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New Law for a New Type of War:
The United States and Additional Protocols to the Geneva Convention

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"We build a world of Justice, or we will live in a world of coercion. The magnitude of our shared responsibilities makes our disagreements look so small."[1]

President George Bush
Berlin, Germany
23 May 2002

Introduction

In the aftermath of the events of 11 September 2001, the United States invoked its right of self-defense under Article 51 of the United Nations Charter.[2] The U.S. views its global war on terrorism as an armed conflict and thereby considers it to be governed by international humanitarian law (IHL). Many international organizations and nations disagree with the application of IHL in many circumstances where the U.S. has applied it and in those instances where it does apply, feel that the U.S. is not in compliance with IHL.[3]

Various legal scholars argue that IHL has failed to keep up with the changing nature of armed conflict, that the rules for governing current conflicts are based primarily on the experiences of the last war.[4] Lee Feinstein, a senior fellow at the U.S. Council on Foreign Relations and a U.S. State Department advisor notes "the nature of this war is different from the kinds of war that international rules were set up to address."[5] Feinstein is quite correct. The war on terrorism being carried out by the U.S. is not warfare envisaged to be covered by IHL. The very basic point of friction is that IHL is based on wars between nations.

While the U.S. had broad support immediately following 9/11, that support has waned over time and in part this trend is due to divergent views on international law. On 12

September 2001, the United Nations Security Council adopted a resolution expressing the determination of the Security Council "to combat by all means threats to international peace and security caused by terrorist acts" and condemned the attacks on 9/11 as being "like any act of international terrorism…a threat to international peace and security." The use of the phrase 'threat to international peace and security' is not a mere rhetorical phrase because the powers of the Security Council to use economic, political, and military power under Chapter VII of the United Nations Charter are invoked.[6] By April 2003, the situation created by the U.S.' interpretation of IHL in one controversial area resulted in the Secretary of State warning the Secretary of Defense in a letter that complaints from eight allied nations about on-going U.S. actions threatened to undermine international security co-operation.[7] Nations that disagree with the American interpretation may not go so far to place sanctions on the U.S. but may well back away from providing support in numerous ways valued by the U.S., such as intelligence, basing rights, over flight authorization, and law enforcement support. The U.S. recognizes that support from allies and friends is critical.

A single statement in the U.S. National Security Strategy recognizes that the war against global terrorism will not be quick or easy. To meet challenges of the twenty-first century, international relationships will be critical.[8] Growing and widespread disagreement concerning the U.S.' application of IHL may well impact negatively on it facing challenges in the twenty-first century and its ability to implement its strategy. In order to ensure continued international security co-operation in the global war on terrorism, the U.S. must lead an effort to establish additional international protocols that

address actions by states involved in armed conflict with non-state actors involved in terrorism.

Aim

Views differ significantly regarding how the U.S. has applied international law in its war on terrorism. In its long-term best interest, the U.S. should seek to reach agreement in the international community upon new protocols that resolve areas in dispute. It is not for this paper to suggest that the current U.S. position is correct or incorrect. Nations may disagree on the application of international law in this situation. Resolving this problem will come through agreement on new protocols specifically addressing international terrorism by non-state actors.

Background

Since 9/11 the U.S. has undertaken numerous actions in its global war on terrorism. Significant actions relate to the most contentious issues regarding the U.S.' compliance and application of international law. The basis for the actions is supported in United Nations, North Atlantic Treaty Organization (NATO), and U.S. Congress provisions.

In addition to the unanimous declaration of the United Nations Security Council resolution of 12 September 2001, the North Atlantic Treaty Organization invoked Article V of its charter, which states "an armed attack against one or more of them in Europe or North America shall be considered an attack on all."[9] On 18 September 2001, the U.S. Congress passed the "Joint Resolution to Authorize the Use of U.S. Armed Forces Against Those Responsible for the Recent Attacks Launched Against the U.S." The resolution authorized the President use of "all necessary and appropriate force against the nations, organizations, or persons he determines planned, authorized, committed, or aided

the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the U.S. by such nations, organizations or persons."[10] The Resolution from Congress gave the President authority to carry out actions equivalent to war. Significantly, there is no nation-state to make a declaration of war upon, only individual non-state terrorists. The language used in the resolutions and actions of the United Nations, NATO and the U.S. Congress are very important because they underpin how the U.S. is involved an armed conflict and can therefore apply the law of armed conflict.[11] The United Nations, NATO, and the U.S. Congress recognized by their actions that the U.S. must enter armed conflict to protect itself. Within less than a month following the attacks, the U.S. launched its first attack.

To carry out the war on terrorism the U.S. launched air attacks into Afghanistan against the Taliban and Al Qaeda on 7 October 2001. Ground forces expanded the operation on 17 October 2001.[12] In accordance with Article 51 of the United Nations Charter, the U.S. notified the Security Council that their armed forces had initiated actions "designed to prevent and deter further attacks on the U.S." The actions were justified under Article 51 and the inherent right of individual and collective self-defense.[13] Further demonstration that the U.S. saw itself in armed conflict was the language of President Bush embedded in an executive order that he issued on 13 November 2001 authorizing the creation of military commissions to prosecute those captured in armed conflict. The order did not limit the jurisdiction to those captured in Afghanistan and was established to handle violations of "the laws of war and other applicable laws."[14] This order reflected the intent to carry out a global war.

