The Law of Armed Conflict After 9/11: Some Salient Features

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Perhaps more than any other body of international law, *jus in bello*—the law of armed conflict—faces inherent and extraordinary stresses and challenges. It is, of course, a law that goes directly to our own conceptions of right and wrong, to the moral choices we make to constrain ourselves, our friends, and our enemies in wartime, and to real questions of life and death. The law of armed conflict reflects moral principles, but more than that, it is binding law. In the words of one course book in the field:

> [E]very humanitarian worker will confirm that when pleading the victims' cause with a belligerent, be he or she a Head of State or a soldier at a roadblock, even the most basic moral arguments encounter a vast variety of counter arguments based on the collective and individual experience, the culture, religion, political opinions, and mood of those addressed, while reference to international law singularly restricts the reserve of counter arguments and, more importantly, puts all human beings, wherever they are and from wherever they come, on the same level.[1]

The law of armed conflict is, above all, a vast framework of general principles, specific laws, and detailed rules that *matter*. This framework stands for the idea that the law can and should protect all persons caught up in war—making the difference between life and death, between humanity and inhumanity—whether they are civilians, prisoners of war (POWs), the wounded, the sick, the *hors d'combat*, or soldiers on the battlefield.

Does the pattern of terrorist attacks followed by military response support the notion that the law still matters? Just as the attacks of 9/11 sought and accomplished the mass murder of American civilians and dozens of other nations' citizens, they also sought to undermine civilized society's way of seeing the world and attempting to govern it. They challenged us to uphold our principles at a time of great fear and anger. This is not, however, extraordinary. Because it applies only in times of armed conflict or its aftermath, the law of armed conflict is particularly subject to abuse, mischaracterization, politicization—and of course violation. When individual and collective survival is at stake and passions run high, as they invariably do at such times, parties to a conflict may look to any tool to gain an advantage.

These dynamics have stressed and strained the law of armed conflict since September 11, 2001, but its basic framework has emerged in a strong position, indeed without need for revision or amendment. This is perhaps

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1. MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR?: CASES, DOCUMENTS, AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL LAW 69-70 (1999).

because several difficult aspects of this body of law were clarified, and therefore became more apt to be understood and implemented than in the past. While one could draw many conclusions from the application of the law of armed conflict since 9/11, the following are among the most salient for the purposes of understanding where the law stands today and where it likely is heading:

The law of armed conflict provides the most appropriate legal framework for regulating the use of force in the war on terrorism. The earliest international reactions to 9/11, beginning with the United Nations Security Council Resolution 1368 on September 12, 2001, and including the North Atlantic Treaty Organization's (NATO) invocation of the Treaty's Article V provision on collective self-defense, demonstrated widespread recognition that the situation should be viewed as initiating an armed conflict. It would have been difficult to predict such a reaction before 9/11. Yet regarding these attacks as implicating the law of armed conflict reflected an understanding that they were different in scale, effect, motivation, and character from other terrorist acts.

The body of the law of armed conflict would thus apply—and, from a U.S. perspective, there was never a question of not applying the law, or of stepping away from international rules. In part, this ready recognition of the applicability of the law of war was a reaffirmation of long-standing U.S. policy to apply this law to its military operations, regardless of the characterization of the conflict in which the operations take place. Most of all, it was a recognition that our response would be rule-based. In a profound sense this is the only appropriate response of civilized societies to the barbarism of terrorism.

The application of the law of armed conflict, however, has confused many observers. Few public debates have evidenced the understanding that if the body of law would apply, we would also look to that body of law to determine *to whom it would be applicable and to what extent.* This approach has been controversial because the law of armed conflict itself disqualifies some fighters and categories of people seeking to fight from claiming certain privileges. But this is precisely what the law calls for, and it is a validation of long-standing elemental principles of the law of armed conflict, in particular distinguishing privileged from unprivileged belligerency.

Terrorists are belligerents who lack the entitlements of those legitimately engaged in combat. No colorable argument has been put forward that terrorists are entitled to any special status under the law of armed conflict—and certainly not to the status of prisoners of war under the Third Geneva Convention on the Protection of Prisoners of War ("GPW"). As a group, terrorists willingly define and conduct themselves outside the coverage of Article 4 of the GPW: They are neither members of the armed forces of a State Party nor members of a "regular" armed force. Even if generously considered, in the broadest sense, "irregulars" of some sort, they willfully and maliciously fail to distinguish themselves from the civilian population, as

impliedly required by the four conditions laid down in the 1907 Hague Regulations and repeated in Article 4(A)(2) of the GPW. In fact, the core aspect of terrorism is that its perpetrators fail on a systematic and willful basis to conduct "their operations in accordance with the laws and customs of war," as required by Article 4(A)(2)(d).

