

**The United States and the Politics of the Laws of War
Since 1945**

Stephanie Jennifer Carvin

Thesis submitted in fulfillment of the requirements of the PhD

London School of Economics and Political Science

UMI Number: U615659

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI U615659

Published by ProQuest LLC 2014. Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code.



ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

I, Stephanie Jennifer Carvin, declare that the work presented in this thesis is my own.

Stephanie Carvin



THESES



F

8715

1 1 2 1 9 2 1

Abstract

The critique of the laws of war (and international law in general) coming out of America as the war on terror began seemed to have emerged as a response to the horror of 9/11 and the belief that the US was now engaged in a 'new paradigm' of warfare. However, the Bush administration's argument needs to be situated in a wider historical context. The source of the arguments against the post-Vietnam US military legal regime emerged well before 9/11 and can be traced to the end of the Cold War. These doctrines emerged out of the work of the 'new sovereigntists' and out of the frustrations guided by coalition warfare.

The implications of the Bush administration's arguments are very significant for America's relationship with the laws of war, challenging the traditional division between *jus ad bellum* and *jus in bello* associated with the rise of the Westphalian system. As the world's most powerful army, and the most active army in the West, America's stance will have important implications as to how the laws of war are applied to future conflicts. Additionally, as the war on terror has generated new ethical dilemmas for the American military, the rebalancing of the priority between international law and the need for security has proved very problematic. Legal uncertainties and inconsistent policies have arguably resulted in several scandals, most notably the abuse at Abu Ghraib prison in Iraq. The thesis will trace US thinking on the laws of war since 1945, noting in particular the impact of Vietnam, the 1991 Gulf War, Kosovo, Afghanistan and Iraq.

Table of Contents

Abstract	vi
Chapter 1: Introduction	
The Politics of the Laws of War	1
What is the ‘laws of war’?	5
What the laws of war are not	8
A law by any other name?	10
Sources of the laws of war.....	12
Prisoners of War.....	13
The laws of war as codified hypocrisy?.....	15
<i>The United States, Politics and History</i>	18
<i>The United States and the Laws of War</i>	18
<i>Politics and the Laws of war</i>	20
<i>International Lawyers and International Law</i>	21
<i>International Relations and International Law</i>	23
<i>History and the Laws of war – or why a chronological approach?</i>	24
Original Contributions.....	26
Conclusion.....	29
Chapter 2: A Weapon and Restraint	
The United States and the Laws of War 1750-1950	30
The New Republic and the Laws of War.....	31
Wars with the First Nations.....	35
War in the Philippines.....	39
Dualistic Tendencies.....	43
America and the Laws of War 1900-1952.....	49
<i>Prisoners of War at the End of WWII and Repatriation</i>	50
<i>Geneva Conventions of 1949</i>	53
<i>The Uniform Code of Military Justice</i>	55
<i>Korea</i>	57
Conclusion.....	59
Chapter 3: Legal Revolution	
America and the Laws of War After Vietnam	61
Vietnam.....	63
<i>Challenges – Jurisdiction</i>	63
<i>Challenges – Classifying Vietnam under international law</i>	66
Implementing the Law of War.....	69
War Crimes.....	71
<i>Peers Report</i>	75
America and the Laws of War After Vietnam.....	77
<i>“Activist” Lawyers and “Operational Law”: 1975-1989</i>	80

American Military Operations in the 1980s	83
America and the Laws of War on the International Stage	86
<i>Law and Politics: The Geneva Diplomatic Conference 1974-77</i>	86
<i>The Geneva Diplomatic Conference and the 1977 Additional Protocols</i>	88
<i>The American rejection of the 1977 Additional Protocols</i>	90
The Most Legal War in History: The US and the 1990-1 Gulf War.....	93
<i>Legal issues in the Gulf</i>	94
America and the Laws of War in the 20 th Century.....	97
Conclusion.....	100
Chapter 4: Just cause and Just Means?	
Linking the purpose and tactics of war after 9/11	103
America and International Law in the 1990s.....	104
<i>The “new” human rights agenda and the ICC</i>	104
<i>The impact of Kosovo I – Targeting</i>	107
The impact of Kosovo II – The ICTY’s Report to the Prosecutor.....	112
American Exceptionalism and the “New Sovereignists”	114
Reconsidering the relationship between ends and means in the laws of war.....	117
“Unlawful Combatants” and “Quaint” Conventions.....	120
<i>Defending the Detainee Policy</i>	122
<i>Military Commissions</i>	123
<i>Prisoner of War Status</i>	124
<i>Interrogation</i>	127
<i>Internal Debate</i>	128
International Lawyers and the Legal Response.....	131
The Case against the “New Sovereignists”.....	134
<i>The Constitution</i>	134
<i>Origins of the laws of war</i>	134
<i>The value of the laws of war</i>	136
Nature of the Threat.....	139
Finding a Lesser Evil.....	142
<i>Greater Evils?</i>	144
<i>Re-claiming a balance?</i>	148
Applying the Lesser Evil.....	149
<i>Hamdan v. Rumsfeld</i>	151
<i>Vindicating the lesser evil?</i>	155
Conclusion.....	156
Chapter 5: Failure of an Ethos?	
Operation Iraqi Freedom, America and the Law of Armed Conflict after Abu Ghraib...	159
What went wrong at Abu Ghraib?.....	161
<i>Background</i>	161
<i>Source(s) of the Abuse?</i>	164
<i>Arguments for “condition specific” roots of the abuse</i>	165
<i>Systemic causes of the abuse</i>	171
<i>Analysis: Who is responsible?</i>	176

Interrogation: A case study of ethics in war.....	182
Private Military Firms.....	186
Preventing Atrocity in War.....	192
The Lessons of Iraq and Abu Ghraib?.....	197
Conclusion.....	200
Chapter Six: Conclusion	
The United States and future of the law of war	203
Ideology.....	204
Dualistic Tendencies.....	207
Implementation.....	209
New Actors.....	211
Law as Politics.....	212
Issues for further research.....	214
<i>Post-Vietnam Military Reform</i>	214
<i>Training</i>	215
<i>Private Military Firms</i>	217
America and the Laws of War after Iraq.....	218
The Law of War after America.....	222
Conclusion: Putting it all together.....	225
Appendix A: Interrogation Techniques 25 October 2002.....	227
Appendix B: Interrogation Techniques 16 April 2003.....	229
Appendix C: Interviews.....	231
Bibliography.....	232

Acknowledgements

The completion of this PhD simply would not have occurred without the excellent support of my advisor, Chris Brown. He could sense when I was having difficulties, helped to get me back on track and realize my own set of strengths. He has been generous with his time, advice and books and has a keen sense of the balance that students need in terms of guidance and letting us learn through our own work. Aside from this, he has a brilliant sense of humour which often proved to be as inspirational as it was appreciated. While I may not have yet converted him to the joys of ice hockey, he has been, quite simply, “Awesome”.

I would like to thank the professionals and professors who took the time to offer their advice for this project. In particular I would like to thank Charles Garraway, Christopher Greenwood, Michael N. Schmitt and the members of the LSE IHL-Project, especially Louise Arimatsu. Heartfelt thanks also go out to those individuals who agreed to be interviewed anonymously for this project that I will not, for obvious reasons, name here. Their help and insight was invaluable. At Queen’s University in Canada, Charles Pentland sparked my interest in international relations and seemed to always be willing to hear out my questions, provide advice and reference letters. He has been a tremendous source of inspiration.

The staff of the LSE International Relations Department have also been very supportive and encouraging. I learned much from the seminars that I have attended and I often found myself receiving excellent advice on not only my thesis, but everything from staying motivated, to how to start writing a chapter to life post-PhD. In particular I would like to thank Peter Wilson and the editors of the *European Journal of International Relations* where I have been working the past two and a half years as the editorial production manager, Barry Buzan, Robert Falkner and Kim Hutchings. And of course, I would certainly have found myself lost in a pile of paperwork if it were not for the excellent help of the departmental secretaries, especially Barbara King, Martina Langer, and Hilary Parker.

My friends have been an invaluable support network on who I could rely on for sharing success and commiseration. I have been very fortunate to live at Goodenough College during the course of my studies, which provided me the chance to live with graduate students from all over the world – many of whom I consider close friends – especially Carina Fourie and Jane McGaughey. At the LSE, Karen Barnes, Annika Bolten, Antoine Bousquet, Douglas Bulloch, Nicola Casarini, Eva Gross, Marjo Koivisto, Christopher Mackmurdo, Tim Oliver and Serena Sharma have been a source of laughter and inspiration. Christopher Berzins provided advice about writing and finishing the PhD (and kept me fed through a great number of Canadian High Commission receptions). Jill Stuart has been an absolute pillar of emotional support and Michael J. Williams, my adopted younger-older brother, has gone above and beyond the call of duty in terms of keeping me sane.

I also owe a special debt to my fellow ‘Brownian’, Kirsten Ainley who kept me on my toes but who I could also always depend on in crisis. Her intelligence and work is something that I have constantly found to be the measure of how I view my own projects and papers. She has been there on the very good days and the very bad and through it all her sense of humour has helped me appreciate the ‘lighter-side’ of international political theory.

Finally, I cannot thank my family enough. My aunts and uncles for their humour and encouragement. My grandmother, (or as I know her, Baba) has given me financial, but more importantly unwavering emotional support. My immediate family Thomas, Darcy and Christopher Carvin who I love dearly across continents, may never have quite understood why I wanted to do the PhD, but seem to never have doubted that I could do it. They have sacrificed a lot so that I could have the chance to study in London – and I will be forever grateful for everything they have done to support me.

SJC
London, August 2006

Chapter 1: Introduction

The Politics of the Laws of War

In his controversial book on the 1990-1 Gulf War, Anthony Swofford describes the following scene:

The instructor breaks in. “Hey, gents, can we talk about the rifles? It’s not news that this war is gonna be all-American. I’m here to teach you how to kill people and disable vehicles with your new toy. By the way, you all know you can’t hit a human target with a fifty-caliber weapon, right? It’s in the Geneva Convention. So you hit the gas tank on their vehicle, and they get blown the hell up, but you can’t target some lonely guard or a couple of towlies in an OP calling in bombs. You’ll have to get closer with the forty or call in your own bombs.”

“We can’t shoot people with this thing? Fuck the Geneva Convention” a sniper from the Fifth Marines says.

Dickerson says, “You fuck the Geneva Convention and I’ll see you in Leavenworth. That’s like shooting a nun or a doctor. Where’d we find this retard?”¹

Perhaps it is a little crude, but Swofford’s narration illustrates a debate over restraint in warfare that has challenged the United States from its inception. What are the obligations to one’s enemy? Can killing be done humanely? When a cause is just why should a nation hold back its armies?

Of course, these are the questions that challenge all nations (or perhaps, more correctly all conscientious nations) with armies that find their interests and security challenged by military threats. Yet in the case of the United States, the influence of its

¹ Anthony Swofford, *Jarhead: A Soldier’s Story of Modern War*, London: Scribner, 2003. pp. 157-8. The debate to which Swofford is referring is one over how .50 calibre weapons could be used in conflict. There was concern that the .50 calibre rifle, used against a human target would cause wounds that were considered excessive and in contravention of the laws of war. The determination of the legality of weapons is a very complex issue but a useful discussion looking at the history, current issues and the way the US currently conducts legal review of weapons can be found in Donna Marie Verchio, “Just Say No! The SIRUS Project: Well-Intentioned but, Unnecessary and Superfluous”, *Air Force Law Review*, Vol. 51, 2001. pp. 183-228. Also see the article by W. Hays Parks, “Means and Methods of Warfare” *George Washington International Law Review*, Vol. 38 No. 3, 2006. pp. 511-539.

founding ideologies, its expanding empire and the sheer scale of its military engagements abroad have, for the last 60 years, prompted a lot of soul searching on these questions by soldiers, lawyers and philosophers alike. There is no doubt that America's global position and even its global role are unique. But what are the implications of this for the way it conducts its military affairs abroad – if any?

With the possible exception of Vietnam, the debates on this issue have traditionally been held behind closed doors in the Pentagon, or at international conferences in Geneva, The Hague and San Remo. Certainly before 1995 the moral complexities and practical dilemmas of the laws of war had not caught much media attention or scrutiny. It is true that citizens in America and throughout the world were familiar with the Geneva Conventions – if only through clichéd World War II movies or through television programs like *Hogan's Heroes*. However, debates over whether killing an enemy with .50 calibre ammunition constituted an inhumane practice under the laws of war, or the obligations of a defender with regards to placing munitions factories in a populated area, or the legality of using white phosphorus (etc), largely escaped public notice.²

True, there was some attention given to the laws of war as the conduct of the wars following the break-up of Yugoslavia came under media scrutiny.³ However, it was the publication of pictures of prisoners in orange jumpsuits, blindfolded and strapped to stretchers at Guantanamo Bay's Camp Delta, in January 2002 that this rapidly changed. The assertion by the Bush administration that the Geneva Conventions could not, and should not, apply to the war on terror put the Conventions in the spotlight and under a new media scrutiny.⁴ The result was to generate a largely uninformed debate

² There was, however, an effort made by the ICRC to ban weapons according to their health-effects on the human body under the Superfluous Injury or Unnecessary Suffering (SIUS) Project. The effort however, which would have ultimately taken away the determination of a weapon's legality from the state to international law, was not supported by many states, including Canada, Denmark, Germany, Sweden and the United Kingdom (all traditional supporters of the ICRC) as well as the US. The effort was subsequently abandoned in 2001. But whether this was a pressing issue on the international agenda is doubtful. See Verchio, "Just Say No!". Other efforts, such as the international campaign to ban landmines were more successful in garnering international attention, winning the 1997 Nobel Peace Prize.

³ These controversies are outlined and discussed in Chapter 4.

⁴ Defining the "war on terror" is as problematic as determining when it really began. For the purpose of the argument here, the war on terror refers to the mostly military campaign being waged by western nations, lead by the United States, against terrorists and their support networks. It is possible to argue that the 'war' began with the attacks of 11 September against the United States. On the other hand, it

in the popular press about the Geneva Conventions and the laws of war. Are there such things as unlawful combatants? Did the rules apply if the Taliban did not wear a distinctive mark? How could the laws of war possibly apply to terrorists?

As the attention switched from Afghanistan to Iraq, the focus on the laws of war somewhat diminished in favour of a debate over the legality of the 2003 Iraq invasion. Yet the laws of war still attracted some significant media attention. Certainly this was

may be more accurate to say the war on terror began earlier with the first attack against the World Trade Center in 1993 and the August 1998 bombings of the US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.

In the 2002, White House outlined what it meant by the war on terror in its National Security Strategy: "The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism — premeditated, politically motivated violence perpetrated against innocents... The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time. Progress will come through the persistent accumulation of successes—some seen, some unseen... Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances. This will have a disabling effect upon the terrorists' ability to plan and operate." See White House, "The National Security Strategy of the United States" September 2002. Available online at: <http://www.whitehouse.gov/nsc/nss.pdf>.

Another report released by the White House in September 2003 described the global war on terror from the Bush administration's point of view "The United States is engaged in a comprehensive effort to protect and defend the homeland and defeat terrorism. Using all instruments of national power, the United States and its partners are attacking terrorists both at home and abroad, denying terrorists sanctuary and sponsorship, disrupting the financing of terror, and building and maintaining a united global front against terrorism." See White House "Progress Report on the Global War on Terror", September 2003. Available online at: <http://www.whitehouse.gov/homeland/progress/>.

By 2006 the Administration began to change its rhetoric and increasingly began to use the term "the long war" to describe the activities describe the global conflict. The Quadrennial Defense Review released by the Pentagon on 6 February 2006 made clear reference to the term: "The United States is a nation engaged in what will be a long war. Since the attacks of September 11, 2001, our Nation has fought a global war against violent extremists who use terrorism as their weapon of choice, and who seek to destroy our free way of life. Our enemies seek weapons of mass destruction and, if they are successful, will likely attempt to use them in their conflict with free people everywhere. Currently, the struggle is centered in Iraq and Afghanistan, but we will need to be prepared and arranged to successfully defend our Nation and its interests around the globe for years to come. This 2006 Quadrennial Defense Review is submitted in the fifth year of this long war." See Department of Defense, Quadrennial Defense Review Report, 6 February 2006. Available online at: <http://www.defenselink.mil/qdr/report/Report20060203.pdf>. It has been suggested that the renaming has come about as an attempt to brace US public opinion for a lengthy battle with a determined foe. See James Westhead, "Planning the US 'Long War' on terror" BBC News 10 April 2006. Available online at: <http://news.bbc.co.uk/1/hi/world/americas/4897786.stm>.

This work will use the term "war on terror" as this was the term usually employed by the Bush administration during the events examined.

There are many sources on the war on terror available. Some of the useful ones include, Ken Booth and Tim Dunne eds. Worlds in Collision, Houndmills: Palgrave Macmillan, 2002. See the special section in Ethics and International Affairs "Roundtable: The New War – What Rules Apply?" Vol. 16, No. 1. pp 1-26, 2002. James Hoge and Gideon Rose have put out several useful collections on the war on terror. See James F. Hoge and Gideon Rose, eds Understanding the War on Terror, New York: Council on Foreign Relations, 2005; War on Terror: Updated and Expanded, New York: Council on Foreign Relations, 2003; How Did This Happen? Terrorism and the New War, New York: HarperCollins Publishers, 2001.

the case as US soldiers were captured by Iraqi troops in March 2003 and shown on Iraqi national television. But the Conventions also came into sharp focus once more as the Abu Ghraib prison scandal broke in the spring of 2004.

Thus, it is hard to deny that the laws of war has played an important role in the conduct, but perhaps more importantly, the public perception of the war on terror since military action began in Afghanistan in October 2001. During the initial phase of the campaign the US military and its allies took care to demonstrate that while engaging in military activities, they were also feeding the Afghan population and going to great lengths to spare civilians. And it is clear that controversy and scandal relating to the laws of war had a great effect upon the conduct of the campaign and on the political leadership. When asked in May 2006 about what he most regretted in respect to the 2003 Iraq War, in May 2006, Bush replied:

...I think the biggest mistake that's happened so far, at least from our country's involvement in Iraq is Abu Ghraib. We've been paying for that for a long period of time.⁵

Therefore the goal of this work is to tell the story, chronologically, of the engagement of the United States with the laws of war – its participation in drafting legislation, how it trains and disciplines its military and how it ultimately implemented the laws of war on the battlefield. In doing so, the effect that its wars had on American engagement with laws of war will be examined. Additionally, it will look at how US participation in these wars changed the way we look at the laws of war, both through US failures and mistakes (in My Lai and Son Than) but also US successes (such as the 1990-1 Gulf War).

Particular attention will be paid to the effect of ideology and its corresponding political imperatives in terms of the decisions the US has made with respect to the laws of war, and what happens when these ideological imperatives clash with the tenets of international law. The effect of ideological and political imperatives on the

⁵ “President Bush and Prime Minister Tony Blair of the United Kingdom participate in Joint Press Availability” 25 May 2006. Available online at:
<http://www.whitehouse.gov/news/releases/2006/05/20060525-12.html>

implementation of the laws of war in the war on terror will be examined to suggest reasons why the United States, or more accurately, the Bush administration, chose to act in the manner it did and what the effects of this have on the ongoing military campaigns throughout the world.

But before going any further, it will first be useful to determine just exactly what is meant by 'the laws of war'.

What is the 'laws of war'?

Definitions in political and legal works are always going to involve some measure of controversy. And when it comes to the laws of war, how one defines the concept says much about the way one views the law's purpose. A very basic definition might be "the law applicable once there has been a resort to force".⁶ However, it is going beyond this limited definition which generates differences of opinion as to what the central aim of the laws of war is.

Michael Byers describes it as the law that "seeks to limit the human suffering that is the inevitable consequence of war."⁷ Similarly, Philippe Sands describes the law as that which:

...aims to protect any person who is caught up in war or armed conflicts, whether civilian or combatant. It places constraints on sovereign freedoms, prohibits certain types of weaponry, regulates the conditions under which an occupied territory and its populations are to be treated, and creates minimum standards of protection in the treatment of prisoners of war.⁸

The ICRC tends to agree with these approaches and views the laws of war as:

⁶ Helen Duffy, The 'War on Terror' and the Framework of International Law, Cambridge, Cambridge University Press, 2005. p. 217.

⁷ Michael Byers, War Law: International Law and Armed Conflict, London: Atlantic Books, 2005. p. 115.

⁸ Philippe Sands, Lawless World: American and the Making and Breaking of Global Rules, London: Allen Lane, 2005. p. 146.

...a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.⁹

On the other hand, there are individuals who see the law in more state and military terms. In 1967, Georg Schwarzenberger gave a “formal definition” of the laws of war as the rules which “determine the possible forms, areas and objects of the exercise of physical pressure by belligerents against one another.”¹⁰ And Yoram Dinstein sees the laws of war as a set of rules which:

...can and does forbid some modes of behaviour, with a view to minimizing the losses, the suffering and the pain [of war]. But it can do so only when there are realistic alternatives to achieving the military goal of victory in war.¹¹

Clearly, then, one of the key problems with the laws of war is its definition – and the political baggage that goes with it.

Yet to suggest that the proceeding definitions have no common ground would be to overstate the case. While the devil may be in the details (as will be seen in Chapter 4) it is also true that there is a great deal of overlap between these definitions which can be used to generate a kind of consensus on the basic characteristics of the law:

1. The laws of war restrains the use of military force in military operations and this includes limits on both weapons and strategies or tactics. For example, it goes against the principles of the laws of war to deliberately target religious sites (such as churches and mosques) and hospitals. In terms of weapons, the laws of war bans the use of gas and weapons designed for the sole purpose of

⁹ Definition found on the ICRC website, http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:IHL_in_brief?OpenDocument

¹⁰ Georg Schwarzenberger, *A Manual of International Law*, 5th Edition. London: Stevens & Sons Limited, 1967. p. 196.

¹¹ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge: Cambridge University Press, 2004. p. 1.

blinding. However, it also bans the way certain weapons can be used. For example, it may be legal to shoot an enemy soldier with a pistol, but it is illegal to use that same pistol to beat a prisoner of war.

2. The laws of war differentiates between various roles in armed conflicts – between legal and illegal combatants, participants and non-participants (normally civilians) and gives different rights depending on the role that one plays in the armed services. For example, medical and religious personnel are given certain duties and obligations separate from regular soldiers and officers.¹² This differentiation is important as individuals, by virtue of their role in the conflict, are assigned rights. These rights are different from human rights in the sense that the laws of war limits these ‘rights’ to some groups and not others. Although everyone does fall under the laws of war in some manner, the rights conferred are not universal.¹³
3. As suggested by the proceeding paragraph, the laws of war outlines protections for non-combatants. This includes restrictions on targeting civilian areas of no military value, and the rights and responsibilities of civilians in occupied territory. Ideally, this part of the law seeks to minimize the impact on and suffering of non-combatants in conflict areas.

In summary, for the purpose of this work, the laws of war will be considered to be *the body of international law which governs military activities and defines the duties and responsibilities of the various roles of participants and non-participants in conflict situations with the (usual) intention of preventing unnecessary suffering.*

In some sense this definition remains vague, but the intention here is to generate a definition that is, for the most part, free of the implied purpose found in other definitions.

¹² See Geneva Convention III, Article 33 and Additional Protocol I, Article 43.

¹³ There is not a lot of scope to go into the differences and similarities between the laws of war and human rights. It is sufficient here to say that the issue is controversial within the international humanitarian and legal communities. A discussion of why these two strands of international law are increasingly blending can be found in Antonio Cassese, *International Law*, Second edition. Oxford: Oxford University Press, 2005, pp. 396-410. For the opposite perspective, see Dinstein, *The Conduct of Hostilities*, pp. 20-5.

What the laws of war are not

Having established a working definition of the laws of war for this work, it also should be clarified as to what the law is *not*. Such a task is, perhaps, even more controversial than actually defining the laws of war, but it will help to evaluate the nature of the laws of war. First, the laws of war needs to be separated from the law which governs the resort to force. Sometimes referred to as *jus ad bellum*, this is the set of laws which govern when a state may legally resort to force – nowadays, normally situations of self-defence or with United Nations Security Council approval. Therefore, in plain language, the *jus ad bellum* is concerned with *why* nations fight. This work, on the other hand, is concerned with *how* nations fight or *jus in bello*.

In medieval times, these two branches of law were not considered to be separate. Rather, the justness of one's cause determined the tactics one could employ on the battlefield. Those who were on the side of the "unjust" could expect little mercy from those who had divine approval for their actions. However, with the gradual impact of the Treaty of Westphalia, the influence of the writings of Hugo Grotius and Enlightenment thinking on the laws of war, including that of Rousseau, there came about a general sense that the enemy soldier and civilian needed to be recognized as human beings with intrinsic worth. This gradually solidified (at least within Europe) so that it was seen as states, and not people, which fought wars and the belief that there were some basic rules of humanity which should be applied on the battlefield. The legality of war became separated from the means which one could legally employ on the battlefield.¹⁴

¹⁴ A full discussion of the emergence of the development of *jus ad bellum* and *jus in bello* is beyond the scope of this work. Yet it should be noted here that, according to Augustine, just wars were those that either avenged injuries, punished wrongs or restored what had been unjustly taken from it. To Augustine, the legal wrong that had been committed by the enemy was also proof of a moral wrong. It was this moral wrong which obliged the Christian to wage war against the unjust enemy as the resort to war was conceived of as a means of punishing an enemy's ungodly behaviour. Augustine did not explicitly discuss *jus in bello* and the incorporation of punishment in Augustine's just war doctrine reduced the likelihood of the *jus ad bellum* providing an internal restraint on the conduct of war. As Colm Mckeogh argues: "The emphasis on punishing wrongs rather than repelling attackers or recovering lost goods opened the way to unlimited wars whose aim was the punishment of wickedness and vice." See Colm Mckeogh, *Innocent Civilians*, Houndmills: Palgrave Macmillan, 2002. p. 23. Augustine's failure to address restraint in warfare had grim consequences for civilians. Essentially, his

There is not the space to go into a lengthy discussion of the differences and relationship between these two strands of international law. Sufficient to say for now that it is widely accepted that the two branches are separate. Because ‘just cause’ has traditionally been used to excuse atrocities in conflict throughout the globe, lawyers and humanitarians (as well as military personnel) are eager to differentiate the two branches of law as separate – and insist that an illegal war must still be conducted by legal means.

