover, such consequences would not be in the overall and long-term interests of the United States or the international community.

III. The Status of Various Detainees and the Legal Test for Combatant Status

Whether there is a significant need for revision of the laws of war that applied during the armed conflict of an international character in Afghanistan on and after October 7th is a separate issue. With respect to the 1949 Geneva Conventions and the 1977 Protocols thereto, the caretaker of Geneva law, the International Committee of the Red Cross (ICRC), sees no need for revision of Geneva law in view of the October 7th conflict but the ICRC does openly express the need for greater compliance. In rare public statements, the ICRC, like several European allies, has criticized the United States for mischaracterization of the status of Taliban military detainees held in Afghanistan and at Guantanamo Bay and the Bush Administration's refusal to grant them prisoner of war status under Geneva law. The ICRC also confirms that compliance with Geneva law "in no manner constitutes an obstacle to the struggle against terror and crime." More generally, there is no significant need to revise the laws of war, including Geneva law, because of the al Qaeda attacks on September 11th or the October 7th international armed conflict in Afghanistan. Some have made sophistic overly broad generalizations concerning the alleged status of various types of persons detained by the United States after September 11th, but there is no need to adopt radically new claims concerning the status of various persons detained by the United States, such as those who were (1) merely members of al Qaeda, (2) members of the armed forces of the Taliban, or (3) U.S. citizens who were members of one or the other or both. Extension of combatant or individual belligerent status to mere members of al Qaeda or denial of combatant or individual belligerent status to members of the armed forces of the Taliban would not merely be legally inappropriate, but could also have seriously

harmful consequences with respect to a radically new reach of combat immunity to mere members of al Qaeda and a radically new denial of combat immunity for members of the armed forces of various states. It should also be noted that during an armed conflict those who pose a real threat to security can be detained without trial while they continue to pose such a threat and prisoners of war can be detained without trial, both for the duration of the armed conflict. Additionally, any such person can be prosecuted for an international crime that he or she is reasonably accused of having committed.

The test for combatant or individual belligerent status under the laws of war is straightforward. It is membership in the armed forces of a party to an armed conflict. Thus, privileged or lawful belligerents include members of the armed forces of a state, nation, or belligerent during an armed conflict. As noted by the U.S. Army Judge Advocate General's School *Operational Law Handbook* (at 12, 2002), "[a]nyone engaging in hostilities in an armed conflict on behalf of a party to the conflict" is a "combatant." The U.S. Navy *Annotated Supplement to the Commander's Handbook of Naval Operations* (1999) is similar: "Combatants include all members of the armed forces of a Party to the conflict." Article 1 of the Annex to the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land expressly states that belligerent status will "apply . . . to armies" and expressly sets forth additional criteria to be met merely by "militia." The customary 1863 Lieber Code (Instructions for the Government of Armies of the United States in the Field, General Order No. 100) also affirmed: "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." Today, Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) has actually expanded the prisoner of war (pw) status that exists for members of "armies" or "armed forces" to include such status for members of certain militia forming part of the armed forces of a party to an armed conflict.

Of course, members of the armed forces of the Taliban were not simplistically mere "militia" or subject to the need to comply with additional criteria for combatant status beyond the determinative criterion of membership in an armed force or army of a state, nation, or belligerent. Although some confuse the two, the tests for combatant status and prisoner of war status can be different for certain types of combatants. For example, both combatant status and prisoner of war status with respect to members of the armed forces of a state, nation, or belligerent are based on a single determinative criterion—membership in the armed forces. However, prisoner of war status for certain "militia" or members of "volunteer corps" not attached to the armed forces of a party to an armed conflict hinges on applicability of various additional criteria, as noted below concerning pow status. With respect to an actual armed conflict (as opposed to the September 11th attacks as such), adding the word "enemy" to

"combatant" has no legal consequence. Enemies in a war who are combatants are indeed enemy combatants.