In continuing its war on terrorism and to secure those detained in its conduct, the U.S. began moving Taliban and Al Qaeda detainees to Guantanamo Bay in January 2002. The Department of Defense termed the detainees 'unlawful combatants.'[15] Shortly after the movement of detainees began, the White House announced that it had conducted a review of the status of the detainees. A spokesman announced that the President had decided that the Third Geneva Convention of 1949, the Convention Relative to the Treatment of POW, applied to the conflict with the Taliban in Afghanistan because Afghanistan was a signatory to the Geneva Conventions but not to the conflict with Al Qaeda terrorists who do not qualify because they are a non-state, terrorist network. He also emphasized that the Geneva Convention covers conflicts between states. The President also determined that the Taliban detainees did not meet the criteria in international law as legal combatants and therefore were not entitled to prisoner of war status, because the members of the Taliban did not wear distinctive signs, insignias, symbols or uniforms and sought to blend into the population. Nor was the Taliban organized into military units with identifiable chains of command.[16] Concerning how the detainees would be treated, Secretary of Defense Don Rumsfeld announced: "we will continue to treat them under the principles of fairness, freedom and justice that our nation was founded on."[17] He added that they will continue to receive humane treatment, they will get three meals a day, clothing, medical care, showers, visits from chaplains, the opportunity to worship and that the International Committee of the Red Cross will be allowed to continue to meet with the detainees in private. [18] As of March 2003, more than 600 detainees from 40 countries were being held in Guantanamo.[19] These actions reflect that the U.S. intends to provide for the detainees generally within the spirit of the IHL but that the detainees are

not going to be handled in a clear cut manner, as in the past where combatants were treated as POW and noncombatants who are violators of law were put before judicial bodies.

Another instance of U.S. actions in the war on terrorism that has drawn criticism for noncompliance with international law involved a Central Intelligence Agency Unmanned Aerial Vehicle fired a hellfire missile at a vehicle carrying six Al Qaeda operatives on 4 November 2002 in Yemen. The attack resulted in the death of all vehicle occupants including a top Al Qaeda figure that was the key suspect in the bombings of the U.S.S. Cole and of a French tanker.[20]

Embedded within each of the above actions are legitimate issues and questions related to the law of armed conflict. The first and most basic question upon which all else must follow is the determination of what body of law is appropriate to follow. Follow-on questions relate generally to the use of force, categorization of detainees and protections afforded them.

IHL and its Specific Matters Relevant to U.S. Actions

IHL, also referred to as the Law of Armed Conflict, aims in an overarching manner to alleviate suffering and to protect lives during armed conflict. IHL is a compromise, although as it protects certain parties it also elevates the right to kill and to detain without trial those who are 'combatants.' The right to kill and to detain rests only with combatants as those not deemed as lawful combatants who kill or detain individuals are criminals and are subject to prosecution and punishment.[21]

While IHL governs actions while engaged in armed conflict, a separate body of international law refers to human rights. Human rights law is generally in effect at all

times, while IHL is only in effect during armed conflict. IHL overrides human rights law when the specific circumstances are explicitly addressed in the instruments comprising that body of law.[22]

IHL is not only limited in its applications to periods of armed conflict but it is also restricted in application to conflicts between states, or high contracting parties. This is an essential point in understanding that current IHL is outdated. Additional Protocol 1 (AP1) to the Geneva Convention does extend the concept of international armed conflict to internal conflicts or wars of liberation and could be argued to govern actions in the war on terrorism but since it is widely agreed that the attacks of 9/11 and resulting U.S. action are not within the scope of AP1, it will not be discussed.[23] Most importantly, the U.S. is not a signatory to the protocol and there is disagreement among legal scholars if in fact AP1 has become customary law.[24] Therefore, in a debate governing the actions of the U.S., it is inappropriate to discuss AP1 since that nation does not recognize it and it cannot be said to be customary law.

These few very basic provisions give rise to some questions which frame the debate surrounding the U.S.' compliance and application of international law. While certainly not inclusive, some of the most basic questions are:

- Is the U.S. involved in an armed conflict or is it using its military to carry out police/law enforcement actions?
- Can the U.S. apply IHL solely in its war on terrorism or should it be applying human rights law as well or exclusively?
- Does IHL apply when one party to the conflict is not a state or a high contracting party?[25]

These questions lie at heart of the issues with the U.S. and its view of international law in the war on terrorism. No clear-cut answers pertain to the questions. Different nations, organizations and legal scholars have differing views on answers to the questions and on more specific ones. Differing views exist also on specific controversial aspects that have arisen in the war on terrorism and that is in regards to the missile attack in Yemen and the status of detainees in Guantanamo Bay.[26] If IHL does not govern the war on terrorism, then it could be argued that the U.S. clearly violates international law. The attack in Yemen would be nothing more than an extra-judicial execution and the detainees are being held in violation of human rights law. The U.S. maintains the war on terrorism is governed by IHL because it is an armed conflict based on reasons previously described. To answer specific concerns about the detainees, it is necessary to examine how the U.S. has applied IHL in determining status and treatment of the detainees. First to understand is what IHL provides in regard to status during armed conflict.