Secondly, it must be said that the laws of war are not instruments of peace or a set of laws to either prevent or end conflicts. At the end of the day, the laws of war dictates who and what may be targeted legally and how military ends may be achieved legitimately. It has certainly been a goal of some international lawyers (past and present) to expand the law so as to make any form of military legal activity

just war doctrine placed subjective guilt to the entire population of the “unjust” enemy which “precludes any necessity to act mercifully toward the enemy population.” See Richard Hartigan, The Forgotten Victim: A History of the Civilian, Chicago: Precedent, 1982. p. 31. As Frederick Russel argues, Augustine’s doctrine contains a certain degree of indifference with respect to the fate of civilians in war. See, Frederick H. Russell, The Just War in the Middle Ages, Cambridge: Cambridge University Press, 1975. p. 19. Still, not everyone agrees. Paul Ramsey maintains that the *jus in bello* elements of Augustine’s thought are obvious. He argues that Augustine’s emphasis on Christian love as the root of the Christian just war ethic essentially constitutes “the genesis of non-combatant immunity.” See Paul Ramsey, War and the Christian Conscience: How Shall Modern War be Conducted Justly, Durham, N. C.: Duke University Press, 1961. p. xviii.

Aquinas can be said to have largely followed the Augustinian model of warfare. He did, however, put forward a theory of non-combatant immunity in his discussion of ecclesiastical immunity which suggested that there were categories of individuals who should be immune. However, this could be said to have been undermined by his theory of “double effect” which essentially excused ‘mistakes’ in warfare which had been carried out with “right-intention”. Despite some canonical efforts to limit war (through the Peace of God which sought to protect ecclesial persons and the Truce of God which sought to prohibit fighting on certain holy days), an explicit argument for the separation of *jus ad bellum* and *jus in bello* considerations did not emerge until the 16th Century writings of Franciscus de Vitoria and the later 17th Century writings of Hugo Grotius. For an excellent of how the *jus in bello* emerged as a separate doctrine see Geoffrey Best, Humanity in Warfare: The Modern History of International Law of Armed Conflicts, London: Methuen & Co. Ltd., 1980.

For a concise essay underlying the historical development of these issues see Chapter 1 “What is – Why Is There – the Laws of war?” in L.C. Green Essays on the Modern Laws of war, Second Edition, New York: Transnational Publishers, Inc., 1998. Also see, James Turner Johnson, The Holy War Idea in Western and Islamic Traditions, University Park, Pa. :Pennsylvania State University Press, 1997, Stephen Lammers, “Approaches to Limits on War in Western Just War Discourse,” in James Turner Johnson and John Kelsay eds., Cross, Crescent and Sword: the Justification and Limitation of War in Western and Islamic Tradition, New York, Greenwood Press, 1990.

fundamentally impossible.¹⁵ However, because it outlines both duties *and rights* of belligerents this has so far been, and is likely to remain, unsuccessful. The laws of war restricts military activity, it does not prevent it.

A law by any other name?

When discussing the ideas encapsulated in the concept ‘laws of war’, it is not uncommon to also hear individuals speak of the ‘law of armed conflict’ and ‘international humanitarian law’ (IHL). For the most part the terms are interchangeable – they all refer to the same body of law which outlines the duties and responsibility of states (though increasingly, some would argue, individuals and non-state actors) in war fighting. So why the difference? And why has this work chosen to use the term “laws of war”?

Part of the problem, of course, comes with defining war. War is, arguably, outlawed in the Charter of the United Nations, and clearly a politically sensitive activity. Since 1918, states have heavily resisted declaring war or describing their military activities as such (even when it is patently obvious that this is indeed what they are engaged in.) Therefore, such military operations are usually referred to as “police actions” or “military assistance”, especially since the Second World War. There is even less willingness for states to recognize civil wars as anything beyond national emergencies.

The problem for this in terms of the laws of war, then, is its name. States not engaged in “war” can argue that the “laws of war” cannot and should not apply to their military activities – seemingly creating a gap for a lot of abuse. The solution of lawyers and NGOs like the International Committee of the Red Cross (ICRC) has been to

¹⁵ This was certainly a complaint of the head of the American delegation to the 1899 Hague Conference who complains about the pressures placed upon the delegation and Conference as a whole by the early pacifist NGOs and activists. See Andrew D. White, *The First Hague Conference*. Boston: The World Peace Foundation, 1912. W. Hays Parks argues that the 1974-1977 Diplomatic Conference which drafted the 1977 Additional Protocols was plagued by attempts by the Non-Aligned movement and the ICRC to turn the Protocols on the regulation of warfare into an arms control agreement to prevent wars or hinder fighting abilities. See W. Hays Parks, “Air War and the Laws of war”, *Air Force Law Review*, Vol. 32. 1990. pp. 1-225. See p. 103-104, including note 325.

increasingly use the terms “Law of Armed Conflict” and “International Humanitarian Law” to try and impress upon belligerents the need to apply the Geneva and Hague principles in situations tantamount to armed conflicts.

Yet this shift, largely influenced by NGOs and the international legal community, is also somewhat political and these names, but especially “international humanitarian law” come with some baggage. In particular is the potential confusion over the word ‘humanitarian’ and what it implies. The nature and scope of humanitarian activities is usually concerned with a general relieving of suffering and the promotion of human welfare. Whether or not this can be said to be true for militaries and their activities (at least for populations outside of their own) is problematic. A second difficulty comes with the similarity in terms to international human rights law (IHRL) and the potential for confusion. Yet there is a crucial difference – as Yoram Dinstein argues, “The adjective ‘human’ in the phrase ‘human rights’ points at the subject in whom the rights are vested: human rights are conferred on human beings as such.”¹⁶ Humanitarian, however, refers to a description of the motivation of those responsible for the formation and formulation of the legal norms.¹⁷ Additionally, as Adam Roberts and Richard Guelf note:

The term ‘international humanitarian law’ could be seen as implying that the laws of war have an exclusively humanitarian purpose, when their evolution in fact reflected various practical concerns of states and their armed forces on ground other than those which may be considered humanitarian.¹⁸

Therefore, given the potential for confusion, the vagueness of the term and the fact that it only seems to suggest new questions where it has resolved old ones, for the most part this thesis will avoid the term international humanitarian law.

This leaves a choice between the law of armed conflict and laws of war. The term law of armed conflict is appealing because it suggests a way to get around problems of

¹⁶ Dinstein, *The Conduct of Hostilities*, p. 20.

¹⁷ Dinstein, *The Conduct of Hostilities*, p. 20.

¹⁸ Adam Roberts and Richard Guelf, *Documents on the Laws of War*, Third Edition, Oxford: Oxford University Press, 1999. p. 2.

defining conflicts that may be internal or go across multiple state boundaries and are not interstate wars. Governments and armed forces do not have an excuse for failing to apply restraint in their military actions by suggesting that they are not engaged in a 'war' where a body of law would apply. Additionally, given the (normally legal) contention that only states can engage in war, a name which suggests that these laws can still be applicable in multiple situations of conflict is useful.

However, there are several reasons why this work will use the term "laws of war". First, in reality, defining what constitutes an international armed conflict can be just as political and problematic as defining what constitutes a war. When a conflict is recognized as an armed conflict, it brings about a certain set of duties, regulations and responsibilities regardless of how this conflict is characterized by the belligerents or international community. The name by which the applicable law is called seems to matter less than how it is actually implemented. Indeed, states have, or have not, implemented the law regardless to the name given to it.

More importantly, the events that this work is primarily concerned with are, in fact, wars as they have been traditionally understood. The title "The United States and the Politics of the Laws of War" implies that there is an interplay between the politics of the law and the politics of 'war' which, in turn, suggests a certain emotional or at least passionate response to the term and what we normally associate with it. Certainly, there is no doubt that there is a particular aesthetic resonance to the word war – it is definitely a word with baggage. However, it is the contention of this work is that this is useful baggage when exploring the relationship of America and the laws of war because of what war entails, what it has been able to achieve for the US and because of the commemoration of war in the American memory. If nothing else, 'war' is how most individuals regard the actions of their armies on the battlefield, whether the operation is an invasion, peace-enforcement or police action.

Sources of the laws of war

Interestingly, rather than going through this muddled process of defining exactly what the laws of war are, many books are content with pointing to a number of treaties of

which it is considered to be composed. This brings us to the question as to what exactly the sources of the laws of war are. Since it is a branch of international law, it is perhaps easiest to turn to Article 38 of the Statute of the International Court of Justice which lists treaties, customary international law and the “general principles of law recognized by civilized nations” as the sources of international law.

So, in looking at these areas to answer a question about sources, the most obvious answer is, of course, treaties to which states have given their consent. In terms of the laws of war, this includes the major treaties such as the 1949 Geneva Conventions, the 1977 Additional Protocols and more specific treaties such as the 1954 Hague Convention on the Protection of Cultural Property and the 1997 Ottawa Land Mines Convention. Beyond this, customary law – essentially long-standing patterns of behaviour by states which can be said to have reached a status where there is a general understanding that the behaviour constitutes a rule of international society – plays a role in filling in any “gaps” that may occur as time, weapons and circumstances change.¹⁹ The role of “general principles” is harder to define. Sufficient for our purposes here, these general principles fill the gaps between treaties and custom. For example, the decision to treat rape as a war crime was based on applying general principles rather than treaty or customary law with the understanding that a general principle of respect for human dignity is the basic underpinning of the laws of war.²⁰

Prisoners of War

As suggested by the above discussion, the laws of war covers a broad area and governs a wide variety of military activities. Traditionally, this includes targeting, protection of cultural property, treatment of the sick and wounded, shipwrecked, civilians in occupied territories, and prisoners of war. However, the law has

¹⁹ For a look at the role of custom in the laws of war, see the report released by the ICRC: Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, Cambridge, Cambridge University Press, 2005. The report is not entirely free of controversy as it may exaggerate its claims in certain places, but it still provides a good example of how custom influences the laws of war. W. Hays Parks argues that the customary law makes several assertions about the law which contravenes US practice. In particular he focuses on incendiary weapons and the use of lasers in conflict. See W. Hays Parks, “The ICRC Customary Law Study: A Preliminary Assessment” American Society of International Law Proceedings, Vol. 99. 2005. pp. 208-212.

²⁰ For more on “general principles” see Cassese, International Law, p. 188-9. In note 3, Cassese refers to the December 1998 Furundžija judgement at the ICTY as an example of the application of general principles.

increasingly expanded to cover blinding weapons, landmines and protection of the environment. Therefore, although the laws of war seems to be a small branch of international law as a whole, it covers a lot of ground. Writing a thesis which covered each of these aspects of the law would require a lot more space, time and resources than are available.

For this reason this work has chosen to focus on one particular aspect of the laws of war: issues relating to the treatment of prisoners of war (POWs). A case can be made for focusing on prisoners of war for a number of reasons, not least because the treatment of prisoners of war in the war on terror has been a major issue since the images of Guantanamo Bay were splashed across newspapers throughout the world. In this sense the question over treatment of combatants or terrorists who themselves have little respect, and a lot of contempt, for the laws of war, and who refuse to abide by its rules, is seen as a very interesting, political and morally complex issue.

This is not to say that decisions over what is and is not a legitimate target are irrelevant or boring. During the 1999 Kosovo War the issue of targeting was certainly a highly contested debate.²¹ However, such debates tend towards arguments that are more legal than political. The issues involved make for discussions over legal texts as to what may be permissibly targeted and under what conditions. Such legal interpretations cannot, of course, avoid at least some political influence. But during the heavy bombing phase of Operation Enduring Freedom or Operation Iraqi Freedom, there were few suggestions that the laws governing targeting were “obsolete” and the overall political impact of targeting in the Afghanistan and Iraq campaigns seems to be less than that of the recognition and treatment of POWs.

²¹ This debate is discussed in Chapter 4. For more on targeting, Dinstein looks at the law regarding targeting and aerial bombardment in his book, The Conduct of Hostilities as does A.P.V. Rogers in his book Law on the Battlefield, Second Edition, Manchester University Press, 2004. Duffy provides a summary of the law in her book The War on Terror, pp. 228-239. The ICRC’s customary law report puts forward a series of customary ‘rules’ regarding targeting. Customary International Humanitarian Law, see especially rules 7-24, 35-45. Michael N. Schmitt has written several articles on targeting and the laws of war. See Michael N. Schmitt, “Conduct of Hostilities During Operational Iraqi Freedom: An International Humanitarian Law Assessment”, 6 Yearbook of International Humanitarian Law, 2003, pp. 73-110; “Targeting and Humanitarian Law: Current Issues”, 34 Israel Yearbook on Human Rights, 2004, pp. 59 - 104.

Issues over the environment and landmines are fairly new and do not have the same historical background for analysis. On the other hand, ever since there has been war, there have been victims of conflicts and moral doctrines as to how to treat one's enemy. Prisoners of war have featured prominently in almost every war that the United States has taken part in since its inception. In this sense there is a history which can be examined, and analysed. The United States has had to deal with POWs in its Revolutionary War, the War of 1812, Civil War and the wars against the First Nations. This has continued in the modern era as American military personnel were captured in the two world wars and the issue of POWs became politicised in the Korea and Vietnam. The treatment of prisoners of war has been one of the most prominent when it comes to the laws of war in the war on terror. The recent debates over Guantanamo Bay, Abu Ghraib and the moral standing of al-Qaida as an enemy suggest that these issues still challenge the United States, morally, politically and legally, today. Given this history and blend of political, moral and legal concerns, the POW issue makes for an interesting case study in terms of the restraints on waging modern war.

The laws of war as codified hypocrisy?

Most of these sources date from the end of the 19th Century through to the beginning of the 20th. However, many lawyers and theorists are eager to look back throughout history to the rules and norms which have traditionally guided and restricted the way wars were waged. Usually they point to ancient codes and medieval treaties to illustrate their point that the laws of war is really as old as war itself. Such a history suggests a sturdy foundation for the application of rules and the laws of war on the battlefield.

Yet anyone who reads of the savagery of the Napoleonic wars, colonial battles or the Russian front in the Second World War could probably be forgiven for thinking that this was not the case. Certainly it is true that the laws of war have their origins in chivalrous codes that are centuries old. But one might be forgiven for thinking that such codes were honoured more often in breach than in practice, or for wondering how much of an impact the law has really had.

This work is interested in the engagement of the United States with the laws of war and therefore operates on the premise that the laws of war do in fact matter. The question over whether or not the US takes the laws of war seriously (and the argument here is that, for the most part, the US military does), will be addressed in later chapters. However, before proceeding further, it is useful for the rest of the work to take seriously the question of whether the term ‘laws of war’ is in fact an oxymoron.

In books on the laws of war it is not rare to find references to Cicero’s dictum *inter arma enim silent leges* or “in war law is silent”, and there has certainly been renewed use of the phrase since 9/11. The pessimistic tone of the saying suggests that matters of national interest or security will always triumph over well established rules and customs. The ideas of “*raison de guerre*”, “*raison d’etat*” in earlier centuries and “military necessity” in times closer to our own, have always been invoked by commanders and politicians justifying breaches of the laws of war. Although Napoleon is quoted as having said “The natural law...forbids us to multiply the evils of war indefinitely”²² he was clearly quite content to have his soldiers raid towns and villages for food and supplies, leaving little left for the inhabitants to survive the winter.²³ Such policies, of course, were justified with reference to necessity. In the present, to answer charges of laws of war violations, many commentators and politicians in the United States have argued that the necessity of defeating al-Qaeda is much more important than any shallow humanitarian political obligations.²⁴

To address the balance between ancient codes and their constant violation, a consideration of the role of law in war is needed. While one may point to the brutality and savagery commonplace in warfare, war always has had some kind of rules which guide its conduct. Without these rules, war cannot be distinguished from chaotic, purposeless murder, serving no goal or interest. As Michael Howard argues:

²² Cited in Geoffrey Best, *Humanity in Warfare*, p. 49.

²³ During Napoleon’s march to Moscow it had pretty much been expected that troops would be able to live off the land as they marched to victory. When this did not pan out as expected and villages were swarmed with hungry and half starved troops, the result for the inhabitants was usually devastation. See Adam Zamoyski, *1812: Napoleon’s Fatal March on Moscow*, London: Harper Perennial, 2004.

²⁴ For example, see Jeremy Rabkin, *Law Without Nations: Why Constitutional Government Requires Sovereign States*, Princeton: Princeton University Press, 2005. This work will examine these arguments in Chapter 4.

War... is not the condition of generalized and random violence pictured by Thomas Hobbes as the 'state of nature'. It is on the contrary a highly social activity – an activity indeed which demands from the groups which engage in it an unique intensity of society organization and control.²⁵

Therefore, there is a link between war and discipline – states with unrestrained armies have often found that their goals cannot be achieved without enforcing discipline. Worse, these nations have been attacked by their own marauding troops. But beyond self-preservation, the rape and pillage of towns could often lead to disastrous consequences for political and military objectives of an invading army. While such policies could create fear within a population to encourage docility, it could also turn a population against an army, making occupation or future advancement very difficult and costly. In this sense, restraint was not only humane, it was militarily advantageous.

In this way, claims that war is an ungovernable explosion of violence with no rule but kill or be killed are just as mistaken as the belief that law alone will ensure that civilians will never die in conflict zones. In short, the laws of war are a strange beast – frequently honoured in words, regularly broken in deeds. It is effective in so much as states want it to be – but to suggest that states do not have a choice in the matter is wrong.

If war is a norm governed activity, then importance can be attached to those norms which do or should apply and the ways they are incorporated into military doctrine; and this in turn is worthy of academic scrutiny. Examining the development and implementation of the laws of war is the aim of this work – but through the lenses of the United States: its military, its politicians and its citizens.

The United States, Politics and History

²⁵ Michael Howard, “*Temperamenta Belli: Can War Be Controlled*” in Michael Howard, ed. Restraints on War: Studies in the Limitation of Armed Conflict, Oxford, Oxford University Press, 1979. p. 1

Having briefly looked at what exactly is meant by 'laws of war', its sources and its relevance to modern warfare, the next section of this introduction will look at three questions implied in the title "The United States and the Politics of the Laws of war Since 1945": Why the United States? Why politics? And why a chronological approach?

The United States and the Laws of War

Anyone familiar with current events should not find it too difficult to understand why this work has chosen to focus on the United States and its relation with the laws of war. The United States has participated in nearly every major conflict of the 20th Century, especially so in the period since 1945. In this way it has seen the changing development of the laws of war throughout the 20th Century and experienced only too well the difficulties posed by the changing nature of conflict.

Because of its military engagement and status as a world power, the United States has had an effect on the development of (or at least the way we consider) the laws of war. It has participated in virtually every conference which aimed to modify or further develop the laws of war since the 1899 Hague Convention. Even where the United States has chosen not to sign on to various legal treaties for political or moral reasons, this has had an effect on the law. First, although it has not formally signed many of these treaties, the United States has incorporated many of their principles into its own military doctrine. One only need look at the targeting provisions of Additional Protocol I²⁶ and compare them to US practice to see that the US, for the most part, follows the rules laid out in the text. Second, as the nation that is most heavily engaged throughout the world in terms of sheer scale and numbers, it is clear that US practice is going to have an effect on the interpretation of treaties and in the development of customary law whether or not the US is, itself, a signatory.

However, this discussion would undoubtedly be amiss if it did not mention the rather obvious fact that the US has probably been the nation most embroiled in controversy

²⁶ See part IV of Additional Protocol I for the targeting provisions, protection of civilians and civilian targets.

regarding the laws of war since 1945. Certainly it is not the only country to come under scrutiny in this regard. French military actions in Algeria shocked western nations and Canada faced international shame when a scandal broke in 1994 over the torture and murder of Somali youths by its soldiers. Recently stories of UN Peacekeepers (from several nations) sexually abusing women in conflict areas such as the Congo have also emerged.²⁷

Yet whether it be because of the sheer scale of military operations the US has conducted since 1945, the nature of the conflicts in which it has chosen to participate in, or its own moral understanding of itself as ‘a law abiding nation’, there has been much domestic and international focus on the conduct of American and American-lead military operations. Clearly, US citizens expect that their soldiers will behave in a way which coincides with American values and principles. Part of the soul-searching which followed Vietnam (inside and outside of the military) was a result of the realization that US soldiers could and did carry out a massacre of civilians. That US soldiers could be induced to participate in such activities contrasted dramatically with public expectations. Additionally, because many of the conflicts that the US has participated in since 1945 have been controversial, American leaders and military commanders have gone to great lengths to ensure that more fuel is not added to the fire by laws of war violations and this has sometimes produced strange results. For example, during the Kosovo campaign, the Clinton administration insisted on carefully going over and approving targeting lists, rejecting those which seemed likely to lead to civilian casualties.²⁸

Therefore, it should not come as that much surprise that there is a lot of domestic and international scrutiny of US military operations in the ongoing ‘war on terror’. However, the public announcement that the laws of war would not technically apply to captured combatants in Afghanistan, and the outcry over Guantanamo Bay and Abu

²⁷ Colum Lynch, “U.N. Sexual Abuse Alleged in Congo” *Washington Post*, December 16, 2004; Page A26, available online at: <http://www.washingtonpost.com/wp-dyn/articles/A3145-2004Dec15.html>. Also see Brian Ross, David Scott and Rhonda Schwartz, “U.N. Sex Crimes in Congo” ABC News, 10 February 2005, available online at:

<http://abcnews.go.com/2020/UnitedNations/story?id=489306&page=1>; BBC News, “UN sexual allegations double” 6 May 2005, available online at: <http://news.bbc.co.uk/2/hi/americas/4521481.stm>.

²⁸ See Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Conflict*, Oxford: Public Affairs, 2001 and Ivo H. Daalder and Michael E. O’Hanlon, *Winning Ugly: NATO’s War to Save Kosovo*, Washington: Brookings Institute Press, 2000.

Ghraib have thrown the US, and some of its more controversial policies regarding the laws of war, into the spotlight. This work seeks to examine these controversies, the arguments on both sides and the implication for the laws of war. Do the arguments and justifications make sense? And if so, on what grounds?

Politics and the Laws of war

This brings us to the next question regarding this work – why “the politics of the laws of war” and not just the “laws of war”? The most immediate answer to this question is that the line of inquiry and arguments put forward are not legal *per se*. In fact, the thesis specifically aims to avoid legal debates over interpretation of treaty texts. Instead, it seeks to present an argument that is about law, but is not legal.

Since the war on terror began, there have been many books and articles published on problems with the law, determining which law applies and the legal obligations of combatants.²⁹ Therefore, to present a legal work on these matters would be to follow a well trodden path. That the author of this work is not a lawyer would probably result in the presentation of an inaccurate, unoriginal argument.

However, it is an assumption of this work that the law cannot and should not be left to the lawyers alone. Rather there is room for much non-legal scrutiny of how the law develops, is implemented and regarded by states, groups and individuals. Examining such attitudes does not require a law degree, but an understanding of politics and history. That law is often affected by politics and our ideological perceptions is a fact that a cold, ahistorical reading of a legal text cannot bring to light.

International Lawyers and International Law

²⁹ For a presentation of the law relating the war on terror see, Duffy, The ‘War on Terror’ and Dominic McGoldrick, From ‘9-11’ to the ‘Iraq War 2003’: International Law in an Age of Complexity, Portland: Hart Publishing, 2004.

Where lawyers have crossed over into the political realm, the results have been only somewhat satisfactory. Most international lawyers who have written on this area have written condemnatory books which present lists of violations of the laws of war and long tirades against the Bush and Blair administrations for their actions.³⁰ In these books there is little appreciation for the role of politics in law, especially international law. Instead, international law is treated as a sacred body of rules of which any violation is presented as a betrayal of humanity as a whole. As Philippe Sands writes in his book, “The ‘war on terrorism’ has led many lawyers astray”³¹ – without ever explaining exactly what lawyers have led been astray from. Rather it is assumed that international law is good and international politics are bad. Michael Byers concludes his book on war law arguing:

The immense power of the United States carries with it an awesome responsibility: to improve the world – for everyone. Obeying the requirements of war law is a necessary first step.³²

The reader is therefore apparently to assume that law is the solution to our problems and unquestioning obedience to it is necessary for world peace and victory in the war on terror. One cannot help but be reminded of E. H. Carr’s contention that among people interested in international affairs, there is “a strong inclination to treat law as something independent of, and ethically superior to, politics.”³³

Perhaps, one might argue, where politics leads to policies and practices of torture, the ethical superiority of law is defensible. And this brings us to a second set of lawyers who are, perhaps, only too willing to dismiss international law as vague and without substance. These lawyers (who will be referred to as the ‘New Sovereignists’ in Chapter 4) argue that the only supreme law that binds a nation can be its own constitution. The only international law which matters is that which states have explicitly agreed to and ratified. Even then, they argue, states only too often ratify international treaties with absolutely no intention to do anything about their new

³⁰ See Byers, War Law and Sands, Lawless World.

³¹ Sands, Lawless World, p. 205.

³² Byers, War Law, p. 155.

³³ E. H. Carr, The Twenty Year’s Crisis 1919-1939: An Introduction to the Study of International Relations, Houndmills: Palgrave, 2001. p. 159.

international commitments, and this demonstrates the weakness and irrelevance of international law. As Jeremy Rabkin argues:

Without a sense that law follows from the national constitution and the past understandings of that constitution, “law” can be manipulated into anything a judge may like it to be and individual rights are as uncertain or as ephemeral as this [international] “law”.³⁴

Therefore, when it comes to the war on terror, these lawyers argue that there cannot be any question of international law restricting US actions. The ultimate purpose of the state is to protect the inhabitants which reside within – even if this means violating the principles of international law.

To the former group of lawyers, international law is everything. To the New Sovereignists, international law is very little indeed. With starting positions like these, both sides ultimately end up talking past each other and there is very little room for debate and reflection on the larger issue of the role of law in the war on terror. It seems that one is expected to believe that international law is an all or nothing phenomenon.

It is a central idea of this work that what has been lost in this debate is an examination of the role of politics in law and law in politics. The New Sovereignists may argue that international law really does not matter, but this does not explain why the Bush administration has worked hard to justify their policies, legally in the war on terror (as well as politically and morally). The international lawyers may argue that the Bush and Blair administrations are destroying the fabric of the international legal system – but this cannot account for the fact that the Geneva Conventions remain fairly intact and continue as the basis for our judgements of military actions in conflicts.

International Relations and International Law

³⁴ Rabkin, *Law Without Nations?*, p. 268.

Yet this discussion would be misleading if it did not also point out that the discipline of international relations has been inadequate in its treatment of international law. The above quote by Carr is indicative of a traditional contempt for the idea that law could constrain power. As Christian Reus-Smit argues, neither of the traditional approaches of international relations, realism or neo-liberalism/rationalism offer an adequate understanding of international law in international politics:

Realist and neoliberal approaches are hamstrung by their underlying conceptions of politics and law, conceptions that leave them ill-equipped to comprehend [legal] issues...³⁵

He suggests that constructivism implies “analytically more useful conceptions of international politics, but these remain underdeveloped.”³⁶

Realism, on the one hand does not address the growing body of international law, it does not explain how law constrains strong states and has no account for how weak states use international law to shape outcomes.³⁷ Neo-liberals, on the other hand, see law as functional solutions to manage problems (such as managing the world’s oceans) but:

the rationalist image of states strategically negotiating functional rules captures but one dimension of the contemporary politics of international law. Ignored almost completely is the way which international law can serve as a focal point for discursive struggles of legitimate political agency and action...³⁸

In terms of international law, nowhere is this truer than with respect to the laws of war. The law is not only a series of rules, but it can and does confer identities and legitimacy. During the negotiations over the Additional Protocols in the 1970s, the Non-Aligned movement and Communist nations were able to include within the text

³⁵ Christian Reus-Smit, “The Politics of International Law” in Christian Reus-Smits, ed. The Politics of International Law, Cambridge: Cambridge University Press, 2004. p. 24.

