

BACK TO THE FUTURE: DE FACTO HOSTILITIES, TRANSNATIONAL TERRORISM, AND THE PURPOSE OF THE LAW OF ARMED CONFLICT

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In the aftermath of World War II, the international community set about to revise the Geneva Conventions. Three of the four treaties that emerged from this effort, all of which had been adopted to mitigate the suffering of victims of war, were in force during the War. However, it was the failure of the law to fully accomplish their humanitarian purpose that animated the revision efforts. These efforts culminated in 1949 with four treaties addressing the plight of four particular groups of war victims, treaties which have since earned the distinction of being the only international agreements to be universally ratified.

The substantive advances in the Law of Armed Conflict ("LOAC") contained in these treaties reflect these. Of the many lessons learned in the "battle laboratory" of World War II, perhaps most profound was that even the most comprehensive treaty regime is meaningless unless it is applied and respected by the parties to a conflict. Prior to World War II, it was simply assumed that the law established to regulate war would apply to war. However, the limits of this assumption were exposed during both World War II and the civil wars that occurred the inter-war years.

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Although these events satisfied any pragmatic definition of "war," the absence of a *de facto* standard for determining when the law of war (a term that is today synonymous with humanitarian law or the law of armed conflict) became obligatory, was exploited by states when they used what can only be described as creative interpretations to disavow the conflict they were engaged in was a war as that term was defined by international law.

In response, the drafters of the Conventions included the first ever treaty "triggering" provisions. Their purpose was to create a truly *de facto* standard for determining when the law would apply to protect the victims of war. As a result, the focal point for determining applicability would no longer be "war"—a term susceptible to interpretive avoidance—but instead "armed conflict." Accordingly, the second article common to the four treaties ("Common Article 2") required application of the full corpus of the treaties to any international—or inter-state—armed conflict. And, in response to the reality that even in a purely intra-state context armed hostilities between competing armed entities could become sufficiently intense as to amount to *de facto* armed conflict, all four treaties also included an article requiring the humane treatment of any person not participating in hostilities during non-international armed conflicts within the territory of a state (intra-state armed conflict): Common Article 3. Although neither of these treaty provisions explicitly indicated that their effect was to trigger not only the treaty provisions contained in the Conventions but all other provisions of the LOAC, they rapidly evolved to have such effect.

From 1949 to 2001, this law triggering paradigm became a genuine article of faith. Military lawyers, government and non-government experts, academics, and judges called upon to apply the law of armed conflict relied on this Common Article 2/3 "either/or" armed conflict dichotomy as the definitive standard for determining situations requiring application of LOAC obligations and authorities. However, during this same period, and particularly following the end of the Cold War, armed forces of many nations found themselves engaged in operations that fell somewhere in the twilight zone between war and peace when executing the ubiquitous "peace keeping" mission. These forces were instructed by their legal advisors that such operations were not technically regulated by the LOAC because they failed to fall within the Common Article 2/3 paradigm. Nonetheless, as a matter of national (and sometimes multi-national) policy, LOAC

principles were invoked to provide an effective and consistent operational regulatory framework.

Peacekeeping operations were, however, defined in large measure by the absence of hostilities. Even when they involved small scale hostilities, like U.S. operations in Somalia in 1992, the general nature of the missions coupled with the application of LOAC principles as a matter of national policy obviated any need to critique the inherent limitations of the Common Article 2/3 law-triggering paradigm. As a result, little attention was paid to the question of whether the Common Article 2/3 standard was sufficiently comprehensive to address the realities of a rapidly changing military operational environment. The events of September 11, or more precisely the U.S. response to those events, would render this critique unavoidable.

Immediately after these infamous strikes on the U.S. homeland, President Bush made clear that the United States considered itself the victim of an armed attack and that the struggle against Al Qaeda was an "armed conflict." This language was not mere hyperbole. Instead, it represented a clear demarcation for a "new" approach to the struggle against international terrorism. For the first time since the inception of the Geneva Convention's Common Article 2/3 triggering paradigm, a state asserted that it was engaged in an armed conflict of international scope with a non-state entity. No longer would this struggle be characterized as an exercise of international law enforcement. Instead, the United States would use the instruments and authority of armed conflict to bring this non-state enemy to submission. While this armed conflict characterization was rejected by some as invalid, in the months and years following the attacks of September 11 all three branches of the U.S. government would endorse the decision by President Bush to define the struggle within this law of armed conflict legal framework.

