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"Artillery Lends Dignity to What Otherwise Would Be a Common Brawl": An Essay on Post-Modern Warfare and the Classification of Captured Adversaries

Ralph Michael Stein
Pace Law School

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“ARTILLERY LENDS DIGNITY TO WHAT OTHERWISE WOULD BE A COMMON BRAWL”: AN ESSAY ON POST-MODERN WARFARE AND THE CLASSIFICATION OF CAPTURED ADVERSARIES

Ralph Michael Stein*

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I. INTRODUCTION

As this essay is written many individuals believed to have adhered to the cause of terrorist activities against the United States, including participation in or support of the September 11, 2001 attacks in New York and at the Pentagon building, are in U.S. military custody. Maintained by the U.S. Marine Corps, the conditions of a detention camp in Cuba attract regular news coverage. Some such persons are detained elsewhere. In a proclaimed war against terrorism, one that by definition cannot end with either an armistice or the conventional peace treaty of yesteryear, it is inevitable that more persons will surrender to the U.S. or be seized during military operations in other countries. This is a war not only without a light at the end of the tunnel but no clear roadmap as to future battlefields.

While most detainees are unquestionably of foreign nationality, the emergence of at least two alleged American-citizen

* Professor of Law, Pace University School of Law. Among other subjects Prof. Stein has been teaching National Security Law for a dozen years and has a background in the area as an Army Intelligence officer (1965-1968) including service on the Army General Staff at the National Command level. Professor Stein frequently comments on National Security issues for various media as well as lecturing on those subjects.

members of the terrorist group presumably responsible for the September 11 attacks complicates already muddy legal waters.

How such persons, when taken on foreign soil, are classified is not simply a matter of nomenclature. Their treatment may wholly or largely be determined by whether they are viewed and defined as international criminals, as are, for example, pirates or whether they are accorded the status of Prisoners of War (POW) under either an existing international compact or through some modified interpretation of prevailing agreements.¹

This essay allows the writer to enter a fluid fray being played out almost day-by-day in the media and, of course, where it counts: in the administration of President George W. Bush. Conscious of the ebbs and drifts of both the current debates and desperately anxious not to be preempted by the march of a swiftly moving time frame, this essay suggests an approach to U.S. integration of generally accepted rules for the treatment of POWs that will advance both the war on terrorism and America's need to embrace the reality of the globalization of humanistic mores and notions about justice without surrendering our sovereignty.²

II. WHAT IS "WAR" IN A POST-MODERNIST AMERICA? (OR IN THE WEST, GENERALLY)

The issue as to whether to classify detained "fighters"³ as POWs or as some form of international criminal deserving no

¹ The most significant international accord for the protection of prisoners of war is, of course, the Geneva Convention. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135, *available at* <http://www1.umn.edu/humanrts/instate/y3gctpw.htm>. An indispensable source of documents relating to the laws of war is maintained on the Web at The Avalon Project at the Yale Law School, The Laws of War *at* <http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm>.

² There is no real way to avoid using the term "war" when referring to the campaign against terrorism. That the word has been expanded in post-modernist speech to embrace everything from political efforts to alleviate poverty to preserving the environment to ensuring that "no child is left behind" is actually very relevant to the arguments made in this essay.

³ "Fighters" seems to be a generally accepted normative term for those captured in Afghanistan, Israel, the Gaza Strip or wherever. Whatever else such persons may be, they have been engaged in fighting or, at the least, are alleged to have been so engaged. During March and April 2002, the term "gunmen" has been increasingly applied to armed Palestinians encountered by Israeli military forces

protection from standards especially formulated to shield conventional combatants from dangers and harms generally abhorrent to Western political and military dogma is a pressing one. Fighters for the purpose of this essay are defined as individuals under arms in an organization that is not a national military force but have some significant attributes of traditional military components. These may include being organized into units, having a rank structure, responding to a command system, training in a coherent organizational manner and other aspects of conventional military identity. Such persons are in support of a military and political goal and are engaged in combat against the government of a nation or against other nations who are viewed as hostile to their political agenda. To be considered as POWs entitled to the protections afforded by international law, their capture must take place in a country other than that of the capturing power.⁴

Without understanding the nature of warfare in the early, modern and continuing post-modern eras, including the shifting meaning of the profession of arms, analyzing the status of Taliban and Al Qaeda detainees will be incomplete, indeed fundamentally misleading.⁵

“Artillery lends dignity to what otherwise would be a common brawl.” The author was a young Army officer going through training as a Counterintelligence Officer and Special Agent at the U.S. Army Intelligence School, then located at Fort Holabird, in Baltimore, Maryland in early 1965. Desiring that its intelligence officers understand the history and nature of other branches, part of the course consisted of short orientation

during their continuing incursions into the territory of Yasser Arafat. Treatment of captured “gunmen” does not appear to be in accordance with the Geneva Convention as they are not recognized as members of a nation state’s military. Even the term “gunmen” reflects an attempt to separate this cohort from the world of soldiers entitled to customary legal protections.