³⁶ Reus-Smit, “The Politics of International Law”, p. 24.

³⁷ Reus-Smit, “The Politics of International Law”, p. 17.

³⁸ Reus-Smit, “The Politics of International Law”, p. 20.

allowances for “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”.³⁹ Understanding the reasons for and implications of this decision cannot be done through a legal or political analysis alone – the reasons and results are mixed and varied.

It should be noted, however, that in recent times there has been a gradual recognition for a need to ‘bridge the gap’ between International Relations and International Legal theory.⁴⁰ Therefore, working on the assumption that there is the theoretical and analytical space to look at the interaction of law and politics, this work attempts to do just that by looking at the relationship of the world’s only superpower to the laws of war. This will be done by looking at the political arguments and the politics of the legal arguments put forward by the Bush administration regarding its policies and those of its critics. Understanding that there are political nuances to every legal argument – but that legal arguments matter for our political understandings of conflicts – is fundamental to this process. It is the intention of this work that it will ultimately give the reader a better understanding of the institutions of war, law and diplomacy and their interactions in international politics.

History and the Laws of war – or why a chronological approach?

In looking at the politics of the laws of war, it is the intention here to present an accounting of the law that currently exists and the US policy towards it. A full explanation, however, can only be made via contextualization. This entails a review

³⁹ Additional Protocol I, Article 1(4).

⁴⁰ Examples include: Michael Byers, Custom, Power and the Power of Rules: International Relations And Customary International Law, Cambridge, Cambridge University Press, 1999; Michael Byers ed., The Role of Law in International Politics: Essays in International Relations and International Law, Oxford: Oxford University Press, 2000; Martti Koskenniemi The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 Cambridge: Cambridge University Press, 2001; Martti Koskenniemi “The Politics of International Law”, European Journal of International Law, Vol. 1, No. 1. 1990; Nicholas Onuf “Do Rules Say What they Do? From Ordinary Language to International Law”, Harvard International Law Journal, Vol. 26. No. 2, 1985; Christian Reus-Smit ed., The Politics of International Law, Cambridge: Cambridge University Press, 2004; Anne-Marie Slaughter, “International Law and International Relations Theory: A dual Agenda” American Journal of International Law, Vol. 87, No. 2., 1993; Anne-Marie Slaughter and Stepan Wood, “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship,” American Journal of International Law, Vo. 92, No. 3, 1998.

of the history of this relationship to understand why certain decisions were made and what the significance of particular actions has been. Therefore, this work will proceed in a chronological manner.

Certainly there are other approaches that one could take in presenting this material – including ones that put greater emphasis on empirical research methods, thematic approaches, or even approaches which emphasized models and modelling. However, a chronological presentation of the material is advantageous over other methods, for several reasons. First, a quantitative or statistical analysis of the laws of war has several drawbacks. It entails the quantification of the laws of war and would probably require some kind of measurement which analysed adherence/non-adherence. Is it possible to quantify, meaningfully, the principles of the laws of war? How does one measure adherence? And even if some kind of statistical correlation could be found or discovered, it would reveal nothing about the history, debates and controversies over the laws of war. In this sense, a relationship might be demonstrated, but the reader would be left knowing little more about it. For a thesis which seeks to understand and reveal the reasons behind America's engagement with the laws of war, a quantitative approach does not seem to make much sense.

Another possible approach, a thematic one, would emphasize the 'themes' or issues which emerge from the relationship of America and the laws of war. Such an approach would be advantageous in the sense that it would allow for a close examination of the various issues in one chapter. However, as it is a goal of this work to look at the trends apparent in American engagement with the laws of war, a chronological approach will assist readers in seeing the 'bigger picture' which emerges. Additionally, the ability to see how these trends interact with one another is another definite advantage in terms of promoting a historical understanding and contextualization. However, this being said, the conclusion of this work will utilize a thematic approach to the issue of America and the laws of war to draw upon common trends and influences in each era once they have already been explored in a chronological fashion. It is intended that a thematic review will help to reinforce and emphasize the factors which have influenced and continue to influence America's relationship with the laws of war.

Finally, because there is a great deal of history presented which is specific to the United States, this work does not purport to offer a model of explanation by which to better understand the laws of war in its relations with other countries. Certainly it is hoped that the argument here can be used in terms of a comparison or contrast in other works, but it certainly does not present a model of development. It is the understanding of this thesis that given the role of the United States in world politics any suggestion that it should or even could present a model for other countries is misguided.

The goal then is to present an argument about the politics of the laws of war which is rooted in the American historical experience in its engagement with this law. As mentioned above, it is a major assumption of this work that this relationship is *sui generis*. Perhaps this then begs the question as to what purpose this analysis really serves. The above arguments have already in part answered this question, noting that America's unique role in the world, especially as the lead nation in the war on terror, makes understanding its relationship with the laws of war important for those who are interested in how the war on terror is being fought, what the repercussion of these actions are, and what the implications are to America's wider engagement with international law. But beyond this, and, again, as mentioned above, there are few works that look realistically at how the laws of war actually work and are implemented in practice. Legal analyses too often lack context – and it is the hope that a political analysis which reflects on this history, can help improve the general understanding of America's relationship with the laws of war.

Original Contributions

Having looked at what the laws of war is, what it is not, why it constitutes an important area of research and outlined the working assumptions of this thesis, this final section of the introduction will provide an overview of the work as a whole and its original contributions to research.

The central focus of this work is to examine the factors that have influenced the relationship between the United States and the laws of war and how these factors help

to explain the state of the relationship today in the war on terror. Following this agenda, the following is a list of contributions to the research in this area:

- The thesis will look at the historical engagements surrounding the development and implementation of the laws of war in the United States which is typically underspecified in the international law literature.
- The thesis will look at the changes in US military training and the development of the concept of ‘operational law’ that came about after the experiences of the Vietnam War which has been largely ignored in the international relations and international law literature outside of material published by the US military. It will then look at how this changed the American approach to the laws of war culminating in the strong level of adherence to international law in the 1990-1 Gulf War.
- Taking this historical background into account, the thesis will assess the relationship of the United States with the laws of war in the two most recent conflicts it has fought in the war on terror. In doing so, it will make a comparison between these conflicts considered to be within the framework of the war on terror and those that came before.
- The thesis will assess the Bush administration’s arguments regarding the applicability of laws of war to the war on terror. This will be done through a political rather than legal approach.

Having established these goals, the ordering of chapters is as follows:

Chapter 2 will begin with a historical overview of America’s relationship with the laws of war from its inception as a nation to the signing of the Geneva Conventions in 1949. It will demonstrate that although the United States saw itself as an exceptional nation, in terms of the laws of war, its approach was very European. This history demonstrates the origins of a ‘dualistic approach’ in terms of the laws of war – the rules that applied to the Civil War and the rules that applied to the wars against the First Nations people were very different. While the United States was engaged in a bloody insurgency in the Philippines it was, at the same time, working with other European nations to expand and codify international law and the laws of war at the

1899 Hague Conference. However, as the chapter will demonstrate, by the middle of the 20th Century, it was clear that the United States was taking the laws of war seriously in terms of participating in their further expansion after the Second World War and in the development of the Uniform Code of Military Justice.

Chapter 3 will outline the difficulties and disasters experienced by the United States in terms of the laws of war in Vietnam. However the focus will be on the lessons US military lawyers drew from their experiences in that conflict (and later in Grenada) and worked to change its approach to the laws of war to make it a more 'sellable' package to its commanders and troops. This led to what may as well be called a 'legal revolution' in terms of the American approach to the laws of war which was apparent in the 1990-1991 Gulf War – referred to by some as the most 'legalistic' war in history.

Chapter 4 will begin the focus of this work on the relationship of the United States and the laws of war in the war on terror. It will seek to explain why, after a policy of strict adherence to the laws of war, the political leadership of the United States chose not to apply the Geneva Conventions to captured combatants in Afghanistan. In looking for answers, the Chapter will look back to the experience of fighting in Kosovo – the difficulties of coalition politics when it comes to the laws of war as well as legal battles with the International Criminal Tribunal for the Former Yugoslavia. Additionally, it will look at the rise of the 'New Sovereigntist' critique of international law in the 1990s. Ultimately, the Chapter will suggest that these factors, combined with the political imperative of winning the war on terror and gaining intelligence resulted in the Bush administration to denying combatants formal recognition as prisoners of war. It will then assess the validity of the claims made in light of the threat posed by international terrorism.

In looking at the relationship of the United States and the laws of war in Iraq, Chapter 5 will look mainly at the scandal at the Abu Ghraib prison but will also focus on other controversial issues such as the increasing participation of private military firms (PMFs) in military operations. In terms of the scandal at Abu Ghraib, the Chapter will look at various explanations as to why the events took place – whether individual soldiers gave in to sadistic tendencies in a chaotic environment with unclear rules, or

whether the abuse at the prison emerged as a direct result of Bush administration policies. The Chapter will look at the implications of generating uncertainty over the laws of war over implementing an overall comprehensive approach.

Conclusion

In setting out to look at the United States and the politics of the laws of war, it is perhaps interesting to consider Hersh Lauterpacht's suggestion that "If international law is, in some ways, at the vanishing point of law, the laws of war is, perhaps even more conspicuously, at the vanishing point of international law."⁴¹ The phrase is now virtually cliché among those who write on the laws of war. But the question remains as to whether the same does hold true for the politics of international law. In looking at the history of, international debates over, conflicts engaged in and controversies relating to the laws of war, this work seeks to demonstrate that although the power of law may be questionable in war, the politics over its implementation remain as important and interesting as always.

⁴¹ Hersh Lauterpacht, "The Limits of the Operation of the Laws of War", British Yearbook of International Law, Volume 30, 1953. pp. 206-43

Chapter 2: A Weapon and Restraint

The United States and the Laws of War 1750-1950

Introduction

Since the founding of the Republic, adherence to the laws of war has been heavily supported by American lawyers and policy makers. It was expected of the American Revolutionary and the soldier in the War of 1812.¹ In many ways, just means were seen as an important part of the just cause that was key in maintaining popular support throughout these campaigns.

Yet at the same time, it is not novel to suggest that America's adherence to the laws of war were heavily qualified. One of America's foremost scholars on international law, Henry Wheaton, wrote in 1866:

Thus, if the progress of an enemy cannot be stopped nor our own frontier secured or if the approaches to a town intended to be attacked cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war... The whole international code is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will be so by others. Where, then, the established means of restraining his excesses, retaliation may justly be resorted to observance of the law which he has violated.²

This was, of course, the perfect justification for an unrestrained war against the First Nations of North America.

¹ Of course, this is in a general sense. There were many violations of the normal customs of war during these conflicts, such as the use of guerrilla tactics and employing First Nations warriors to strike deadly blows against the enemy. For example, see Christopher Hibbert, Red Coats and Rebels: The War for America 1770-1781, London: Penguin Books Ltd, 2001.

² Henry Wheaton, Elements of International Law: The Literal Reproduction of the Edition of 1866, Richard Henry Dada Jr. Ed. George Grafton Wilson, Oxford: The Clarendon Press, 1936. pp. 368-371.

This chapter will provide a brief survey of America's relationship with the laws of war from 1750 through to the Korean War. It will be apparent that, like most countries at this time, America's adherence to the laws of war was erratic. Yet what makes America stand out was that the new republic saw itself as exceptional among nations. This belief played a part in encouraging the newly formed United States to adhere to the traditional laws of war, the American imperative to expand its civilizing empire created a dualistic tendency in its application of this law. While the United States was crucial to the development of the laws of war – the Lieber Code and its influence on the 1899 Hague Convention were key to the development of the laws of war in the latter half of the 19th Century – it would also use those same laws to justify the tactics it employed against non-Western peoples.

By the middle of the 20th Century, the US began to put into place a more coherent and doctrinal approach to the laws of war. This approach responded to the need of a growing military in a democracy, but also reflected its experience in fighting total wars. It was never a straight path, but the US would go from fighting unrestrained wars against its native populations to implementing a strong code of military justice and, for the most part, a decent respect for the laws of war.

The New Republic and the Laws of War

As the newly formed American Army engaged in war against their British counterparts in the War of Independence, the first American Articles of War came into force on 30 June 1775 when they were adopted by the Second Continental Congress.³ They were directly derived from the British Articles of War which themselves had been greatly influenced by an almost literal translation of Roman Law.⁴ John S. Cooke notes that this did lead to

³ During this period the Navy operated under the "Rules and Regulation of the Navy of the United Colonies" which was put in place on 28 November 1775. The name was later changed to the Articles for the Government of the Navy in 1799. See John D. Cooke, "Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition" *Military Law Review*, Vol. 165, September 2000, pp. 1-20. p. 2-3.

⁴ Edmund M. Morgan, "The Background of the Uniform Code of Military Justice," *Military Law Review*,

a somewhat ironic result – the British Articles, with their medieval origins rested on a particular relationship between leaders and the rank and file that was different from the egalitarian principles espoused by revolutionary Americans. Ideological inconsistency aside, Cooke notes that such a decision was not that surprising given the urgent need to organize and govern the rebelling forces.⁵

Perhaps more importantly, it appears that the goals of the American and British systems were the same – to instill a command-dominated control to secure obedience. Courts-martial were not viewed as independent mechanism for determining justice, but as tools to serve the military. As Cooke notes, punishment, or the threat of it was seen as the only way to motivate poor, uneducated and newly integrated men on the battlefield.⁶ In the life and death struggle of conflict, not to mention the chaos of the battlefield, discipline was crucial for getting an objective accomplished. Writing just over a century later, General William T. Sherman (himself a lawyer) wrote:

Civilian lawyers are too apt to charge that Army discipline is tyranny. We know better. The discipline of the best armies has been paternal, just and impartial. Every general, and every commanding officer, knows that to obtain from his command the largest measure of force, and the best results he must possess the absolute confidence of his command by his firmness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of his command. Without this quality, no army can fulfill its office, and every good citizen is as much interested in maintaining this quality in the army as any member of it.⁷

That there were few changes made to the Articles of War until the mid-20th Century

Vol. 28, April 1965, pp. 17-35.

⁵ Cooke, "Introduction", p. 4.

⁶ Cooke, "Introduction", p. 3.

⁷ William T. Sherman, *Journal of the Military Service Institute of the United States*, Vol. 132, 1880. Cited in George S. Prugh, Jr., "Observations on the Uniform Code of Military Justice: 1954 and 2000" *Military Law Review*, Vol. 165, September 2000, pp. 21-41. p. 30.

indicates that such a belief was firmly held by military and political leaders.⁸

Given this emphasis on discipline (even over justice for the American soldier who found himself accused), extensive guidelines with regards to humanitarian restraint in warfare had not been laid out in the Articles – though, in view of its European origins, it must be said that America was hardly alone in this. Still, the Articles remained the tool through which the customary laws of war were enforced.

It was not until the Civil War that the American government realized that it needed an explicit code for its soldiers to follow. In some ways, America again looked to Europe – or at least to a European – for advice. Francis Lieber, an old Prussian soldier, was a professor at the University of Columbia in 1861 when he gave a series of lectures on the laws of war. This he subsequently published as a 16 page paper “of concise, sensible notes about the treatment of guerrilla forces, spies, brigands and ‘bushwhackers’.”⁹ When one of Lieber’s audience, General H. W. Halleck, became the General-in-Chief of the Union’s armies, he ordered five thousand copies of Lieber’s paper and invited him to propose amendments to the few existing army regulations.¹⁰ At the outset of the US Civil War, it was clear that most of the professional officers in the US armed forces were going to be on the Confederate side.¹¹ Clearly this would be a problem in a system that relied on custom to prevent atrocities in warfare. The generally less experienced men in charge of the Union’s forces would need some kind of instruction as to how to conduct themselves in battle and engaging with hostile populations. Therefore, General Orders 100: Instructions for the Government of Armies in the United States in the Field, was published in the Spring of 1863 (six months before the Geneva meeting) and became known as the “Lieber Code”.

⁸ There were changes made in 1786, 1806, 1874, 1917. Future Presidents Thomas Jefferson and John Adams were made members of one of the first committees set with the task of revising the military code of 1775 but made no substantial changes. As Morgan notes, even the Articles enacted in 1916 were only a rearrangement and a reclassification without much alteration in substance. See Morgan, “The Background of the Uniform Code of Military Justice”, p. 17-18.

⁹ Caroline Moorehead, Dunant’s Dream: War, Switzerland and the History of the Red Cross, London: HarperCollins, 1999. 37.

¹⁰ Moorehead, Dunant’s Dream, p. 37.

¹¹ Geoffrey Best, War and Law Since 1945, Oxford: Oxford University Press, 1997. p. 41.

The code covered military discipline, an explanation of the laws of war and their status between two opposing armed forces. It strictly adhered to the view that tactics in warfare were not unrestricted by the law of nations or natural law. It was a set of guidelines for soldiers on the battlefield and offered some innovations. One of Lieber's main contributions was to provide what was then the clearest definition of who a Prisoner of War was and what his rights were according to customary international law. According to Article 49:

A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.¹²

According to Best, so far as POWs are concerned, Lieber's language indicates both a keen awareness that among the law's classical purposes was the prevention of things being done in war which might hinder the return to peace, and an awareness that popular passions were actually pressing for the execution of such drastic and severe war measures as were sure to do that.¹³ Additionally, Best argues that this definition was important because it clarified the fact that prisoners of war were not to be considered criminals. Instead, Lieber made it clear that POWs were to be considered a distinct category of

¹² Text found at Yale University's Avalon project: Documents in Law, History and Diplomacy. Available online: <http://www.yale.edu/lawweb/avalon/avalon.htm>.

¹³ Best, Humanity in Warfare, p. 156.

war's sufferers or victims and thus deserving of protection like the wounded.¹⁴

Ultimately, despite this impressive step, Lieber's rules were more like guiding principles than binding rules – as they were not adhered to by the Confederate forces they did not have to be applied. Yet the Lieber Code had some impact in the field on the behaviour of Government troops. Additionally, Lieber's overall contribution would become very influential in the US and Europe, as well as in the future treaties on the laws of war that were negotiated in the later half of the 19th Century.

Wars with the First Nations

In the 1860s, the United States simultaneously fought the Sioux Indians in Minnesota and Confederate armies in the South – a comparison of the treatment of these two groups opposing the government is telling. Interestingly, neither group was treated as legal combatants. As mentioned above, the South was not entitled to the full protection of the laws of war (as defined in the Lieber Code) because the Confederate forces did not adhere to it. On the other hand, because the First Nations were considered savages, they did not have the opportunity to be a part of the shared international law of civilized nations. Therefore, the First Nations would find themselves considered hostile, rounded up and placed into reservations or killed should they resist the US government. While it would be incorrect to suggest that prisoner of war camps housing the southern prisoners were luxurious, Confederate soldiers were treated far more fairly and with much more dignity than the warriors of the First Nations ever were.

Still, at the time such treatment of 'natives' was consistent with the military practices of the European powers who fought formal restrained wars against one another and used very harsh tactics in their colonial wars.¹⁵ Yet, America's situation was unique – in the words of Peter Maguire:

¹⁴ Best, *Humanity in Warfare*, p. 156.

¹⁵ Peter Maguire, *Law and War: An American Story*, New York: Columbia University Press, 2001. p. 5.

It became increasingly difficult to justify an expansive, essentially imperialistic foreign policy within the framework of an egalitarian political ideology.... More than the obvious gap between words and deeds, from the beginning there was a tension between America's much-vaunted ethical and legal principles and its practical policy interests as an emerging world power.¹⁶

In other words, America by the beginning of the 20th Century simultaneously championed rights, law and the rule of law – but also denied these protections where affording them would have clashed with the national interest. This, Maguire calls 'strategic legalism': "the use of laws or legal arguments to further policy objectives, irrespective of facts or laws."¹⁷

Maguire goes so far as to describe the American interpretation of international law at this time as "cynical". Whether one agrees or not with this description, it is certainly possible to point to a dualist trend in American thought on international law. First, there was America, the idealist who championed rights, and, second, there was the expanding empire, first over North America and then overseas. This tension only grew as America increasingly developed international interests abroad – such as in China and Japan.

What is key here is that these policies, and America's understanding of international law, including the laws of war, were increasingly seen through the prism of manifest destiny. The messianic overtones which accompanied the founding of the republic argued that America was to be the 'shining city on a hill' and represent all that was good and possible for civilization. However, as the United States grew increasingly expansionist, those groups who opposed its influence were increasingly seen as standing in the way of

¹⁶ Maguire, *Law and War*, p. 6. Of course it is possible to overdo the uniqueness of the American approach. The French republican tradition and the British sense of liberty were also deemed compatible with Empire. Additionally, all of these empires saw themselves as undertaking a civilizing mission in their engagements abroad.

¹⁷ Maguire, *Law and War*, p. 9.

civilization. Civilization, in return, was no longer obliged to provide protections to those who were standing in the way of progress.

These sentiments can be seen in American engagements from the Revolutionary War up to the First World War. Although one often reads about the strength of the isolationist movement in the United States at this time, America fought wars with Britain, Spain, Mexico, China and the Philippines (just to name the most prominent). Yet, while the wars with the European powers were relatively restrained and adhered to the laws of war as they were known, those who were not European, and seen as rejecting the civilizing influence of the United States, were treated as savages and outlaws and America's power would come down on them hard. The wars with the First Nations peoples were very bloody.

Although many of the founding fathers of the American republic considered the First Nations to be barbarians, there were others, such as Thomas Jefferson and Henry Knox who wanted to demonstrate the purity of America's institutions and moral worth of the republic's enterprise in terms of their policies towards the First Nations. They therefore placed much emphasis on reasoning and negotiation with the tribes with the eventual goal of converting them to 'civilization' as Americans.¹⁸ This republican idealism can be seen in policies which provided the First Nations tribes with gardening implements in the hope that they would turn from their nomadic ways and cultivate the land like the American settlers.

However, not everyone subscribed to these 'enlightened' views: the western settlers had no problem with clearing out rather than converting the First Nations. Aside from the fact that their uncivilized ways deemed them unworthy to inhabit the land, many First Nations tribes had sided with the British in the American Revolutionary War. Therefore, as 'losers' in the conflict, the First Nations forfeited their rights and land claims in the new republic.

¹⁸ Reginald Horseman, Expansion and American Indian Policy, 1783-1812, Norman: University of Oklahoma Press, 1992. p. 83.

Ultimately, as the perception that there was a need for more land grew, these divergent positions were united. The view that the First Nations had no rights to soil that they refused to cultivate was ever more being accepted. In this regard, war with the First Nations tribes was increasingly seen as a just war.¹⁹ This was confounded after the War of 1812 where, again, the First Nations tribes sided with the British. Although by this time the Supreme Court had defined them as a 'domestic dependent nation', the outcome of the War had opened the West for American settlement and delegitimized the First Nation's claims even further.²⁰ By 1850s, in the face of the California Gold Rush and a general push westward, the land promised to the First Nations, the so-called Permanent Indian Frontier, was abandoned and an all out war over settlements began.

Much of the fighting took place right before, during and after the Civil War. As the regular army was distracted by the conflict, the forces fighting the First Nations were mostly made up of citizen-soldier volunteer armies. Many of the confrontations were sparked when civilian-settlers provoked the increasingly frustrated and volatile First Nations tribes. As one historian describes it, "In a sense, the Army was left with the dirty work by others. It was called in at the last moment, usually, to clean up a mess made by civilians."²¹ Still, this did not mean that the tactics of the army were restrained. Soldiers were known for sparking confrontations with the First Nations during tense moments.

The First Nations, of course, had not been taking the encroaching Americans peacefully. By the end of the 18th Century they had incorporated horses and guns into their ways of making war – making them ruthlessly efficient and, in the eyes of American settlers, a real threat. Already to Americans and Europeans the style of warfare that the First Nations followed was completely foreign, and certainly not within the remit of the traditional laws of war. Therefore "because the customary laws of war forbade guerrilla warfare, the taking of hostages, and the massacre of civilians, the early colonists and the

¹⁹ Horseman, *Expansion and American Indian Policy*, p. 89.

²⁰ Richard H. Dillon, *North American Indian Wars*, Wigston: Magna Boods, 1983. p. 64.

²¹ Dillon, *North American Indian Wars*, p. 251.

US government never recognized the legitimacy of the American Indian resistance.”²² So, when First Nations warriors were captured in the fighting that occurred throughout the 19th Century, they were not charged with violations of the customary laws of war because the US did not consider them lawful combatants. To grant them such a status would have been to recognize a right to wage war.²³

As such, the skirmishes with the First Nations tribes quickly became a part of a larger war of extermination on both sides. First Nations leaders, tired of the lies and false promises of Washington, would attack the encroaching settlements without mercy – attacking soldier, civilian, woman and child alike. The American forces responded in kind – attacking anyone and everyone within range of their bullets. Soldiers would boast of not taking prisoners – and those who were taken were often subject to torture and abuse. Scalping and desecration of the dead was also rampant on both sides.

War in the Philippines

As the process of settling the west neared completion by the end of the 19th Century, America found itself in a war with Spain which, started over Cuba, but resulted in the destruction of the Spanish empire and the US in control of Cuba, Guam, Puerto Rico and the Philippines. The war was not only one of the first serious military engagements that the American Republic had fought overseas, but it also was the first time America had colonies within its possession.

The actual war with Spain was over with very quickly on all fronts, although the war in the Philippines was more or less a sideshow to the one in Cuba,²⁴ the American fleet had destroyed the Spanish fleet and with the help of the local independence movements, Spanish soldiers were quickly routed. The laws of war were, for the most part, respected

²² Maguire, *Law and War*, p. 21.

²³ Maguire, *Law and War*, p. 32.

²⁴ Stanley Karnow, *In Our Image: America's Empire In the Philippines*. New York: Random House, 1989. p. 100.

and followed by the Americans and the Spanish. The war between the Spanish and the native Filipinos who were fighting for independence, however, was brutal. In skirmishes before the US intervention, Filipino leader Emilio Aguinaldo y Famy oversaw the rebel forces massacre fleeing Spanish soldiers.²⁵ If the Americans were paying any attention, it as an ominous sign of things to come.

