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The Law of Armed Conflict and the War on Terrorism

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In commenting on Mr. Lavoyer's presentation, as well as his paper,[2] allow me to begin with his concluding remarks and then move from there to speak to his observations regarding whether there is a need to revise, amend, or supplement the existing law of armed conflict in light of the events of September 11, 2001—and the ensuing declaration by the United States that it is now engaged in a "war on terrorism." I would note that, contrary to Mr. Lavoyer, I will use the term "law of armed conflict" (LOAC), as opposed to "international humanitarian law" (IHL). Once again, as I have stated on a number of previous occasions, both at conferences here in Newport and elsewhere, I have yet to hear a definitive explanation as to the need for—or the body of law encompassed by—this latter term. If it is but a kinder, gentler synonym for the law of armed conflict, it is duplicative in nature—and unnecessary. If, on the other hand, it purports to embrace some undefined aspects of human rights law, I reject it as unclear, confusing, and fraught with peril for commanders in the field.

In the draft of his paper, Mr. Lavoyer notes that, "The best guarantee for respect [of the law of armed conflict] is to keep the law realistic." With this statement, I am in complete agreement. Aspirational LOAC standards are inherently subjective in nature and bear little reality to the practice of warfare and modern weapon systems. Moreover, they harm the credibility of the LOAC as a whole. As has been

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previously stated in many fora, this is a principal reason why the United States has rejected a number of the provisions of Protocol I Additional to the 1949 Geneva Conventions[3]—and why it has chosen not to become a party to this Protocol.

Mr. Lavoyer notes that, "[T]he main challenge today is without any doubt the proper application of IHL in today's armed conflicts. Extensive research into recent armed conflicts has led the ICRC to conclude that, on the whole, the existing rules are adequate enough to deal with today's armed conflicts."[4] Once again, I agree completely with this statement. I do not number myself among those who now criticize the law of armed conflict "for not being adequate to deal with the 'war on terror.'"[5] More on this particular point, later.

Now, lest you feel that I am being overly kind to Mr. Lavoyer, let me turn to a number of areas of disagreement. In his paper, he makes reference to a study conducted by the International Committee of the Red Cross (ICRC) regarding the customary LOAC. (He refers to it as "customary IHL.") In doing so, he states that,

> The study—published in 2005—will be particularly useful for non-international armed conflicts. Maybe the most important result of the study is the fact that many rules of the 1977 Additional Protocol I relating to the conduct of hostilities also apply to internal armed conflicts on a customary law basis. Furthermore, States not party to certain IHL treaties will be bound by their customary rules.[6]

This, of course, is a significant overstatement of the effect of this study. The international community, at large, has not been privy to the results of the ICRC's work. However, I think that it is safe to say that, given the somewhat controversial nature of the study's process—to include even the supposed mandate of the ICRC to engage in this endeavor, not all States will find themselves in full agreement with the conclusions which are drawn therein. It is always useful to remember that the essence of customary international law in general, and the customary LOAC in particular, is State practice, and—for better or worse—the principal practitioner of the LOAC is the United States.

Mr. Lavoyer refers to the ICRC as the "promoter and 'guardian' of IHL."[7] Well enough. However, in his draft paper he then goes on to declare that, "Based on its assessment of the needs of the victims of armed conflicts, it is well placed to prepare clarifications or developments of humanitarian law." With this assertion, I disagree. Clarifying and formulating the LOAC is the domain of the international community—not that of the ICRC. The former does not respond to the demands of the latter. Such an arrangement would far exceed the ICRC's charter and mission. While the ICRC can play a vital role in facilitating the efforts of the international community in addressing LOAC matters, it cannot unilaterally dictate the

agenda. A prime example of the ICRC's attempt to aspire to the latter is the statement in Mr. Lavoyer's draft paper that, the "[d]evelopment of humanitarian law has to continue in specific domains. The restriction or prohibition of weapons is a good example." I would submit, to you, that such decisions regarding weapon systems lies with the community of States—not the ICRC.