⁴ The language and tenor of the Geneva Convention, and predecessors including the American Lieber Code, presume that legal duties of care for captured enemy combatants (and protection of non-combatants) arises in the context of a war with a nation state. The key exception in American history was the Civil War where pragmatic and overwhelming reality dictated that *de facto* status be accorded to the Confederate States of America forces encountered in the field.

⁵ Two indispensable starting points for all researchers, to which I am much indebted, are CHRISTOPHER COKER, *TERRORISM AND CIVIL STRIFE* (John Pimlott ed., 1987) and CHRISTOPHER COKER, *WAR AND THE ILLIBERAL CONSCIENCE* (1998).

lectures about every other arm of the service. The quotation heading this paragraph was at the top of a projected slide that occupied an entire screen. The picture showed characters out of the age of castles walloping each other with an odd assortment of comical hand weapons including oversized spears and rather large rocks. It was a brawl writ large.

Undercutting the humor of the slide was the very serious lecture by an artillery officer whose purpose was not simply to tell us about his branch but to make us understand that artillery brought a sort of humanistic warriorhood to land combat. In that sense, he was both part of and an extension of an evolved Western concept of warfare and the warrior that must be re-examined in the post-modern context of military engagements against forces described as terroristic.

The Western tradition of warfare glorifies virtues seldom found in combat but sought through adoption first of codes of conduct and later through domestic and international law. The very notions of both chivalry and the theologically imbued philosophy of Just War support the dual concepts of personal ennoblement and achieving that status through the avoidance of unnecessary imposition of harm on non-combatants and captured enemies. That the exception has always been more of the rule, that the warrior class has constantly had to redefine itself and explain incremental departures from earlier practices, is the reality. Curbing excessive violence through codes of conduct⁶ has clashed consistently with technological development, the increased scale of warfare, barbarism born of rampant nationalism and ethnic centrality in conflicts, and vastly wider theaters of military and naval operations.⁷

⁶ See, e.g., *The Law of Land Warfare*, in THE UNITED STATES ARMY FIELD MANUAL, available at <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/fieldman.html>

⁷ Warfare has gone through technologically mediated phases in the past two hundred years. Combat of rather brief duration yielded to extensive and prolonged operations with significant and often fatal impact on civilian populations. The rapid abandonment of what were believed to be accepted concepts of limited aerial warfare early in World War II led to the carpet bombing (a very accurate term) of cities in England, Europe and Japan. The current emphasis on Precision Guided Munitions is part wise operational tactics and part sound public relations. The Western world in general, the United States in particular, takes scant comfort in military operations that bring about substantial "collateral damage," the loss of civilians as opposed to combatants. John Keegan has best discussed the evolving

In Western culture where military and naval valor were respected in societies that sometimes were relatively inclusive of military professionals and those that regarded them as necessary evils, self-definition of the warrior class was unavoidable, indeed indispensable.⁸

The professional soldiers of today's Western armed services are in a complex, evolving departure from his/her forbears.⁹ The Western attitude toward great violence has changed radically since World War II for a host of reasons. The enormity of worldwide suffering in the Second World War triggered an ongoing revulsive factor toward such combat not wholly based simply on fear of its possible repetition. The recognition that "hot wars" can end in stalemates, as in Korea¹⁰ or that the unthinkable - that the U.S. might lose a war - actually happened; Vietnam, tempered sentiment that previously supported an aroused warrior mentality that supported the professionals leading, largely, the amateurs.

Several key factors have led to a general post-modern consensus disfavoring broad (geographical) and lengthy military campaigns.¹¹ Post-modern society exhibits little of the patience associated with past generations. Familiarity with military and

Western abhorrence of broad and lasting infliction of casualties in a number of his books, especially JOHN KEEGAN, *THE FACE OF BATTLE* (1977). The writings of Archer Jones also illuminate the changing nature of Western warfare.

⁸ Influencing today's events is the long American dilemma of the role of the professional military vis-à-vis the volunteer soldier. A part of American constitutional law and political history, the generalized belief in and dependence on volunteers (and later conscriptees) serving under a needed but often spurned professional cadre is in some degree of conflict with the contemporary all-volunteer Armed Forces.

⁹ The mere reality of the feminization of most contemporary military forces is beyond the scope of this discussion but is not irrelevant. Rapidly fading is the exclusive masculinity of the military, in itself largely a source of didactic values concerning the definition of who a warrior is and how he regards his foes, faced on the fields or captured.