Almost immediately after the Spanish capitulated and the Americans took over there were difficulties with the native Filipinos who, somewhat naïvely, expected help from the Americans to throw off the Spanish yoke and then leave them to form their own independent government. The United States had different plans in mind for the islands for two reasons. The first was the concern that the collapse of the Spanish in the Philippines would result in a vacuum in Asia that would be filled by the Germans, Russians or Japanese.²⁶ Second, although President McKinley had been reluctant to engage in war with the Spanish, there were others who believed that now was the time for America to bring its enlightened message and civilization to the rest of the world. Said future Senator Albert Jeremiah Beveridge to an enthusiastic audience in 1898:

We are a conquering race... American law, American order, American civilization and the American flag will plant themselves on shores hitherto bloody and benighted, but by those agencies of God henceforth to be made beautiful and bright.²⁷

The US saw itself as a different colonizer – differing from its European counterparts because it would apply an ‘enlightened’ colonialism on its new subject-citizens. It would build schools, hospitals and roads and help the Filipinos to develop their own society based on American principles. However, in return, the US expected unquestioning loyalty and compliance. “Their welfare is our welfare,” said McKinley, “but neither their

²⁵ Karnow, *In Our Image*, p. 75.

²⁶ Karnow, *In Our Image*, pp. 128-129.

²⁷ Karnow, *In Our Image*, p. 109. Interestingly, Beveridge would later go on to be an isolationist within the Senate. In this speech, he echoed the sentiments of another advocate of the war with Spain, Theodore Roosevelt, who played a large role in pushing for the conflict and who also would go on to advocate an isolationist stance for the US.

aspirations nor ours can be realized until our authority is acknowledged and unquestioned.”²⁸ The Americans would not take lightly the rejection of their attempts to bring the benefits of civilization.

Therefore, when war broke out on 4 February 1899, the legitimacy of the resisting Filipinos was not acknowledged. The subsequent conflict was termed ‘the Philippine Insurrection’. As one historian writes:

...the euphemism contrived to convey the impression that they were subduing a rebellion against [the American] lawful authority. For the same reason, they later referred to their Filipino enemies as insurgents and rebels, and in some instances...bandits. But to the Filipino nationalists, America had embarked on a war of conquest against an independence movement that had formed a government no less legitimate than the young republic founded by the American revolutionaries a century earlier.²⁹

The tense situation that followed had serious results for the ensuing conflict. After some disastrous fighting where the Filipinos had tried to take on the Americans in conventional style fighting, they switched to guerilla style tactics by end of 1899. Aguinaldo’s new strategy was intended to protract the war until either the US Army broke down from disease and exhaustion or the American republic demanded a withdrawal.³⁰ Therefore, they employed traps such as sharpened bamboo stakes in concealed pits and spears and arrows triggered by sudden trip wires. Americans taken prisoner could expect brutal treatment – there were several reports of American POWs found dead, castrated with their genitals in their mouths or eaten alive by ants.³¹ Additionally, The Americans were frustrated by the fact that the Filipino militia operated as part-time guerrillas who would otherwise continue their normal civilian lives when not out in the field, thus rendering it

²⁸ Karnow, *In Our Image*, p. 160.

²⁹ Karnow, *In Our Image*, p. 140.

³⁰ Brian McAllister Linn, *The US Army and Counterinsurgency in the Philippine War 1899-1902*, Chapel Hill: The University of North Carolina Press, 1989. p. 16.

³¹ Karnow, *In Our Image*, p. 178.

difficult to tell friend from foe.³² This resulted in the Americans burning down villages in attempts to wipe out the insurgents.

The Americans came down on these new tactics hard. US Chief Administrator (and future president) William Howard Taft described the Filipino resistance as “a conspiracy of murder and assassination” and proposed that the enemy troops be executed or exiled as they were captured.³³ Arthur MacArthur, the US Commander in the Philippines, declared in December 1900 that guerrillas would be considered war rebels and traitors and would be punished accordingly. Captives unaffiliated with a ‘regularly organized force’ were not to be classified as soldiers and were to be denied the rights of prisoners of war. This, argued MacArthur, was part of the laws of war as defined by the Lieber Code. Unfortunately, this had the effect of delegitimizing virtually all of the Filipino participants – whatever their status.³⁴ Military commissions tried and executed captured guerrillas and Army provost courts operating in areas subjected to martial law were given a free hand to try and punish suspects without evidence.³⁵

There are many incidents which could illustrate the brutality of the Philippine Insurgency but one particularly sad example will be sufficient for our purposes here. In September 1902, the Filipino forces used deception in carrying out a vicious attack against a US Army detachment at Balangiga resulting in the death and mutilation of 48 of the 74 soldiers stationed there. In planning his retaliation for the attack and out of a sense of frustration at the continuing insurgency, Brigadier General Jacob H. Smith ordered his officers to turn the island of Samar into a ‘howling wilderness’ and to shoot any males over the age of 10. “I want no prisoners. I wish you to kill and burn. The more you kill and burn, the better you will please me.”³⁶ The men under his command carried out his orders perfectly. Smith would later face court-martial for his actions despite the fact that no clear laws governing the use of force were in place. Interestingly, or perhaps tellingly,

³² Linn, *The US Army and Counterinsurgency*, p. 17.

³³ Karnow, *In Our Image*, p. 172.

³⁴ Karnow, *In Our Image*, p. 179

³⁵ Linn, *The US Army and Counterinsurgency*, p. 25.

³⁶ Maguire, *Law and War*, p. 60.

Smith was not tried for murder, but for “conduct to the prejudice of good order and discipline.” As one commentator describes it, Smith “was tried for making a verbal gaffe”.³⁷ Smith was found guilty of the charge but the punishment for his actions was only admonition – a verbal scolding. This caused many to denounce the sentence as far too lenient. To ease the outcry, President Roosevelt, upon the advice of Secretary Root, involuntarily retired Smith.

Dualistic Tendencies

During the Civil War, more than 45,000 Union soldiers were confined at the Confederate Prison at Andersonville, Georgia. Of these, almost 13,000 died from disease, poor sanitation, malnutrition, overcrowding, or exposure to the elements. Pictures of the survivors very clearly resemble those of the survivors of modern concentration camps. Additionally, as mentioned above, the Union government did not recognize the Confederate soldiers as legal combatants because to do so would have implied accepting the Southern soldiers were not rebels, but had a right to wage war. Yet, for the most part, the Lieber Code was followed by the Union forces. Considering the Southern violations against POWs and the attitude of the Union government towards the legitimacy of the South’s cause, why were the Confederate soldiers treated humanely and the First Nations treated far worse? As one historian writes:

However, given the Confederates’ early battlefield successes, the Union had no choice but to grant them *de facto* recognition by largely observing the laws of war on the battlefield. Even though the United States considered the Confederates rebels, they were not ‘others’ who stood outside the circle and so not considered barbaric. This distinction was reserved for racial and cultural others who flouted the military customs of the West. The

³⁷ David L. Fritz, “Before the ‘Howling Wilderness’: The Military Career of Jacob Hurd Smith, 1862-1902”, *Military Affairs*, Vol. 43, No. 4, December 1979, pp. 186-190.

Confederates were both white and American.³⁸

A similar situation took place in 1899 as the Americans fought a savage war in the Philippines and, at the same time, were sitting down on the other side of the world laying out the laws of war with other “civilized” nations. Secretary of State John Hay had instructed the Hague delegates that “any practical propositions” based upon ideas to protect those *hors de combat* should receive “earnest support.” Indeed, in his instructions he expressed the hope that “The proposed Conference promised to offer an opportunity thus far unequalled in the history of the world for initiating a series of negotiations that may lead to important practical results.”³⁹

Andrew D. White, head of the American delegation to the Hague Conference recorded in his diary the events and, occasionally stressful negotiating process.⁴⁰ Interestingly, according to his and most accounts, the laws of war do not seem to have captured the imagination of the participants or the throngs of groups and individuals who sought to influence the Conference. Instead most of the hope laid in the idea of ending wars for good through the establishment of a mandatory international court for the peaceful settlement of disputes – this was certainly one of White’s main goals. White recalls that the American delegation spent a lot of time trying to achieve the international court, and convincing a very skeptical German delegation of the need to agree to the final documents of the Conference. The correspondence between White and German Chancellor von Bülow is an interesting mix of religious-inspired humanitarianism and *realpolitik*.⁴¹

³⁸ Maguire, *Law and War*, p. 37.

³⁹ John Hay, “Instructions to the American Delegates to the Hague Conferences”, as reprinted in: *World Peace Foundation Pamphlet Series*, Vol. III No. 4. April 1913. p. 5.

⁴⁰ Andrew D. White, *The First Hague Conference*. Boston: The World Peace Foundation, 1912.

⁴¹ White, *The First Hague Conference*, pp. 70-76. In a letter to von Bülow re-printed in the book, White refers to the fact that even the Conservative Churches in America are praying for success and in the very next paragraph warns von Bülow that failure will play into the hands of the French Socialists. By the end of the Conference von Bülow did ‘come around’ and eventually became proud of the accomplishments at The Hague. Koskenniemi argues that it was Professor Philip Zorn’s influence that convinced von Bülow. (Zorn was a member of the German delegation to the conference who, prior to his attendance, denied that international law was real law but instead merely treaties subject to the will of states.) See *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* Cambridge: Cambridge University Press, 2001. p. 8. This would compliment White’s account who claimed to have debated with Zorn and

Therefore, by the beginning of the 20th Century, what the situation came down to was this: although the Americans claimed that their republic differed from European nations in terms of its policies and in its attempts to spread civilization, it very well matched the Europeans in its treatment of non-Western peoples. The Lieber Code, which in turn had greatly influenced subsequent international treaties, was based on European thinking on the laws of war. The different treatment handed out to captured First Nations warriors and Confederate soldiers (even though both had violated the Lieber principles) was not at all inconsistent in American eyes.

Actually, the effect of the Lieber Code went even further than that: it was on several occasions specifically invoked by the Americans to justify their actions. MacArthur invoked it to severely punish civilians thought to be aiding the guerillas and to distinguish between regular organized forces and “war rebels”.⁴² Major Littleton Waller, brought before a military court in Manila in March of 1902 for war crimes had planned to defend himself using the Lieber Code which authorized reprisals and described them as “the sternest feature of war”.⁴³ Major General Smith, who had ordered the attack on Samar, made a similar argument and claimed that his actions were totally justified under the Lieber Code.⁴⁴ Specifically, he invoked Article 24 which states:

The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized people,

“seemed to impress him”. Zorn then returned to Berlin with a member of the American delegation who then helped to change the Chancellor’s mind. According to Koskenniemi, von Bülow would claim that the intital German skepticism had been caused by the inflated expectations of the Conference. Gentle Civilizer of Nations, p. 212.

⁴² Karnow, In Our Image, p. 179.

⁴³ Maguire, Law and War, p. 63. Waller admitted to the killings, claiming that they were justified by General Smith’s orders and the laws of war. Waller was found not guilty and sentenced only to a loss of pay. Maguire argues that Secretary Root wanted to use Waller as a scapegoat but Waller was able to successfully to defend himself by producing Smith’s written orders and witnesses. Waller was thus able to implicate Smith. See the discussion of the rather sensational trial pp. 62-66. The courts-martials of Waller and Smith are also discussed in Fritz, “Before the ‘Howling Wilderness’”.

⁴⁴ Maguire, Law and War, p. 63.

the exception.

The laws of war themselves were therefore invoked to excuse brutal conduct. As one historian explains, the main purpose of MacArthur's invoking of the Lieber Code's in the Philippines:

...was to educate Filipinos on their violations of the laws of war and the punishments that awaited transgressors. As a statement of policy, it provided little guidance and there was much debate and confusion over what punitive measures were sanctioned.⁴⁵

Therefore, the major contribution of MacArthur's proclamation that invoked the Lieber Code was to "provide official sanction for some of the more stringent policies either advocated or already applied in the field."⁴⁶ So while one writer may argue that "it was ironic that the new international humanitarian laws came at a time when America's Indian wars were entering their most brutal phase,"⁴⁷ it is perhaps less so when put in the context of the way America sought to legitimize these policies of dealing with the First Nations and the Filipinos. Tough political justifications and questions of 'dirty hands' could be avoided by invoking a Code more or less seen as neutral and customary by Western powers.

Walter Russell Mead offers one further explanation as to why this was the case in his examination of the 'traditions' of American foreign policy.⁴⁸ He uses four schools of thought named for Thomas Jefferson, Alexander Hamilton, Woodrow Wilson and Andrew Jackson to explain approaches to American foreign policy. Jeffersonianism, Hamiltonianism, Wilsonianism represent emphasis on maintaining a democratic system, the protection of commerce, and the promotion of moral principle respectively. In terms

⁴⁵ Linn, *The US Army and Counterinsurgency*, p. 24.

⁴⁶ Linn, *The US Army and Counterinsurgency*, p. 24.

⁴⁷ Maguire, *Law and War*, p. 42.

⁴⁸ Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World*, New York: Alfred A. Knopf, 2001.

of international law and the rule of war, Jacksonianism differs from these three traditions in its emphasis on populist values and military power. As Mead describes it: “Jacksonianism is less an intellectual or political movement than it is an expression of the social, cultural and religious values of a large portion of the American public.”⁴⁹

Therefore:

Jacksonians are more likely to tax political leaders with a failure to employ vigorous measures than to worry about the niceties of international law. Of all the major currents in American society, Jacksonians have the least regard for international law and international practice. In general Jacksonians prefer the rule of custom to the written law, and that is as true in the international sphere as it is in personal relations at home. Jacksonians believe that there is an honour code in international life... and those who live by the code will be treated under it. But those who violate the code, who commit terrorist acts against innocent civilians in peacetime, for example, forfeit its protection and deserve no more consideration than rats.⁵⁰

Mead argues that while the Jacksonian notion of national honour prohibits America from carrying out some military activities, it also often spurs America on to some of its bloodiest battles.⁵¹ The notion of honour also carries on to the battle field. Jacksonians, according to Mead, recognize two kinds of enemy and two kinds of fighting. Honourable enemies fight in a clean fight and are entitled to be opposed in the same way; dishonourable enemies fight dirty wars and in that case rules do not apply.⁵² This then helps to explain the dualistic tendencies – why Civil War soldiers, seen as honourable fighters, were treated well and the First Nations warriors were often not:

⁴⁹ Mead, *Special Providence*, p. 226.

⁵⁰ Mead, *Special Providence*, p. 246.

⁵¹ Mead, *Special Providence*, p. 246.

⁵² Mead, *Special Providence*, p. 252.

In Jacksonian terms, Indian war tactics comprised a dishonourable, unscrupulous, and cowardly form of combat. Anger at such tactics led Jacksonians to abandon the restraints imposed by their own war codes, and the ugly conflicts along the frontier spiraled into a series of genocidal conflicts in which each side felt the other was violating every standard of humane conduct.⁵³

Therefore, a Jacksonian point of view, (“whose influence in American history has been, and remains, enormous”⁵⁴) does acknowledge a set of international laws governing conflict – but prefers to think about such “laws” as customary rules. These rules apply as long as both sides in the conflict agree to abide by them. However, where these rules have been violated, there is little mercy provided to perpetrators. Since foreign evil-doers have forced America into war, whatever casualties the other side suffers are self-evidently the fault of their own leaders rather than of the United States. Therefore Jacksonian opinion takes a broad view of the permissible targets in war and view targeting civilian morale as legitimate.⁵⁵

Mead’s argument is a persuasive one and helps to explain the dualistic tendency in American Foreign policy towards the laws of war. Interestingly, he points out that all sides believe that there are norms governing conflict, but suggests that the influential Jacksonians are willing to ‘take the gloves off’ should those rules be violated or should the need arise.

However, such influence can only be said to go so far. By 1900, the terrible fighting and harsh policies in the Philippines would provoke outrage among many Americans. East coast papers would occasionally speak out against the mass-execution of First Nations POWs and there was much outrage at the actions of American troops at Samar. The headline of the *New York Journal* on April 8 1902 read “KILL ALL: MAJOR WALLER

⁵³ Mead, *Special Providence*, p. 252. And the same could be said as to why the Germans were seen as honourable and the Japanese were not.

⁵⁴ Mead, *Special Providence*, p. 259.

⁵⁵ Mead, *Special Providence*, p. 255.

ORDERED TO MASSACRE THE FILIPINOS” and the media vilified the perpetrators of the action.⁵⁶ While it is true that outrage over the actions against the First Nations peoples was more muted, the public anger over policies in the Philippines had a significant impact on that war. In fact, after 1902, the war dramatically lost popularity in the United States and became more a source of embarrassment than anything else. The brutality of the conflict (on both sides) greatly tarnished the perception of the just cause the Americans claimed. While they could approve of the civilizing missions abroad, especially when contextualized as combating threats to the Republic, Americans were becoming less inclined to tolerate massacres and collective punishments in order to obtain their goals.

America and the Laws of War 1900-1952

The 18th and 19th Centuries provided the framework for how the US would cope with total war at the beginning of the 20th. As we have seen, the results of the previous 130 years had been somewhat mixed – and the new republic’s ideological foundations had played a complicated role in this. Americans wanted to demonstrate that they were different from other nations, yet relied on the European laws of war (and implemented them – or not – accordingly). The impetus to continue with its civilizing mission also played a role in promoting a dualistic tendency with regards to the implementation of the laws of war. Clearly, the US record was not perfect – but then again, the same could be said for most, if not all nations. Great Britain, Germany, Belgium and France were certainly not known for compassion in warfare. Perhaps the only thing exceptional about America in this regard was that it saw itself as an exception – albeit one that followed the traditional laws of nations.

While the dualistic tendencies would continue into the 20th Century, US policy towards the laws of war, including its own system of military justice, was becoming increasingly

⁵⁶ Maguire, *Law and War*, p. 63. Then again Mead also points out that Jacksonianism held less sway over New York and East Coast populations than the more populist and “folk” oriented populations in other parts of the country. See Mead’s discussion *Special Providence*, p. 226-7.

standardized into a more cohesive doctrine. In World War I and World War II, America sent massive armies, comprised mostly of civilians, to fight in Europe and the South Pacific. In these large-scale military actions, the US was not really exceptional for either adherence or non-adherence to the laws of war, at least in terms of conventional fighting. The biggest controversies can reasonably be said to surround the massive aerial bombardments or fire bombing which took place in the later stages of the war against both Germany and Japan, which caused large numbers of civilian casualties. The decision to drop the nuclear bomb on Hiroshima and Nagasaki in August 1945 will also always remain a point of debate and discussion between those who believe it was an act of necessity which brought the conflict to a quick end and those who see these actions as unjustifiable, war crimes.

Yet, perhaps the greatest effect upon the Americans was the growing belief that the Allies should put not only the leaders of the Axis powers but also those who had committed battlefield war crimes on trial. This impetus only increased as the sheer horror of the Japanese treatment of prisoners of war and the Holocaust became known. Supported by the International Commission for Penal Reconstruction and Development, and the United Nations War Crimes Commission, the Allies announced that German and Japanese soldiers would be prosecuted for obeying improper orders and would not be allowed the defense of superior orders.⁵⁷

Prisoners of War at the End of WWII and Repatriation

There were other challenges for the Americans after the end of the war: the millions of POWs stranded in the countries in which they had been held. For the Allies (particularly the US but also the UK), the issue of repatriation posed two problems – mostly stemming from the fact that both countries were exhausted from the war and wanted to deal with this humanitarian issue as quickly as possible. In the first instance, 400,000 German

⁵⁷ Gary Solis, “Obedience to Orders: History and Abuses at Abu Ghraib Prison”, *Journal of International Criminal Justice*, Vol. 2. No. 4, 2004. pp. 988-998. p. 991. Solis notes, the International Military Tribunals concluded that the true test was not whether or not there was the existence of the manifestly illegal order, but whether moral choice was in fact possible.

POWs held by the Americans were handed over to the French *en masse* in the summer of 1945. The Germans, who were kept in POW camps and then sent to work throughout France in post-war reconstruction projects, fared far worse than they had under the Americans. Thousands died from what one critic of the policy called “the politics of vengeance”: POWs were poorly treated, forced to work long hours and, not infrequently forced to clear minefields.⁵⁸

On the other hand, there were those who did not want to go back. Throughout the Second World War, the Nazis had deported millions of Russian slave labourers to Germany and throughout their occupied territory. Repatriation accords were concluded at Yalta in February 1945 and an agreement in Halle in May 1945 formalized this policy. Therefore, the US and the UK adopted a policy where all claimants to Soviet nationality were to be released to the Soviet government irrespective of their wishes. Once repatriated to the Soviet Union, most of the Russian prisoners vanished in the Gulag system.⁵⁹

The problem lay with the legislation as it was written. Article 65 of the Hague Convention specified that repatriation would take place ‘with the least possible delay’ after the end of hostilities, even in the absence of a formal treaty.⁶⁰ There was no provisions made for prisoners who wanted to claim asylum from their home country – if anything, their journey home had been made quicker by the legislation.⁶¹

⁵⁸ Moorehead, *Dunant’s Dream*, pp. 530-8.

⁵⁹ Eva-Maria Stolberg, “Yalta Conference”, in *Encyclopedia of Prisoners of War and Internment*. ed. Jonathan F. Vance, Santa Barbara: ABC-CLIO, 2000. pp. 345-5. See also Anne Applebaum, *Gulag: A History of the Soviet Camps*, London: Penguin Books Limited, 2004. Rafael Zagovec notes, of the approximately 1.8 million prisoners eventually repatriated to the USSR, 150,000 were sentenced to six years of forced labour for ‘aiding the enemy’. Almost all of the other former POWs experienced hostility enabled by Josef Stalin’s infamous Order 270 which labeled all Red Army soldiers who allowed themselves to be captured alive as ‘traitors to the motherland’. “World War II – Eastern Front” in *Encyclopedia of Prisoners of War and Internment*. ed. Jonathan F. Vance, Santa Barbara: ABC-CLIO, 2000. pp. 329-333.

⁶⁰ Richard D. Wiggers, “Forcible Repatriation” in *Encyclopedia of Prisoners of War and Internment*. Ed. Jonathan F. Vance, Santa Barbara: ABC-CLIO, 2000. pp 100-102.

⁶¹ However, Cathal J. Nolan points out that the Soviets were holding 60,000 US POWs and US policy developed out of a concern to get these prisoners back. This, of course, may not have happened if the US did not force the Russians back to the Soviet Union. See Cathal J. Nolan, “Americans in the Gulag: Detention of US Citizens by Russia and the Onset of the Cold War, 1944-9”, *Journal of Contemporary History*, Vol. 24 No. 4 (October 1990), 523-545.

However, there were other reasons that the Western nations, (especially the US), were willing to trade the reluctant Soviets home: blackmail. In December 1944, after several POW camps had been liberated by the Russians, Foreign Affairs Commissar Vyacheslav Molotov refused the US access to its POWs and went so far as to accuse it of mistreating Soviet prisoners.⁶² There have been several reasons given for this policy. First, the US Ambassador to the Soviet Union, Averell Harriman speculated that the Soviets had implemented this policy to keep Western observers out of Poland until the pro-Soviet Lublin regime was established.⁶³ Second, it has been suggested that in addition to protecting interests in Poland, the Soviets may have been embarrassed over the presence among their POWs liberated in the West of thousands captured in German uniform.⁶⁴

Repeated demands for access to the American POWs were met with continued refusals, assurances that the Americans were being treated well and recurring charges that the Americans were the ones who were really abusing the Soviet prisoners. Given the fact that the Russians were still holding thousands of American POWs, the Americans were understandably nervous about returning the only bargaining chips they had to ensure they got their soldiers back, however, as both sides gradually came around after some diplomatic wrangling, the exchange process was speeded up.

For what it is worth, as Cathal J. Nolan points out, the decision to repatriate the Soviet prisoners was not as clear-cut as it seems to us now in hindsight. Aside from the confounding factors of blackmail listed above, the Soviet Union had been an ally in the war and some of the Soviets caught in German uniforms had actually inflicted casualties on Allied soldiers, while others willingly collaborated with the Nazis.⁶⁵ Still, for those caught up in this process, the result was tragic. In one camp in Austria, 134 Russians committed suicide in June, after which the British authorities forced the remaining 30,000

⁶² Nolan, "Americans in the Gulag", p. 526.

⁶³ This view was backed by the senior American military officer in Russia, Major General John R. Deane Nolan, "Americans in the Gulag", pp. 526-7.

⁶⁴ Nolan cites Russell Buhite, "Soviet/American Relations and the Repatriation of Prisoner of War, 1945", *Historian*, May 1973, 385-386. "Americans in the Gulag", p. 527 and note 15, p. 542.

⁶⁵ Nolan, "Americans in the Gulag", p. 530.

on the train to Moscow.⁶⁶ It was only in mid-1947 that Secretary of State George C. Marshall decided that not even those who had collaborated with Nazi Germany should be repatriated to Soviet bloc countries against their will, declaring that forced repatriation went against the American tradition of granting political asylum.⁶⁷

Geneva Conventions of 1949

Despite these difficulties, at the end of the war, the Americans were willing to help codify and draft a new version of the Geneva Convention in 1949 which would greatly expand and codify the laws of war and extend it to cover civilians in occupied territory. Best notes that, despite the increasing hostility between the US and the Soviet Union, the Americans took a relatively relaxed approach to Soviet participation in the conference.⁶⁸

However, this does not mean the Diplomatic Conference was free of controversy – or hostility between the new superpowers. As Best argues, “From the moment that Soviet participation became known ...an infusion of politics was to be expected.”⁶⁹ The first of these issues was indiscriminate bombings. To the clauses protecting civilians, the Soviet delegation proposed banning “all other means of exterminating the civilian population” causing “extensive destruction of the [civilian] property.”⁷⁰ It was clear that the Soviets were aiming to ban the atomic bomb. This put the Western delegations in the unfortunate position of having to vote down the Soviet proposal and looking as if they were somehow supporting indiscriminate bombing. Although they looked for a better way out of the situation, the Soviet proposal was voted down on 6 July 1949.

Prisoners of war were another hotly contested issue during the course of the Diplomatic Conference. The point in dispute was the text that would eventually form Article 85 of the Third Geneva Convention. The 1929 Convention dealing with prisoners of war

⁶⁶ Nolan, “Americans in the Gulag”, p. 531.

⁶⁷ Nolan, “Americans in the Gulag”, p. 534.

⁶⁸ Best, *War and Law Since 1945*, pp 89-91

⁶⁹ Best, *War and Law Since 1945*, p. 109.

⁷⁰ Best, *War and Law Since 1945*, p. 110-111.

contained no provision concerning the punishment of crimes committed by POWs prior to their capture. Those provisions which did deal with offenses and punishment only referred to the acts committed during captivity.⁷¹ With an increase in the number of special tribunals for War Crimes, the ICRC became increasingly concerned that POWs would be tried based on special *ad hoc* legislation rather than tribunals based on international legal principles. Therefore, it was proposed that POWs should continue to receive all of the benefits of the Convention until their guilt was definitively proven. The suggestion, however, received only limited support – the Anglo-Saxon powers were particularly hostile.