IV. Combat Immunity

Importantly, enemy combatants are privileged to engage in lawful acts of war such as the targeting of military personnel and other legitimate military targets. Such acts are privileged belligerent acts or acts entitled to combat immunity if they are not otherwise violative of the laws of war or other international laws (*e.g.*, those proscribing aircraft sabotage, aircraft hijacking, genocide or other crimes against humanity). Violations of the laws of war are war crimes, are not entitled to immunity, and are thus prosecutable. However, lawful acts of war are covered by the rule of combat immunity and cannot properly be criminal under domestic law, elements of domestic crime, or acts of an alleged conspiracy to violate domestic law, and the laws of war should not be changed to provide otherwise. As former General and Professor Telford Taylor once wrote: "War consists largely of acts that would be criminal if performed in time of peace.
. . . Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war."[5] Language in several cases is also informing. In *United States v. Ohlendorf*, decided during the subsequent Nuremberg proceedings, it was recognized: "Many of the defendants seem to assume that by merely characterizing a person a partisan, he may be shot out of hand. But it is not so simple as that. If the partisans are organized and are engaged in what international law regards as legitimate warfare . . . , they are entitled to be protected as combatants. . . . The language used in the official German reports . . . show[s], however, that combatants were indiscriminately punished only for having fought against the enemy. This is contrary to the law[s] of war."[6] If lawful combat actions

[5] TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 19-20 (1970). For a more extensive list of authorities concerning combat immunity, *see, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 683-84 n.35 (2002); *The Right to Life in Human Rights Law and the Laws of War*, 65 SASK. L. REV. 463, 471-72 n.44 (2002).

[6] 4 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER

could be the basis for domestic crimes, U.S. military personnel would be placed in serious danger in any future armed conflict involving U.S. military forces. The United States rightly expects as a matter of venerable law that combat actions of U.S. armed forces that are not violative of international law will be immune from prosecution under the domestic laws of various countries in which they operate and that captured U.S. military personnel will be treated as prisoners of war. There is no need to make changes in the laws of war that will change such results or provide ready pretexts for denial of combatant or prisoner of war status to U.S. or other military personnel. Similarly, a decision to deny combat immunity to members of the armed forces of the Taliban with respect to lawful acts of war would be illegal and could have serious unwanted repercussions for U.S. military personnel in the future.

Some who argue that members of the armed forces of the Taliban should be denied either combatant or prisoner of war status stress partial language from an old U.S. Supreme Court case, *Ex parte Quirin* (317 U.S. 1 (1942)), that was decided before the creation of the 1949 Geneva Conventions and much of the modern practice of warfare. In any event, *Ex parte Quirin* actually involved prosecution of a set of combatants for war crimes, *i.e.*, for one of the exceptions to combat immunity for those combatants who engage in a violation of the laws of war. Thus, *Ex parte Quirin* actually provides implied support for the principle of combat immunity for lawful acts of combat. Defendants in that case were clearly "enemy belligerents" or enemy combatants, but they were prosecutable for war crimes ("the offense of unlawful belligerency," *id*. at 36) "because [their particular acts were then] in violation of the law of war" (*id*. at 24-25, 31 ("offenders against the laws of war"), 37-38) and, thus, the defendants were combatants ("who though combatants," *id*. at 35), but had nonetheless "violated the law of war applicable to enemies" (*id*. at 44). Thus, the war crimes engaged in by particular individuals (as opposed to those engaged in by other members of the armed forces of Germany) resulted in a lack of combat immunity for those individuals

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CONTROL COUNCIL LAW NO. 10, at 1, 492-93 (1949); *see also* United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 757, 1236, 1246 (1950); *In re* Yamashita, 327 U.S. 1, 47 (1946) (Rutledge, J., dissenting) ("[W]e have no question here of what the military might have done in a field of combat. . . . The purpose of battle is to kill."); United States v. Noriega, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990) ("the essential purpose of" GPW "is to protect prisoners of war from prosecution for conduct which is customary in armed conflict"); United States v. Calley, 22 C.M.A. 534, 540 (1973); Arce v. State, 202 S.W. 951, 953 (Tex. Crim. App. 1918) (four soldiers under command of the *de facto* government of Mexico who killed a U.S. Army corporal during hostilities could not be lawfully prosecuted for such conduct); 1863 Lieber Code, Arts. 49, 56-57.

with respect to their particular acts ("[i]t subjects those who participate in it" to prosecution, *id*. at 37), but not a lack of combatant status for those individuals (or the rest of the German armed forces), a lack of combat immunity for lawful acts of war, or a lack of access to federal courts concerning the propriety of their detention and prosecution (i*d*. at 24-25). *Ex parte Quirin* also affirmed that judicial power exists to finally determine the legal status of detainees under and in accordance with international law: "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals." Subsequently, other federal courts have also addressed prisoner of war status under international law.