Article 4 of the Third Geneva Convention (GC III) provides the basic criteria for defining status in an armed conflict. GC III provides that legal combatants are designated as those who are members of the official armed forces of a party. Combatant designation is also provided to members of militias, volunteer groups and organized resistance movements provided that they (1) are commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign recognizable at a distance, (3) carry their arms openly and (4) conduct their operations in accordance with the laws and customs of war.[27] Combatants may engage in hostilities without the possibility of prosecution for killing or detaining individuals (as long as their actions are in accordance with the laws and customs of war) and they are legitimate targets of the opposing party. With the

designation of combatant comes the protection of being designated as a prisoner of war (POW). POW, who unlike other detainees, must be treated in accord with provision of Geneva Conventions, must be repatriated immediately upon conclusion of hostilities. [28]

GC III also provides for various rights of prisoners and conditions during their period of detention. Among the provisions are entitlement to pay, opportunities for sports and games, freedom to move about and interact with other prisoners, and the right to maintain their own kitchen and commissary.[29] The Convention also provides that when POWs are tried for offenses they can be "validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of member of the armed forces of the Detaining Power."[30] These entitlements and protections are uniquely provided to those serving as part of the opposing force as combatants unless special provisions exist. The special provisions are evidenced in certain categories of individuals as provided in the next major status area defined under IHL.

IHL identifies the other major status of personnel as noncombatants. Noncombatants are generally civilians, medical personnel, chaplains, journalists, war correspondents, persons who accompany the force and crews of merchant marine and civil aircraft. They may not be attacked as targets but if accompanying the force they run the risk of being attacked. Certain categories of noncombatants are entitled to POW status if detained. Those that have an affiliation or in some means support the force are entitled to POW status.[31] Some nations have expanded on the statuses, going beyond that provided in the Hague and Geneva Conventions by applying their own interpretation, creating such terms as unlawful combatants.

Though not recognized as a term in any of the Geneva Conventions or Hague Conventions, the U.S. uses the term unlawful combatant. The term first appeared in a U.S. Supreme Court ruling, *Ex Parte Quirnin*, in 1942 that involved a case against a group of German saboteurs captured in the U.S. The Court stated that since international agreements refer to lawful combatants, "our government has thus recognized the existence of a class of unlawful belligerents."[32] The term has grown in use and recognition in the wake of U.S.' actions and has drawn much criticism on the grounds that it is not recognized in IHL. It is of interest to note that the term has grown in international acceptance, as the Canadian Forces recognizes the term. In its manual on the Law of Armed Conflict, the Judge Advocate General of the Canadian Forces defines unlawful combatants as civilians engaged in hostilities, mercenaries, and spies. Civilians "who take a direct part in hostilities" are unlawful combatants, according to North American terminology. Unlawful combatants lose their protection as civilians and become legitimate targets for such time as they take a direct part in hostilities. "If captured …they are not entitled to P[O]W status, but they must nevertheless be treated humanely. They may also be punished as unlawful combatants but only following a fair trial affording all judicial guarantees."[33] Providing that there are two clear-cut statuses (legal combatant and noncombatant) and one that is in dispute (unlawful combatant), the significant issue of determining that status is also at issue with American application of IHL.

At issue particularly is the provision in GC III that entitles individuals to a presumptive POW status if there is any doubt as to the status of the individual. It further provides that the status of those individuals who are in doubt is to be determined by a

"competent tribunal."[34] As already discussed, the President of the U.S. and the executive branch of government made the determination of status in Guantanamo, not a tribunal. The International Committee for the Red Cross, the internationally recognized authoritative interpreter of the Geneva Convention, has stated that all detainees are either combatants or noncombatants, covered by either GC III (Treatment of POW) or the Fourth Convention, (Protection of Civilian Persons).[35] Status and determination of that status are critical in defining how the rights of those detained are addressed. The manner in which the U.S. has handled the issues has drawn significant criticism.

Many international organizations and other nations have strongly criticized the U.S. for its interpretation and actions related to the specific provisions contained in the Third and Fourth Geneva Conventions as discussed above.[36] Most criticisms center around the issue of the detainees at Guantanamo being denied status as POWs, the fact that the determination of status was made by the Executive Branch of the U.S. Government as opposed to a competent tribunal, and the Executive Order that establishes military commissions to try criminal violations rather than being brought before a U.S. Federal Court or a military court martial.[37] By not defining the detainees as lawful combatants and thereby POW, the U.S. does not have to try the individuals for misconduct before a military court martial. If defined as a noncombatant they would be rightfully put before a judicial body to adjudicate any alleged misconduct. By defining the detainees as unlawful combatants the U.S. can, in its view, use military commissions to adjudicate any alleged crimes.