Perhaps it was the chilling of the Cold War and the increased likelihood that Western soldiers would soon be fighting against communist nations, but the Anglo-Saxon nations had changed their mind on the issue by 1949 and now agreed with the ICRC position. In fact, they even went further – that POWs should continue to enjoy those benefits of the Convention even after they had been judged. Article 85 was therefore submitted to read: “Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”

The objection now came from the Soviet Union who argued for the original proposal – that POWs were only protected under the convention until *after* they had been convicted. The Soviet delegation argued that there was no reason why prisoners of war convicted of such crimes should not be treated in the same way as persons serving sentence for a criminal offence in the territory of the detaining power.⁷²

Best points out that it was the Soviets who had consistency on their side. Beyond that, “they could also plausibly claim to represent the general opinion of mankind. That POWs accused of perhaps terrible crimes should enjoy the benefits of the Convention through the period of arrest and trial, was not unreasonable, and the USSR was not proposing anything else; but that such lavish benefits should continue after conviction was

⁷¹ Jean S. Pictet, ed. Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War, Geneva: International Committee of the Red Cross, 1960. p. 413.

⁷² Pictet, Commentary, p. 415.

incredible.”⁷³

The Article was voted on and passed as written above. The Soviet Union, maintaining its position, insisted upon a reservation to the Article:

The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the Detaining Power, in accordance with the principles of the Nuremberg trial, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment.⁷⁴

The other Socialist-bloc countries expressed similar reservations upon their ratification as well.⁷⁵

Aside from the (fairly successful) attempt at putting the West in a no-win situation regarding a prohibition on the use of atomic weapons, the political role of the 1949 Geneva Conventions were rather mild. For the most part, the Conventions and the humanitarian goals behind them were supported within the US government. However, the impact of the Conventions, including the Soviet Bloc’s reservation to Article 85, would play a major role in the fate of POWs throughout the Cold War. This was especially so as international wars became less frequent and the wars of decolonization – conflicts with a very ambiguous status – became the norm rather than the exception.

The Uniform Code of Military Justice

⁷³ Best, *War and Law since 1945*, pp. 137-8.

⁷⁴ Text found in Pictet, *Commentary*, p. 423.

⁷⁵ Other countries who made similar reservations include: Albania, Bulgaria, the Byelorussian Soviet Socialist Republic, the People's Republic of China, Czechoslovakia, the German Democratic Republic, Hungary, the Democratic People's Republic of Korea, Poland, Rumania, the Ukrainian Soviet Socialist Republic and the People's Republic of Vietnam. List found in Pictet, *Commentary*, p. 423.

The Articles of War – the American legislation used to try soldiers for military infractions and war crimes had come under significant pressure for reform by the late 1940s. First, the experiences of millions of civilians of the rather uneven and often harsh system of military justice lead to calls for reform. Nearly one in eight American men and women served in the armed forces during World War II and with over two million courts-martial many of those who had been exposed to this system and were not pleased with what they experienced. As Cooke notes:

The system appeared harsh and arbitrary, with too few protections for the individual and too much power for the commander. To Americans who were drafted or who enlisted to defend their own freedoms and protect those of others around the world, this was unacceptable and complaints and criticisms became widespread.⁷⁶

There had been a similar push for change after World War I and during the 1920s, but such attempts had not succeeded.⁷⁷

However, there were several other several important reasons for reform by this point, including new developments in international law. As Solis notes, the Allied position regarding the negation of the defence of obedience to superior orders to the charge of war crimes at the post-war International Military Tribunals mandated a re-evaluation of US policy of allowing its own soldiers to employ such a strategy as an automatic and complete defense.⁷⁸ Additionally, with the threat of communism spreading, it was becoming clear that the size of the peacetime armed forces would be unprecedented.⁷⁹ A

⁷⁶ Cooke, "Introduction", p. 7.

⁷⁷ For an account of the attempts at reform at the beginning of the 20th Century, see Morgan, "The Background of the Uniform Code of Military Justice". Morgan was the protégé of one of the main voices for reform, General Samuel T. Ansell. Morgan recounts how Ansell's push for reform was rejected by a hostile military establishment.

⁷⁸ Solis, "Obedience to Orders", p. 991. Solis notes that this had actually been the US policy until the 1914 manual on the laws of war was published which "ignored previous military and civilian case law of the previous 110 years." The 1944 version of the Field Manual reversed the 1914 Manual. pp. 990-1.

⁷⁹ Cooke, "Introduction", p. 7.

larger army would not tolerate such an uneven and, arguably, unfair system of justice.

A major push came from the first Secretary of Defense James F. Forrestal who took office in September 1947. The War Department had been abolished, which had the effect of bringing all of the service branches under the newly formed Department of Defense.⁸⁰ Forrestal wanted to have one system of military justice applicable to all of the services.⁸¹ On 1 June 1951 the new Uniform Code of Military Justice (UCMJ) came into force along with a new Manual for Courts-Martial which further outlines and expands upon the military law in the UCMJ. The UCMJ is federal law and sought to make the courts-martial system more fair. However, under Article 18, the UCMJ also incorporates war crimes into military law and meets America's obligations under the 1949 Geneva Conventions.⁸²

Although the full implications of the new UCMJ were still unknown when it was passed into law in June 1950, it had not been anticipated that it would take effect during the height of the Korean War.⁸³

Korea

During the Korean War, America (and its allies in the United Nations Command) confronted an enemy who employed western military tactics and technology but not the laws of war. The result for prisoners of war caught by the North Koreans was disastrous as Cold War politics came to dominate the way they were cared for. Wounds were left untreated and prisoners were given an insufficient diet, especially in the first year of the

⁸⁰ It was at first named the National Military Establishment in 1947, but this was changed in 1949 – apparently due to the unfortunate acronym of “NME”.

⁸¹ Gary Solis, Marines and Military Law in Vietnam: Trial by Fire, Washington DC: History and Museums Division Headquarters, U.S. Marine Corps, 1989. p. 6. It should also be pointed out that the 1948 Elson Act to amend the Articles of war in a way that answered a lot of the criticism of the US system of military justice. However Forrestal saw that a continued system of separated branches of law for the different services was contrary to the unification of the armed services. Also see Cooke, “Introduction”, p. 7.

⁸² Solis, “Obedience to Orders”, p. 994.

⁸³ This, notes Cooke, proved to be a formidable task for the judge advocates of the day. “Introduction”, p. 8.

war. POW camps were left unmarked and several were accidentally attacked by the UN Command forces. This made the implications of Soviet reservations to Article 85 very clear. It was also a foreshadowing of the unfortunate events to come. This would not be the last time that the Americans would face problems with ensuring reciprocal respect for the laws of war in a conflict in the 20th Century, especially as the number of wars of national self-liberation was on the increase, including in Vietnam.

For now, the implication of the Korean war was that the American approach to the laws of war began to emphasize heavily the rights of American soldiers who were captured. Concern over the 21 Americans who chose to stay in North Korea after having spent years there as POWs (most of whom had collaborated with their captors) prompted President Dwight Eisenhower to establish the Military Code of Conduct.⁸⁴ The Code was applicable to all soldiers and geared towards providing them with a standard of behaviour expected of them, especially if they were captured. Many Americans were shocked at the idea that Americans would betray their country while in Communist captivity and allegations that their troops had surrendered too easily did not sit well with the American government or its people. In some ways the text of the Code reads as a way to maintain the honour of the armed forces and or the individual soldier if he is captured. However, the Code of Conduct reflected another American realization/assumption about future conflicts; that soldiers were not likely to be treated according the standards of the Geneva Convention. Principles like “I will evade answering further questions to the utmost of my ability” seem to assume that American POWs would be pressed to answer questions with

⁸⁴ The six articles of the Code of Conduct are: (1) I am an American, fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense. (2) I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist. (3) If I am captured, I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy. (4) If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me, and will back them up in every way. (5) When questioned, should I become a prisoner of war, I am required to give only name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause. (6) I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

tactics that went above and beyond those practices allowed by the laws of war.⁸⁵

Conclusion

Many have written on the tendency of the United States to see itself as an exceptional nation from its very founding. Yet in its approach to the laws of war, the young republic remained very European. This resulted in what Peter Maguire calls a “dualistic tendency” in the American implementation of the laws of war. At the same time the US applied the laws of war to the Confederate Army, (albeit not in a strictly legal sense), it did not do the same for the rebelling First Nations. The US could go to the Hague and play a major role in strengthening the laws of war while at the same time engaging in fairly brutal tactics and torture in the Philippines.

Despite what we would see as the two-facedness of these policies today, it somehow seems wrong to suggest that they were deliberately hypocritical in the full meaning of the word. American policies were based on the European or “civilized” understandings of the time. It seemed perfectly sensible to apply the laws of war to rebel Confederate forces and not the natives who shared neither the same legal or military traditions as the white American settlers did.

In this way, the policies were just that – two-faced – operating on different legal pages, with two separate lists of means, weapons and restraint permitted. Those who stood in the

⁸⁵ However, it is important to remember that the laws of war does allow for detaining powers to ask and question their prisoners, but restricts their ability to bribe and, more importantly for the welfare of POWs, torture is forbidden. As A. P.V. Rogers has argued, "There seems to be a popular misconception... that you cannot interrogate prisoners of war. This is not so. Prisoners of war are often a valuable source of military intelligence and there is nothing in the Geneva Prisoner of War Convention that prohibits questioning them. However, under Article 17, they are not obliged to answer questions (only to give their name, rank and date of birth) and no torture, coercion, threats, insults, or unpleasant disadvantageous treatment may be used to secure information from them. The situation is no different in the case of people classified as illegal combatants. They can be questioned but if they refuse to answer question, basic human rights standards prevent torture, inhuman or degrading treatment." Letter published in the *Independent* published 31 January, 2002. Found in Rogers, A.P.V. *Law on the Battlefield*, second edition. Manchester: Jurispublishing, Manchester University Press, 2004. p. 55-6. Also see Article 17 of the Geneva Convention relative to the treatment of Prisoners of War.

way of manifest destiny, civilization and progress would not be considered a legitimate combatant or an object of sympathy in the eyes of many Americans. The nature of the conflicts could then take upon a brutal character on both sides.

Yet, as we can see by the end of this chapter, there had been significant changes in American armed forces by the time of the Korean War. These changes had been prompted by growth in the military, the development of international tribunals which began to regard violations of the laws of war as punishable crimes on the global stage, and the creation of the 1949 Geneva Conventions. The new Uniform Code of Military Justice, which came into effect during the Korean conflict, embodied many of these changes. Despite the tactics of an opposing side, increased protection was increasingly provided for America's enemies by the rules of engagement that American soldiers lived and died by – especially when compared to the wars that had been fought just 50 years previous.

Yet, as the next 25 years would show, these rules were based on a way of warfare that was rapidly disappearing and being replaced by guerrilla tactics. The latter was a mode of warfare that would prove to be especially frustrating for American troops and very confusing under their rules of engagement and the laws of war. In this way, the “dualistic tendencies” of the American approach had, for the most part, ended, but a difficult period involving violations of and frustrations with the laws of war was just beginning. This is the subject of the next chapter.

Chapter 3: Legal Revolution America and the Laws of War After Vietnam

Introduction

Having signed and ratified the 1949 Geneva Conventions as well as having developed the Uniform Code of Military Justice, the United States looked well placed for its future military engagements in terms of the law of war. In Korea the US had demonstrated that it took the issue seriously – although they certainly had used the law to their advantage where they could. Still, on balance, the US commitment to the law of war looked fairly certain to remain stable for the immediate future.

Of course, what did not remain stable was the nature of conflicts in the Cold War. In many ways, Korea was to be the last ‘classic’ war the United States would fight for nearly 40 years. Replacing this paradigm of state-to-state warfare were third world insurgencies, involving non-traditional, non-Western tactics and guerilla warfare. This emerging pattern of warfare did not fit well with the conception of war implicit in the Geneva Conventions or in the mindset of Americans as to how the law of war could be applied to conflicts.

As is well known, the result was disaster. Writing of his experience interviewing the mother of a Vietnam War veteran who was accused of committing war crimes at My Lai, Seymour M. Hersh wrote:

She told me that when he came home, “He looked like he had just been whipped...” And then she said with a look I wish those who send young men and women off to war could see, “I gave them a good boy and they made him a murderer.”¹

¹ Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib, New York: HarperCollins Publishers, 2005.

Hersh broke the My Lai massacre story on 14 November 1969 in newspapers across America. The story prompted widespread domestic and international condemnation and gave powerful ammunition to the anti-war movement. Combined with the new and powerful media images being broadcast in American homes each night of villagers fleeing napalm attacks or prisoners being executed, the Vietnam War, to many people, became and remains synonymous with American war crimes and brutality.

Yet the Vietnam War did not occur in a legal vacuum. There were lawyers on the ground, rules of engagement were drafted and disseminated and superior orders which demanded respect for the laws of war were issued. The question after the war was then “how did this happen?” and, perhaps more crucially for the US military, how to ensure ‘never again’. The tragedies at My Lai and Son Thang, as well as the experience of military lawyers in Vietnam, would prompt a major re-think in the way the US military regarded the laws of war, and how it implemented them.

By the 1990-1 Gulf War, what could reasonably be described as a military legal revolution had taken place within the Department of Defense. “Activist lawyers” lobbying for reform brought about revised rules, strengthened training and developed the concept of “operational law” as a powerful tool that the US could use in war and peace time. At the close of the First Gulf War the American Bar Association Journal described the conflict as “a lawyer’s war”² and one judge advocate who served as a General H. Norman Schwarzkopf’s legal advisor described it as “the most legalist war [the United States] ever fought.”³

This chapter will follow the path from the confusion, mistakes and crimes of Vietnam to the legal sophistication of First Gulf War. In doing so, it will look at what went wrong in Vietnam and how the disasters there prompted change in the US military’s attitude to, and implementation of, the laws of war.

² Steven Keeva, “Lawyers in the War Room” *American Bar Association Journal*, December 1991. pp. 52-59. p. 52.

³ Keeva, “Lawyers in the War Room”, p. 52.

Vietnam

There can be little doubt that its experience in South-East Asia from the early-1960s until 1973 left a major impression, if not a painful scar, upon America and its military. The conflict influenced a generation of soldiers who, having served their country in this controversial war, sought to ensure that the lessons learned from the experience were not forgotten. This group of soldiers includes the military lawyers who saw significant room for improvement not only in the role of the military lawyer, but in the way the whole defense establishment thought about the laws of war and how the military was trained in them.

In terms of thinking about the conflict's relationship with the laws of war, Vietnam's record is often automatically linked to the massacres at My Lai and Son Thang, images of terrified villagers fleeing attacks by US forces, and the speeches of anti-war organizations such as Veterans Against the War describing alleged US war crimes in Vietnam. Certainly this is one side of the story. But there was also a great deal of concern among lawyers and the defense establishment that the US should adhere to the laws of war to the very best of its ability. Often, this was the result of individual initiatives in a difficult environment. The first section of this chapter will look at America's relationship with the laws of war after Vietnam, but particularly the conflict's role in planting seeds for reform that would come in the mid-1970s through to the mid-1980s.

Challenges - Jurisdiction

One of the first challenges that the US faced was related to the problem of jurisdiction. Although it is a basic tenet of international law that the courts of a country have jurisdiction to try all cases arising out of wrongful acts committed in that country, the US wished to retain the greatest possible measure of jurisdiction over its own forces in Vietnam.⁴ While normally, in peace time, matters of jurisdiction are sorted through a

⁴ Gary Solis, *Marines and Military Law in Vietnam: Trial by Fire*, Washington DC: History and Museums Division Headquarters, U.S. Marine Corps, 1989. p. 14. As George Prugh notes, "The United States has

Status of Forces Agreement (SOFA), in the case of Vietnam, the Agreement for Mutual Defense Assistance in Indochina (commonly referred to as the Pentalateral Agreement) solved the issue for the US forces. The Agreement, signed on 23 December 1950 by the United States, France, Cambodia, Laos and Vietnam, governed the legal status, rights and obligations of American personnel in Vietnam. All American forces entering Indochina were to be considered members of the US diplomatic mission. As military lawyer and historian Gary Solis notes, “Few Marine riflemen in Vietnam knew that in terms of legal jurisdiction they were considered to be diplomatic mission clerks.”⁵ The agreement was brief (less than six pages long) and its terms were broad and generous. This provided a minimal but adequate framework and the generality of its provision allowed for a flexibility that would leave many legal questions to be solved on a case-by-cases basis but also happened to meet the many legal complications that were to arise.⁶ As George Prugh, who served as the Staff Judge Advocate from 1964 through 1966, notes: “It is unlikely that the diplomats who signed the Pentalateral Agreement in 1950 ever imagined that its simple provisions would govern the legal status and activities of almost 600,000 Americans in Vietnam.”⁷ However, he adds that the South Vietnamese had good reasons for maintaining this broad document – all pragmatic. Distracted by protracted military crises and political turbulence, the government did not desire to enter into a long and detailed negotiation with the US on the matter.⁸ In this way Vietnam had neither criminal nor civil jurisdiction over American personnel – prosecution for crimes, including war crimes, were exercised exclusively under the Uniform Code of Military Justice (UCMJ).

There was one complicating issue, however – how was misconduct by US civilians connected with the war effort, who by the late 1960s numbered over 6000, to be dealt with? Such misconduct fell into three categories: disorderly conduct, abuse of military

never relinquished jurisdiction over its armed forces during combat; to do so in Vietnam would have been as unprecedented as it would have been impractical. During World War II, for example, the United States kept jurisdiction over U.S. troops in the United Kingdom.” *Law at War: Vietnam 1964-1973*, Washington DC: Department of the Army, 1975. p. 89.

⁵ Solis, *Marines and Military Law in Vietnam*, p. 14.

⁶ Solis, *Marines and Military Law in Vietnam*, p. 14.

⁷ Prugh, *Law at War*, p. 87.

⁸ Prugh, *Law at War*, pp. 89-90.

privileges and black market activities and currency manipulation.⁹ In April 1966 the Military Assistance Command Vietnam (MACV) staff judge advocate prepared a study on the problem. It was determined that the ambassador could issue police regulations for all US citizens in Vietnam, or punishments could be meted out through administrative measures (such as the withdrawal of military privileges and the loss of employment.)¹⁰ Yet the seriousness of crimes being committed by US civilians soon made criminal prosecutions more appropriate – but the question then became, by whom? The problem was never adequately solved. While employment could be terminated, prosecution either had to be carried out by Vietnamese civilian authorities (who were either unable or unwilling to prosecute Americans) or the US military under the UCMJ – whose authority over civilians in Vietnam was tenuous at best.¹¹ While Staff Judge Advocate Prugh did recommend that the most effective remedy would be a trial in a Vietnamese court, the MACV eventually decided upon a policy to try civilians, when absolutely necessary, through courts-martial.¹²

This policy proved to be ineffective – a total of four US civilians were tried by military courts-martial during the Vietnam war. When one of those convicted under the UCMJ appealed his conviction to the US Court of Military Appeals, the highest court in the military system, the court ruled on 30 April 1970 that the military had no jurisdiction over civilians in Vietnam. In the Court's opinion, Article 2(10) of the UCMJ was applicable only in time of a declared war. Thus, the question of whether, as a matter of

⁹ Frederic L. Borch, Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti, Washington DC: Office of the Judge Advocate General and Center of Military History United States Army, 2001. pp. 22-3. Also see Prugh, Law at War, pp. 109-110.

¹⁰ Borch, Judge Advocates in Combat, p. 23.

¹¹ Borch, Judge Advocates in Combat, p. 23. As Borch notes, Article 2 of the UCMJ permits the courts-martial of civilians "accompanying an armed force in the field." However, that provision applied only in "time of war," and it was unclear as to whether the fighting in Vietnam even constituted a war.

¹² Solis, Marines and Military Law, pp. 99-100. Solis cites a letter from then Major General George S. Prugh to Brigadier General Edwin H. Simmons dated 29 December 1988. Available in the comment folder of the Marines and Military Law in Vietnam file at the Marine Corps Historical Division. Solis also notes that there were many in the US embassy who felt that it was "politically unacceptable" to have Americans prosecuted by the Vietnamese. Solis, Marines and Military Law in Vietnam, p. 99.

policy, the military should try civilians in Vietnam was rendered moot – the services no longer had jurisdiction over civilians in Vietnam and no further cases were tried.¹³

As mentioned above, most crimes committed by civilians were related to black market activities rather than violation of the laws of war. Still, the discussion here is important as it marks one of the first instances where the military found itself having to deal with the problem of jurisdiction over civilian contractors. The failure to solve the problem in Vietnam or afterwards would have repercussions for the military as it would face the same problem in many of its future conflicts, especially as the number of civilian contractors and private military firms would exponentially increase by the year 2000 – and alleged wrong doing would include violation of the laws of war.¹⁴

Challenges – Classifying Vietnam under international law

The Gulf of Tonkin Resolution in 1964 by the US Congress resulted in an increased US presence in Vietnam by 1965. While the conflict had assumed an international character by this point, in terms of the issue of jurisdiction under the laws of war, classifying the conflict as a war was problematic. Quite simply, under international law and the laws of war, Vietnam was a conflict with an identity crisis. This became readily apparent when the conflict was broken down into separate components. While the conflict between North and South Vietnam and the conflict between North Vietnam and the US were clearly interstate conflicts as envisioned by the 1949 Geneva Conventions, the conflicts between South Vietnam and the National Liberation Front (NLF) and the US and the NLF were not. The former could be considered a civil war of international character, with the second being an international – but not interstate – conflict. The issue was complicated as the South did not necessarily want to recognize that it was engaged in an international or interstate war with the North.

¹³ Prugh, *Law at War*, pp. 109-10

¹⁴ The case of problems over jurisdiction regarding private military firms is discussed in Chapter 5.

The issue may seem to be one of semantics – perhaps not least to the American soldier who faced the reality of a guerilla-warfare struggle for survival in the jungle against the Vietcong – but it was important. Prugh accurately summed up the problem:

The battlefield was nowhere and everywhere, with no identifiable front lines, and no safe rear areas. Fighting occurred over the length and breadth of South Vietnam, on the seas, into Laos and Cambodia, and in the air over North Vietnam. It involved combatants and civilians from a dozen different nations. Politically, militarily, and in terms of international law, the Vietnam conflict posed problems of deep complexity. The inherent difficulty of attempting to apply traditional principles of international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.¹⁵

In short, a determination of the type of conflict that was being waged was crucial for determining how the law of war applied, especially as to what was to be done with prisoners caught in military operations and how US forces should conduct operations against combatants in the field.

Yet the very nature of the conflict rendered carrying out operations in accordance with the laws of war exceptionally difficult. The problem related to the fact that the laws of war had traditionally presumed two kinds of warfare: interstate warfare and civil war. Yet, it was clear that since the end of the Second World War internationalized civil wars were rapidly becoming the principle form of conflict. The US now found itself engaged in one such conflict where it was confronted by a guerilla force that did not adhere to the laws of war.¹⁶

¹⁵ Prugh, *Law at War*, p. 62.

¹⁶ It was the position of the International Committee of the Red Cross (ICRC) that the NLF was bound to the Geneva Conventions (or at least the customary law listed under Common Article 3) as it was comprised of nationals of a state whose governments have ratified the Conventions. However, the NLF argued that it was not bound by the Conventions because it had not taken part in their negotiations. See Geoffrey Best, *Law and War Since 1945*, Oxford: Oxford University Press, 1994. p. 364. A legal justification of this argument was put forward in an anonymous note in the *Harvard Law Review*, "The Geneva Convention

In order to ensure that operations were conducted in a controlled manner, a determination of the status of the conflict was going to have to be made by the MACV. Eventually the official position adopted by the US, stated by 1965, was that the hostilities constituted an armed international conflict, that North Vietnam was a belligerent, that the Viet Cong were agents of the government of North Vietnam, and that the Geneva Conventions applied in full.¹⁷ Therefore, on 6 March 1966 Directive 381-11 was enacted which provided POW treatment to any Viet Cong taken in combat.¹⁸ To deal with situations where uncertainty still remained, a separate directive, MACV Directive 20-5 (1968), established procedures for convening tribunals consistent with Article 5 of the Third Geneva Convention in order to determine the status of any captured combatant.¹⁹ As South Vietnam was severely lacking in the proper facilities to deal with an influx of POWs, a POW program was established which called for the construction of five POW camps, administration and management of the camps, labour and educational programs, and managing visits from the ICRC.

There were several reasons why this decision was made. The first of these was that Prugh and his staff were aware that such a move might be good for public relations in at least three ways. First, Prugh writes that it was part of the campaign to win over the “hearts and minds” of those who had been taken prisoner.²⁰ Second, such a move might help to ease domestic and international criticism of the conduct of the war.²¹ Finally, there was the hope that if the US provided good treatment for POWs, North Vietnam and the NLF would reciprocate towards the prisoners that they had taken. The Viet Cong were very harsh in their treatment of their captives. South Vietnamese soldiers were executed as a

and the Treatment of Prisoners of War in Vietnam”, in Richard Falk (ed), The Vietnam War and International Law, Vol. 2. Princeton: Princeton University Press, 1969. pp. 398-415.

¹⁷ Prugh, Law at War, p. 63.

¹⁸ William Hays Parks, “The Law of War Advisor”, JAG Journal, Vol. 31 Summer 1980, pp. 1-52. p. 13-17.

¹⁹ Parks, “The Law of War Advisor”, p. 14. According to Parks, tribunals consisted of three officers who, insofar as practical, were familiar with the Geneva Conventions. At least one member of the tribunal was to be a judge advocated.

²⁰ Prugh, Law at War, p. 62.

²¹ Borch, Judge Advocates in Combat, p. 11.

matter of routine and although US personnel were initially spared, several were killed in retribution for the execution of Viet Cong agents in South Vietnam.

In the absence of a statement whereby the Viet Cong acknowledged that they were bound by international law and/or the Geneva Conventions, the US sought to ensure better treatment for its captured personnel. After the reciprocal killings had taken place against US captives, it was concluded by Prugh and his staff that the Viet Cong might also reciprocate with better treatment for American POWs if they could convince the South Vietnamese to provide better treatment for Viet Cong POWs. The South Vietnamese often killed guerillas outright as they were seen as “Communist rebel combat captives” who deserved summary treatment as illegitimate insurgents.²² It had been the position of the South Vietnamese that the Viet Cong were not POWs as South Vietnam was engaged in a civil conflict and not an international armed conflict.²³

An effort was made to convince Colonel Nguyen Monh Bich, the Director of Military Justice, that it was in South Vietnam’s best interest to improve conditions for enemy POWs and the US as ultimately successful in its efforts to persuade the South Vietnamese (at least officially).²⁴ Sadly, however, the North Vietnamese were not moved to improve treatment for the “war criminals” that they had captured. Prisoners taken by the NLF or the North Vietnamese, for the remainder of the war, would exist on starvation diets of rice and water, and suffer beatings and torture in filthy prisons.²⁵

Implementing the Law of War

In accounts of the military lawyers who went to Vietnam – often written by the lawyers themselves – it is clear that Vietnam presented huge challenges to their “traditional” role.

²² Borch, *Judge Advocates in Combat*, p. 11.

²³ Borch, *Judge Advocates in Combat*, p. 11. Borch and Prugh note that this resulted in Viet Cong captives often being placed in the same prisons as common criminals and political prisoners. Prugh, *Law at War*, p. 64.

