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THE LAW OF ARMED CONFLICT IN THE GLOBAL WAR ON TERROR: INTERNATIONAL LAWYERS FIGHTING THE LAST WAR

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The old maxim of military strategy, “be aware of fighting the last war,”¹ is especially apropos when nations confront the international security threats posed by the Global War on Terror (“GWOT”). Strategies have changed, tactics have changed, and even our notions of what constitutes warfare have changed. The events of 9/11 have even altered what we mean by “targeting the enemy.” Strategists and tacticians have become especially mindful of the changed environment in which they operate.² However, the theory of *jus in bello*³ has failed to adapt to these new circumstances. What follows is a brief overview concerning the need for international law to adapt to this changed environment. First, I will give some necessary background regarding the new geopolitical landscape. Second, I will address the important question of whether we really are “at war.” Third, I will describe the traditional principles of the law of armed conflict. Based on these considerations, a proposal for a new law of armed conflict

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1. It is a common maxim that generals are always fighting the last war. See Bob Edwards Interview of General Mike Turner, USA (Ret.), *Commentary: Possible Worst Case Scenarios if War in Iraq Occurs* (NPR radio broadcast, Mar. 11, 2003) (audio recording available at <http://www.npr.org/programs/morning/transcripts/2003/mar/030311.turner.html>).

2. One need look no further than the recent tragic events in Russia by Chechen rebels. See, e.g., Peter Baker & Susan B. Glasser, *Hundreds Held Hostage at School in Russia: Many Children Seized In Town Near Chechnya*, WASH. POST, Sept. 2, 2004, at A1. Such attacks, by otherwise apparently lawful combatants, further complicate an already ambiguous legal regime.

3. The term *jus in bello* refers to the laws of war applied during actual armed conflict. Its sister term is *jus ad bellum*, referring to the rules governing the resort to armed conflict. Together, they make up the Law of Armed Conflict, or the laws of war.

specifically designed to meet the challenges of twenty-first century warfare is outlined.

I. BACKGROUND

The United States, and more particularly the Bush administration, has been at the forefront of re-organizing to meet the threat. In fact, the government merged twenty-two agencies and 175,000 workers to better attack the enemy.⁴ The Bush Doctrine, calling for a proactive military/strike force and homeland security regime (against nations posing a threat or posturing to act against the United States in order to prevent acts like 9/11), can be called formal foreign policy recognition of this changed world situation. Security threats are no longer from nation-states alone, but increasingly from rogue, international criminals operating across the borders of nation-states.⁵ The articulated need for such changes is further evident in Congress's enactment of the USA PATRIOT Act in the fall of 2001.⁶ Counter-terrorism became a priority of our national security and the term "homeland security" is now part of the American vernacular. In fact, the U.S. Congress recently passed landmark legislation implementing many of the 9/11 Commission's recommendations to reorganize the intelligence community.⁷ Many scholars and government officials argue that further changes are necessary to meet the new world order and imminent threats such as those posed by al Qaeda and other terrorist organizations.⁸ It seems that all three branches of the American government—executive, legislative, and judicial—have been forced to make adjustments (some more radical than others) in order for the nation as a whole to modify its strategies, plans, policies, and tactics in order to counter international terror. Ironically, one group that has not made such adjustments has been international lawyers. In the light of current events, their reluctance to explore modification of the *opinio juris*, seek changes to existing international law, or consider the need for new international norms is startling. Failure to engage these questions will have a profoundly negative

4. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

5. See generally THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

7. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

8. See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004).

impact upon the international community in the foreseeable future.

The Law of Armed Conflict ("LOAC"), by its definition, governs the law of war between *two or more nation-states*.⁹ Presently, nation-states must be involved for LOAC to govern the warfare activities between groups. This narrow definition is ill-suited to the current realities. However, it is frequently non-aligned international actors, rather than traditional nation-states, that are conducting warfare. International terrorism does not fit comfortably into any existing law of armed conflict analysis. Global terrorism has produced a new kind of "warrior." There are multiple unanswered questions about the legal status of international terrorists; for example, "Do the Geneva Conventions apply to them as prisoners of war?" These unanticipated ambiguities due to inadequate definitions and accepted norms create problems for the Bush administration, both domestically and abroad. Many in the international community seek to afford the full protection of the Geneva Conventions to these unlawful combatants, while others seek to strip them of any of the protections of the laws of war. It is time to acknowledge that al Qaeda and like minded terrorists have ushered in a new type of warfare. Without significant change in the law of armed conflict and consensus in international law regarding the status of the al Qaeda warriors, these ongoing ambiguities will hurt American interests abroad and hamper the prosecution of the Global War on Terror. Modification is needed, and needed immediately, or the U.S. position will continue to be criticized at home and abroad.