Designating the struggle against a transnational non-state opponent as an armed conflict seemed, at least at the military operational level, logical. U.S. armed forces were directed to seek out and engage Al Qaeda operatives with combat power, and to detain captured Al Qaeda personnel to prevent them from returning to the "global fight." However, a legal incongruity was almost immediately exposed: while the United States had invoked the most fundamental authority associated with armed conflict—the authority derived from the principle of military necessity (which included the authority to employ deadly combat power as a

measure of first resort)—the transnational scope of the non-state enemy excluded the conflict from the Common Article 2/3 “either/or” paradigm. According to the President, because Al Qaeda was not a state, the armed conflict did not trigger the full corpus of the law pursuant to Common Article 2; and because the conflict was not “internal,” it did not trigger even the minimum humane treatment obligation of Common Article 3.

This incongruity would be fully exposed by the status and treatment standards adopted for captured Al Qaeda operatives. In his February 7, 2002 finding, President Bush explicitly disavowed any United States obligation to comply with the law of armed conflict vis à vis these detainees. The United States was not even bound by the minimum humane treatment obligation of Common Article 3 because of the transnational scope of the armed conflict.

This incongruity was further exposed by President Bush when he ordered the trial and capture of Al Qaeda operatives before a military commission for violations of the laws and customs of war. This invocation of the LOAC as a source of authority to condemn the conduct of captured Al Qaeda operatives would lead to Salim Hamdan’s challenge of the legality of his trial by military commission. This challenge would ultimately reach the Supreme Court, where Hamdan asserted that the procedures for his military commission violated the Common Article 3’s humane treatment mandate. In response, the Supreme Court interpreted Common Article 3 to apply in “contradistinction” to Common Article 2. In so doing, the Court effectively rejected the President’s selective invocation of the law by holding that *any* armed conflict not regulated by Common Article 2 was ipso facto regulated by Common Article 3. However, it was also clear that the Court also endorsed the armed conflict characterization of the struggle against transnational terrorism.

Almost immediately following this landmark decision, Israel launched a major combat operation into Lebanon against Hezbollah forces. Neither Israel nor Lebanon asserted that they were engaged in an inter-state armed conflict. Instead, Israel and the non-state entity Hezbollah engaged in intense hostilities, almost all of which occurred outside Israeli territory. The confluence of these two events generated a subtle but profound reassessment of the Common Article 2/3 law-triggering standard. The longstanding assumption that the inter-state v. intra-state paradigm provided the exclusive trigger for LOAC application seemed increasingly invalid. Both the United States and Israel

engaged in hostilities against non-state transnational enemies, employing force in a manner that certainly indicated the existence of de facto armed conflict. For the Supreme Court, this assertion of authority for purposes of trying a captured opponent with an accordant rejection of obligation derived from the same law resulted in an interpretation of Common Article 3's scope arguably inconsistent with the accepted understanding of the treaty. A similar reaction followed Israel's use of combat power in Lebanon: government and non-governmental critics of both Israeli and Hezbollah tactics consistently invoked LOAC principles to support their positions. The world had witnessed once again the inevitable reality of war: the unleashing of combat power to disable or destroy a designated enemy. And, international reaction to these operations quite logically demanded compliance with "rules" to regulate the application of such power, protect innocent victims of the hostilities, and to ensure the humane treatment of captured opponents. Like the Supreme Court, the existence of de facto hostilities and the invocation of armed conflict authority by the state seemed to override the inherent limitations of the Common Article 2/3 law-triggering paradigm, which proved no impediment to the assertion that both Israel and Hezbollah were bound to comply with the law of war.

By the summer of 2006, a realization appeared to be emerging in the international community: LOAC regulation is essential during *all* armed conflicts. While this might seem axiomatic, from a legal perspective it was anything but. Because the armed conflict characterization of the struggle against transnational non-state entities did not "fit" within the Common Article 2/3 law-triggering paradigm, it was met with widespread criticism. But this criticism failed to recognize what was exposed first by the Guantanamo experience and subsequently by Israeli operations in Lebanon: armed conflict is defined by operational reality, not by whether a given operation "fits" within the Common Article 2/3 paradigm. It was becoming apparent that irrespective of the inter-state v. intra-state limiting interpretation of the law, states were using military power in a manner that appeared to create the risks historically associated with armed conflict. As a result, the same critics who challenged the legitimacy of the U.S. invocation of LOAC *authority* were increasingly demanding compliance with LOAC *constraints*, implicitly acknowledging the applicability of the LOAC outside the inter-state v. intra-state law triggering paradigm.