²⁴ Borch, *Judge Advocates in Combat*, p. 12.

²⁵ There are several good accounts of the treatment received by Americans held in Vietnam. One of the best is written by perhaps the most famous of the American POWs, US Senator John McCain, *Faith of My Fathers*, New York: Random House, 1999.

Many accounts describe the first lawyers as arriving with little more than a Manual for Courts-Martial, a JAG Manual and a yellow legal pad.²⁶ As lawyers began to arrive in the early 1960s, their mission was unclear and overseas communication was difficult, creating a situation where judge advocates were pretty much on their own.²⁷

Traditional duties of judge advocates basically involved providing legal services to the command and ordinary soldiers. This included assisting with wills and power of attorney, tax assistance, advice on domestic relations, civil suits, and the filing of claims for damaged property. Yet, as the war escalated, military lawyers saw room for expansion in terms of the potential for contribution to the overall mission. In surveying his surroundings, Colonel Prugh identified three major areas that went beyond the traditional judge advocate role. The first, (as seen from above) concerned the status and treatment of captured enemy personnel. The second was to develop an official policy on the reporting and investigation of war crimes. Originally, Prugh's Directive 20-4 *Inspection and Investigations of War Crimes*, only dealt with the investigation of war crimes committed against US forces, but by mid-1965, MACV judge advocates were advising, assisting and reviewing all war crimes investigations in Vietnam, including those committed by US forces. (A third area, of less concern for our purposes here, involved the control of South Vietnamese resources and material and preventing them from getting into enemy hands.²⁸) In order to encourage adherence to the laws of war, military lawyers also promoted programs to help increase respect for the rule of law in South Vietnam and to help bring along improvements to its system of military justice.²⁹

By 1966, in order to deal with the new challenges emerging out of the escalation of the war, the MACV transferred some responsibilities for the judge advocates (such as claims adjudication) elsewhere and the legal office had a "slimmed-down" organizational structure which involved a Civil Law and Military Affairs Division, a Criminal and

²⁶ For example, see Solis, Marines and Military Law in Vietnam, p. 2.

²⁷ Borch, Judge Advocates in Combat, pp. 5-6.

²⁸ Borch, Judge Advocates in Combat, pp. 10-13.

²⁹ See Prugh, Law at War – especially chapters 2 and 3 for detail on the advice given to South Vietnam and attempts to improve respect for the rule of law, pp. 15-39.

International Law Division and an Advisory Division.³⁰ In terms of war crimes, criminal and disciplinary matters, the Criminal and International Law Division gave out advice on the Geneva Conventions, handled investigations and developed policies in these areas.

Soldiers first received their training in the laws of war and the Geneva Convention during basic training.³¹ Ideally, further training was incorporated with other subjects and principles during field training and commanders were instructed to continually incorporate the Geneva Conventions into their training programs.³² Further actions taken to promote teaching on the law of war included the development of instructional films and, in October 1965, the issuing of 3x5 yellow cards to both American and Vietnamese forces outlining the basic requirements of the Geneva Convention on the treatment of prisoners of war. The card, titled "The Enemy in Your Hands" included Vietnamese translations and reminded military personnel that they were to adhere to the Geneva Conventions and not to humiliate or degrade their prisoner or refuse him/her medical treatment if needed.³³ The basic principles of this training were repeated in a MACV bulletin issued in October 1966 which emphasized that the Geneva Conventions applied to the conflict despite the absence of a formal declaration of war. Additionally, it was emphasized that the United States was applying not only the letter of the law, but also the spirit of the Geneva Conventions, which were designed to protect the individual who could no longer protect himself.³⁴

War Crimes

Thus, there was a lot of effort put towards implementing and enforcing the laws of war in Vietnam by the MACV and its judge advocates. Yet, as mentioned in the introduction of this section, Vietnam has often been linked with war crimes in the popular media and the popular imagination. Most likely this has something to do with the politics of the war and

³⁰ Borch, *Judge Advocates in Combat*, p. 16.

³¹ Prugh notes "The soldier's first introduction to the Geneva Conventions was during basic training, where he received two hours of formal instruction, followed by a test, the results of which were noted on his record." *Law at War*, p. 74.

³² Prugh, *Law at War*, p. 75.

³³ Card found in Appendix H of Prugh, *Law at War*.

³⁴ Prugh, *Law at War*, pp. 75-76.

the campaigns of the anti-war movement. Certainly there had been war crimes committed in previous wars – but never before had American citizens been so aware of what was actually going on overseas. The rapid development of media communications enabled television networks to air unedited footage of the US military campaigns into American living rooms. War crimes could easily be edited out of newsreel footage in the Second World War, but television had brought the gory reality of war home to a shocked viewing public.

However, it is clearly the case that awful crimes were committed by US forces in a deliberate matter despite the efforts put forward by MACV. Military leaders often voiced their concern for the treatment of POWs as reports of abuse meted out by US soldiers came in. In September 1965, the Commanding General, Fleet Marine Force, Pacific, Lieutenant General Victor H. Krulak, contacted Major General Walt, saying:

I am anxious that all of our people are made fully aware of their obligations, under the Geneva Convention, as to the treatment of Prisoners. This point acquires particular importance now that the flow of replacements will bring you a large group of new and uninitiated people each month.³⁵

He made a similar point only two months later to Walt: “Ensure that every officer in the chain of command knows the rules, the reasons for the rules and the penalties for their violation, and then accept no compromise at all.”³⁶

But the problem was not going away. Prugh states that between 1965 and 1975 there were 241 cases in which Americans were alleged to have committed war crimes, of which 160 were found to be unsubstantiated. 36 war crimes incidents resulted in trials by courts-martial on charges including premeditated murder, rape, assault with intent to commit murder or rape, involuntary manslaughter, negligent homicide, and the mutilation

³⁵ Message cited in Solis, Marines and Military Law in Vietnam, p. 34.

³⁶ Message cited in Solis, Marines and Military Law in Vietnam, p. 34.

of enemy dead.³⁷ 16 trials involving 30 men resulted in not guilty verdicts or were dismissed after arraignment, while twenty cases involving thirty-one soldiers resulted in conviction.³⁸ Yet these numbers do not tell the whole story. The infamous case of My Lai, not included in Prugh's accounting, illustrates this point.³⁹ 14 officers were charged with covering up information related to the massacre, but most charges were eventually dropped. 26 men were charged with taking part in the massacre, but only Lieutenant William Calley was convicted.⁴⁰ Additionally, there were at least several cases on the record of the mistreatment and torture of prisoners to extract information. In some cases American personnel were present at, or participated in, the abuse of prisoners by South Vietnamese personnel, and in others they were directly responsible for acts of torture themselves.⁴¹

Given the fact that American soldiers had been given training, and that there seemed to be a genuine concern for implementing the laws of war at senior levels, why were these war crimes taking place? At some level it probably came down to the very nature of the conflict that was being fought. As Parks notes, "For the first time in a half-century, U.S. military forces in Vietnam were confronted with guerrillas who failed to comply with the traditional requirements for classification as a prisoner of war."⁴² The very nature of the insurgency and fighting in the jungles in Vietnam against combatants who were farmers by day and guerillas by night was an exceptionally frustrating and dangerous experience

³⁷ Prugh, *Law at War*, p. 74

³⁸ Borch, *Judge Advocates in Combat*, p. 22.

³⁹ There have been several books on the massacre at My Lai already published and so the argument will not go into the details of the event. For an account of the incident by the reporter who broke the story, see Seymour M. Hersh, *Cover-Up: The Army's Secret Investigation of the Massacre at My Lai 4*, New York: Random House, 1972. See also Michael Bilton and Kevin Sim, *Four Hours in My Lai: a war crime and its aftermath*, London: Viking, 1992.

⁴⁰ Famously, despite receiving a life sentence for the massacre, Calley was released from jail by Nixon and only served 3½ years of house arrest. But it must be said that military justice seems to have been exceptionally difficult in Vietnam. Aside from a lack of resources, the situation was one of constant turnover of military personnel. Witnesses often had been sent back to the US before they were called to testify. Additionally, in cases involving Vietnamese there were many difficulties with locating witnesses, and arranging translation. Moreover, the fact that the US military justice system was a very foreign and intimidating prospect for Vietnamese villagers. For this reason trials could indeed be a trying endeavour for prosecutors. See Prugh, *Law at War*, pp. 99-102 for a discussion of these difficulties as well as Solis, *Marines and Military Law in Vietnam*, pp. 48-51.

⁴¹ Guenter Lewy, *America in Vietnam*, New York: Oxford University Press, 1978. pp. 328-9.

⁴² Parks, "The Law of War Advisor", pp. 13-14.

for soldiers on the front lines. Confronted with booby traps and ambushes rather than traditional forces was a confusing experience. As Gunther Lewy argues:

In trying to understand why [warcrimes] took place, one must again remember the overall Vietnam environment – the frustrations from fighting an often unseen enemy, the resentments created by casualties from booby traps frequently set by villagers, the decline in discipline during the years of disengagement. None of these factors justify the atrocities, but they help provide explanations for them.⁴³

Yet there were clearly more factors than difficult circumstances at work here. The demoralization and breakdown in military discipline that occurred in the US military worldwide, but especially in Vietnam was a key factor. Theft, insubordination, black market activities and drugs were rampant in the US forces in Vietnam (according to Prugh during 1970 there were 11,058 arrests of which 1,146 involved hard narcotics such as heroin.)⁴⁴ “Fragging” – the murder of officers by their own men – became a serious problem reflecting this sense of malaise as well as serious racial tension between black and white troops. In this environment, enforcing basic military discipline was a major challenge, let alone enforcing the laws of war.

One of the factors aggravating this problem was “Project 100,000” implemented by Secretary of Defense, Robert McNamara. The “Project” required the armed services to accept men that had previously been rejected – mostly because they had failed to meet intelligence standards. All of the services were forced to lower drastically their standards to accept an additional 100,000 men into their ranks. Solis argues that the influx of lower standard recruits had an immediate negative effect on discipline – and remained a significant problem for commanders and military lawyers until the enlisted “Project

⁴³ Lewy, *America in Vietnam*, p. 234.

⁴⁴ Prugh, *Law at War*, p. 107.

100,000” recruits were phased out of the armed services in the mid-1970s.⁴⁵ As Parks notes, the average marine or soldier involved in a serious incident or charge had less than 10 years of formal education, was socially disadvantaged and of below average intelligence.⁴⁶ A lower quality of recruit also had an effect on leadership. Lewy argues that weak leadership was the “the most important single element, present in almost all incidents”.⁴⁷ Ineffective leadership, he argues, lead to weak discipline. Additionally, it also meant “inadequate planning of operations and loosely issued orders.”⁴⁸ The Rules of Engagement (ROE) handed out to forces in the field were not consistently observed or implemented.

Peers Report

Many of these problems were revealed in the aftermath of My Lai. As the tragedy became public, the Chief of Staff of the Army began formal investigation as to how the incident occurred, and its findings were published in the “Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident” (otherwise known as the “Peers Report” after the general ordered to investigate the incident, General William R. Peers). As well as providing a very critical account of what occurred, the Report provided a list of findings and recommendations to be implemented.

Crucially, the Peers Report looked at the issue of training. The Report made it clear that part of the problem stemmed from the fact that the soldiers in the brigade taking part in the My Lai incident were inadequately trained in “their responsibilities regarding obedience to orders received from their superiors which they considered palpably illegal”, “their responsibilities concerning the procedures for the reporting of war crimes”, and

⁴⁵ On “Project 100,000” and its effects, see Solis, Marines and Military Law, - especially pp. 73-4. Also Kelly M. Greenhill, “Don't Dumb Down the Army” New York Times, February 17, 2006, p. A23; Lewy discusses the matter in his book, America in Vietnam, p. 331.

⁴⁶ W. Hays Parks, “Crimes in Hostilities”, Marine Corps Gazette LX, no. 9 (September 1976), pp. 38-9. p. 38.

⁴⁷ Lewy, America in Vietnam, p. 330.

⁴⁸ Lewy, America in Vietnam, p. 330.

“the provisions of the Geneva Conventions, the handling and treatment of prisoners of war, and the treatment and safeguarding of noncombatants”.⁴⁹

Certainly this a grim verdict on the military’s efforts to promote the law of war in Vietnam. Yet it is clear that the criticism reflected some underlying problems that were going to have to be taken seriously if the military wanted to prevent another My Lai. It was acknowledged by high-level MACV officials that laws of war instruction provided by the judge advocates had tended to be “abstract and academic, rather than concrete and practical.”⁵⁰ Beyond this, despite efforts to emphasize duties towards enemy POWs, training in the law of war had tended to placed more emphasis on the rights of an American soldier when captured than on his or her obligations towards others, or on compliance with the law of war.⁵¹ As Parks notes, the nature of the counterinsurgency operations in Vietnam required increased training on the protection of civilians – but the attempts to provide such training was not always effective or consistent:

The effort was uneven and often personally driven. If a commander believed in the law of war, and in the importance of a disciplined military force, law of war training was emphasized, as was the investigation and prosecution of incidents when they occurred...Without positive command enforcement, and adequate realistic training, a law of war program is not likely to succeed. Where law of war training occurred in Vietnam, it occasionally left much to be desired.⁵²

Where commanders believed in the laws of war, it would usually be enforced and followed. Where leadership was weak, or belief and the desire to enforce the law was lacking, it was not. Troops would not necessarily follow the law on their own, without

⁴⁹ Department of the Army, “Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident”, Washington: Department of the Army, 1970. (Herein referred to as the “Peers Report”.) See “Findings and Recommendations”

⁵⁰ See Hersh, *Cover-Up* p. 42. Hersh cites correspondence between General Bruce Palmer and General Harold K. Johnson, Army Chief of Staff in May 1968.

⁵¹ W. Hays Parks, “The United States Military and the Law of War: Inculcating an Ethos”, *Social Research*, Vol. 69. No 4 (Winter 2002) pp. 981-1015. p. 984.

⁵² Parks, “The United States Military”, p. 984.

guidance or leadership. Rather than a comprehensive or a systematic approach, the implementation of the laws therefore depended very much on the personalities on the ground. Poor leadership, weak discipline and inadequate training in a hostile and frustrating environment clearly created a recipe for disaster.

Still, Prugh argues in the introduction to his book on military law in Vietnam, that the legacy of My Lai “beclouds the record of the many well-led-and legally conducted-military operations.”⁵³ This is not a surprising claim coming from someone who dedicated most of his career to improving the law of war, and who personally worked very hard in Vietnam to improve legal services there. While Prugh’s claim has its basis in fact, it was also clear that there was a need for change in the way the US taught and implemented the law of war. In Vietnam there had been many mistakes made in terms of training and implementing the law. Changes were to come in the post-Vietnam period.

America and the Laws of War After Vietnam

The Vietnam years demonstrated that there was an immediate need for change in the way that the US taught and implemented the laws of war in its armed forces. Guenter Lewy writes that although the ROE were republished every six months to insure maximum visibility to all US personnel, the distribution of the rules to the lower levels was often inadequate.⁵⁴ Only the Air Force made a systematic effort to test the actual knowledge of the ROE by its personnel. In other services familiarity with the ROE was inconsistent or lacking entirely.⁵⁵ Many officers had therefore relied on ‘common sense’ rather than training.

The shock of My Lai and the apparent sense of crisis regarding discipline in the armed forces prompted some immediate changes. Effort was put into improving the training of military personnel in the field. The improved training revealed flagrant disregard of the ROE in some units, thus indicating what kinds of corrective action could and should have

⁵³ Prugh, *Law at War*, p. v.

⁵⁴ Lewy, *America in Vietnam*, p. 234.

⁵⁵ Lewy, *America*, p. 234.

been taken years earlier.”⁵⁶ The military was trying to make up for years of lost time. As Lewy notes:

An inspection of US Army Vietnam in May-June 1969 noted that about 50 percent of all personnel had not received their required annual training in the Geneva and Hague Conventions. At that time, the pressure for body count and the free use of heavy weapons in populated areas probably made this kind of instruction rather academic and irrelevant.⁵⁷

By May 1970, the amount of time required for training in the laws of war was increased. In the revamped training there was greater emphasis placed on dealing with illegal orders and the responsibility to disobey them. In terms of leadership, there was also a new section on command responsibility.

However, as Lewy argues:

All these reforms probably came too late to have much of an impact on the final years of the American combat in Vietnam. The failure to implement and enforce proper training in the humanitarian conventions of the law of war until a major incident like My Lai revealed the inadequate training prevailing until then must be considered the responsibility of MACV and of the military and civilian chiefs of the military services.⁵⁸

⁵⁶ Lewy, *America*, p. 268.

⁵⁷ Lewy, *America*, p. 366. “Body count” refers to a measure of ‘success’ of US forces in Vietnam. As confusion over the goals of the war grew, body counts – the number of individuals (presumably enemy forces) killed in an encounter – was presented to the public to demonstrate progress in the conflict. Unfortunately, or perhaps, predictably, anyone killed in a skirmish, whether it be a member of the Viet Cong, NLF or a civilian was reported as part of this body count. See Scott Sigmund Gartner and Marissa Edson Myers, “Body Counts and ‘Success’ in the Vietnam and Korean Wars”, *Journal of Interdisciplinary History*, Vol. 25, No. 3, Winter 1995. pp. 377-395. Interestingly, Gartner and Myers argue that ‘body counts’ were also used in Korea, although the term is normally associated with the Vietnam War.

⁵⁸ Lewy, *America*, p. 369.

While the US military had taken efforts to increase training time and to revise the rules to make them clearer and stronger, the underlying causes of disaster in Vietnam outlined above would require more measures than this to prevent another My Lai.

In certain ways, some of the problems in Vietnam solved themselves – or were solved institutionally – outside of the system of military justice and regardless of concern for the laws of war. With the end of the “draft” in 1973 (as well as “Project 100,000”), those who did not wish to be enlisted in military service, or for that matter, those who would not have regularly qualified finished their time in the military and were discharged. Teaching the laws of war to an all-volunteer force that could meet certain standards of intelligence would, in many ways, be a much simpler task for US military lawyers than that they had encountered in Vietnam.

In terms of improving implementation of the laws of war, one of the first steps taken in this direction was the 1974 Department of Defense (DoD) Directive 5100.77. This was the DoD’s first overall law of war directive which set out the specific duties and responsibilities for law of war training for military personnel and the reporting of suspected violations of the law of war committed by US personnel.⁵⁹ As Parks describes it, the Directive contained four key points:

It assigned responsibilities within the Department of Defense for law of war implementation. It assigned primary responsibility for training and compliance to each unit commander. It required reporting of war crimes for timely and proper investigation and appropriate disposition. Finally it established a training requirement, mandating training for each member of the military ‘commensurate with his duties and responsibilities.’⁶⁰

The Directive was implemented in the Army in 1975, the Navy in 1976 and the Air force in 1976 with the expectation that each service would meet the standard established by the

⁵⁹ W. Hays Parks, “The Gulf War: A Practitioner’s View”, *Dickinson Journal of International Law*, Vol. 10 No. 3, 1991-2. pp. 393-423, pp. 396-7.

⁶⁰ Parks, “The United States Military”, pp. 985-6. See also Parks, “The Gulf War”, p. 8 and n. 29.

DoD. Military lawyers were also assigned the task of providing specific law of war training programs for the services, as well as providing reference and training materials.⁶¹

*“Activist” Lawyers and “Operational Law”: 1975-1989*⁶²

In the face of incontrovertible evidence that the US military had serious problems regarding the laws of war, several immediate steps were taken to improve compliance and implementation by the Department of Defense. Yet, bringing about change was not that simple – and by the late 1970s, still did not go very far in changing the culture of military operations – at least in a legal sense. As Borch argues, successful implementation of the Law of War Program would require that military lawyers would be able to communicate directly with commanders and their staff principals throughout the operational planning process, identifying issues of both a legal and a nonlegal nature.”⁶³

⁶¹ Parks, “The Gulf War”, pp. 8-9.

⁶² The sources of this section are heavily dependent on books and articles written by individuals in or formally in the military. It would seem that there has not been much research done on the development of operational law from a non-military perspective. One exception might be the work of critical legal scholars who claim that international legal institutions are molded to serve the interests of dominant states such as Thomas W. Smith, “The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence” *International Studies Quarterly*, Vol. 46, 2002. pp. 355-374. See also Chris af Jochnick and Roger Normand, “The Legitimation of Violence: A Critical History of the Laws of War”, *Harvard International Law Journal*, Vol. 35 No. 1, 1994. pp. 49-95; and Roger Normand and Chris af Jochnick “The Legitimation of Violence: A Critical Analysis of the Gulf War.” *Harvard International Law Journal*, Vo. 35, No. 2, 1994. pp. 387-416. Smith argues that operational law, or the “new law of war” serves to merely legitimize violence rather than restrain it. “The new law of war burnishes hi-tech campaigns and boots public relations, even as it undercuts customary limits on the use of force and erodes distinctions between soldiers and civilians.” p. 356. Naturally, these arguments are very controversial and not typically accepted among law of war scholars who tend to work on the assumption that the law operates on the basis of protecting lives rather than serving state interests. af Jochnick and Normand do present a compelling case for arguing that the law of war has typically been the servant of state interests. However, it only seems to make sense that states would only sign on to those international agreements that were in some way compatible with their long term interests, given that states rarely act out of purely altruistic motives. In this sense, the argument presented by af Jochnick and Normand may be original – but ultimately of questionable use in terms of understanding the politics of the law of war. While the critical argument may make more sense when applied to targeting issues, its line of reasoning does not seem to adequately explain US attempts to implement the law of war in Korea or Vietnam in terms of policies towards prisoners of war. Therefore the critique of the critical legal scholars will not be given much attention in this work – especially as the focus of this work is not on the legitimation of violence.

⁶³ Borch, *Judge Advocates in Combat*, p. 51.

While the changes that had been made went beyond the purely cosmetic, there was still a lot more that could be done at the command level to ensure that the mistakes of Vietnam would not repeat themselves. Again, as Borch notes:

Institutionally, the [JAG] Corps failed to view its years in Vietnam as a basis for engaging in any substantial modification of the way in which it had traditionally practiced military law. With the exception of an extensive effort to incorporate Vietnam lessons learned into both the Law of War training materials prepared and provided by the Judge Advocate General's School, little was done to capture the unique aspects of the Corp's Vietnam experience.⁶⁴

It was not that the judge advocates were entirely unaware of the potential for change. By the early 1980s, JAGs had become involved in the detailed review of operational plans, pursuant to DoD Directive 5100.77, for nine years and “were far more aware of the potential for encountering legal issues impacting on the conduct of an operation.”⁶⁵ Yet, as Parks notes, lawyers serving as law of war instructors in the late 1970s found themselves “confronted with hostile clients. Lawyers and the law of war were blamed for restrictions placed upon the use of military force during Vietnam.”⁶⁶

Change would come about on two fronts – the creation of a new way of looking at the implementation of the laws of war in military operations, called “operational law” and the emergence of “activist lawyers” to implement it.⁶⁷ The former of these two factors came about as an attempt to rethink and reintroduce the law of war as it related to military operations. In the late 1970s, the term “law affecting military operations” was developed

⁶⁴ Borch, “Judge Advocates in Combat”, p. 51. It should be noted here that Borch is referring specifically to the Army JAGs, but it would be fair to say that this went for the entire Corps.

⁶⁵ Borch, “Judge Advocates in Combat”, p. 62.

⁶⁶ Parks, “The Gulf War”, p. 397. Parks notes that many of the restrictions were put in place not because of the law, but because of political decisions or because of a mistaken belief that certain actions would violate the laws of war. Parks expands on this argument in W. H. Parks, “Rolling Thunder and the Law of War” *Air University Review*, Vol XXXIII No. 2, 1982 and “Linebacker and the Law of War”, *Air University Law Review*, XXXIV No. 2, 1983.

⁶⁷ The term “activist lawyers” is borrowed from Parks, “The Gulf War”, p. 400.

to indicate that there were a myriad of facets of the law that affected both war and peace operations. The concept brought together all of the areas that, as the name indicates, affected military operations in war and peace. While the basis of operational law remains the laws of war, it also includes US domestic law, such as laws and directives relating to security assistance, foreign military sales, intelligence oversight, contracts for goods and services overseas, foreign claims, and authority to negotiate agreements on behalf of the United States.⁶⁸ This also included aspects of public international law, such as base rights agreements, status of forces agreements, and questions of sovereignty.

Therefore, rather than presenting the law as a set of restrictions, emphasis was placed on the use of this law as a planning tool that not only dictated responsibilities but also set out the legal rights of the military.⁶⁹ Additionally, the use of the phrase, (quickly shortened to “operational law” or OPLAW⁷⁰), temporarily minimized the use of the term “law of war” which had pejorative connotation in the aftermath of Vietnam.⁷¹ In this way, military lawyers tried to present operational law as a positive tool rather than a set of bureaucratic restrictions.⁷²

However, implementation of operational law required lawyers to be in the war room and this required that the rapport between lawyers and commanders would have to be improved. While it would be wrong to suggest that all doors were shut to military lawyers, it was clear that they would have to present a case to their services and for the idea of operational law. Military lawyers needed to convince their commanders that they would be helpful to the conduct of military operations, and not meddlesome. In other words, it was imperative for lawyers to overcome their Vietnam-stereotype whether it was

⁶⁸ Parks, “The Gulf War”, p. 394. On operational law see, David E. Graham, “Operational Law (OPLAW) – A Concept Comes of Age” *The Army Lawyer*, July 1987, pp. 9-10. Graham and Parks define the concept in very similar terms.

⁶⁹ Parks, “The Gulf War”, p. 398.

⁷⁰ Graham, “Operational Law” p. 9.

⁷¹ Although Parks notes that the law of war remained the foundation for the operational law program. “The Gulf War”, p. 398.

⁷² William Eckhardt argues that an approach which teaches the law of war as a set of ‘positives’ instead of ‘negatives’ is more effective. Therefore, instead of instructing troops “Do not kill civilians”, lawyers would tell troops “Marines fight only enemy combatants.” See William George Eckhardt, “Lawyering for Uncle Sam When He Draws His Sword”, *Chicago Journal of International Law*, Vol. 4, 2003. pp. 431-444; especially note 23, p. 440.

deserved or not. This, in turn, required getting the military lawyer and his or her commander talking to improve understanding.