The Bush administration has declared the actions against al Qaeda a "war."¹⁰ In so designating the conflict a "war," many have asserted combatants involved in the conflict should be afforded the protections of the Geneva Conventions. The administration has continued to call it a war, but has declared on numerous occasions that the combatants are unlawful.¹¹ This apparent contradiction confounds some and seems politically expedient to others. Regardless, it erodes international support for both the GWOT and other U.S. interests around the world. Simply put, if we are at war, then we need to have some way of

9. See generally 2 L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR & NEUTRALITY § 254, at 574 (H. Lauterpacht ed., 7th ed. 1952).

10. President George W. Bush, State of the Union Address (Jan 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

11. Kelly Wallace & Andrea Koppel, *Bush Advisors Debate Detainees Status*, CNN, Jan. 26, 2002, at <http://edition.cnn.com/2002/US/01/26/ret.powell.detainees> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

regulating the activities of the “warriors” involved. Accordingly, the first issue that must be reviewed is whether we are actually at war.

II. A WAR?

The President, the Congress, and the United Nations all authorized the use of force in self-defense after the attacks of 9/11.¹² Al Qaeda, on myriad occasions since 1995, has “declared war” on the United States. The level of attack inflicted on New York City, the Pentagon, and Pennsylvania were construed by most, if not all, as an armed attack.¹³ The anti-terrorist tactics employed during the previous two decades, using the law enforcement model, have manifestly failed. The Bush administration sought a change in approach. They understood this to be a new, asymmetric threat—one that required military intervention. In this administration’s judgment, a law enforcement model would simply not suffice to meet this new threat. Although some still argue the actions of the U.S. and its allies against the terrorists constitute a law enforcement response,¹⁴ it is plainly unrealistic to describe what has transpired as anything less than a war against international terrorists who seek to destroy American strength abroad and Western culture throughout the world. The GWOT is now predominantly fought on two fronts—Afghanistan and Iraq.¹⁵ Despite widespread disagreement, the reality is American and Coalition armed forces have been fighting a new war since October 2001. Soldiers returning from combat overseas have a hard time viewing their experiences as “law enforcement.”¹⁶ It seems inescapably true that we are at war, albeit a new war, with new strategy, new tactics, and new policies.

12. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of force against those responsible for the Sept. 11th terrorist attacks); S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370 mtg., U.N. Doc. S/RES/1368 (2001).

13. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370 mtg., U.N. Doc. S/RES/1368 (2001).

14. See Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFFAIRS, Jan.–Feb. 2004, at 2.

15. Beyond these two major fronts, the war has progressed in Indonesia, the U.K., France, Russia, and Spain as well.

16. Forces returning from both Afghanistan and Iraq consistently discuss the warfare they have been exposed to while deployed overseas. See Meredith May, *Tearful Easter Reunions as Troops Return Home*, S.F. CHRON., Apr. 12, 2004, at B1; see also Lynn Neary, *Troop Rotation: Coming Home* (NPR radio broadcast, Feb. 11, 2004) (audio recording available at <http://www.npr.org/run downs/run-down.php?prgId=5&prgDate=11-Feb-2004>).

III. THE LAW

The Law of Armed Conflict (“LOAC”) regulates the conduct of armed forces when engaging one another. One might say that it is a means of enforcing a certain level of humanity within an arena that is inherently inhumane. The LOAC affords some level of duty and responsibility to the warrior. In addition, it offers legal protections to the warrior. However, the LOAC has simply not adapted sufficiently to this new threat and new form of warfare.

The LOAC assumes that, while it is nations that wage war, individuals and citizens make up the fighting force and should be accorded certain norms of humane treatment. Confronted with this new type of warfare, most international lawyers have hastily concluded either that the LOAC does not apply to the GWOT or that the protections of LOAC should be afforded to all involved. Both positions have some positive and negative aspects. Unfortunately, neither satisfies the current needs of policymakers.

Both positions are shortsighted. They fail to take account of the realities now confronting the civilized world. On the one hand, if we accord the existing LOAC protections to the al Qaeda warriors, many assert such protection tends to legitimize international terror as a means of warfare.¹⁷ This would equate those warriors who fight for nation-states as soldiers, sailors, marines, or coastguardsmen with terrorist agents who do not wear any indicia of being soldiers,¹⁸ who do not represent any particular nation, and who have made the killing of innocent non-combatant civilians the central tactic of their plan of war. In addition, if the LOAC were to apply, then the nineteen hijackers and those who helped plan and coordinate the attacks would be entitled (if captured) to Prisoner of War (“POW”) status. This seems, at best, inappropriate. Besides, as it has been traditionally understood, the LOAC requires the involvement of two or more nation-states in the conflict in order for its rules to apply. Thus, on several levels, this analysis does not seem adequate to regulate the current security threats.

