



Battling Terrorism under the Law of War

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THE WAR ON TERRORISM began with the atrocities of 11 September 2001. Approximately 3,000 Americans, as well as citizens of other countries, tragically died that day at the Pentagon, the World Trade Center, and in a field in Pennsylvania. The world now knows that the perpetrator of that attack was Al-Qaeda, an insidious ideologically and religiously motivated network of Islamic terrorists intent on destroying our Nation and our way of life. Despite our Herculean global effort over the last six years to detect, disrupt, degrade, and destroy this decentralized network of non-state, multinational terrorists, there is no end in sight to the fight against it. Even if the war in Iraq were to end soon, experts unanimously agree that the conflict against Al-Qaeda will continue unabated around the world for years to come.

Unquestionably, one of the most challenging issues confronting the United States since 11 September has been how—or even if—the laws of war apply to the War on Terrorism. The laws of war, also known as the law of armed conflict or international humanitarian law, are codified in multilateral treaties. They reflect ancient traditions of humanity, military chivalry, and internationally agreed-upon customary norms of behavior for belligerents. Current and former military leaders, federal judges, government officials, scholars, international lawyers, journalists, human rights advocates, and others are struggling to understand, adapt, and articulate the appropriate legal framework for fighting the War on Terrorism. Several reasons underlie the ongoing confusion and debate.

First, the United States historically addressed terrorism as a criminal justice matter. It responded to it under a law-enforcement paradigm that gave suspected terrorists significant due process and an abundance of procedural and substantive rights. Armed conflicts, on the other hand, are governed by a completely different legal regime with different rights, duties, and obligations. The convergence of these two legal frameworks in the context of an ongoing conflict has unquestionably led to uncertainty and frustration. For example, we currently use war-fighting powers to detain and interrogate without the restriction of law enforcement rules, then use law enforcement-type institutions to punish while disregarding or reinterpreting the laws of war. Choosing to use the authority of one paradigm, when advantageous,

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PHOTO: The setting sun lights up the entrance to Camp X-Ray, the first detention center at Naval Base Guantanamo Bay, Cuba, for enemy combatants captured in the war on terror. Photo taken 14 November 2006. In use for four months in 2002, Camp X-Ray was replaced by Camp Delta, a more permanent facility better suited for the safe and humane care of detainees. (U.S. Army, SSG Jon Soucy)

then using the other paradigm to avoid the restrictions of that choice, has created ambiguity.

A second reason for the confusion and debate is that government officials, in an effort to increase our security in the face of a genuine terrorist threat, have marginalized or ignored key principles of the laws of war. In other words, they did or are doing the wrong things for arguably the right reasons. The overriding justification for much of what has been done has simply been to save American lives from the insidious threat of Al-Qaeda and its surrogates.

In making such arguments, U.S. officials have characterized the Geneva Conventions as “quaint,” denounced them as vague or ambiguous, and attempted to redefine or reinterpret their provisions.¹ They have simply ignored the fact that the Geneva Conventions, the most ratified treaties in the history of the world, have withstood the test of time and are universally accepted by the civilized world. Similarly, senior U.S. officials have attempted to define “torture” as equivalent in intensity to the pain accompanying such serious physical injury as organ failure, impairment of bodily functions, or death.² U.S. officials also have been accused of engaging in extraordinary rendition; that is, sending prisoners to other countries so they can be tortured or subjected to cruel, inhumane, or degrading treatment. And lastly, on 13 November 2001 the president established military commissions as the forum of choice to try suspected terrorists.³ From the outset, military commissions have been harshly criticized for not providing suspects an opportunity for a full and fair trial based upon modern notions of justice.

Needless to say, we face a number of extraordinarily difficult questions that do not lend themselves to simple or quick answers: Should we regard the War on Terrorism as a true armed conflict, or see

it as a rhetorical one like the wars on poverty and drugs? Do the Geneva Conventions, Hague Regulations, other international humanitarian-law treaties, and customary principles of law apply to the War on Terrorism? Do we bring terrorists to the bar of justice, or do we just hold them as prisoners of war until the end of the conflict? How far can interrogators go in putting pressure on prisoners to obtain human intelligence? Whom may we lawfully target in the War on Terrorism? Is targeted killing lawful? What is the appropriate role for contractors on this battlefield, and how do the laws of war apply to them? Should the law of occupation function in this war? Do the laws of war need revision? In sum, are the rules developed for state parties during international armed conflicts out of date for modern conflicts like the War on Terrorism?

When considering such questions and possible responses to them, three points are worth bearing in mind:

- Given the severity and magnitude of the 9/11 attacks and our decision to respond with military force, a war-fighting paradigm is appropriate for this conflict.