“Activist lawyers” therefore emerged in the Department of Defense to make the case for their presence in the war room. As Borch notes, the increase in individual initiative had its roots in the fact that the unconventional nature of the war in Vietnam required non-traditional thinking and this was brought back by many lawyers who went to Vietnam. Additionally, by the late 1970s there were more lawyers in the military than ever before – and these were better educated.⁷³ Individual lawyers would approach individual commanders to convince them that military lawyers could provide a “package of total legal services” from the planning stages through to withdraw.⁷⁴ As Parks describes it, “The idea was to make the client aware of the many politico-legal facets of the lawyers work, in peace and war” while also educating the lawyer on the work of his superiors.⁷⁵ This was done through a series of symposiums, the first of which took place at The Judge Advocates General’s School, U.S. Army, in 1982 – and was found to be sufficiently useful as to ensure that it has been held annually ever since.⁷⁶ Additionally, military lawyers worked to get security clearance to perform their job in the war room as operations were actually carried out.⁷⁷

American Military Operations in the 1980s

By the time of the 1983 intervention into Grenada in Operation Urgent Fury, there had been substantial improvements in the way that military lawyers conceived and sought to implement the laws of war in US military operations. However, there were still some problems – operational law, in its infancy, had not been completely implemented. Additionally, while commanders had certainly warmed to the idea of military lawyers in the war room by this point, it was clear that they were still not involved in the planning process. Few military lawyers had little knowledge of Urgent Fury until a few days

⁷³ Borch, *Judge Advocates in Combat*, p. 318.

⁷⁴ Parks, “The Gulf War”, p. 400.

⁷⁵ Parks, “The Gulf War”, p. 398.

⁷⁶ Parks, “The Gulf War”, p. 399.

⁷⁷ Parks, “The Gulf War”, p. 399.

before it began. The first judge advocate on the ground in Grenada had little more than twelve hours notice of his deployment.⁷⁸ Additionally, the Army still only expected lawyers to focus on specific issues such as those related to the status and treatment of prisoners of war and detainees.⁷⁹

Although Operation Urgent Fury was short, and, arguably, relatively well conducted, it indicated that there was still room for improvement regarding the role of military lawyers and operational law.⁸⁰ Military commanders reached the decision that judge advocates must be included in the planning of contingency operations from the beginning. The lack of notice given military lawyers hindered preparation for potential legal problems, especially as giving correct and complete legal advice depends on having a full understanding of the nature and purpose of the deployment.⁸¹ Additionally, it was clear that military lawyers would have to be prepared to solve or advise on quasi-legal issues and unanticipated legal matters. As Marc Warren argues, the task for lawyers was to facilitate operations, and this called for versatility as well as the ability to serve as a “honest broker” or “sounding board” in matters other than those involving law and other regulations.⁸² For example, Army lawyers in Grenada were involved in setting up of a graves registration system.⁸³ As Borch argues, “Both the nature and the tempo of the deployment to Grenada presented novel legal challenges for the twelve or so judge advocates who served there from 25 October to 15 December.”⁸⁴

⁷⁸ Borch, “Judge Advocates in Combat”, pp. 62-3.

⁷⁹ Borch, “Judge Advocates in Combat”, p. 62. Incidentally, in Urgent Fury, Army Lawyers determined that the Geneva Conventions applied and that all persons captured should be treated as prisoners of war. p. 66.

⁸⁰ Most of the law of the conflict’s legalities surrounded three issues. First, the confusing legal status of the conflict. This was important for whether or not the Geneva Conventions would apply. (The Army lawyers determined that it did regardless.) Second, a mental hospital was bombed in the course of the campaign (which was unmarked and therefore the Army judge advocate determined that there was not law of war violation). Third, the treatment of Cuban diplomats caught in the conflict.

⁸¹ Borch, “Judge Advocates in Combat”, p. 68.

⁸² Marc L. Warren, “Operational Law – A Concept Matures”, *Military Law Review*, Vol. 152, 1996, pp. 33-73. See pp. 37-40.

⁸³ Borch, “Judge Advocates in Combat”, pp. 68-9.

⁸⁴ Borch, “Judge Advocates in Combat”, p. 81.

In this way, Borch sees Grenada as more of a “wake-up call” than Vietnam was for the Judge Advocates Corps in that, unlike Vietnam, there was an “institutional recognition” that military lawyers had a greater role to play:

[The] experiences of judge advocates in Grenada resulted in the Judge Advocate General’s Corps’ formal acknowledgement, as an institution, that judge advocates must be trained and resourced to provide timely advice on a broad range of legal issues associated with the conduct of military operations.⁸⁵

By 1986 there was a renewed effort to impress the importance operational law in the war room. This was facilitated by the Goldwater-Nichols Act of 1986 which dramatically increased the authority and responsibility of legal advisors.⁸⁶ By the time that Operation Just Cause began in Panama in 1989, the scale of the transformation becomes readily apparent. First, unlike Operation Urgent Fury, Army lawyers began planning almost a year in a half in advance of the deployment of US troops. In this way the ROE could be tailored to the operation and to ensure that they strictly adhered to the laws of war.⁸⁷ Additionally, by the time the Operation Just Cause was underway, the revised ROE was fully in place. To military lawyers, Operation Just Cause, demonstrated that the Department of Defense were taking the laws of war seriously and this enabled them to implement a comprehensive operational law program. Eckhardt argues the changes signified that:

⁸⁵ Borch, “Judge Advocates in Combat”, p. 81.

⁸⁶ Eckhardt, “Lawyering for Uncle Sam”, pp. 433-4. See also the Goldwater-Nichols Department of Defense Reorganization Act of 1986. Pub L. No. 99-433

⁸⁷ Borch, “Judge Advocates in Combat”, pp. 95-6. Borch outlines five major concerns that were dealt with in advance. First, the issue of armed civilians accompanying the Panama Defense Forces; second, the circumstances under which civilian aircraft could be targeted; third, indirect fire in populated areas, fourth, the regulation of air-to-ground attacks in populated areas and finally, the treatment of individuals captured or detained during hostilities. (Again it was determined that under the ROE that all of those detained would be treated as Prisoners of War.). See Borch, “Judge Advocates in Combat”, pp. 96-7.

the profession of arms reclaimed the rules of its own profession. The law of war came out of the library and off lawyers' desks and once again became the province of the practical profession of arms.⁸⁸

America and the Laws of War on the International Stage

The mistakes made in Vietnam and the pressures of operations in the 1980s prompted the US military to reform itself and the way it implemented the laws of war. As we have seen, these changes were largely brought about by domestic developments (such as the notion of operational law) and even individual "activist" lawyers pushing for reform. Yet, internationally, these developments did not occur in a vacuum. In order to generate a fuller picture of what is going on, it is necessary to take a look at international developments with regards to the laws of war and the US reaction to them. It was going to be a bumpy road ahead.

Law and Politics: The Geneva Diplomatic Conference 1974-77

By the end of the Vietnam War, it was becoming very clear that the 1949 Geneva Conventions, if not falling out of date, were not well designed to deal with the increasing numbers of wars of national self-liberation occurring across the globe.⁸⁹ Naturally, this did not escape the notice of humanitarians who grew concerned over the lack of law governing conflicts that fell between civil wars and interstate categories. In such cases, invoking Common Article 3 of the Conventions could ensure a bare minimum of regulation in the conflict, yet this was far removed from the protections of the full

⁸⁸ Eckhardt, "Lawyering for Uncle Sam", p. 440. However, one cannot help but wonder if this is an overstatement of the case. Given the history so far explored in this work it is clear that the military appears to have claimed rather than reclaimed the law of war in terms of its implementation.

⁸⁹ This section draws on material previously written by the author. See Stephanie Carvin, "Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War", *Journal of Conflict and Security Law*, Vol. 11, No. 1, 2006. pp. 67-92.

Conventions properly carried out.⁹⁰ Convincing governments or rebels to adhere to even these basic standards was more often than not an impossible task. The truth of the matter was that the states gathered in 1949 did not truly take wars of national liberation into consideration or believe in the possibility that liberation movements could become a contracting party to the Conventions or be bound by them.⁹¹ However, conflicts like Korea and Vietnam had demonstrated the deadly danger of this gap in the laws of war.

In response, the ICRC and humanitarian-minded countries (especially Sweden and Switzerland) began to press for the strengthening of the laws of war in this regard. The issue had been raised by the ICRC at the 1957 International Red Cross Conference in New Delhi but had met with an adverse reaction from the major powers. Yet, clearly the US was beginning to warm to the idea when it sought support to apply the Geneva Conventions to the war in Vietnam at the Vienna International Red Cross Conference in 1965. However, it was not until the 1969 International Red Cross Conference in Istanbul that a resolution was passed to support an ICRC mandate to convene a diplomatic conference to move forward with its efforts to further codify the laws applicable in armed conflicts. This led to the 1971 and 1972 preparatory conferences where two draft

⁹⁰ Common Article 3 States: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 (b) Taking of hostages;
 (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
 (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

⁹¹ Ingrid Detter, *The Law of War*, Second Edition. Cambridge: Cambridge University Press, 2000. pp. 199-202. Detter notes that extending the Convention to internal wars could be done through a “literary interpretation construed regardless of the intention of the drafters” to consolidated resistance movements and to guerillas.

proposals were drawn up that would later serve as the basis for negotiations at the 1974 Geneva Diplomatic Conference.

The Geneva Diplomatic Conference and the 1977 Additional Protocols

While the Western nations, including the US went along with the idea of further developing the laws of war, the socialist states and the non-aligned movement saw the Convention as an opportunity to make political stands (particularly against the US and the west), to score points in the international arena and, in some cases, to secure recognition for particular political struggles and objectives throughout the world. Additionally, there were several national liberation movements invited to ensure “broad representation”.⁹²

What eventually emerged out of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, were two Additional Protocols to the 1949 Geneva Conventions. The first was the Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and the second Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). But while the Diplomatic Conference, which was to occur for three negotiating periods over three years, did succeed in expanding the laws of war, the end result was so controversial that many states would not ratify until decades after it was signed, or in the case of the US, refuse to ratify it altogether.

Partially because of the presence of the national-liberation movements, it was almost guaranteed from the beginning that Cold War politics and the politics of the Non-Aligned

⁹² The participation of the national liberation groups in the full deliberations marked a major difference in the Conference from the others that had taken place. Various international organizations were also represented in an observer status. See Adam Roberts and Richard Guelff, *Documents on the Laws of War*, Third Edition. Oxford: Oxford University Press, 2000. p. 419. Such groups included the Palestinian Liberation Organization and the African National Congress who, aside from international recognition, also demanded full POW status for their captured personnel due to, what they felt to be, the justness of their cause.

Movement would play a major role in shaping the Diplomatic Conference.⁹³ This resulted in several controversial provisions in Protocol I. Perhaps the most familiar of these was the success of the Third World and Socialist Countries to have the first session of the Conference elevate three categories of wars of self-determination to the status of international armed conflicts: “peoples fighting colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”. Such a stipulation would guarantee forces fighting in these conflicts the status of POWs should they be captured. Not only did this guarantee a certain standard of treatment, but also afforded a respectable international status which was valuable in wars for “hearts and minds”. This provision, which eventually fell under Article 1 Paragraph 4, was opposed by the United States and other Western states but was passed by a vote of 70 in favour, 21 against and 13 abstaining. Interestingly enough, Western opposition to the provision gradually diminished during the Conference, so much so that when it was finally voted upon in the final draft of 1977, a general agreement emerged and it was passed 87 in favour, 1 against with 11 abstentions.⁹⁴

The purpose of Protocol II was much narrower than Protocol I as it sought to apply humanitarian standards to internal conflicts not covered by Protocol I. Yet it is clear that the issues covered in Protocol II were subject to the same Cold War/political pressures and controversies that affected Protocol I. Important here is the scope of Protocol II itself. An ambitious plan to adopt an extensive, detailed set of rules for governing internal conflict which are not liberation wars as defined in Protocol I was rejected due to the intervention of Third World states lead by Pakistan.⁹⁵ Pakistan indicated that it was concerned that any such plan would inevitably impinge on state sovereignty and other Third World states were quick to agree. It was argued that while wars against imperialism and racism could be placed under the rules laid out in the Geneva Conventions, any regulation of internal conflicts, including how captured prisoners were treated inside

⁹³ For a critical look at what happened at the Diplomatic Conference, including the politics involved in the negotiations, see W. Hays Parks, “Air War and the Law of War”, *Air Force Law Review*, Vol 32. No. 1, 1990. pp. 1-225. While the focus of the article is on Air War and targeting, there are quite lengthy sections on the history of the laws of war, the Diplomatic Conference, the US Review of the 1977 Protocols and reasons for the US ultimately rejecting them.

⁹⁴ Israel voted against for reasons that are, perhaps, fairly obvious.

⁹⁵ Detter, *The Law of War*, p. 202.

national territories, would infringe rights of sovereignty and self-determination.⁹⁶ Those who revolted against their own regime were to be considered criminals and as traitors who did not deserve the rights and protections afforded POWs.

As Forsythe argues:

Because of the nature of its origins, [the Diplomatic Conference and the Additional Protocols] was to be concerned as much with *realpolitik* as with war victims. The ICRC might see IHL as a means to regularize improved humanitarian protection for victims of war, but states might very well see IHL as another policy instrument to advance their primary policy concerns – concerns that might not prioritize the well-being of victims.⁹⁷

The American rejection of the 1977 Additional Protocols

However, it was not just international Cold War politics that would have an effect on the fate of the Additional Protocols. In the US, a new domestic factor was in play with the election of Ronald Reagan in 1980. As the new administration came into office, it was clear that it was taking a hard line stance to combat Communism, which did not blend well with the new protections for those engaged in wars of national liberation in the Additional Protocols.

The US delegation to the 1974-77 Diplomatic Conference had felt that the legislation represented progress in terms of the laws of war. The Head of the US Delegation, Ambassador George Aldrich argued in a series of articles that the Protocols represented a “new life for the laws of war”⁹⁸ and “a major accomplishment for international law and

⁹⁶ Detter, *The Law of War*, p. 202.

⁹⁷ David P. Forsythe, *The Humanitarians*, Cambridge: Cambridge University Press, 2005. pp. 92-93.

⁹⁸ George H. Aldrich, “New Life for the Laws of War”, *American Journal of International Law*, Vol. 75 No. 4 October 1981, pp. 764-783.

for human rights”.⁹⁹ One of the main arguments Aldrich put forward for ratification was improved protections for Prisoners of War. Aldrich had actually worked on the problem of treatment of American POWs in Vietnam for the State Department during that conflict and felt he, as well as America, had a vested interest in strengthening guarantees for captured personnel.¹⁰⁰ Additional Protocol I, Article 5 stipulated that each side of the conflict must designate and accept a protection power that would ensure that prisoners of war were not being abused and Aldrich argued that this provision would have been very valuable in Vietnam.¹⁰¹ Additionally, Aldrich argued that the Protocols drafted a single, non-discriminatory set of rules which were applicable to all combatants.¹⁰² Exceptions to the rules, which Communist forces had argued in the past, were made as narrow as possible and provided presumptions and procedures to prevent abuse of the exceptions.

Yet some would later argue that the US delegation suffered from the fact that the actual negotiation of the Protocols was left in the hands of international lawyers, “not all of whom were entirely conversant with either the law of war” or Pentagon priorities.¹⁰³ Although the military was certainly involved in helping to develop guidance, the participation of military lawyers in crucial negotiations was minimal. Military lawyers, commanders and Department of Defense personnel came together to review the 1977 Protocols in December of that year. In this way, for the first time, the documents were reviewed by those who would live or die by the rules set forth in the Protocols.¹⁰⁴ The review process looked at the provisions, whether or not they were acceptable and if not, why not, and whether or not it could be fixed.¹⁰⁵

⁹⁹ George H. Aldrich, “Some reflections on the origins of the 1977 Geneva Protocols”, in Christophe Swinarski, ed. Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet, Hague: Martinus Nijhoff Publishers, 1984. pp. 129-137.

¹⁰⁰ Aldrich, “Some reflections” pp. 130-2 and Aldrich, “New Life for the Laws of War”, p. 766.

¹⁰¹ Aldrich, “New Life for the Laws of War” p. 768.

¹⁰² Aldrich, “New Life for the Laws of War” p. 770. Of course, as Aldrich points out, there were exceptions made for spies, mercenaries and guerillas who take advantage of their apparent civilian status and conceal their weapons heading into an attack.

¹⁰³ Parks, “The Gulf War”, p. 398.

¹⁰⁴ Parks, “The Gulf War”, p. 398.

¹⁰⁵ Parks, “The Gulf War”, p. 399.

In this way, the review process marked a drastic change in how the DoD looked at the laws of war, considered their effects on the military, and how they would be implemented. Yet, the legal review – whatever its verdict was going to be – was going to be overruled by the new ideological considerations of the Reagan administration. While Aldrich certainly believed that the Protocols marked progress for the laws of war and was concurrent with the US position, the White House made it clear that it disagreed.

In particular Douglas Feith, the Deputy Assistant Secretary of Defense Negotiations Policy from 1984-1986, had deep concerns regarding US ratification and spoke out critically against ratification while he was in that position. In particular, he spoke out against the politicized negotiations process, provisions that would shield “terrorists” and render protections to their illegal tactics.¹⁰⁶ Feith, who is often associated with the neoconservative wing of the Republican Party, was clearly going to have ideological opposition to the Additional Protocols whether they were found workable or not.¹⁰⁷

In 1987 it was announced by President Reagan that while the US would sign and ratify Protocol II, Protocol I was fundamentally flawed and would not be sent to the Senate. In an address to the Senate Regan argued:

[Protocol I] would give special status to “wars of national liberation,” an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.

¹⁰⁶ Douglas J. Feith, “Law in the Service of Terror - The Strange Case of the Additional Protocol”, National Interest, No.1 1985; Douglas J. Feith, “‘International responses’, in Uri Ra’anan *et al* eds. Hydra of Carnage, International Linkages of Terrorism, Lanham, MD: Lexington Books, 1986; and Douglas Feith, “Protocol I: Moving Humanitarian Law Backwards”, Akron Law Review, Vol. 19, pp. 531-5.

¹⁰⁷ How far Feith was able to influence the eventual decision is not entirely clear. Speaking confidentially, one Department of Defense employee who participated in the process indicated that the legal review concluded would have put the US in a position to ratify both Protocols (with the proper reservations put in place). However, Feith, upon taking his position in the DoD indicated to the lawyers that the US would not be signing the Protocols – period. This, apparently, put an end to finding ways to make ratification possible and the military lawyers overseeing the process felt free to criticize Protocol I as much as they could. That Feith was the Under Secretary for Defense in the first George W. Bush Administration 2001-05, makes his views particularly interesting for this thesis.

This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form...

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.¹⁰⁸

This, while the US committed itself to accepting those parts of Protocol I that are considered customary, it refused to sign the Protocol I and is not likely to do so in the near future.¹⁰⁹ While Protocol II was transmitted to the Senate for ratification, the US Senate has taken no action on the treaty.

The Most Legal War in History: The US and the 1990-1 Gulf War

¹⁰⁸ "Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions" 29 January, 1987.

The speech is available online at the website of the Ronald Reagan Presidential Library,

<http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM>.

¹⁰⁹ The US position was considered to have been summed up in Michael J. Matheson, "The United States Position on the Relation of Customary Law to the 1977 Protocols Additional to the 1949 Conventions" in *American University Journal of International Law and Policy*, 1987 pp. 419-431. However, this was subsequently withdrawn by the US in 2005. Apparently there was some confusion as to whether or not Matheson was speaking in an official capacity. It is the position of the Department of Defense that he was not. Aldrich's disappointment with the decision is made clear in a follow up to his "Some reflections" article where he states: "Looking back from 1997, I deeply regret that 20 years ago I did not press, within the executive branch of my government, for prompt submission of the Protocols to the Senate of the United States for advice and consent for their ratification. All but a very few provisions had been adopted in Geneva with the complete support of both the U.S. State and Defense Departments, and I believe President Carter and Secretary Vance would have endorsed them. I failed to realize that, with the passage of time, those in both Departments who had negotiated and supported the Protocols would be replaced by skeptics and individuals with a different political agenda." George H. Aldrich, "Comments on the Geneva Conventions" *International Review of the Red Cross*, No 320, October 1997. p.508-510

Certainly the rejection of Additional Protocol I, especially in such strict ideological terms, was controversial for the United States internationally and for those lawyers at home who wished to see the US as a model global citizen. Still, despite its rejection, it was clear going in to the First Gulf War that the US military had a vastly different approach and attitude to the laws of war than it did in Vietnam – with or without ratification of the Protocols. This new approach represented the culmination of the efforts of “activist lawyers” in the Department of Defense who realized that a better appreciation of the law did not only mean complex restrictions, but also that law-guided policy could help operations to run smoother. The result, as has been described at the beginning of this chapter, was the materialization of the most legalistic war fought in the history of the United States.

Yet, the US still faced the prospect of issues regarding Protocol I. At the outset of the conflict, there had been the very real threat of “legal-interoperability”¹¹⁰ The Allies in the Gulf all subscribed to different laws of war treaties, including Protocol I, and each had their own separate reservations and interpretations. In some ways this was, of course, somewhat of a moot point as Iraq had not signed or ratified the Protocols and they were therefore not binding on any of the parties. Still, even in its refusal to adhere to the Additional Protocols, the US had declared on several occasions that it would adhere to those provisions of the Additional Protocols that were considered customary.¹¹¹ There was good reason to do so. As Christopher Greenwood argues:

The nature of the hostilities, which involved, for example, the heaviest aerial bombardments since the Second World War, meant that many of the provisions of Protocol 1 were potentially of great importance.¹¹²

Legal issues in the Gulf

¹¹⁰ The term is borrowed from Françoise J. Hampson, “Means and methods of warfare in the conflict in the Gulf”, in *The Gulf War 1990-91 in International and English Law*, ed. Peter Rowe. London: Routledge, 1993. pp. 108-110. p. 108.

¹¹¹ Christopher Greenwood, “Customary international law and the First Geneva Protocol of 1977 in the Gulf Conflict” in *The Gulf War 1990-91 in International and English Law*, ed. Peter Rowe. London: Routledge, 1993. pp. 63-88., p. 64.

¹¹² Greenwood, “Customary international law”, p. 65.

In terms of war crimes or violation of the laws of war, most of the debate was over the targeting policy employed by the United States. In particular, the bombing of the Amiriya bunker was the subject of much controversy.¹¹³ However, like most of the wars that the United States engaged in the 20th Century, POWs were again a major issue. By the time the ceasefire was declared in February 1991, there were approximately 86,000 Iraqi and 47 coalition forces captured.¹¹⁴ While it had been anticipated that large numbers of prisoners of war would be taken; it was probably not foreseen that they would amount to over eighty thousand.¹¹⁵

There were several problems that the sheer numbers of surrendering Iraqis produced. POWs had to be issued with gas masks and evacuated from the battlefield.¹¹⁶ In terms of fighting, the bombing had to be conducted in such a way as to provide a lull from time to time, to enable the Iraqi forces to come forward and surrender.¹¹⁷ Additionally, like the Second World War and Korea in particular, the Gulf War again brought about problems of repatriation. There were concerns that large numbers of prisoners of war would resist repatriation – and this indeed was the case. Many countries in the Coalition, including the US and the UK, having had negative experiences in Korea agreed that no prisoner should be forcibly repatriated. The problem was then where to send the POWs who did not wish

¹¹³ On 13 February 1991, there was an attack on the Amiriya bunker which resulted in 400 civilian deaths. The United States Air Force commanders who ordered the attack argued that the bunker had previously been used in the Iran-Iraq war for military purposes and that they did not suspect that this had changed. The Americans maintained that the structure housed a command and control center, from which military radio communications had been monitored for two or three weeks. Some information here from Greenwood, “Customary international law”.

¹¹⁴ The focus here will be on the 86,000 Iraqis who were taken prisoners. By virtually all accounts, the 47 Coalition forces members taken prisoner were treated in a very bad way – not even coming close to the Geneva Convention’s requirements. Many were beaten and tortured and often they were used as human shields. The Iraqis also refused to allow the ICRC to visit. For more information, see Peter Rowe “Prisoners of War in the Gulf Arena” in *The Gulf War 1990-91 in International and English Law*, ed. Peter Rowe. London: Routledge, 1993. pp. 188-204. (The numbers of POWs captured comes from this source.) Also see Frank Smyth “The Gulf War” in *Crimes of War: What the Public Should Know* eds. Roy Gutman and David Rieff, New York: W.W. Norton and Company, 1999. pp. 162-168.

¹¹⁵ Rowe, “Prisoners of War in the Gulf Arena” p. 197. In all likelihood, this was probably due to the impression that the air war had had on the Iraqi military and the propaganda campaign that the coalition had launched. This included the dropping of thousands of leaflets which warned of massive attacks and advising soldiers to flee.

¹¹⁶ Rowe, “Prisoners of War in the Gulf Arena” p. 198.

¹¹⁷ Peter Rowe, “Prisoners of War in the Gulf Arena”, p. 197.

to return to Iraq. The issue was largely resolved when King Fahd of Saudi Arabia offered to take in 50,000 Iraqi refugees and prisoners of war including army deserters.¹¹⁸

Why, then, can we regard the 1990-91 Gulf War as a success story in terms of the law of war? The numbers alone tell part of the story. The ratio of American legal advisors sent to the Gulf Region in comparison to the other allies by one estimate was 70:1.¹¹⁹ Yet these numbers are ultimately meaningless unless there are actions to suggest that the level of legal influence was substantial. However, to demonstrate this, it is possible to look at the judgments and statements of officials, journalists and NGOs in reflection on the conflict. Colin Powell, the then Chairman of the Joint Chiefs of Staff, indicated in an interview for the American Bar Association Journal that “Decisions were impacted by legal considerations at every level... Lawyers proved invaluable in the decision making process.”¹²⁰

Steven Keeva adds in the article:

Lawyers were everywhere during the Gulf War. They worked out of the headquarters of Central Command... and they slept in the sand alongside troops in the field. They negotiated host-nations agreements and advised commanders on the legal implications of targeting decisions and weapons use...¹²¹

Additionally, given the genuinely unprecedented legal oversight of the operations, Human Rights Watch and Greenpeace concluded that the US generally “behaved in accordance with provisions of the Geneva Protocol”.¹²²

¹¹⁸ Peter Rowe, “Prisoners of War in the Gulf Arena”, p. 203.

¹¹⁹ David Garratt, “The role of legal advisors in the armed forces,” in The Gulf War 1990-91 in International and English Law, ed. Peter Rowe. London: Routledge, 1993. p. 59. Garratt notes that this was partially due to the wider responsibilities of US legal advisors.

¹²⁰ Keeva, “Lawyers in the War Room”, p. 52.

¹²¹ Keeva, “Lawyers in the War Room”, pp. 52-3.

¹²² Cited in af Jochnick and Normand, “A Critical Analysis of the Gulf War”, p. 409. It should be pointed out that both organizations remained critical over certain aspects of the bombing campaign.

Of course these efforts did not and could not prevent any law of war violations from taking place; mishaps are bound to happen in war as are controversial actions.¹²³ Expecting an accident free-conflict or bloodless war is unrealistic. However, the American Military's policy of following the law of war clearly lead to a smoother operation than might otherwise might have occurred. Warren argues that the purpose of a law of war advisor "is to lawfully facilitate mission accomplishment, thereby enhancing the versatility of already capable units to meet diverse mission requirements."¹²⁴ If we evaluate the implementation of the law of war on these grounds, it is then possible to agree with the assertion that law played a significant role in the 1990-1 Gulf War.