However, if we do not apply the LOAC at all, then we prosecute what we call a “war” using law enforcement techniques. This too seems illogical and inadequate to meet the exigencies of the present situation. Armed forces fighting the GWOT would

17. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1 (2004).

18. See W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493 (2003).

have to alter intelligence collection practices, use civilian evidence custody procedures, and execute the mission in exactly the opposite manner of the military practices for which they were trained. Also, armed forces officers could potentially be vulnerable to tort litigation, negligence lawsuits, and other liability, as are law enforcement officials. Clearly, the warriors are uncomfortable being police officers. The results from using the law enforcement model for over two decades permitted the conditions wherein al Qaeda could plan, arrange, and stage the horrendous attack that was carried out on 9/11.¹⁹ Thus, concluding that the LOAC does not apply to global terrorists seems just as inadequate a response to the needs of our nation and world as saying that the LOAC does apply.

IV. A NEW LAW OF ARMED CONFLICT

The nature of warfare has changed. International lawyers must not cling to the definitions of the past if history has rendered them obsolete. The law must be flexible enough to evolve with the new issues confronting the family of nations. Clearly, the existing customary law and the Geneva Conventions did not anticipate the new world (dis)order. International terrorism, whether we want to accept it or not, is *the* security threat of the twenty-first century. It will remain as such for the foreseeable future. Seeking to use the old norms and customs of how war is fought will result in erosion of the will to fight the enemy. A new, modified law of armed conflict against international terrorism ("LOAC IT") needs to be developed in order to regulate the conduct of coalition forces and the treatment of captured international terrorists. This new form of warfare must have a new means of regulating conduct between forces. Nation-states are no longer the only entities with the ability to wage war. Such notions are relics of the period from Grotius's writings in the seventeenth century to the Cold War of the twentieth century. Non-governmental political organizations, terrorist organizations, and various interest groups all have the capacity to wage (and are waging) war against nation-states. Lawyers must create an adequate code to meet the new threats. In doing so, they cannot and should not, obviate the Geneva Conventions and the laws of war as conducted between lawful combatants of recognized nation-states. Thus, the LOAC IT will offer a middle ground to regulate the activity of this warfare without necessarily

19. See generally NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

creating the appearance of equating tactics of international terrorists with those of established armed forces.

While the exact details will require very careful analysis and discussion, at a minimum, the following list provides some of the necessary features of a new LOAC IT:

1. Geneva Conventions would still apply to those serving in combat operations, openly displaying their uniform and nation, and otherwise observing the laws of war;
2. Limited protections must be afforded to non-military enemy combatants, including the right to a military commission, the opportunity to pray and observe their faith, access to a detailed military defense counsel while imprisoned, access to adequate military facilities, and quarters that are habitable;
3. Torture must be strictly forbidden; however, interrogation should be permissible. Interrogations should be in accord with customary international law and applicable Torture Conventions;
4. Neutral nations, persons, and property shall be forbidden from capture;
5. Use of protected places, such as temples, churches, hospitals, mosques and other areas generally recognized as protected, must be exempt from attack. If used as haven or occupied through perfidy, as in some means supporting the war effort, such actions shall be prohibited and violators shall be tried by military commissions;
6. The use of chemical weapons must be prohibited and in accord with the Chemical Weapons Convention;
7. The principles of necessity, proportionality, and distinction would apply to all activities.

CONCLUSION

In essence, aware that international terrorists will, as a matter of policy and tactics, violate the existing LOAC with regard to the *jus in bello* as well as the *jus ad bellum*, we must adapt international law to afford some elements of conventional protections to those who fight wars in this fashion. The existing status for "enemy combatants" and international terrorists has left the West open to criticism from both the new Europe and throughout the Muslim world. Cognizant that the threat will remain for some time and conscious this will be the form of war of the twenty-first century, adapting and changing our paradigms for treatment of prisoners in the Global War on Terror will help to resolve many of the ambiguities we now face. An international commission

will be necessary in order to formulate a new code for this new form of warfare. This Commission should be tasked with creating a new Law of Armed Conflict for International Terrorists. Strategy, organization, and policies around the world have adapted to meet the new threat of international terror. It is now critical for international lawyers to accept and adapt to the new wars of the twenty-first century and not remain trapped in the laws of the past.