¹⁰ See BEVIN ALEXANDER, *KOREA, THE FIRST WAR WE LOST* (1986). The political fallout from the American policy to settle for an armistice rather than strive for a comprehensive military victory, ended President Truman's hopes for a second full term and shifted U.S. foreign and domestic policy dramatically.

¹¹ As indicated previously, the citizens of most Western nations recoil from the possibility of lengthy and costly military engagements. Whether technology has oversold itself or there are unrealistic expectations of modern ordnance, the fact remains that Americans, in particular, expect that the nation's military operations will be short and as bloodless as possible (that is, with regard to U.S. casualties).

naval options and operations comes through an ever present media that, beginning in the Vietnam conflict, brought war into America's (and other country's) living rooms; and in color. With it came the increased momentum of a generalized rejection of widespread imposition of violence affecting civilian populations.¹²

While treatment of POWs and indiscriminate or deliberate infliction of widespread civilian casualties may be separate issues for both international law and military science, the Western populace as a whole does not make such distinctions. With regard to POWs, American prisoners, horror became the central reaction as news of Japanese maltreatment and torture of our personnel in World War II became common knowledge.¹³ The horrific maltreatment of both captured military personnel (Allied as well as American) and civilian internees was a major part of the prosecution of Japanese war crimes at both the International Military Tribunal for the Far East and local trials in areas that had been Japanese-occupied.¹⁴ Death penalties for killing prisoners and internees and being responsible for the acts of subordinates were handed down in quite a few cases.¹⁵

A second, sensitizing experience for Americans (and also to a lesser degree for other Westerners) was the shock of discovering during and after the Korean conflict that POWs were sub-

¹² Whether it was the bombing of Dresden, its horror expressed most widely through KURT VONNEGUT, *SLAUGHTERHOUSE FIVE* or an introspective, part fear-based, part-humanitarian reaction to Hiroshima and Nagasaki, American popular opinion favors achieving stated objectives with minimal force largely expended on clearly military targets. The mistaken targeting of a handful of people is front-page news with now expected negative reactions having serious political implications.

¹³ The German record was, overall, better but nonetheless there were significant departures from international law. The German treatment of captured Russians was wholly and by direct order of Adolf Hitler in abject disregard not only of controlling international law but of several centuries of evolved rules of military behavior. See BEVIN ALEXANDER, *HOW HITLER COULD HAVE WON WORLD WAR II* (2001).

¹⁴ See generally *International Military Tribunal for the Far East* at <http://www.yale.edu/lawweb/avalon/imtfem.htm>; see also *Stephen's Study Room: British Military & Criminal History in the Period of 1900-1999* at <http://www.stephenstratford.co.uk/imtfe.htm>.

¹⁵ See THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001) available at <http://www.bartleby.com/65/wa/warcrime.html>. The postwar trials of Japanese generals Homma and Yamashita, after which they were executed, remain both troubling and controversial.

jected not merely to illegal physical maltreatment but also excruciatingly sophisticated and persistent psychological conditioning, so-called "brainwashing."¹⁶ That a handful of American POWs could be conditioned to renounce their country and accuse the U.S. of committing bizarre criminal acts forbidden by international law (in particular, waging biological warfare) not only astounded many, but also thoroughly frightened them. Not even the Germans had tried that approach. The national reaction was to further support and insist upon the application of international law insofar as it forbade maltreatment of POWs.¹⁷ The Vietnam experience, in which captured Americans, mostly Navy and Air Force officers of higher education than their Korean War POW predecessors, occasionally succumbed to psychological manipulation reinforced a belief in the right of POWs to be protected.¹⁸

The main problem is that most Americans then, and perhaps now, define war in ways that may be largely irrelevant to post-modern society. In American historical thought and experience, true war invoking evolved international and domestic rules of humane treatment of prisoners was defined as hostilities between powers having a Western form of government. This approach was largely the successor in interest to the British doctrine, hardly hidden, that the rules of warfare were only to be extended to the combatants of civilized nations. Thus, restraints on British military conduct during colonial wars were limited by the values and orders of field commanders, not because of subordination to international or military law. American political and military practice followed that of Great Britain.¹⁹

¹⁶ See American Defense Institute, *The Captain's Chair* (1997) at <http://www.ojc.org/adi/ccwinter.htm>.

¹⁷ See *id.*

¹⁸ See Memorandum from the Central Intelligence Agency, Washington D.C., Office of the Director, for Dr. Henry A. Kissinger (May 10, 1971) at <http://nationalalliance.org/tan01.htm>.