The ultimate irony in this law applicability debate is that the intent of the 1949 Conventions had been flipped on its proverbial head. Of all the LOAC advancements contained in those four treaties, the most profound was the express rejection of creative law avoidance. The purpose of the "armed conflict" law trigger was to ensure that humanitarian protections came into force based not on legalistic definitions and interpretations of the term "war," but instead on a truly *de facto* criterion. That criterion was armed conflict, which denoted a situation of armed hostilities justifying the imposition of international legal constraints on the participants. Once hostilities existed, the humanitarian interests of victims required a law-triggering standard that prevented states from disavowing constraints and obligations at the core of humanitarian law. Even in the realm of intra-state armed conflict, which up until 1949 had been regarded as immune from international regulation, both state and non-state actors would be compelled to respect the most basic limitations on their conduct through the requirement to ensure the humane treatment of all those actively engaged in hostilities.

However, because the drafters of the Geneva Conventions focused on the two types of conflict prevalent between World War I and 1949, namely inter-state and intra-state conflict; the law triggers they adopted became synonymous with only these types of armed conflict. Thus, in the aftermath of September 11, this inter-state *v.* intra-state paradigm was relied upon to assert that the law did not apply to transnational non-state actors, even though the United States was invoking the authority of war to disable this enemy. This "authority without obligation" interpretation of the treaties was thus derived from a credible interpretation of Common Articles 2 and 3, but it defied the underlying spirit of these provisions. It also distorted the purpose of the law itself, which has always been to strike an efficient balance between the authority of military necessity and the constraints of the dictates of humanity.

Rejection of this selective invocation of authority without obligation was central to the Supreme Court's "contradistinction" interpretation of Common Article 3. But this was just the tip of the proverbial iceberg. Designating the struggle against transnational terrorism as an armed conflict has necessitated a re-evaluation of the entire law triggering paradigm. The Court's interpretation of Common Article 3 was effective to ensure the humane treatment of detainees—the issue the Supreme Court confronted in *Hamdan*—

but Common Article 3 provides no regulation for the application of combat power. As a result, the *Hamdan* decision did not address the broader question of what rules regulate hostilities between state and transnational non-state entities. The Israel and Hezbollah conflict confirmed this by exposing the world to the reality that conflict regulation becomes essential when the first salvo is fired, and not just when opponents are detained.

This process of reconsideration has stirred vigorous debate in the circles of LOAC expertise. Many scholars reject the assertion that the LOAC applies outside the inter-state v. intra-state context, arguing that operations conducted against transnational terrorists are properly categorized within the law enforcement legal framework. However, this approach is increasingly rejected by experts within the militaries responsible for executing these operations. This divide is particularly instructive, for it reveals an underlying defect in the rejection of the transnational armed conflict trigger for applicability of the LOAC regulatory framework: the failure to recognize that the ultimate purpose of Common Articles 2 and 3.

The great innovation of these treaty provisions was the recognition that armed conflict must dictate applicability of law, and this applicability must be based on a truly de facto assessment of the existence of armed conflict. Neither the nature of the enemy, nor the geographic scope of operations against that enemy should be dispositive in determining the existence of armed conflict. What is emerging in response to the reality of “transnational” armed conflict is an understanding that *any* armed conflict triggers a customary regulatory framework composed of foundational LOAC principles. These principles are essential not only to ensure the humane treatment of captured and detained enemy personnel, but also to effectively regulate the application of combat power. As a result, in addition to the humane treatment mandate derived from Common Article 3, they include: 1) the principles of military necessity (which itself reflects an inherent balance between power and restraint by authorizing only those measures that are not otherwise forbidden by international law); 2) distinction (limiting attacks to only lawful military objectives); 3) proportionality (imposing an obligation to balance the advantage of an attack against the anticipated but non-purposeful infliction of harm to innocents); and 4) a prohibition against infliction of unnecessary suffering (prohibiting the infliction of superfluous injury or suffering to lawful objects of attack). These four principles provide

the foundation for the regulation of all hostilities, and failure to acknowledge their applicability to *any* armed is inconsistent not only with the common sense expectations of the international community, but more importantly with the interests of the armed forces required to engage in such operations.

