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Moran, Daniel

Monterey, California. Naval Postgraduate School

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"Illegal Combatants" and the Law of Armed Conflict

by Daniel Moran

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As a consequence of its operations in Afghanistan, the United States has found itself holding several hundred Taliban and al-Qaida prisoners whom it has identified as "illegal combatants." Similar status has also been ascribed to at least one American citizen, arrested by civil authorities, who is suspected of being part of the al-Qaida terrorist organization, and who is being treated, for the time being at least, as a subject of military justice. The classification of prisoners taken in Afghanistan as "illegal combatants" immediately attracted much scrutiny, in part because international law provides no precise definition of what such a categorization implies, and in part because its use in the present instance was intended to deprive Taliban and al-Qaida fighters of the protections afforded prisoners of war under the 1949 Geneva Conventions. Although United States officials have routinely referred to the struggle against terrorism as a "war," that characterization is, to all appearances, not acceptable when applied to the conduct of those on the other side.

The comments that follow are not intended to address the POW issue directly, still less the question of what should or should not count as "war" in present circumstances. The aim is rather to examine the historical genesis and legal standing of the idea of the combatant, in order to shed some light on the difficulties that surround its application to irregular warfare and terrorism. Those difficulties are not new. On the contrary, the problem of how to distinguish the soldier's legal use of force from all the other forms of violence to which mankind is prone has been crucial to the development of the modern law of war -- development that may well take some new twists in light of recent events.

The first military theorist to place war's violence at the center of his analysis was Carl von Clausewitz. Among the instruments available to policy, he argued, war is categorically distinguished only by its recourse to physical force. This in turn accounted for the unique practical and cognitive dynamics that attend its use. The violence of war lay at the heart of the twin concepts of "friction" and "genius," and helped explain the preponderant role of chance in every military operation. More generally, in Clausewitz's work violence is the key that unlocks the psychological or, as he would have said, the moral universe of those called upon to fight. It is only when the scale of military violence is fully appreciated that the difficulties of thought, decision, and action in war's "resistant" environment could be grasped.

One aspect of war's violence that escaped Clausewitz's attention is its vicarious nature. The killing and destruction that are the routine work of a soldier in wartime would be regarded as criminal in any other circumstance. If they are not so regarded in war, it is because it is recognized that the soldier is not acting for himself, but as the agent of a community whose right to use force is accepted by others of its kind. The legal immunity of the combatant is logically derived from the reciprocal rights and obligations of belligerents in war, and may, indeed, go unrecognized when such reciprocity is absent. A soldier's uniform signifies the process by which the right to use force is delegated to him, and also the subordination of his own, personal moral obligations to those of the community he serves. Whether he serves enthusiastically or not, voluntarily or not, is immaterial. He is not acting as an individual and is accordingly not a criminal. This distinction has survived the criminalization of war itself. The Charter of the United Nations outlaws the use of military force for any purpose other than individual and collective self-

defense. Yet the soldiers of a state embarked upon illegal aggression retain the rights of legal combatants, provided their own actions conform to the norms and customs of war.

The moral effacement of the individual under international law is not complete. Democratic societies in particular are concerned to preserve the ultimate claims of personal responsibility in wartime, as a final check on the conduct of higher authority. Even the most reprehensible belligerents have accepted the general notion that there are "war crimes," meaning behavior under color of military discipline that is too extreme or indiscriminate in its cruelty, or too self-interested in its motives, to deserve protection. Nevertheless, the vicarious character of military violence is central to our understanding of what we mean by war. It is chiefly in its absence -- that is, when large-scale violence arises from motives that are too personal or parochial to merit the protection of a surrounding belligerent community -- that questions arise as to whether the resulting conflict is "war" or not. Conversely, combatants serving a country at war do not expect to be held personally responsible for whatever injury they inflict in the course of doing their duty. If they are, that too is a war crime.

Issues of this kind did not much concern Clausewitz's contemporaries, who were content for the most part to view war as a contest between the uniformed armed forces of sovereign states -- a consensus that, at the time, was regarded as the result of slow but steady progress toward civilized norms of conduct. Violence of any other kind was consigned to the realms of criminality or treason. Clausewitz himself may well have felt that his analysis of war's instrumental character was sufficiently comprehensive that no specific comment on the legal status of the combatant was called for. Yet he was intensely interested in contemporary developments that would soon cast the conventional understanding of combatant status into doubt. The Napoleonic Wars included many instances of what Clausewitz called "people's war," meaning insurrectionary violence by civilians. The most consequential episode occurred in Spain, where French forces found themselves enmeshed in a protracted partisan war of exemplary ferocity. Prussians like Clausewitz, who chafed at their country's subordination to France, urged their own government to adopt similar methods. A few years later Prussia too would seek to throw out the French by mobilizing its civil population to fight as "guerillas" (a name popularized by the Spanish uprising). Although Prussia was one of the most conservative monarchies in Europe, its effort incorporated many revolutionary elements, including the creation of local self-defense forces that would operate without uniforms, insignia, flags, or prescribed weapons, any of which might have given the bearers away to the enemy. Afterward, reflecting on these matters, Clausewitz concluded that people's war was a "phenomenon of the nineteenth century," hence difficult to analyze by virtue of its newness; and yet, perhaps, the wave of the future.