Let me now turn my attention to the primary point of discussion—Did 9/11 and the US Administration's subsequent pronouncement of a "war on terrorism" manifest the need for a fundamental revision of the LOAC in the belief that the current body of law is simply incapable of effectively dealing with this "new form of conflict"? Mr. Lavoyer says, "No"—I agree. He notes that

> It has been asserted that terrorist attacks—including the attacks of September 11, 2001—as well as counter-terrorist activities were part of a global "armed conflict" in the legal sense, an armed conflict that started years ago and that will continue until the end of terrorist activities. Such a conclusion would have considerable consequences in practice, especially if it is used to justify that States could theoretically strike the transnational group at any time and everywhere—without having to obtain any kind of approval, e.g., from those States on whose territories the military interventions take place.[8]

I agree that if the war on terror were considered as a "global armed conflict" there would be considerable consequences. But those consequences are not reached, because, for good reasons, it's not a "global armed conflict."

From a legal perspective, the "global war on terrorism" is simply hyperbolic fiction—a good political sound bite, but nothing more. Is this "declaration of war" by the Executive branch, vice Congress, truly intended to advise the international community that the President, acting unilaterally, will now deploy US armed forces across any international boundary or boundaries, with or without the consent of the State or States concerned, to engage in combatant activity against any terrorist organization—regardless of the cause purported by such an organization? Pause for a moment to consider not only the LOAC concerns that such a pronouncement would invoke, but the broad range of *jus ad bellum* issues, as well. Indeed, the US congressional and United Nations Security Council resolutions authorizing the use of force against the Taliban government of Afghanistan pointedly tied such a use of force against only those who engaged in the 9/11 attacks on the World Trade Center and the Pentagon—and those who assisted these individuals in their efforts. In no way can these resolutions be cited as authority for the current Administration to unilaterally declare that it is engaged in a "global armed conflict" against "terrorism," which itself is an undefined phenomenon.

For this reason, we must continue to draw a sharp distinction between acts of "terrorism" to which numerous international conventions are applicable, and

what can legitimately be perceived as an unlawful "armed attack" against the United States committed by "unlawful combatants" or "unprivileged belligerents," i.e., al Qaeda personnel, aided and abetted by the Taliban government. Well defined international conventions and State domestic laws apply to terrorist acts, while the LOAC applies to the use of force undertaken in self-defense in response to an armed attack. The United States must choose: Does it view al Qaeda members as "terrorists" to whom the law relevant to terrorism applies, or does it view these individuals as "unlawful combatants" engaged in an unlawful belligerency (armed attack) against the United States and its citizens to whom the LOAC is applicable? It cannot have it both ways. When viewed in this context, one must come to the conclusion, arrived at by Mr. Lavoyer, that, if the United States does view its ongoing use of force against al Qaeda as a response to an armed attack, the LOAC requires no significant revision; it need only be applied.

While the current Administration might assert the validity of its use of military force against al Qaeda personnel—and those who support them—wherever they might be found, even this claim must realistically be tempered by the rights of sovereign States under existing international law. How, for example, does the United States realistically apply the LOAC to a global war against al Qaeda? When the United States targeted suspected al Qaeda members in Yemen, did it comply with the applicable LOAC? With international law in general? Did the United States gain the consent of the Yemeni government prior to its use of force within the latter's borders? Absent the consent of any State in which al Qaeda personnel might be discovered, does the relevant Security Council resolution sanction the use of armed force by the United States within such a State? Does all of the LOAC apply to such operations? If not, what provisions of the LOAC do apply? These are but a few of the questions associated with this subject that merit serious consideration—and resolution.