The question whether the U.S.' actions against terrorism are correct is not pertinent but the facts represent that the world has entered a new era of warfare and there is much

gray area. That gray area can be defined in part by some rhetorical questions. Can IHL that was envisaged to address armed conflicts between states adequately protect the interests of nations and individuals if applied in the war on terrorism?[38] If IHL is inappropriate and domestic criminal and international human rights law should mandate the actions of the U.S., does it protect the interests of a nation in ensuring the protection of its citizenry? [39]

Martin van Creveld in his 1991 book, *The Transformation of War*, describes a future of war that looks much like circumstances since 9/11: "Distinctions between war and crime will break down. Crime will be disguised as war, whereas in other cases war itself will be treated as if waging it were a crime…over time a different war convention will emerge, possibly one that is based on distinctions between guilty and innocent."[40] Van Creveld by exposing the gray area in the new era sets the stage for the next area to be explored in determining if the war on terrorism is an armed conflict and if IHL does apply.

War on Terrorism, An Armed Conflict where IHL Applies?

In order for IHL to apply in the war on terrorism, an armed conflict must exist. The U.S. Government has asserted that the global war on terrorism is an international armed conflict and therefore IHL governs its actions.[41] The order establishing military commisisions signed by President Bush stated that international terrorists have carried out attacks on the U.S. "on a scale that has created a state of armed conflict that requires the use of the U.S. Armed Forces."[42] This assertion demonstrates the view from the executive power that the U.S. is in an armed conflict.

Legal scholars and other viewpoints vary on the issue of the 'War on Terror' being an international armed conflict. The widely published Professor of International Law at the London School of Economics and Politics, Christopher Greenwood, believes it does. He argues that based on numerous factors to include the magnitude of the attack on 9/11 and the past history of Al Qaeda attacks on U.S., that a threat to international peace and security existed, as was stated in the United Nations Security Council Resolution of 12 September 2001.[43] Voicing a contrary and broadly held view is Gabor Rona, another widely published legal authority who has served in the Legal Division of the International Committee of the Red Cross. Rona argues primarily against the war on terrorism as an armed conflict with IHL governing its actions based on the fact that the war is not between two states or high contracting parties. Rona states that the view of the U.S., if accepted "would serve as a global waiver of domestic and international criminal and human rights law that regulate, if not prohibit, killing. Turning the whole world into a rhetorical battlefield cannot legally justify…a claimed license to kill people or detain them without recourse to judicial review anytime, anywhere. This is a privilege that, in reality, exists under limited conditions and may only be exercised by lawful combatants and parties to armed conflict."[44] Rona feels that human rights law and other legal regimes rightfully govern the war on terrorism.[45] U.S. officials would argue that the scope of the action goes beyond that which the criminal justice system can reasonably handle, that the nature of the boundary-less war on terrorism necessitates new tactics. National Security Advisor Dr. Condoleezza Rice stated: "we're in a new kind of war, and we've made very clear that it is important that this new kind of war be fought on different battlefields."[46] Rice's use of the term 'war" is significant. It demonstrates a

clear mindset held in the White House. The practicality of the U.S. view must be respected. It is not logical or practical for a nation that must protect its citizens to attempt to handle every member of multiple large terrorist organizations individually. Actions of the past, limited to criminal justice actions, have demonstrated the failure in protecting the citizens of the U.S. from Al Qaeda. It can be argued with merit that had the Clinton Administration carried out a war on terror following the first attack on the twin towers, the second attack may well not have occurred.

A realization that protecting its citizens is the first priority of a government among national security policy makers of the U.S. harks back to van Creveld. Van Creveld cautions that the most important demand placed on a government is the demand for protection: "A community which cannot safeguard its citizens will not survive."[47] A pragmatist would assert it is incorrect to restrain a government in its efforts to protect its citizens because the body of law that governs its action was written in 1949 and warfare was defined as between states? Can large groups of people who as van Creveld describes as not having territorial ties but which are formed on charismatic lines that are motivated by loyalties to charismatic, fanatical, ideological based leaders " escape being legitimate targets in war?[48] The answer from the U.S. would be an emphatic no! Organizations and nations that have not felt threatened, that have not lost thousands of people in a singular attack, that have not had its men, women and children attacked around the world perhaps have the luxury to focus on humanitarian issues and would argue that each should be handled individually with protections. This viewpoint would suggest that individuals may group together to wage war but can then hide behind protections established to ensure due process, to subject their acts of war to individual review in a court of law.