Some use the regrettable and technically oxymoronic phrase "unlawful combatant" in an inappropriate way that confuses separate issues regarding personal status (*e.g.*, as a combatant or noncombatant who is not privileged to engage in warfare) and the lack of immunity for personal acts committed in violation of the laws of war. If one is a combatant under the laws of war, one is not an "unlawful combatant" and one does not become an "unlawful combatant" merely because other members of the armed forces or unit to which one belongs commit war crimes. More generally under the laws of war, mere membership (even in a criminal organization) is not a crime and one cannot become an "unlawful" combatant or lose pow status merely because other members of the armed forces violate the laws of war. Additionally, during war reprisals against any detainee and "collective punishment" (*i.e.*, punishment of an individual not for what he or she has done but for the acts of others) are war crimes. Further, Geneva law must be applied "in all circumstances." In view of the above, broad-brush generalizations concerning all al Qaeda or all Taliban are both intellectually and legally deficient. Lawful combatant status, combat immunity, and pow status for members of the armed forces of a party to an armed conflict rest either on the individual's membership or personal conduct. Today under GPW, even a prisoner of war being prosecuted for or who has been convicted of war crimes does not lose pow status or protections. No changes in relevant laws of war are needed and some changes could have dire consequences for U.S. soldiers and afford enemies of the United States a pretext for denial of present legal protections.

V. Legal Tests for Prisoner of War Status

With respect to prisoner of war status, the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) sets forth separate categories of persons who are entitled to prisoner of war status. The 1949 Convention's list of six separate categories involved a clear change of certain prior

interpretations of coverage under the 1929 Convention. Under express terms of the treaty, only one category out of six contains criteria limiting prisoner of war status to those belonging to a group that carries arms openly, wears a fixed distinctive sign recognizable at a distance, and conducts operations generally in accordance with the law of war. Under GPW Article 4(A)(2), these limiting criteria expressly apply only to certain "militias or volunteer corps" or "organized resistance movements." They expressly do not apply to "[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces" covered under 4(A)(1) or to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" covered under 4(A)(3).[7]

With respect to the armed forces of a party to the armed conflict in Afghanistan (such as those of the Taliban and the United States), the determinative criterion for prisoner of war status is membership. Thus, members of the armed forces of each party qualify as prisoners of war under GPW Article 4(A)(1), if not 4(A)(3), and the authoritative ICRC has expressly recognized combatant and pow status for all members of the armed forces of the Taliban. Moreover, pow status does not inhibit the ability to detain enemy pws for the duration of an armed conflict, whether or not particular pws can also be prosecuted for war crimes or other violations of international law. Indeed, prisoners of war subject to prosecution do not thereby lose their status as a prisoner of war. There is no need to change the laws of war in that regard.

VI. Dangerous Consequences Can Arise if the Legal Tests Are Changed

A new extension of the four criteria expressly set forth only in GPW Article 4(A)(2) to the "armed forces" of a party to an armed conflict (who are presently covered by Article 4(A)(1)) would actually result in a nonsensical, policy-thwarting denial of pow status to all members of the armed forces of a party to an armed conflict whenever several members do not wear a fixed distinctive sign

[7] Article 4(A)(1) and (3) of the GPW states: "A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. . . . (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *Expressum facit cessare tacitum*. Only 4(A)(2) contains the four limitations. *Specialia generalibus derogant*. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5-8 n.15 (2001).

recognizable at a distance or several members violate the laws of war. This is not in the interest of U.S. military. In Afghanistan and more generally and in conformity with widespread state practice, several types of U.S. soldiers (*e.g.*, special forces) or various regular soldiers at different times have used camouflage and have otherwise attempted to blend in with local flora or geography in an effort to avoid being recognizable at a distance or to be clearly recognizable at all. Indeed, various U.S. soldiers in Afghanistan have not only not met the criterion of wearing distinctive emblems or signs recognizable at a distance, but have also been spotted wearing Afghan civilian clothing and sporting beards to "blend in."[8] Thus, under the nonsensical approach, all U.S. soldiers could be denied prisoner of war status during the conflict in Afghanistan. The same could occur during the ongoing war with Iraq. Further, under the nonsensical approach, Lieutenant Calley's war crimes at My Lai and those of other U.S. military personnel there and elsewhere would have required a denial of pow status to any member of the armed forces of the United States captured in Vietnam. Since it is not unlikely, although regrettable, that during any armed conflict war crimes will be committed by some soldiers on each side, the nonsensical approach would provide a pretext for enemies of the United States to deny pow status, combatant status, and combat immunity to U.S. soldiers. There is no need to change the laws of war to adopt such a nonsensical approach.