- The long-standing policy of the United States has been and continues to be that its armed forces will comply with the laws of war during all armed conflicts, however such conflicts are characterized. The laws of war play a vital and continuing role in the culture, training, and operations of our armed forces. Our moral authority, values, and prestige are inextricably linked to compliance with the spirit and the letter of the laws of war during all of our military operations.

- When the United States interprets and applies the laws of war, it should always take the high road. Our enemies do not fight fairly. They kidnap, torture, target civilians, cut heads off, and hide behind and among innocent men, women, and children, as only cowards will do. Should we abide by the laws of war when they do not? The answer is a resounding “yes.” It might be more popular to say we are going to take the gloves off, but our conduct is ultimately about us, not them. Our Nation and our military justifiably take pride in abiding by the rule of law. Now, more than ever, we need to uphold the code of civilized behavior.

Several reasons compel us to abide by the laws of war in this conflict. First, by doing so, we will

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maintain domestic and international support for our military operations. To the degree that we do not abide by the laws, we risk inflaming public opinion against the United States and our armed forces. In a democratic society like ours, hostile public opinion erodes support for an operation and for the military in general. In the current conflict, Abu Ghraib, Haditha, and allegations about war crimes at Bagram and Guantanamo Bay have done more to undermine our position than anything Al-Qaeda could have done directly. Our enemies have used incidents in which we failed to comply with the laws of war as recruiting tools for their cause.

Second, the laws of war are the law. They are enforceable under our own domestic legislation. According to the Uniform Code of Military Justice, a member of the U.S. military who commits a war crime may be court-martialed and, in the most egregious cases, the death penalty may be imposed. The U.S. Army and the other services have aggressively prosecuted a number of service members who failed to follow the laws of war in this conflict. We must continue to hold to our standards.

Third, when the enemy knows that his captors will treat him humanely, he is more likely to surrender. During the first Gulf War, 86,000 Iraqi soldiers surrendered to U.S. forces because they knew we would treat them humanely in accordance with the laws of war.⁴ If our adversaries believe they will be tortured or killed upon capture, they may be more inclined to fight to the death. Some would argue that our enemy in the War on Terrorism will not surrender under any circumstances. That might be true for some, but certainly not all of them.

Fourth, following the laws of war promotes discipline in our units. The most effective units in the U.S. Armed Forces scrupulously follow the laws of war. A unit that violates them suffers a reduction in combat efficiency, morale, good order, and discipline. Abiding by the laws of war is a combat multiplier, not a detractor.

Finally, abiding by the laws of war is simply the right thing to do. As Americans, we take enormous pride in the belief that we are the good guys. We treat our prisoners humanely. We do not torture anyone or condone torture. We protect civilians. Accordingly,

we should always meet or exceed the standards of the war conventions and international law.

In summary, the current fight raises many difficult issues associated with applying and interpreting the laws of war. When analyzing these matters, our default position must always be to uphold the letter and spirit of the law of war. We do not torture our enemy or in any way engage in cruel, inhumane, or degrading treatment. If our enemies are arguably entitled to prisoner of war status (e.g., the Taliban, members of Saddam Hussein's military), we must give them all the protections afforded under the Third Geneva Convention. On the other hand, unlawful combatants such as Al-Qaeda members and Iraqi insurgents do not have combatant immunity and can be tried for their warlike acts.

Regardless of a prisoner's status, we must treat him or her humanely. We should never lower the bar for our treatment of prisoners. If we bring prisoners to the bar of justice, we must ensure they receive a full and fair trial. There should be no shortcuts under any circumstances—period. We must always respect and protect civilians. The success of our fight in the War on Terrorism depends on our acting on a higher plane than our enemy. We must always be true to our core values, which means upholding an unwavering commitment to the rule of law and the law of war. **MR**

For an excellent discussion of how the law of war applies to the War on Terrorism, see David Wippmand and Matthew Evangelista, New Wars, New Laws (Ardsey, NY: Transnational Publishers, 2005) and Operational Law Handbook (The Judge Advocate General's Legal Center and School, 2006).

NOTES

1. White House Counsel Alberto Gonzalez, memorandum to President George W. Bush, 25 January 2002. The memo can be read in full at <www.msnbc.msn.com/id/4999148/site/newsweek/>.

2. Jay C. Bybee, Office of Legal Counsel, U.S. Department of Justice, "Memorandum for Alberto R. Gonzales, Counsel to the President," 1 August 2002, <www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

3. Actually, the 13 November 2003 Military Order and the Military Commissions Act of 2006 state that only terrorists who are not U.S. citizens can be tried by military commissions. This distinction has acted as further fuel for critics of military commissions, who make an equal protection argument; that is, American citizens get one form of justice, non-citizens another.

4. Number of surrenders cited in Jacqueline S. Porth, "Iraqis Who Commit War Crimes Will Be Prosecuted, Parks Says," Department of State website, <usinfo.state.gov/dhr/Archive/2003/Oct/09-348669.html>.