Following the argument of those that believe the war on terror does not rise to armed conflict, the U.S. would try members of Al Qaeda in U.S. Federal Court. The realities of that practice are seen in the government's case against Zaccarias Moussaoui, an alleged conspirator in the 9/11 attacks. The requirements of criminal law and the Constitution of the U.S. mandate the court to protect the rights of Moussaoui, the individual. However, the government represented by the executive branch feels compelled to protect its citizens, heeding van Creveld's caution. The prosecutor in the case said in regards to the judge's order to allow Moussaoui to speak to other members of Al Qaeda that the order "would needlessly jeopardize national security at a time of war with an enemy who has murdered thousands of our citizens." [49] The Department of Justice has not allowed Moussaoui to speak to any member of Al Qaeda, thereby defying the Court's order. Moussaoui has openly stated in court that he is a member of Al Qaeda and that his loyalty is to Osama Bin Laden.[50] His loyalties and motivations are just as those described by van Creveld. In an era when warfare is described in terms of asymmetric threats and nonlinear fighting, should legitimate threats to a nation be defined as coming only from states shaped by geographic boundaries? To do so is a failure to recognize a new era in warfare.

While this issue is the overarching issue in regards to IHL and the war on terrorism it is constructive to review two particular areas in dispute as they have drawn sharp criticism and are potentially most divisive in the international community as they represent the broader topic and more specifics of international law.[51]

Missile Strike in Yemen, Justified under IHL?

One legal scholar questions the missile strike in Yemen that killed six Al Qaeda operatives as being of "dubious legality."[52] The Swedish Foreign Minister was harsher in his criticism calling it "a summary execution."[53] In a letter of protest to the President of the U.S., Amnesty International wrote about the attacks: "if this was the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extrajudicial executions in violation of international human-rights law."[54] These criticisms reflect the views condemning the U.S. and it is important to note that the criticism is based primarily on the grounds that IHL does not apply.

The U.S.' position is that the attack was governed by IHL and that the targets were "enemy combatants" since one of the operatives was a key suspect in the October 2000 bombing of the U.S.S. Cole, an attack carried out under the direction of Al Qaeda.[55] Some suggest that the U.S. is trying to "effect rapid change in international customary law" in its application of the Geneva Convention.[56] The question again arises on the appropriateness of applying IHL when the very basic requirement is that it is only applicable in conflicts between states.[57] Applying IHL in this instance could be viewed as Rona argued as a global license to kill.[58] In a contrary view, inadequacies in law to provide for targeting someone that wages war against a nation because he is not associated with a nation that signed a convention suggests that the U.S. should seek to expand the law. Van Creveld is correct. Trying to change IHL by effecting change in customary law will only alienate nations.

The U.S. has not directly commented on why it chose to attack the individuals rather than make an arrest. It is speculated that the U.S. was not in position to make an arrest

and rather than allow the suspects to escape, the attack was authorized.[59] Perhaps it is that the U.S. never considered an arrest and the action is consistent with its position that the war on terrorism is governed by IHL. Its actions are also consistent with views as stated in its National Security Strategy to be on the offensive and as stated as its first priority, to destroy terrorist organizations of global reach by attacking their leadership.[60] Disagreement over application of IHL in this instance certainly exists. The international view may be similar to that of a former U.S. Assistant Secretary of State, who stated "we undermine our credibility with the rest of the world when we commit human rights abuses …in the name of fighting the war on terror."[61] Whether this attack was a violation of human rights law or an appropriate application of IHL remains open to debate but that debate alone hurts the credibility of the U.S. When nations disagree with actions of the U.S., they may be inclined to provide less support in the war on terrorism. A legal scholar has written that "while a new rule of law recognizing that the laws of war may be applied to independent terrorist organizations may be evolving, no consistent and general state practice has yet merged."[62] It is this period of evolution and debate that hurts the U.S. and its credibility. The U.S. cannot push forward customary law to adapt to this new environment unilaterally. Customary law can only be effected by a "consensual process of consistent and general practice among states, which they follow out of a sense of legal obligation."[63] The international community must come to grips with a new era in warfare and just as changes are required in doctrine and technology, so to, must law. Law by nature is reactive to circumstances and circumstances have radically changed, it is time to react.

Detainees, IHL Appropriately Applied?

Having viewed the situation with the U.S. in its application of lethal force, its authority to detain and the provisions of law that apply will now be explored. The situation with the detainees in Guantanamo was well represented though perhaps not intended so by Ari Fleischer, White House Press Secretary, on 7 February 2002 when he stated: "the President has maintained the U.S. commitment to the principles of the Convention, while recognizing that the Convention simply does not cover every situation in which people may be captured or detained by military forces."[64] The two primary and divergent arguments concerning the status of the detainees are contained in this singular statement, namely that while the U.S. wants it to apply, it is inadequate for the circumstance.

The U.S. argues that while complying with the spirit of the convention, it has expanded and interpreted IHL in some areas where the conventions do not provide guidance for a unique situation in this new form of warfare. Secretary Rumsfeld stated when describing the status of the detainees: "when the Geneva Convention was signed in 1949, it was crafted by sovereign states to deal with conflicts between sovereign states."[65] He went on to state that the framers of the convention did not envision the current war on terrorism but that he had issued an order mandating all detainees be treated in a manner consistent with the Geneva Convention.[66] The Secretary's view can be agreed upon but there are certainly different viewpoints upon how humanitarian law is being applied and if it is appropriate to apply.