¹⁹ Whether it was the future Duke of Wellington's campaign against the Mahrattas in India or U.S. forces fighting the Indians, no concept of warfare according to the Western warriors code ever existed. Captured adversaries may or may not be humanely treated according to the whims of the field commander or the policies of the day. Neither was ever predictable or consistent.

III. WARFARE MOVES IN TWO CONTRADICTORY DIRECTIONS

In order to posit a theory as to how captured fighters who adhere to a cause, rather than directly and traditionally serving a nation state, ought to be treated today, a brief review of the shifting nature of Western concepts about warfare and its practice is necessary.

Whatever the clear language of the U.S. Constitution as to war-making authority, the reality is that the U.S. has only declared war four times in its long history of military and naval combat.²⁰ In the period following World War II, strategic political and military concerns militated against declarations of war in Korea, Vietnam and, latterly, the conflict against Iraq and the continuing operations in Afghanistan. Declaring war has too many domestic and international ramifications, it is, simply, not the way to go anymore. Without any alteration of international law, Western nations have embraced the concept of limited war with stated objectives to be carried out by armed forces charged, at their peril, with minimizing harm to non-combatants and their property and also required to conclude hostilities successfully within the shortest time possible.

The Western watchword is to conduct "humane warfare" with little serious public analysis by a technology-sotted population as to the possible oxymoron nature of such a concept.²¹ Thus two somewhat contradictory paths are followed. War is waged with minimal adherence to historic formalities that force a sharp focus on government policies and aims and when forces are engaged they are expected, indeed required, to fight the most narrow and bloodless campaigns technology and command oversight will permit. General "Unconditional Surrender" Grant, neither as military commander nor as commander-in-

²⁰ The four declared wars are the Mexican War, the Spanish-American War and the two World Wars.

²¹ Perhaps the clearest manifestation of that concept is the public's demand for and belief in the utility and effectiveness of a wide range of Precision Guided Munitions ranging from "Smart Bombs" to non-lethal ordinance. That the success rate of Precision Guided Munitions claimed in the Gulf War and now revealing warts as after action analysis of their employment in Afghanistan indicates it is less than both claimed and desired seems beyond the point for most people. Without doubt, losses to civilian populations have been significantly avoided by the use of very expensive "smart" weapons.

chief, would recognize the doctrinal terrain of post-modern America (and that of other major Western powers).²²

IV. THE PROTECTION OF PRISONERS OF WAR

In classical times, captured soldiers and sailors often faced lifelong enslavement with their actuarial longevity being somewhat short.²³ If they were lucky they might be slain shortly after capture. The practice of ransoming captives, familiar from the legend and lore of the Middle Ages, only occurred when a personage of worth might be redeemed for familial reasons, political reasons,²⁴ or both.²⁵

Codes of chivalry dictated that those of knightly rank treat opponents of the same grade with if not kindness at least not with naked brutality.²⁶ A Western tradition of treating at least some captives according to contemporary rules of leniency slowly developed.

The emergence of a professional military caste in substitution for the feudal leadership that combined political and military duties with scant separation between the two reflected the beginnings of the modern state. In England the rule of the regicide, Oliver Cromwell marks the inauguration of a true professional military class.²⁷

By the time of the American Revolution, European codes of conduct with regard to POWs were sufficiently developed as to

²² In print after more than a century, General Grant's "Memoirs," available in a number of editions, reflect his strategic view of warfare, one that dominated American thinking until the Korean War. See, e.g., *Personal Memoirs: Ulysses S. Grant*, WAR TIMES J. at <http://wtj.com/archives/grant/>.

²³ See, e.g., *Avignon & Provence*, at <http://www.avignon-et-provence.com/avignon/histoire/gb/hist3.htm>

²⁴ See *id.* See also Yvonne Friedman, *Encounter Between Enemies*, at <http://www.brill.nl/catalogue/productinfo.asp?product=9103>.

²⁵ While ransom was sometimes a feature of Japanese and Chinese feudal warfare, the practice never became as common as in the West.

²⁶ See Brian R. Price, *A Code of Chivalry* at <http://www.chronique.com/Library/Chivalry/code.htm>.