The new phenomenon did not have anything to do with the tactical forms that people's warfare might take. These had changed little since the Bronze Age. With each turn of history's wheel, guerillas, partisans, terrorists, and "insurgents" have learned to hit and run, to hide among the people, to lay traps, to hold out, to instill fear; while those charged with hunting them down have learned about scorched earth, pacification, cordon-and-search, summary reprisal, and "collective responsibility." What had changed was the ideological framework within which people's war could now manifest itself. The French Revolution had elevated the idea of the nation to a new level of moral significance, even among those who had suffered from French aggression. From Clausewitz's day to our own, no cause, no form of economic, social, or religious grievance, has legitimized popular violence so effectively as the claim that cultural communities possess an inherent right to organize political power for themselves. Once that claim was accepted, it became necessary to consider the further claim that those who fought for the nation did not act as individuals, even if they were not soldiers serving an organized government. If so, then they too were combatants, and not criminals.

The first attempt to address the legal rights of civilian combatants came during the American Civil War, whose onset also illustrates the unique hold that nationality had acquired on the conscience of the West: the armed forces of the Confederacy, after all, were composed of men who would presumably have crushed a slave revolt without a second thought. Yet they regarded rebellion in pursuit of national independence as entirely legitimate, and expected to be treated with the respect their cause deserved. Most donned the accepted symbol of combatant status -- the soldier's uniform -- which was generally respected by the Union side, despite the fact the Confederacy itself was not regarded as a legal

belligerent. Some Southerners also fought as irregulars, however, sometimes in large formations, sometimes as individuals or small bands defending their homes against the invader. The Union army, concerned that its officers should know how to proceed, formulated a training manual that became known as the "Lieber Code" (after the German-born Columbia University professor, Francis Lieber, who supervised its composition). It declared that civilians who had organized themselves into "free corps" in order to resist advancing Union forces should be treated as combatants, even if not in uniform. Clandestine violence by individuals remained subject to summary justice, however, as did any form of civilian resistance once an occupation had been established.

By the turn of the twentieth century most governments were prepared to concede that patriotism was a sufficient warrant for civilians to take up arms. Several delegates to the Hague Peace Conference of 1899 insisted that a willingness to risk one's life for one's country was a supreme expression of civic duty, which should not be suppressed in the interest of military efficiency. Whether the right to combatant status extended beyond defense against invasion remained contested, however. The Hague Convention of 1899 incorporated Lieber's distinction between self-defense and continued resistance to occupation. A subsequent conference, concluded in 1907, went further, and accepted that prolonged resistance might be legal, provided certain conditions were met. These required that all combatants (1) be "commanded by a person responsible for his subordinates"; (2) wear a "fixed distinctive emblem" visible at a distance; (3) carry arms openly; and (4) conduct their operations "in accordance with the laws and customs of war."

The Second Hague Convention of 1907 remains the most authoritative statement on combatant status in war, despite many subsequent efforts to expand on it. Among these the most ambitious is the first Protocol Additional to the Geneva Conventions of 1949 (Protocol I), concluded in 1977. Protocol I, which the United States has signed but not ratified, tried to take account of the perfectly obvious fact that no guerilla organization or resistance movement worthy of the name could possibly survive strict adherence to the requirements set forth at the Hague. To this end it incorporated an elaborate discussion of circumstances in which a civilian combatant might retain his legal protections, while still (partially) concealing his weapons, and foregoing visible insignia. On the whole, however, even the most generous allowance for the practicalities of concealment and insignia can offer but limited relief from the basic logic of the Hague rules. Combatants who are also civilians must inevitably tread so close to the line separating deception from treachery that the law can offer them scant protection. It is, furthermore, difficult to imagine any legal regime under which this would not be true, for the simple reason that, in defining that line, law is the central issue.

Treachery in war is readily distinguishable from legitimate forms of surprise, because it always involves a pretence that legal protection is being offered or requested. A company of soldiers who conceal their true numbers in order to induce their opponents to expose themselves imprudently have engaged in a legitimate ruse. A soldier who feigns surrender -- or, for that matter, civilian status -- for the same reason has engaged in treachery, because he has invited his enemy's confidence in a legal norm that he intends to betray. The steady expansion of the legal protections extended to civilians in war -- which have grown in proportion to the steady brutalization of war itself in the twentieth century -- have only heightened the sense of treachery that attaches to any effort by a combatant to conceal himself among the general population. This is not simply a matter of perception, but of the logic of the law itself.

The ultimate reason to have legal rules defining combatant status is not simply to ensure that the right of combatants to employ vicarious violence is respected, but simultaneously to ensure, as far as possible, that such violence is not directed against civilians. The essence of combatant status is to be liable, at any time, to deliberate attack. The essence of civilian status is to be immune from deliberate attack. Any legal norm that expands the rights of civilians to function as combatants is certain to erode that basic immunity. In legal terms, what is good for the guerilla must inevitably be bad for the civil society within which he hides. To suppose otherwise is to imagine the legal equivalent of a perpetual motion machine, which seeks to draw a circle that cannot be closed, but must inevitably spiral in upon itself. A terrorist or other "illegal combatant" who trades upon his adversary's respect for the law is, in effect, using the law as a weapon. He cannot simultaneously use it as a shield, and he may well deprive those around him of its aegis as well.

It must be added, by way of conclusion, that it is by no means clear what element of treachery may be alleged against the prisoners currently in American hands. Demonstrable connection to al-Qaida would presumably suffice in the eyes of most observers, but the issue will become more complicated for Taliban soldiers without direct terrorist affiliation, captured weapon in hand on the battlefield. All of them are, in all circumstances, entitled to humane treatment under international law and, as far as is known, all have received it. This appears, for the time being at least, to have allayed international and public concern as to their fate. In the long run, however, some formal legal disposition will be necessary. How far that disposition can usefully be guided by international law governing prisoners of war is a complex problem, to be taken up at another time.

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