Putting aside the technicalities, it is important to recall why the Convention lays down such specific criteria for determining which combatants are entitled to the status of POW and the protections of the GPW. As far back as the negotiations that led to the 1907 Hague Regulations, this question has been of the utmost concern to states. Jean Pictet, in his famous commentaries for the International Committee of the Red Cross (ICRC), called Article 4 of the GPW "in a sense the key to the Convention." [2] It is of fundamental importance that Article 4, consistent with the maxim *expressio unius est exclusio alterius*, imposes a distinction between the legitimate and the illegitimate combatant—and while Article 4 expressly entitles the legitimate soldier to the GPW's protections, its real beneficiaries are the civilians who make up the mass of our societies. It *requires* soldiers to adhere to certain basic principles, such as distinction and compliance with the law, which serve first and foremost to protect civilian populations. The terrorist flouts these basic rules and is a perfect example of why there are criteria to separate lawful from unlawful combatants.

The purposes of the law of armed conflict are not advanced by granting illegitimate fighters immunity for their belligerent acts, for that would undermine the law's fundamental purpose, bring the entire body of law into disrepute, and strip it of credibility. The positive incentives of the existing normative system require that soldiers follow the rules and, most importantly, distinguish combatants from civilians. To recognize terrorists as lawful combatants would upend the entire system and cause predictably grim humanitarian consequences.

Certain minimum standards apply to the detention of even unprivileged belligerents—they are not "outside the law." Terrorists forfeit any claim to POW status under the laws of armed conflict, but they do not forfeit their right to humane treatment—a right that belongs to all humankind, in war and in peace. It is a general principle of civilized societies that inhumane treatment is cruel and unacceptable under any circumstance. Such treatment degrades the perpetrator even as it inflicts unjustifiable harm on the victim. The customary law of armed conflict innovated a structure to deal with the situation of persons—like terrorists—who fall into "enemy" hands without meeting the basic criteria of Article 4 of the GPW. Article 64 of the Fourth Geneva Convention and articles which follow it reflect this system and the desire of states to ensure a protective "safety-net" for persons, including enemy combatants without POW status, in occupied territory. More broadly, this customary law notion of fundamental guarantees found more expansive

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2. International Committee of the Red Cross, Commentary on the Third Geneva Convention 49 (1960).

expression in Article 75 of Additional Protocol I to the Geneva Conventions. While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.

The law of armed conflict constrains and, if necessary, sanctions privileged and unprivileged belligerents. If U.S. policy since 9/11 has confirmed that terrorists lack the basic characteristics to be considered lawful belligerents entitled to status under the GPW, it has also confirmed that the restraints and sanctions of the law apply to both lawful and unlawful belligerents. The President's Military Order of November 13, 2001, for instance, indicates that such persons may be held responsible for violations of the laws of armed conflict. This is in keeping with the grave breach provisions of the Geneva Conventions and other instruments, as well as tribunal decisions concerning the law of armed conflict, which do not require that a perpetrator be a *lawful* combatant in order to commit *unlawful* acts. Indeed, how could it be otherwise? The law would not exempt unlicensed drivers from liability for violations of the rules of the road.

The law applicable to the means and methods of warfare applies whenever armed forces employ military force, however the conflict is characterized. The U.S. military, in its actions since 9/11, has assiduously adhered to the traditional rules associated with the use of military force, laid out in the Hague Regulations of 1907 and in customary international law. Some of these traditional rules are reflected in the 1980 Convention on Certain Conventional Weapons (CCW), the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (and its Second Protocol of 1999), and elements of the Additional Protocols of 1977, including Articles 48 to 52 and Article 57. In particular, the United States has carefully selected only military objectives as the targets of attack and has sought in every instance to avoid or minimize civilian casualties, calling off attacks where the risk of civilian casualties was assessed to be too great. And this has been the case whether the conflict may be considered an international one, an internal one, or, in the layman's terms, a war against terrorism.

In fact, the United States, just months after its military campaign commenced in Afghanistan, pressed successfully for an expansion of the rules contained in the CCW so that they apply not only in international armed conflicts but in others as well.[3] The attacks of 9/11—attacks that violated every principle of the law of armed conflict—met a striking response from the coalition arrayed against terrorism: we have not responded in kind, and instead are carefully, discriminately, and lawfully rooting out the terrorists, and debunking and undermining their modes of operation in the process.

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3. *See* David Kaye & Steven A. Solomon, *The Second Review Conference of the 1980 Convention on Certain Convention Weapons*, 96 AM. J. INT'L L. 922 (2002).

Terrorism is, above all, the negation of law. More specifically, it is the negation of the fundamental humanitarian principles of the law of armed conflict. Whereas humanitarian law proscribes directing attacks against civilians as such, terrorism promotes it; and whereas a fundamental purpose of *jus in bello* is the facilitation of order after a conflict, the aim of terrorism is the opposite—chaos clad in violence. The attacks of September 11 shocked the United States into an instant military campaign, but they also clarified for the world community the elemental considerations of humanity that lie at the heart of the law of armed conflict. Application of the law of armed conflict, and in particular its bedrock principles of distinction and fundamental protections, serves humanitarian ends and ultimately reinforces the rules governing international behavior at all times, even in war.