²⁷ Not coincidentally, the beginnings of a professional officer class in Cromwell's New Model Army was accompanied by the forming of the first permanent English regiments in a form which remains largely unchanged to the present. This development, followed by other European powers, fostered the development of the professional warrior class with its own traditions, uniforms (much later), distinctive and important symbols of service and authority (decorations and insignia) and system of laws and codes of conduct.

allow serious challenge to British treatment of captured rebellious colonists.²⁸ Following a then almost universal tradition, people in armed rebellion were considered to be outside the law of nations and the codes of military conduct and could be, and often were, killed as traitors.²⁹

British treatment of captured Continental Army personnel was exceedingly harsh and insured a commensurate surfeit of outrage. Retaliation by the Continental Army was generally isolated. As a matter of policy, prisoners were often reasonably well protected from abuse.³⁰

Pre-modern European armies rarely had the resources to maintain large numbers of POWs and were restrained by codes of conduct from killing them. A legal process from an earlier time, parole, became a dominant means to both neutralize POWs without straining a belligerent's resources.³¹ A paroled prisoner swore not to engage in any hostilities against the capturing power until exchanged for a similar prisoner held by his side.³² While the literature of the era often talks about high-ranking paroled officers enjoying, as it were, a liberal and

²⁸ The famed and dreaded Prison Ships in New York harbor violated contemporary norms for housing prisoners of war but not for traitors, a fine legal point maintained by the British but attracting little understanding from their foes. Brooklyn's Fort Green park has a large monument, a pillar, memorializing the thousands who died in inhumane, even by the standards of the time, conditions about the Prison Ships. See generally HAMILTON FISH, LL.D., NEW YORK STATE – THE BATTLEGROUND OF THE REVOLUTIONARY WAR (Vintage Press 1976) available at <http://www.longislandgenealogy.com/prison.html>.

²⁹ There are many online documents dealing with the treatment of prisoners during the American Revolution. See, e.g., Virtual Marching Tour of the American Revolution, The Philadelphia Campaign 1777 at http://www.ushistory.org/march/phila/whitemarsh_3.htm. In Brooklyn's Fort Greene Park, a tall, slender monument attests to the Continental soldiers (and some hapless and uninvolved folks) who suffered and died on British prisoner hulks in the Hudson River.

³⁰ In any event, the often retreating and under-supplied Continental Army had little ability to maintain significant bodies of captured enemy. Given the fluidity of the war zones establishing camps for prisoners was impossible. Thus, parole played a very important part in the Revolutionary War. The British, of course, rarely reciprocated as they viewed all captured combatants as, at least in the least sense, rebellious subjects not entitled to the courtesies of warfare. See generally The George Washington Papers at the Library of Congress, Time Line: The American Revolution at <http://memory.loc.gov/ammem/gwhtml/1776.html>.

³¹ See generally, Richard Seltzer, *The Rise, Progress, and Termination of the American Revolution Interspersed with biographical, Political, and Moral Observation* (1805), available at <http://www.samizdat.com/warren/rev21.html>.

³² See *id.*

friendly quasi-leave among the enemy, in reality parole became the system for transforming, at least temporarily low-ranking enemy soldiers into a harmless and largely unsupervised cohort.

The American Civil War created an unprecedented challenge to the issue of limiting war through law and, of immediate relevance, the treatment of personnel captured or who surrendered. While the Southern rebellion can be analyzed, legally and technically, as a criminal conspiracy from start to finish, the form and organization of the Confederate government and the forces raised under its flag mirrored almost exactly the Federal government and less exactly but significantly that of European governments. In no way could the Lincoln administration recognize the Southern government as a *de jure* entity. To do so would be to undermine any Constitutional theory of the inseparability of the Federal Union.³³

On the other hand, meeting Confederate forces in the field and recognizing that each side would inevitably take prisoners and accept surrenders forced a rational accommodation between the demands of Constitutional law and theory and the realities of what was a major war.³⁴

Into the breach came Francis Lieber and his code of warfare, the first thorough American codification of discreet laws and regulations previously scattered throughout federal law.³⁵ The Lieber Code encapsulated both formalized and generally accepted rules of Western law and practice for the treatment of POWs while also addressing special aspects of the then raging Civil War including the treatment of slaves encountered or taken into custody. At a time when military orders resisted easy reading and obtuse language permeated legal writing, the Lieber Code was remarkably clear. It was intended to be understood by Union officers of all ranks and not solely by staff judge advocates.

³³ The literature on the claimed right to secede is vast and ever growing and is not relevant to this article. My view of Southern constitutional theory may be found in my article, Ralph M. Stein, *The South Won't Rise Over Again but it's Time to Study the Defunct Confederacy's Constitution*, 21 PACE L. REV. 395 (Spring 2001).

³⁴ See *id.*

³⁵ The Lieber Code available at http://www.ptialaska.net/~swampy/powers/mart_law.html#sec3.