This re-assessment of the situations that trigger LOAC applicability is perhaps the most significant development in this area of international law since the International Criminal Tribunal for the Former Yugoslavia ("ICTY") began to inject LOAC regulation into the realm of internal armed conflict. Both of these developments share a common connection: the recognition that effective regulation of hostilities cannot be nullified by an inflexible approach to treaty application. Just as the ICTY determined that essential regulatory principles evolved from treaties applicable only to inter-state armed conflict had "migrated" to the realm of intra-state armed conflict, there is an analogous recognition emerging that these principles must also "migrate" to the realm of transnational armed conflicts. While opposition to this proposition is undoubtedly inevitable, the increasing reliance on this expanded conception of LOAC applicability by armed forces suggests that this opposition is not based on a genuine appreciation of the underlying logic and purpose of the LOAC, but instead on the type of inflexible adherence to treaty interpretation that the ICTY concluded was inconsistent with the purpose of the law.

Acknowledging the need to ensure transnational armed conflicts are subject to LOAC regulation does not, however, resolve the even more difficult question of how to define these armed conflicts. While the assertion that the law enforcement legal framework applies to all operations conducted against transnational non-state opponents is both illogical and overbroad, it would be equally illogical and overbroad to suggest all such operations are armed conflicts. What is necessary is to identify a logical and effective criterion to distinguish between non-conflict and armed conflict uses of military power in state efforts in the struggle against transnational terrorism. What this suggests is that contrary to the hyperbolic designation of a "Global War," a much more precise conception of the military component of this struggle is necessary.

The most fundamental distinction between law enforcement and armed conflict is the nature and extent of the authority for the use of deadly force. At the most basic level, law enforcement treats the use of deadly force as a measure of last resort. In contrast,

armed conflict is defined by the authority to use deadly force as a measure of first resort. This dichotomy provides the most logical *de facto* indication of armed conflict: armed conflict exists whenever a state employs armed force and grants that force the authority to use deadly force against an opponent as a measure of first resort. This is intuitive to military professionals increasingly competent in the full spectrum of operations. They understand that patrolling the streets in Kosovo or Bosnia is not armed conflict because their use of force authority is purely responsive. In contrast, whether engaging terrorist operatives in the mountains of Afghanistan, a base camp in Somalia, or the hills of southern Lebanon, it is the authority to engage an opponent with deadly combat power once that opponent is identified that defines such operations as armed conflict.

Moving towards a broader conception of LOAC applicability is essential to ensure the fundamental purpose of the law is implemented: balancing authority and restraint during the conduct of armed hostilities. Denying the applicability of this law to situations involving the application of combat power implicitly based on the LOAC principle of military objective—a principle that permits the use of deadly force as a measure of first resort—results in a distortion of this balance. It also deprives the armed forces of the framework developed to guide their conduct in the most brutal environments, an outcome that is not only inconsistent with the general perception of what is “right” or “moral,” but also with the preservation of disciplined and morally based armed forces.

Like the military professionals who sowed the historic seeds of battlefield regulation that blossomed into the law of armed conflict, the drafters of the 1949 Geneva Conventions understood this, and in response they included articles in those treaties intended to prevent nullification of this regulatory framework based on politics and legal technicalities. But they could only respond to the legal deficiencies they had so painfully experienced, and in so doing created a law triggering paradigm that evolved to be restricted to that context. Although never fully responsive to the reality of contemporary military operations, the use of policy gap fillers negated the operational impact of the lacuna resulting from this restrictive interpretation. However, the selective invocation of authority without obligation that defined the Bush administration response to the terror attacks of September 11 exposed the limits of policy, and initiated a reconsideration of the limits of the law triggering paradigm itself. Subsequent events in Lebanon and

more recently in Gaza reinforced the imperative need to ensure that when a state invokes the authority of the LOAC—namely the authority to engage an opponent with deadly combat power—other principles must come into force to ensure this historic balance is preserved.

The military component of the struggle against transnational terrorism will almost certainly continue to present complex challenges for our nation and other nations compelled to respond to this threat with armed force. But such complexity is not unprecedented in the history of warfare. Conducting military operations against highly organized non-state actors has been an aspect of the American way of war since the inception of the nation. What is new is the suggestion that based on the transnational non-state nature of the enemy these operations fall into a legal “black hole,” permitting states to selectively invoke those LOAC principles that serve their interests. Such a suggestion fundamentally undermines the basic “charter” of a professional armed force, creates a dangerous risk of encouraging the darkest instincts of those called upon to “deliver” results, and corrodes the moral integrity of the men and women who serve this nation. Only a rejection of this proposition and an endorsement of the obligation to comply with a framework of basic LOAC principles during all armed conflicts will preserve the appropriate balance between the dictates of necessity and the interests of humanity. Such an outcome is more than logical. It is a fulfillment of the most significant advancement in the LOAC produced by the 1949 Geneva Conventions: a categorical rejection of law avoidance.