The counter view to the U.S. position is embodied in several different schools of thought that come from different members of the international community. One is that

the U.S. has not appropriately applied IHL by not having the status of the detainees determined by a 'competent tribunal,' by not providing entitlements of POW status while detainee status was in question and in the end, wrongly assessing their status.[67] The other school of thought put forward is that IHL may cover some of the detainees but certainly not all and therefore other forms of law should be applied, in particular human rights laws.[68] Defenders of the U.S. position continue to assert that the law of armed conflict applies exclusively and that for practical reasons, adaptations must be made.

There are various practical arguments put forward to justify how the U.S. has 'uniquely' applied the Geneva Convention. One legal scholar who defends the U.S. position notes: "our European allies have been fulminating with advice about how we should handle the dangerous business of housing these men. Our allies extravagantly insist that every semi-colon of the Geneva Convention, a treaty among sovereign countries designed to protect honorable soldiers, also belongs to the self- appointed terrorists and saboteurs who deliberately attack guards and deliberately kill civilians." [69]

One practical situation demonstrating the complexity of the situation concerns the matter of repatriation. Human rights organizations as well as U.S. allies point out that the U.S. has placed the detainees in a position where they may be held indefinitely while the war on terror with no real known end point is pursued. This practice appears to ignore the requirement that prisoners of war be immediately repatriated upon conclusion of hostilities. Supporters of the U.S. position counter that argument by those that ask what nations are in a position to vouch for a detainee's future peaceable behavior.[70] Moreover, whether a lawful or unlawful combatant, it would be unwise for the U.S. to release a member of Al Qaeda. To understand the U.S. position, one must accept that the U.S. is

in an on-going war with non-state associated, organizations of people. Support for the U.S. position continues on other grounds.

Others point again to the Convention being a treaty among sovereign countries designed to protect honorable soldiers and suggest that provisions should not apply to those who have not demonstrated a respect for the laws of armed conflict. They argue that some provisions would make it difficult to run a safe camp. Specific requirements of the Convention to allow POWs to keep their mess kits, metal helmets, and to receive from home scientific equipment and musical instruments as well as providing the means for preparing food are all provisions that would put potential weapons into the hands of dangerous individuals. Detainees who have demonstrated no regard for the norms of society, international law or their own life are different in how they are secured as compared to a solider of nation compliant with international law. A soldier would sacrifice his life or those of fellow soldiers only if it provided some military advantage. A terrorist thinks in terms of symbology, so the terrorist accepts that which is inconceivable to the soldier. The requirement to provide the detainees a military salary, not a provision that would endanger lives, is one that would certainly not be seen as a politically viable action in the U.S.[71] Americans view the detainees as something worse than average criminals and much more akin to mass murderers. Any connection to terrorism draws a linkage in the public mind to 9/11 and over 3,000 dead Americans. Any administration or political leader that supported a concept to pay detainees, as if they were soldiers serving in another nation's Army would be sharply rebuked by the American people. In sum, the differing parties essentially agree upon the view that the U.S. is not applying the 'fine letter of the law'. However, the U.S. defends its position on

the grounds that it is warranted in an armed conflict governed by IHL by apply the spirit of Geneva Convention and afford those protections that are reasonable in a new form of warfare.

The other criticism of the U.S. position is that it should apply not only IHL but should apply other legal regimes, human rights law, and its own criminal law. Many argue that the U.S. should apply the International Covenant on Civil and Political Rights and the American Convention on the Rights and Duties of Men. Both are treaties that the U.S. is party to and are recognized as instruments of human rights law. Both treaties provide rights to individuals such as the right to be free from arbitrary detention, to be informed of pending charges, to be brought before a judicial officer and to challenge an unlawful detention and the right to due process. [72] The position that more than IHL applies in the circumstance is shared broadly as demonstrated by the United Nations Special Rapporteur who stated that the U.S. is in clear violation of both General Assembly and Security Council Resolutions that counter-terrorism measures must comply with IHL, human rights, law and refugee law. Condemnation of actions comes further from friends and allies. The United Kingdom High Court described the situation in Guantanamo as "objectionable" and "in…apparent contravention of fundamental principles recognized …by…international law." [73] The United Kingdom Parliament passed a resolution condemning the U.S.' actions as "arbitrary and therefore unlawful."[74] The criticism of the actions in Guantanamo comes also from numerous other agencies on the same grounds (UN Working Group on Arbitrary Detention, the European Parliament, Inter-American Commission on Human Right, Parliamentary Assembly of the Council of Europe).[75] This condemnation has the potential to impact adversely on future support to

the U.S. When both the United Kingdom Parliament and High Court voice objections, the U.S. must take notice to preserve its relationship with its strongest ally in the war on terror as well as others who are alienated by its policy.

Despite the international condemnation, the U.S. has not wavered on its position. It continually reasserts that the war on terror is an armed conflict and the detainees in Guantanamo are to be handled only under the provisions of IHL.[76] It is the practical reality, the utilitarian view that drives the U.S. to view its 'war on terrorism' as an armed conflict. Police, courts and judicial processes that must be coordinated throughout the world, wherever terrorists are, have proven that they cannot respond in a manner to prevent terrorist acts.