The Lieber code forbade the execution of POWs not otherwise convicted of capital crimes.³⁶ It forbade physical maltreatment and recognized the right of POWs to adequate nourishment and shelter.³⁷ Following customary law, it provides for the death penalty for spies, traitors and criminals seeking to benefit from the disturbed state brought by war.³⁸ While Union practice never followed the letter of the code and abuses occurred, to a large degree the Lieber Code, which was thoroughly disseminated and largely enforced, insured that the captives of the federal army stood a better chance of humane treatment than had been accorded prisoners in many prior European wars.³⁹

The twentieth century saw the greatest expansion of international law through treaty, compact and domestic legislation in history. The laws of war were revised, recodified and expanded.⁴⁰ World War I showed the need to bring controls on to the practice of law and the technology spawned to wage war. Postwar conferences such as the Washington and London naval conferences sought, ultimately with devastating results for the Western democracies, to cap naval expansionism. The issue of POWs was, however, a major concern.

Whether arrived at Geneva or The Hague, both prominent localities for the negotiation of international compacts addressing warfare, the issue of treatment of POWs was central to a number of conferences. In 1929, the United States entered into the "Convention Between the United States of America and Other Powers, Relating to Prisoner of

³⁶ See *id.* arts. 48-80.

³⁷ See *id.* art. 76.

³⁸ See *id.* art. 83.

³⁹ The Confederacy never adopted, the Lieber Code but its practices, at least in the field and during the first two years or so of the conflict largely mirrored federal practice. MACKINLAY KANTOR, *ANDERSONVILLE* (1993) effectively captures the horror of the Confederate camp for federal POWs in Georgia but the situation in the North was often about the same. A glaring and often unremarked upon departure by Confederate military authorities from general principles of treating POWs was the systematic brutalization and even cold-blooded murder of captured black soldiers.

⁴⁰ This essay is limited to issues involving POWs but the Yale Avalon Project offers an enormous quantity of documents on the laws of war from the eighteenth century on. It is an unsurpassed Web-based resource. The Avalon Project at the Yale Law School, 20th Century Documents at <http://www.yale.edu/lawweb/avalon/20th.htm>.

War.”⁴¹ The gravaman of the Geneva Convention, ratified by many nations (but not, to their awful eventual detriment, by the Union of Soviet Socialist Republics)⁴² was that all POWs were entitled to safety from hostile or friendly fire,⁴³ removal from the immediate area of combat as expeditiously as possible⁴⁴ and protection from arbitrary execution, inhumane treatment and inadequate food and shelter.⁴⁵ Reflecting the warrior code that the politicians accepted from their military advisors, the Geneva Convention also provided that POWs could wear decorations and prescribed when officers of the custodial power had to be saluted. The signers vowed that it “will be the duty of every Power to diminish, so far as possible the unavoidable rigors thereof and to mitigate the fate of prisoners of war.”⁴⁶

Most critically, the definition of a person entitled to POW status was framed based on the realities and nature of warfare as it was then known. Indeed, the Geneva Convention virtually accepts, without commentary, the assumption that a prisoner of war is a recognized formal member of his nation’s armed forces.⁴⁷ Of relevance today and often overlooked, the Geneva Convention of 1929 and subsequent amendments and other compacts specifically recognize that POWs may be punished for crimes committed prior to capture or after. According POW status to any detainee cannot be a defense against prosecution for crimes committed whether in furtherance of military orders or as part of what is denominated as a terrorist organization.

⁴¹ Convention Between the United States of America and other Powers Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021 (1932), revised in Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135.

⁴² Hitler used the absence of the U.S.S.R. as a signatory as part of his basis for ordering that Soviet prisoners be treated in any manner expedient, specifically directing that no act that would constitute a war crime when committed against a Geneva Convention signatory would be so regarded when committed against a Russian. Hitler’s order also specifically authorized the summary execution of any Russian deemed dangerous with only an officer required to pass sentence. In practice no such authorization was sought nor could it be for the mass murders committed by the Germans.

⁴³ Geneva Convention, *supra* note 1, art. 23.

⁴⁴ *Id.* art. 19.

⁴⁵ *Id.* arts. 25-28.

⁴⁶ *Id.* at preamble.

⁴⁷ The drafters and signers of the Geneva Convention never envisioned female combatants but they did require signatories to respect women. Article 3 provides that “Women shall be treated with all the regard due to their sex.”

While there are procedural safeguards with reference to imposition of the death penalty, its availability is granted for serious crimes.⁴⁸

Generally, U.S. forces observed the Geneva Convention provisions during the Second World War (in any event, much of the convention language tracked that of the Lieber Code, which in American military law was in effect continuously from the Civil War).⁴⁹ American observance of the Geneva Convention and related legal protection for POWs continued throughout the Korean War (where, as previously noted, such adherence to law was not reciprocated by either the North Koreans or their Chinese ally).