The last issue I shall address among those discussed by Mr. Lavoyer is the legal status of those individuals captured by coalition forces in Afghanistan, and, in particular, those currently being detained at Guantanamo Bay. I agree with his assessment that the coalition military action taken against the Taliban government and al Qaeda operatives within Afghanistan clearly constituted an international conflict to which the LOAC, in its entirety, applied—a fact belatedly and reluctantly agreed to by the current US Administration. Given this fact, he questions why none of the captured personnel have been afforded prisoner of war (POW) status—why all, in fact, have been declared to be "unlawful combatants." Again, he asserts that this is not a matter that gives rise to a necessity for revising or amending the LOAC; the existing LOAC—the long established provisions of the Third Geneva Convention[9]—need only be applied. Once again I agree with Mr. Lavoyer. I even find myself in agreement with his contention that while he might understand how

the relevant provisions of Article 4 of the Third Convention could be interpreted in such a way that POW status could be denied to all al Qaeda personnel, how can the same be said to be true of members of the Taliban army as a whole? The question of the status of Taliban fighters deserves far more careful consideration than that apparently given it by the responsible US decision makers. While a case can be made for the decision not to accord POW status to the Taliban captives, some have argued that sound legal, as well as policy, considerations should have dictated a different course of action.

Where I do disagree with Mr. Lavoyer, however, is with his contention that, the US decision "To make a blanket determination and to disqualify from the start all captured combatants from POW status raises serious concerns."[10] He specifically contends that "If there is doubt about that status, competent tribunals as foreseen in the Third Geneva Convention should come into action."[11] While this statement refers to Article 5 tribunals, he does not cite the text of this article, which reads, in part: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

Mr. Lavoyer clearly implies that the United States had a LOAC obligation under Article 5 to employ tribunals to determine the status of both al Qaeda and Taliban captives. Yet this is clearly not the case. An examination of Pictet's Commentary reveals that this provision was intended to apply only to deserters, and to those persons who accompany the Armed Forces and who have lost their identity cards.[12] Even more telling is the clear language of Article 5, itself: "*Should any doubt arise* as to whether persons...belong to any of the categories enumerated in Article 4. . . ." (Emphasis added.) While one might argue with the Administration's legal rationale for determining that all al Qaeda and Taliban captives were to be viewed as "unlawful combatants," one cannot posit the argument that there existed any degree of doubt on the part of the Administration as to the status of the individuals in question. I would submit to Mr. Lavoyer—and to others who have raised this issue—that the "doubt" referred to in Article 5 must arise in the "mind" of the "Capturing Party," not that of third States, the ICRC, or the collective psyche of the international community. When the President of the United States makes a determination as to the status of personnel captured by US armed forces on the battlefield, there would appear to be no doubt on the part of the Capturing Party as to the status of the individuals concerned, and, in the absence of such "doubt," there clearly exists no LOAC obligation to conduct Article 5 tribunals.

It is important, I think, that in the final analysis we are in agreement on Mr. Lavoyer's essential premise: The events of 9/11 do not call for revising or

supplementing the LOAC. What is called for is a candid recognition of the true nature of the "conflict" in which the United States is engaged—and a good faith adherence to both the law of armed conflict and the other controlling principles of international law.

Notes

1. Colonel David E. Graham, JA, USA (Ret.) is the Special Assistant to the Judge Advocate General of the United States Army.
2. In advance of the conference, Mr. Lavoyer provided a draft paper for my review. Certain of my comments address the contents of that paper; others address the contents of his final paper as it appears in this volume. In this paper, I indicate to which I am referring.
3. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (A. Roberts and R. Guelff eds., 3d ed. 2000).
4. Mr. Lavoyer's paper, *Should International Humanitarian Law Be Reaffirmed, Clarified or Developed?*, which is Chapter XVI in this volume, at 287.
5. *Id.* at 290.
6. *Id.* at 301.
7. *Id.* at 300.
8. *Id.* at 290, 291.
9. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 3, at 244.
10. Lavoyer, *supra* note 4, at 292.
11. *Id.* at 292.
12. COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 77 (Jean S. Pictet ed., 1960).