The law of war has developed over history by two radically different perspectives, that of the utilitarian or warrior, and that of the humanitarian. The rules governing how warriors conducted themselves on the battlefield were primarily written by the utilitarian school until just over the past few decades.[77] It is clear that the U.S. is taking more of a utilitarian approach in defining how it fights the war on terrorism. In President Bush's order establishing the military commissions, this view came clear: "Given the danger to the safety of the U.S. and the nature of international terrorism…it is not practicable to apply in military commissions…the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts."[78] The danger comes in allowing the defendant access to people and information, which may well be useful in his/her defense, but can also be used to further other attacks. Perhaps the international community has come to an impasse between those taking a utilitarian approach to the war on terrorism and those that are more heavily influenced by the humanitarian view. Does

the U.S. take advantage of its unique position in world affairs today and demonstrate that power is the constitution of international law?[79] Can the U.S. continue on a path that in its view protects its citizens but in the eyes of many "undermines the U.S.' reputation as a nation of laws"? Or should the U.S. take concrete actions that reflect the view of the Secretary of Defense in responding to a question about international criticism about children being among the detainees in Guantanamo, when he responded: "I do know that we care what the rest of the world thinks."[80] If the U.S. does care what the world thinks it should reach international agreement on how international law should apply in this new era, and this is necessary if the U.S. is to win the war on terrorism.

Winning the War on Terrorism Requires International Support

In its most recent version of its National Security Strategy the U.S. lays out eight ways by which it intends to achieve its national security goals. Second among them is "strengthen alliances to defeat global terrorism and work to prevent attacks against us and our friends."[81] Throughout the document, numerous references are made to the need for support from allies and friends. In President Bush's introductory comments to the Security Strategy, he states that the "war against terrorists of global reach is a global enterprise of uncertain duration" and comments that every tool in the arsenal will be used and includes military power, law enforcement, intelligence, and efforts to cut off terrorist financing. [82] Some would suggest that in order to enable its desire to strengthen alliances, it must fulfill the first stated objective to "champion aspirations for human dignity."[83] Presently it appears that many actions serve to alienate other nations and that it is difficult for the U.S. to maintain a position on the moral high ground and serve as the champion for human dignity.

A European writer for the Wall Street Journal, Anne Applebaum, appears to represent the views of many within Europe. In speaking of the image the U.S. has developed by the manner in which it has handled the detainees in Guantanamo, she states though the situation with the detainees in Guantanamo may be a minor episode: "it reveals a carelessness about that image, and an arrogance which bodes ill for the future."[84] She goes on to draw a parallel to the Cold War in that the war on terror will last for many years and that it will require allies. Applebaum recognizes just as the National Security Strategy states, the U.S. will not hesitate to act alone, and cautions the U.S. in flaunting its position and in defying internationally accepted norms. She states, "intelligent unilateralism means that the U.S. abide by treaties, especially human rights treaties that it has ratified."[85] Criticism comes not only from abroad but also internally. Former Assistant Secretary of State for Human Rights, Harold Koh, has said: "To win a global war on terrorism, nations that lay claim to moral rectitude and fidelity to the rule of law must not only apply, but also universally seen to be applying credible justice."[86] It has been already substantiated that the U.S. is not universally seen as applying credible justice and therefore its ability to garner continued support in the war on terrorism lessens with each passing event where another nation believes that the U.S. has acted outside of international law. Those that believe the U.S. is not compliant with international law would be less inclined to support war on terrorism operations. A nation that believes the detainees in Guantanamo are being handled outside of the law would logically be hesitant to provide intelligence that would lead to capture of a potential terrorist.

It is clear, however, that many do not accept the U.S. position that only IHL should apply and that it can adapt to fit the unique circumstances brought on by applying

conventions that were developed to handle armed conflict between states. There is agreement at least by one highly recognized legal scholar that new thinking is required. Greenwood states that the attack of 9/11 does not fit easily under any obvious categories of international law and "to some observers, the attack can only be regarded as an entirely new phenomenon falling wholly outside the existing framework of international law with its emphasis on (horizontal) relations between states and (vertical) relations between state an individual…a challenge on this scale by a non-state actor to the one superpower calls for entirely new thinking about the nature of law."[87]

The U.S. may well be in a position where other nations "care less and less about how the U.S. thinks regarding the law of armed conflict and more and more about the fact that the U.S. seems to behave as if it can dictate the law but is not subject to the law."[88] In his forward-looking thoughts on the conventions of war, van Creveld warns, "an armed force that violates the war convention will disintegrate. This will be all the more the case if it is powerful, hence unable to convince others- and itself- of the imperative need for it to break the rules."[89] Some argue that the U.S. has already lost its ability to influence formal protocols and that the U.S. is more alienated from its allies and the international community more so than ever.[90] Is it the case that the U.S. is in a new era where international law is inadequate but is in a position where it cannot influence change in protocols and, therefore, uses its power to constitute international law? Perhaps it is, as the U.S. is the lone superpower and the main target of international terrorism. It does not have the luxury to take the humanitarian approach to international law but must take more of a utilitarian viewpoint.