VII. Laws of War Already Address and Proscribe Various Forms of Terrorism

It is important to note also that use of various forms of terrorism during an actual armed conflict

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[8] *See, e.g.*, Henry J. Kenny, *Mission: Free the Oppressed; U.S. Commandos Have Special Skills—and Philosophy*, CHICAGO TRIBUNE, Sept. 29, 2002, at C3 (wearing "beards, riding donkeys into combat"); Max Blenkin, *SAS Troops Are the Mountain Phantoms—War on Terror*, DAILY TELEGRAPH (Sydney), Sept. 21, at 10; Ian Bruce, *US Soldiers Ordered to Lose Beards*, HERALD (Glasgow), Sept. 16, 2002, at 11 ("beards and adopted local dress to allow them to blend in on undercover missions"); James Brooke, *Pentagon Tells Troops in Afghanistan: Shape Up and Dress Right*, N.Y. TIMES, Sept. 12, 2002, at B21 ("growing beards and donning local garb in an effort to blend in with the local people and their surroundings"); Glenn Mitchell, *Bin Laden Bolts After Surrender*, HERALD SUN, Dec. 13, 2001, at 15 ("convoy of five trucks carried US troops wearing Afghan dress"); THE AUSTIN AMERICAN STATESMAN, Dec. 12, 2001, at A1 (same); WASH. POST, Dec. 12, 2001, at A1 (same); Michael R. Gordon, *Securing Base, U.S. Makes Its Brawn Blend In*, N.Y. TIMES, Dec. 3, 2001, at B1 ("the soldiers wear Afghan clothing").

may be as old as war itself. Yet, by the early twentieth century a general proscription of "systematic terrorism" under the customary laws of war was reflected in the list of war crimes formulated in 1919 by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was presented to the Preliminary Peace Conference.[9] Other proscriptions under the customary laws of war, such as those designed to eliminate unnecessary death, injury or suffering and those prohibiting the targeting of civilians who do not take an active part in hostilities, have also had the effect of constraining certain forms of terroristic strategies or tactics. However, one form of terrorism during war still seems permissible—the terroristic targeting of enemy combatants and the leadership of enemy states, nations, or belligerents.[10] Thus, terrorism and responses to terrorism during war are not new phenomena and the laws of war have been expressly and impliedly designed in part as a response to both impermissible and permissible forms of terrorism,[11] among various other types of strategies or tactics. Further, there is no need to change the laws of war because certain nonstate actors like Usama bin Laden and members of al Qaeda choose to engage in certain forms of terrorism. The targeting of the World Trade Center, during a war, would be a war crime. There is no need to change that portion of the laws of war. The targeting of the World Trade Center on September 11th was not done during a war and was not covered by the laws of war, although other international criminal laws are relevant. Again, there is no need to change the status of war or thresholds for application of the laws of war in view of such targetings by al Qaeda, and any such change could have dire consequences. The targeting of the Pentagon during a war, even with

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[9] Reproduced in JORDAN J. IONO PAUST, M. CHERIF BASSIOUNI, MICHAEL SCHARF ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 103 (2000). Law Foundation Professor, University of Houston]

[10] *See, e.g.*, Jordan J. Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1 (1974).

[11] *See, e.g., id.*; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 33, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2), 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 13(2), 1125 U.N.T.S. 609; 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 31, 53, 220, 225-26, 594 (Jean S. Pictet ed., ICRC 1958).

terroristic intent, would nplot be a war crime. There is no need to change that portion of the laws of war. The targetings of the Pentagon on September 11th and the U.S.S. Cole at an earlier date were not done during war and were not excused under the laws of war. Similarly, there is no need to change the status of war or thresholds for application of the laws of war in view of such targetings by al Qaeda, and any such change could have dire consequences.

VIII. Conclusion

The pretense that "new" forms of social violence exist and that new laws of war are needed might be claimed by some in an effort to avoid responsibility for misinterpretation or misapplication of present laws of war, but the laws of war do not need to be changed because of September 11th or because of subsequent U.S. military efforts in Afghanistan. Indeed, claimed changes in the status of war, thresholds for application of the laws of war, and "combatant" status could have serious consequences for the United States, other countries, U.S. military personnel, military personnel of other countries, and the rest of humankind. In some ways, claimed changes could even serve those who attacked the United States on September 11th as well as other nonstate actors who might seek to engage in various forms of transnational terrorism in the future. Mean-spirited denials of international legal protections would not merely be unlawful, but would also disserve a free people. Such denials have no legitimate claim to any role during our nation's responses to terrorism.

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