The long and costly Vietnam conflict produced a series of challenges regarding protection of POWs by U.S. forces. For the first time in a major war, a significant part of a presumably civilian population engaged in warfare that could not be dismissed under the older legal rubric of partisan activities.⁵⁰ What had fundamentally changed was the mode of warfare. Belligerents largely without motorized vehicles, tanks and heavy artillery and with no air assets adapted to fighting a superpower through guerilla warfare in league with a conventional armed force, the North Vietnamese Army.⁵¹

The U.S. largely skirted the issue of defining POW status by turning over to Army of Viet Nam units most of the captured personnel. That such persons were often abused or even killed rekindled debate about treatment of prisoners in the context of an increasingly questioned and unpopular armed conflict.⁵² That such persons were not infrequently female and sometimes

⁴⁸ Geneva Convention, *supra* note 1, art. 100.

⁴⁹ Adherence to the Geneva Code was far greater in Europe than in the Pacific, but far fewer prisoners were taken from Japanese forces. When they were taken, it was often within the confines of a small and volatile combat zone where violations of rights were, at the least, understandable if not excusable. In any event the inescapable reality is that the Pacific war had major racial overtones, a factor not without pressing comparison with regard to the current domestic and foreign U.S. war on terrorism.

⁵⁰ This is a position I have heard stated a number of times.

⁵¹ The parallel to the continuing and dangerous Israel/Palestine conflict is obvious.

⁵² Paradoxically, one of the most inflammatory photos of the war, the single shot to the head execution of a North Vietnamese officer in civilian clothes by GEN Loan was in substance, if not in nuanced procedure, lawful under the Laws of War (including the Geneva Convention).

even children complicated the matter greatly.⁵³ What was clear was that in a major military operation consuming vast assets and continuing for years, the line between the traditionally defined soldier and other parties engaging in combat had been blurred beyond previous wars in numbers, scope and importance. There was no justification for the My Lai massacre, but it happened for no better reason than the depraved whim of a junior officer.

My Lai and other incidents, occurring at a time when the American military was assailed from many quarters of our society (to say nothing of foreign criticism), forced the services to reexamine not whether sufficiently detailed law existed to protect POWs but whether the troops on the line understood their responsibilities and were committed to obeying the law.⁵⁴ Initial inquiries did not return reassuring answers. At least at the level of the uniformed services, especially the Army and the Marine Corps, those most likely to take prisoners, indoctrination regarding protection of POWs was intensified and accountability stressed and where necessary enforced by a career-ending process. Instruction in the rights of POWs and the corresponding duties of American military personnel became an integral and frequently reviewed aspect of training, especially in overseas deployments where encounters with a hostile force was either likely or insured.⁵⁵

⁵³ See generally SEYMOUR HERSH, *MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH* (1970); SEYMOUR HERSH, *COVER-UP: THE ARMY'S SECRET INVESTIGATION OF THE MASSACRE AT MY LAI 4* (1973).

⁵⁴ Recently, I asked the students in the three classes I teach if they knew of the My Lai massacre. With class attendances at 19, 22, and 65, only 0, 1 and 6, respectively, indicated that they had ever heard of the massacre. Now out-of-print, Seymour Hersh's two books, following his groundbreaking revelations about the Army murder of women, children and male noncombatants remain essential reading. Much has happened in the American military since the Vietnam War to not only reduce the chance that a junior officer will order a massacre with soldiers responding to his commands but that the cover-up which tarnished the Army is unlikely to be repeated. I hope.

⁵⁵ I am a member of the Navy League of the United States and at a recent meeting a Marine officer sitting with me at dinner pulled a wallet card issued to every Marine which said, among other things, that Marines don't kill prisoners. Training in protecting prisoners has been reduced to that level of simplicity and ubiquity.

V. AND NOW, WHAT DO WE DO WITH THE TALIBAN AND
AL QAEDA FIGHTERS?

First, the quick answer every law student wishes would precede discussion of difficult material. Without ignoring the very real differences between members of Taliban forces and members of or detained supporters of Al Qaeda, an international organization having no known formal relationship to any government, I believe all such detainees should be accorded Prisoner of War status under the Geneva Convention and relevant United States law. Doing so represents not a rejection of existing law but a relevant and imperative growth of principled American recognition of post-modern values, whether well-formed or emergent.

For the purposes of this essay, a member of the Taliban is, or more accurately was, part of the armed forces of a nation state, that nation being Afghanistan. That the Taliban did not, or could not, clothe its ground force with the traditional appurtenances of military service ought to be of no concern. Its forces were at the least rudimentarily organized in military fashion, had a rank structure, received varying but recognizable degrees of military training and were empowered by a government-in-being to exercise duties compatible with those of a historically denominated national military force. Obviously not the least of such responsibilities was defense of Afghanistan against foreign troops. The arguments against treating captured Taliban soldiers as other than persons entitled to Geneva Convention protection are weak, to put it mildly.