In furthering her description of intelligent unilateralism, Applebaum suggests that the U.S. should sell itself abroad. That despite the outcry of politicians in Britain about the treatment of detainees in Guantanamo, a poll showed that more than 90% of the public approved of the manner in which the U.S. treated the detainees.[91] While one can argue it is an uninformed public voicing that opinion, it demonstrates a recognition of practical requirements. It would certainly seem as if the U.S. were to make its case openly, it would have nothing to lose. Others suggest that the U.S. take a broader, more proactive role in influencing international law, that it is in the interest of both the utilitarian and the humanitarian for the U.S. to reassume a leadership position in the development of the law of war on the international scene.[92]

There appears to be broad consensus that in order for the U.S. to succeed in its war on terrorism it will need the full support of its allies and other friendly nations. The U.S. recognizes the various aspects at play in this matter and captures them in its closing paragraph concerning alliances in the National Security Strategy:

> In the war against global terrorism, we will never forget that we are ultimately fighting for our democratic values and way of life. Freedom and fear are at war and there will be no quick or easy end to this conflict. In leading the campaign against terrorism, we are forging new, productive international relationships and redefining existing ones in a way that meet the challenges of the twenty-first century.[93]

At question is whether the disagreeable actions of the U.S. in its war on terrorism are significant enough to impact on the support that nations are willing to provide? Are perceived violations of international law enough to modify relationships with the lone superpower or do nations protest lightly in diplomatic channels and go about business as usual? If the latter is true then the point of this essay is moot. If nations continue to support the U.S. then there is no real practical reason to pursue change. If nations

continue to support then perhaps international law can evolve through customary practice. At question also is if the U.S. recognizes the ultimate fight is for democratic values and way of life, will it as part of its effort in leading the campaign in the war against terrorism, seek to reach a consensus among the international community on a manner to fight that war that protects the ultimate goal? The U.S. has various options at hand to ensure continued international support. One option, such as leading an effort to establish new protocols to address the war on terrorism will best protect the interest of the U.S. while finding common ground among the international community on how best to protect the interest of all involved.

Conclusion

In the war on terrorism, there are many things agreed upon by the U.S. and those that view themselves as allies and friends to the U.S. It is widely agreed that it will be a protracted conflict, that it will require international co-operation, and that it will require all elements of power to win the fight. There remains, however, disagreement in varying degrees on the manner in which the U.S. carries out the war on terrorism.

Two camps have existed over time in regard to how IHL is shaped. The U.S. over the recent decades has been seen as more in the utilitarian camp and is perhaps more so today than ever. With that comes an alienation of others whose footing is more in the humanitarian camp. Logically, those who feel a greater security threat take a more utilitarian view. The events of 9/11 shook a nation that felt secure with its lone superpower military strength and geographic position. It is evident that the Bush Administration has taken a utilitarian view with its primary concern being the safety of its citizens.

While it was suggested previously that those setting the security policy of the U.S. might have studied van Creveld's work on the future of war, they have overlooked some of his cautions. Whether the U.S. is attempting to expedite the fashioning of customary law through its current practices, breaking the rules without recognition as suggested by van Creveld, or is fully correct in its application of IHL, it is significant in its perception by friends and allies. How other nations perceive the U.S. may well dictate the level of support that nations may be willing to provide.

In the short term, the U.S.' strategy may well best protect its security interest. In the long run, however, which is most important in this protracted conflict, the erosion of the moral ascendancy of the U.S. brought about by its perceived noncompliance with the letter of the law may well adversely impact on its security interests.

Using IHL or the full body of international law to address the war on terrorism is inadequate in either case. Christopher Greenwood is correct about the situation when non-state actor's actions rise to the level of armed conflict, a new thinking about international law is required. Van Creveld may not be that far off in suggesting that new conventions may be shaped around the notion of innocent and guilty. It is well beyond the scope of this paper and capabilities of this author to suggest what new protocols should be fashioned but it is clear that no current body of law adequately handles the situation. Many argue that the full body of international law is adequate. Supporters of the U.S. position would argue that in applying the full body of international law, greater protections would be provided to individuals that do not recognize international law, at the expense of protecting security interests of nations. Once again, the balance between the utilitarian and humanitarian view is at question.

The resolution to the situation lies with the U.S. taking the lead, putting forward the utilitarian view in crafting new protocols to address armed conflict between states and non-state actors involved in terrorism. Time has lessened the strong feelings of the world in its condemnation of terrorism. One can only guess at the reaction if on 12 September 2001 the U.S. would have suggested on the floor of the General Assembly of the United Nations that the protocols governing armed conflict should be reviewed in light of the current situation.

It is a new era in warfare with non-state actors involved in terrorism now the major adversary of states. In order for the U.S. to win in the war on terrorism, it must have international support and current international perceptions about the U.S.' actions erode that support. To turn the tide, the U.S. should lead the effort to find common ground on how the new form of warfare should be governed in international law.

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