The Al Qaeda detainees are different in significant ways but not to the extent that they should not be treated as POWs. They are different in that they belong to an organization belonging, formally, to no country and they act on behalf of, openly, no government. To the extent that such persons are caught committing or planning criminal acts in any country, they can be and should be subject to that country's laws as accused criminals. The story is different when they engage in organized combat against an opposing force under circumstances that reflect the reality that combat is being waged by U.S. military assets outside this country. That such detainees were captured or that they surrendered along with Taliban troops strengthens the assumption that they were engaged in military

operations.⁵⁶ Of course the feelings run much higher in the U.S. (and elsewhere) against Al Qaeda members than against the captured remnants of the wrecked Taliban regime.

As of the date of this writing, the Bush administration continues to waver over the issue of according Geneva Convention protection for the detainees, the majority whom are now at the Guantanamo Navy Base in Cuba. In an administration unusually free of reports of internal dissent, only Secretary of State Powell has clearly and publicly indicated his preference to clothe the detainees with Geneva Convention protections (which does not, automatically, require application of the Prisoner of War label but the association would be unavoidable if the protections were extended). While it is clear that the Administration agrees that due process in some form is both mandated and accepted, the lines of procedure to be followed remain hazy.⁵⁷

While support for extending Geneva Convention protections to some of the detainees appears to be taking hold in the Bush administration it may well be for the wrong reasons. The realistic question as to how American military personnel might be treated if we fail to apply international law protections had dominated the discussion and may have dictated a resolution. Given the organizations and individuals arrayed against this country and their ideological, theologically-driven agendas it is not likely that reciprocity with regard to treatment of captured

⁵⁶ A historical precedent is not without relevance. In World War II, the German *Schutzstaffel*, more commonly known as the SS, was divided into two general groupings. One was the separate combat units, the *Waffen-SS*, which was organized into traditional combat formations, was fully integrated into the German Order of Battle and which waged war. That members of such units often committed atrocities is besides the point as such persons were fully amenable to prosecution. Members of such units were, when captured, always legally entitled to POW status. By contrast those members of the SS assigned to various duties the most heinous of which was running concentration camps were never accorded POW status but were treated as members of a criminal organization (as were members, for example, of the Gestapo). Distinguishing between the two elements was done in World War II despite the heady emotionalism associated with anything bearing the title of "SS."

⁵⁷ One reason for the murky picture is that while prisoners of war who have allegedly committed crimes have, in the past, possessed little or no potential value as informants the case is quite different here. The contradictory stresses induced by dealing with enemies who may be chargeable with capital offenses but who may possess information of value to the United States are real.

personnel is an important consideration in their thinking, or any consideration at all.⁵⁸

The real argument for according Geneva Convention protections for Taliban and Al Qaeda prisoners is the recognition that America's role in the post-modern world requires our understanding of strongly held views about the role of humane treatment of captives in warfare, irrespective of the foe's devotion to such principles. A large segment of the First World has turned away from capital punishment; the U.S. has not as a nation. A large segment of the First World is strongly committed to employing legal stratagems against terrorism before embracing military solutions to an extent the United States has not. Bellicosity, especially of the unilateral American type, disturbs much of post-modern Europe. President Bush's exclamation that he wants Osama bin Laden "dead or alive" played very well domestically. It was a chilling and unacceptable statement from our nation's leader for much of the world.

Conditioned by media exposure to the nature of modern military operations and seduced by the often false promise of precision attacks with "smart" weapons, many Americans and citizens of other countries have gravitated profoundly to a new and possibly unrealistic but compelling model of warfare as a highly limited, generally brief, surgically precise, limited destruction, few casualties event. Arguments exist to refute such beliefs, but the reality is that in the war against terroristic activities for which no final victory is remotely foreseeable, balancing American interests against the concerns of those needed as allies is absolutely vital. National security interests cannot be surrendered and neither can American sovereignty where it validly exists. What is essential is accommodating values that are reflective of a fundamental shift in the politics and views of post-modern nations. Those nations still moving through the various stages of modernity have their own problems.

The issue of the detainees is a prime example where without any loss of strategic goals a principled adherence to cloaking

⁵⁸ Another historical example is the attitude of the Japanese in World War II toward captured Caucasian prisoners. Since they had zero regard for their own personnel who had been captured, how they were treated played no role in the way Allied prisoners were regarded. There is a strong parallel with current religion-affiliated groups employing both terrorism and military operations.

our Guantanamo detainees (and others sure to follow) with the Geneva Convention protections solidifies international support for an effort in which this country is the acknowledged leader and would be an adoption of international law principles increasingly regarded as fundamental by the majority of developed countries. It would be a win-win position for the United States.