America and the Laws of War in the 20th Century

To look back at the course of the 20th Century, comparing the US in the Philippines at the beginning with the US in the First Gulf War at the end, we can see a clear difference in the way the US considered, enacted and taught the laws of war. It is worth examining why is this the case. As we have seen, there are several reasons one can point to that seem to have played a role in what as well might be called the 'legal revolution' in the American military. The first goes back to an idea that even Clausewitz recognized in On War:

Any unnecessary expenditure of time, every unnecessary detour, is a waste of strength and thus abhorrent to strategic thought... Thus theory demands the shortest roads to the goal.¹²⁵

The concept that Clausewitz is referring to is the idea of the 'economy of force'. Simply put, it is the idea that armies should attempt to achieve their goals as fast, efficiently and effectively as possible. While this may sound like an invitation to trample on the laws of

¹²³ Of course, the word "violation" seems to suggest a deliberate plan to infringe upon the law of war. However, the term is here used to also encompass accidents which may happen in the fog of war where no one is necessarily to blame.

¹²⁴ Warren, "Operational Law" p. 35.

¹²⁵ Carl von Clausewitz, On War, ed. and trans. Michael Howard and Peter Paret, Princeton: Princeton University Press, 1976. p.624.

war in the name of 'efficiency' (and on numerous occasions throughout history it has been invoked to do just that) – in fact, the notion of economy of force has had quite the opposite effect. For example, in so far as precision guided missiles (PGMs) have replaced carpet bombing as a means of warfare, this may be considered an illustration of the economy of force. New possibilities for discrimination thus become possible when you have a bomb that can find its target within a one meter radius, versus the relative indiscriminate damage caused by traditional “dumb” bombs that required far more firepower to ensure that a target was hit.

But the idea has wider implications and this point was driven home by the massacres in Vietnam; namely that major violations of the laws of war are quite costly in terms of resources, manpower and reputation. The US missions in Mai Lai and Son Thang were not just brutal in their attacks – they were quite useless. Aside from the sufferings of those who were there, it cost the Americans in terms of resources, but also heavily in terms of international reputation. Going out of one's way to commit atrocities is a direct violation of the principle of 'economy of force' and over the course of the 20th Century this became increasingly recognized by western armies throughout the world, including the United States. If the good will of civilians and prisoners of war will help you achieve your goal easier and faster, then you have every incentive to treat them well. If international support crucial to your cause and support for particular military endeavours is damaged by violations of the laws of war, then armies have every incentive to ensure that they do not happen. Troops out of control are indicative of an inefficient force and therefore commanders have every reason to ensure that their troops do not run 'amuck'. As the US Department of Defence report on the First Gulf War argued:

...no Iraqi action leading to or resulting in a violation of the law of war gained Iraq any military advantage. This 'negative gain from negative actions' in essence reinforces the validity of the law of war.¹²⁶

¹²⁶ US Department of Defence, "Conduct of the Persian Gulf War: Final Report to Congress", Washington: Department of Defence, April 1992. p.624. Interestingly, the Report was authored under the supervision of now Vice President Richard Cheney, who was the Sectary of Defense during the First Gulf War.

Thus, the US military redrafted and re-wrote its rules of engagement (ROE) and drafted its operational law to combine policy with tactics, methods and means and the laws of war.

Another crucial factor was the improvements made in the teaching of the laws of war. As Parks argues “it is likely that some see the [laws of war] training as ‘checking the box’”.¹²⁷ The difficulty, as he describes it, is the common notion that American military personnel are automatically going to do the right thing in the field. “It is sometimes difficult for our soldiers to see the necessity for repeated law of war training, because they do not believe this to be an American problem.”¹²⁸ Yet, My Lai and Son Thang showed that this was clearly not the case – and demonstrated that if training was not revamped, revised and made mandatory, then mistakes would happen again. The new approach which sought to increase the amount of training, to rely on a simplicity of principles to keep rules straight forward and to take a positive approach which emphasized rights as well as responsibility helped to make this the case.

In short, by the 1990s, law seemed to be fully integrated into US military operations. As the decade progressed, the focus turned to those areas where circumstances and the law were not so clear cut. Increasingly the United States found itself involved in situations like Somalia and Haiti where the role between combatants, civilians and criminals was blurred. Engaging in such dangerous environments proved to be a legal nightmare. Thus, a lot of the efforts regarding the law of war within the US military in the 1990s looked at how the law applied to “operations other than war”. Increasingly, the law of war was applied to issues such as police training, and rules of engagement were drafted to fit with peacekeeping and peace enforcement operations (which typically emphasized self-defence and restraint).¹²⁹ In Panama, Somalia and Haiti, the decision was made to treat

¹²⁷ Parks, “The United States military and the law of war”, p. 7.

¹²⁸ Parks, “The United States military and the law of war”, p. 7.

¹²⁹ For a discussion on operations other than war, see Warren, “Operational Law”, especially pp. 41-48, and pp. 51-57. Also, for a slightly partial look at the law in operations other than war, see the chapters on Haiti and Somalia in Borch, *Judge Advocates in Combat*. In his efforts to praise the efforts of judge advocates, Borch tends to paint a picture that must be a little rosier than what the case was in both operations. For example, in his Somalia chapter Borch barely mentions the Battle of Mogadishu which took place on 3-4

captured persons – termed “detainees” – according to the provisions of the Geneva Convention although persons captured may not have qualified or often fell between categories. Each detainee was visited by a “detainee judge advocate” within 72 hours of detention and, through an interpreter, explained the reasons for detainment and given an opportunity to communicate with his or her captors.¹³⁰

Although such operations would often prove frustrating, if not deadly, to US troops, the US military continued to say that it would under all circumstances abide by the law of war. While serving as the Commanding General of the First Marine Expeditionary Force, Lieutenant General Anthony C. Zinni argued:

Operational law is going to become as significant to the commander as maneuver, as fire support, and as logistics. It will be a principal battlefield activity... Operational law and international law are the future.¹³¹

Conclusion

On May 4, 2000, US Ambassador at Large for War Crimes Issues David J. Scheffer addressed the US Army First Corps at Fort Lewis Washington on US adherence to the laws of war:

The US military leads the world in the art of integrating legal advice into the process of planning and executing operations.... The Army leadership is committed to reinforcing legal principles in the real world of military practice because the laws of armed conflict do not simply exist as some ethereal smoke in the ozone. They are not some ethereal smoke in the ozone. They are not some rigid code of unrealistic regulation imposed upon you by

October 1994, which saw 18 US military personnel killed as well as hundreds of Somali dead and thousands wounded. The situation was certainly a mess – politically if not legally.

¹³⁰ Warren, “Operational Law”, pp. 58-61.

¹³¹ Anthony Zinni, “The SJA in Future Operations” *Marine Corps Gazette*, February 1996, pp. 15-17.

a disinterested chain of command.... [Violations of the laws of war] are the acts of criminals and the law recognizes that brand of conduct as criminal even in the context of conflict.¹³²

The sentiments expressed in this statement reflect the attitude of the United States by the end of the 20th Century towards the laws of war, but as discussed in the last two chapters, in many ways it also rings true with the sentiments expressed at the beginning. The US, in its idealism and belief in the rule of law, had committed itself to improving the laws of war. Yet, where ideology and interest conflicted with the desire to fight wars humanely, the US, like the European countries, would find legal reasons why the law did not and could not apply. Such decisions were not *realpolitik*, but based on standards of western civilization and normative assumptions as to who qualified for rights under the laws of war and under what circumstances.

This had changed by 1945, but especially so with the drafting of the 1949 Geneva Conventions and creation of the UCMJ. Increasingly it was harder to justify not affording prisoners rights and punitive targeting policies. However, if this was the case, why does Vietnam remain powerfully linked to the idea of American war crimes?

As this chapter has tried to argue, there were several important factors involved – first, the nature of the conflict which, conceptually, did not lend itself very well to the idea of international law or the laws of war. However, and second, problems in the US military regarding discipline and weak leadership created the space for violations of the laws of war to take place. Orders were not properly handed down, the rules of engagement were ignored, training was lacking, frustration and agitation were allowed to flourish and weak leadership only served to aggravate these problems.

While the military walked away from Vietnam in a mood to forget rather than implement any lessons learned, “activist lawyers” and the concept of “operational law” began the

¹³² Cited in Sean D. Murphy ed., United States Practice in International Law: Volume 1: 1999-2001, Cambridge: Cambridge University Press, 2002. p. 369.

process of reform in terms of how the laws of war were implemented in the American armed forces. Talking to commanders and advocating the usefulness of the law as a tool rather than as a restraint gradually lead to a process where law took on a greater importance than ever before. By the time of the 1990-1 Gulf War, the law had seemed to become a major consideration in the carrying out of military operations. It is possible to regard some of these activist lawyers as the largely un-sung champions of the laws of war in terms of US military policy. While certainly the Department of Defense was going to have to change the way it implemented the law regardless, “activist lawyers” in the 1970s and 1980s played a major role in bringing about a ‘legal revolution’ by speaking with commanders and making the case for the laws of war.

The other lesson to be drawn from the Vietnam and post-Vietnam experience is that the implementation of the laws of war requires constant effort and diligence on behalf of not only lawyers, but commanders in operational centres and on the ground. Where war crimes occur, it is virtually almost always possible to point to a lack of vigilance, discipline or willingness to implement the law. My Lai and Son Thang demonstrated that regardless of the respect for the laws of war in one’s own country, in the fog of war a nation cannot assume that its soldiers will always do the right thing. Improved training in the laws of war and a belief in its effectiveness by commanders played a major role in the improvements of the military operations of the 1990-1 Gulf War over Vietnam.

By the end of the Gulf War, it seemed to many that the future lay with “operations other than war” – peacekeeping, peace-enforcement operations as well as the delivery of aid. Throughout the operations of the 1990s (including the difficult missions in Somalia) the US maintained this position, policy and procedures regarding the laws of war that had been in place during the 1990-1 conflict. The post-Vietnam “operational law” regime looked to remain in place for some time. Yet, the attacks of 9/11 and the ensuing war on terror posed a massive challenge to the policies that had been put in place – and many began to question whether they should have been put there to begin with. This will be the focus of the next section of the thesis.

Chapter 4: Just cause and Just Means? Linking the purpose and tactics of war after 9/11

Introduction

In terms of the laws of war, the US began the 1990s with what has been quite reasonably called the most legalistic war in history. Many acclaimed the first Gulf War as an indication of what could be accomplished with a proper military ethos, implementation of the laws of war, precision guided weaponry and a coalition of like-minded states – a relatively humane war with relatively minimal loss of civilian life.

The reaction to 9/11 would seem to mark a reversal in this regard. Within five months of the start of the “war on terror” and Operation Enduring Freedom in Afghanistan, pictures of prisoners, blindfolded and chained, appeared prompting worldwide allegations of US torture, and serious violations of the laws of war. Why, within a 10 year period was the US openly refuting what many considered some of the key principles of the laws of war? Where many had once praised the United States for its efforts to institutionalize laws of war training in its military doctrine and its careful implementation when it came to targeting issues, now its actions received almost universal condemnation from friend and foe alike.

The answer to why this apparent about-face occurred is complex – and the issues involved not as black and white as many international lawyers and commentators often argue. In looking for the answer, this chapter will briefly look at the issues facing the laws of war in the 1990s and the response of the United States, including its reaction to Kosovo’s “war by committee”. It will also look at the impact of what has been called the “New Sovereigntist Critique” of international law in America. In doing so, the chapter will examine the reasons why, as events unfolded, the United States ultimately downplayed the significance of the laws of war, specifically the Geneva Conventions, in the war on terror. Rooted in an increasing suspicion of the direction of international law, frustration with formally organized coalition warfare, and, crucially, a belief that the rules

of the game had changed after 9/11, the United States argued that its right to self-defence trumped its international “obligations” and that the war on terror would be fought on its own terms.

America and International Law in the 1990s

It is the purpose of this section to demonstrate that the decisions made regarding the laws of war in the war on terror did not come from out of the blue. Rather, they partially reflect an increasing frustration with and suspicion of international law, including the laws of war, in the 1990s. In particular it will look at the creation of the International Criminal Court, and at the implications of NATO’s Kosovo campaign in the spring of 1999.

The “new” human rights agenda and the ICC

As is now well known, the end of the Cold War brought about in many countries a new faith in international institutions, not only for maintaining or even establishing peace, but also for the protection of human rights. This could be seen with the establishment by the UN General Assembly of the Office of the High Commissioner for Human Rights (OHCHR) in 1993. As Julie A. Mertus argues, “Decades of human rights standard-setting had at last given way to a new age of human rights implementation and enforcement.... When the Cold War ended, anything seemed possible.”¹ Hundreds, if not thousands of NGOs claiming some interest in human rights emerged in the 1990s and many states, such as South Africa and Chile, began to confront human rights violations that occurred during their dark Cold War years.

¹ Julie A. Mertus, The United Nations and Human Rights: A guide for a new era, London: Routledge, 2005. p. 8.

At the same time, the end of the Cold War resulted in a surge of internal and intra-national state conflicts now outside of superpower control and usually involving some kind of ethnic hatred. The failure of the international community, if not Western countries, to respond appropriately to these crises resulted in a bloody, protracted war in the Former Yugoslavia and genocide in Rwanda. To address some of the wrongs committed during these conflicts, criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were set up under international auspices to try those accused of war crimes and/or crimes against humanity. These efforts lent force to the movement already pushing for a permanent international criminal court. In 1989, Trinidad and Tobago persuaded the UN General Assembly to instruct the International Law Commission to prepare a draft statute which was to be submitted back to the UN General assembly by 1994. After the text of the Statute was finalized by a three year Preparation Committee, the ICC Statute was adopted by the 1998 Rome Diplomatic Conference, and came into force on 1 July 2002.²

While many heralded the agreement as the hallmark of a new era in the protection of human rights and prosecution of war criminals, the ICC was greeted with suspicion in the United States. Some of the specific reasons for this caution will be dealt with below. For now it is sufficient to say that US leaders and military officials were concerned about over-enthusiastic, independent prosecutors who would not be accountable to any national or international authority. They also had a concern that the Court would be used more as a political tool to wield against the US than as a harbinger of justice.

² For more on the ICC, see Antonio Cassese, International Law, Second edition. Oxford: Oxford University Press, 2005; Antonio Cassese, ed. The Rome Statute for an International Criminal Court: A Commentary Oxford: Oxford University Press, 2002; William Schabas, An Introduction to the International Criminal Court, Cambridge: Cambridge University Press, 2001. The American Journal of International Law has published many articles on the Court. See The American Journal of International Law, Vol. 93, No. 1, Jan., 1999; and The American Journal of International Law, Vol. 99, No. 2, Apr., 2005 for a survey of recent developments. Documentation on the ICC can be found at <http://www.un.org/law/icc/>; A valuable resource can also be found at the website for the Coalition for the International Criminal Court: <http://www.iccnw.org/> - although it should be noted that the site's original and continued stated purpose is to promote universal ratification. Literature that is more critical of the Court is discussed below.

Additionally, it was becoming clear that there were many who did not agree with the direction that human rights were taking in the 1990s – in so far it related to warfare. Human rights advocates argued that international human rights law should be applied in conflict situations. Although the laws of war and international human rights law have developed separately, there are many who would argue that they are increasingly intertwined. As Cassese argues:

...the human rights doctrine has operated as a potent leaven, contributing to shift the world community from a reciprocity-based bundle of legal relations, geared to the 'private' pursuit of self-interest, and ultimately blind to collective needs, to a community hinging on a core of fundamental values, strengthened by the emergence of community obligations and community rights and the gradual shaping of the public interest.³

Therefore, "humanitarian law has become less geared to military necessity and increasingly impregnated with human rights values."⁴

³ Cassese, International Law, p. 396.

⁴ Cassese, International Law, p. 404. Cassese notes that this point of view can be supported by the *Tadić (Decision on Interlocutory Appeal)* decision by the International Criminal Tribunal for the former Yugoslavia which noted "the impetuous development and propagation in the international community of human rights doctrines... had brought about significant changes in international law..." Cited in Cassese, 404, note 2. The International Court of Justice made a similar decision in the *Nuclear Weapons case*, arguing that the protection of human rights does not cease in times of war, except for some provisions may be derogated from in a time of national emergency as defined under Article 4 of the International Covenant of Civil and Political Rights). Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Volume 1: Rules, Cambridge: Cambridge University Press, 2005. p. 301.

There was and (continues to be) a great deal of apprehension about this situation.⁵ As the laws of war and human rights law are brought together, there is a concern that this convergence extends and overcomplicates the law further than what states are willing to tolerate. In disseminating information about the laws of war to ordinary soldiers, any blurring of the laws by adding human rights considerations may only serve to complicate matters. Militaries seek to ensure that the law is kept as simple as it possibly can be, so that, to the highest degree possible, it is obvious to soldiers which law is applicable and when. A blending of the two legal regimes only serves to complicate matters, and to insist upon it on the battlefield will only serve to make decision making more complicated for military commanders.

However, by the end of the 1990s, some states, and many NGOs, were increasingly willing to subject military actions, especially those by Western armies, to international human rights tribunals such as the International Court of Justice (ICJ) the European Court of Human Rights (ECHR) and the ICTY. This was certainly the case during the Kosovo conflict – to which we will now turn our attention.

⁵ For a critique of merging the laws of war with human rights law, see Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge: Cambridge University Press, 2004; Additionally, René Provost illustrates the problems of merging the two areas of law in René Provost, International Human Rights and Humanitarian Law, Cambridge: Cambridge Studies in International and Comparative Law, Cambridge University Press, 2002. For a look at the issue in the wake of allegations after the exposure of the Hadithah incident, see Mackubin Thomas Owens, “Men@War: Hadithah in context”, National Review Online, 30 May 2006. [http://article.nationalreview.com/?q=MGFjZGFhZGJjYWw0NTJIM2IzMjAxM2I4NDEwYWM5NWl](http://article.nationalreview.com/?q=MGFjZGFhZGJjYWw0NTJIM2IzMjAxM2I4NDEwYWM5NWl;); There has also been much discussion about this issue in the UK where the line between human rights and the laws of war has been even further blurred. See Michael Smith. “Iraq battle stress worse than WWII” The Sunday Times, November 6, 2005; and Thomas Harding, “Britain's Armed Forces 'under legal siege'” Daily Telegraph, 15 July 2005. <http://www.telegraph.co.uk/news/main.jhtml;jsessionid=UCQBOHAGB0MNPQFIQMFCM5WAVCBOYJVC?xml=/news/2005/07/15/nforces15.xml>.

*The impact of Kosovo I – Targeting*⁶

With the goal of stopping Milosevic's forces from massacring Albanian civilians in Kosovo, NATO began an 11 week bombing campaign against (what was then) the Federal Republic of Yugoslavia, which lasted from 24 March to 11 June, 1999. As the alliance did not have any formal approval from the UN Security Council (due to the inevitability of a veto from Russia, if not from China), the issue was politically divisive and, according to many international lawyers, legally dubious. Although the campaign took 77 days, it is generally accepted that NATO's intervention did indeed stop Milosevic – leading to a period of relative stability in Kosovo.⁷

Still, despite this outcome, the NATO campaign left a bitter taste in the mouths of many within the Atlantic Alliance, including the United States. Two issues in particular, the impact of coalition warfare, and the laws of war and the ICTY's actions during and after the campaign are noteworthy here. First, the impact of coalition warfare, what was later referred to as "war by committee" by General Wesley Clark and other American military officials, certainly seems to have tested American patience.⁸ NATO, an alliance that relies on consensus when it makes decisions, needed to be unanimous in its agreement when selecting targets. Therefore, each target was subject to up to 19 different

⁶ The discussion of legal issues here is brief. Much has been written on the legal aspects of the Kosovo campaign. Some useful sources include: Adam Roberts, "Nato's 'Humanitarian War' over Kosovo" *Survival*, Vol. 41. No. 3, 1999, pp. 102-23; Andru E. Wall, *Legal and Ethical Lessons of NATO's Kosovo Campaign*, International Law Studies Volume 78, Newport, RI: Naval War College, 2002; Nicholas J. Wheeler, "Chapter 8: The Kosovo Bombing Campaign" in Christian Reus-Smit ed. *The Politics of International Law*, Cambridge: Cambridge University Press, 2004; Also see the series of articles published in the *American Journal of International Law*, Vol. 93, No. 4, Oct., 1999; the special section in *International and Comparative Law Quarterly*, Vol. 49, no. 4, 2000, including Vaughan Lowe, "Legal Issues Arising in the Kosovo Crisis"; *International Review of the Red Cross*, "Special issue: The Kosovo crisis and international humanitarian law", *International Review of the Red Cross*, No. 837, March 2000.

⁷ On the Kosovo War in general see Ken Booth, *The Kosovo Tragedy: The Human Rights Dimension*, London: Frank Cass Publishers, 2000; Wesley K. Clark, *Waging Modern War: Bosnia, Kosovo and the Future of Conflict*, Oxford: Public Affairs, 2001; Ivo H. Daalder and Michael E. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo*, Washington: Brookings Institute Press, 2000; Michael Ignatieff, *Virtual War: Kosovo and Beyond*, Toronto: Viking, 2000; Tim Judah, *Kosovo: War and Revenge* New Haven: Yale Nota Bene, 2000; Michael Mandelbaum, "A Perfect Failure" *Foreign Affairs* Vol. 98, No. 5, 1999.

⁸ See, for example "NATO grapples with 'war by committee'", CNN, 19 April 1999, <http://www.cnn.com/US/9904/19/war.by.committee/> and "Nato leadership splits revealed", BBC News, 9 March 2000, <http://news.bbc.co.uk/1/hi/world/europe/671420.stm>.

interpretations of the laws of war. This in particular became an issue over “dual-use” targets, objects which may have both civilian and military uses, in the later and intensified part of the campaign.⁹ The Americans, who have traditionally taken a much wider view of what constitutes a legitimate target, frequently disputed with nations, such as France, who adhered to a much stricter interpretation of the applicable targeting law.¹⁰ According to Lieutenant General Michael Short, the NATO Air Commander during the campaign, planes were often sent up in the air on a mission, only to have that mission recalled at the last moment when one nation indicated that it could not support the targeting of a particular object.¹¹ As one of the commanders in the campaign, he argued:

Unfortunately, because NATO was an alliance of 19 nations, you get the lowest common denominator. All those folks have to agree on something... Targeting was not mine to decide. Targeting decisions were made in the White House, at Number Ten Downing Street, and in Paris, Rome and Berlin... We did our best to target those things that we thought would have the effect of bringing Milosevic to the table. Instead, because those targets were not picked by professional soldiers and professional sailors and professional airmen, we bombed targets that were quite frankly inappropriate for bringing Milosevic to the table. I would say to you that in terms of targeting this was a victory by happenstance more than victory by design.¹²

It was argued that an overly strict interpretation of the applicable law dragged out the campaign by hindering its effectiveness. Ivo H. Daalder and Michael E. O’Hanlon argued that it was not until the NATO Commanders were able to persuade the political

⁹ Daalder and O’Hanlon, *Winning Ugly*, p.118.

¹⁰ For a discussion of this, see Nicholas J. Wheeler, “The Kosovo bombing campaign” in Christian Reus-Smit ed. *The Politics of International Law*, Cambridge: Cambridge University Press, 2004, pp. 189-216. Wheeler points out that “What makes this dispute so fascinating is that there was agreement on the legal rules that should be applied, but disagreement over the correct application of the rules.” p. 191.

¹¹ Lieutenant General Michael Short, USAF (Retired), “Operation Allied Force from the Perspective of the NATO Air Commander” pp. 19-26 in Andru E. Wall, *Legal and Ethical Lessons of NATO’s Kosovo Campaign*, International Law Studies Volume 78, Newport, RI: Naval War College, 2002. p. 25.

¹² Short, “Operation Allied Force”, p. 20.

leadership to authorize a much wider range of targets in Belgrade and elsewhere in late May that the campaign became truly effective. By early June, Serbia was reeling as its electrical grids were severely damaged and water distribution was adversely affected in all major cities.¹³

Many NATO officials, and certain members of the Clinton administration, have argued that the United States would have conducted a much more vigorous bombing campaign from the outset of the war if only the other NATO members had allowed it to do so. However, as Daalder and O'Hanlon argue, while France did exercise some restraining power on NATO planners, particularly after the first couple of weeks of the war, the net effect was generally to push back the bombing of some specific targets by, at most, a few days. Additionally, France was not the only country to scrutinize the target sets in detail – it is apparent that the Joint Chiefs of Staff had to request permission on a daily basis from the White House to strike certain targets.¹⁴

Still, it is clear that the impression that the Americans were left with after Allied Force was that their allies' overly strict interpretation of the laws of war prevented them from conducting an effective campaign in the first stages of the war. Again, as Short has argued:

[The United States] wants to fight as part of the coalition. We want to be with our allies... However, as a professional soldier, I would tell you I prefer to be a member of a coalition of the willing as we had in the Gulf War. In 1991 if you chose to throw in your forces with us... you were welcome, but you came under our terms. We explained to you how we were going to make war and that if you did not like that explanation, or if you could not sign up for those terms, then you did not need to be part of our coalition.

¹³ Ivo H. Daalder and Michael E. O'Hanlon, Winning Ugly: NATO's War to Save Kosovo, Washington: Brookings Institute Press, 2000. p. 4. This raises issues relating to discrimination which will be discussed below.

¹⁴ Daalder and O'Hanlon, Winning Ugly, p. 105-6. See also James E. Baker "Judging Kosovo: The Legal Process, the Law of Armed Conflict and the Commander in Chief", pp. 7-26 in Wall, Legal and Ethical Lessons of NATO's Kosovo Campaign. Baker serves as the Special Assistant to the President and Legal Advisor to the National Security Council during Operation Allied Force.

However, in 1999 it was NATO, not a coalition of the willing. All nations had to agree, and so we ended up with the lowest common denominator. This is how it was that a nation that was providing less than 10% of the total effort could say to the most powerful nation on the face of the earth “you cannot bomb that target.”

The United States of America lost its leverage on the first night. On the first night of the war we lost any leverage we had, and we ended up being leveraged.¹⁵

General Wesley Clark, who recounts the war in his memoir, Waging Modern War, seems to agree conditionally:

As for NATO, political approval from each member nation has been necessary before any military plans can be developed, and the general political resistance in the West to signal readiness to use force means that the Alliance’s military planning will almost inevitably be too slow.¹⁶

He adds:

In the American channel there were constant temptations to ignore Allied reservations and attack the targets we wanted to strike. It was always the Americans who pushed for the escalation to new, more sensitive targets... and always some of the Allies who expressed doubts and reservations. For a US administration anxious to finish the operation and avoid the problems of a ground intervention, these Allied reservations were, no doubt, exasperating.

¹⁵ Short, “Operation Allied Force”, p. 24.

¹⁶ Clark, Waging Modern War, p. 426. However, Clark goes on to add “We paid a price in operational effectiveness by having to constrain the nature of the operation to fit within the political and legal concerns of NATO member nations, but the price brought significant strategic benefits that future political and military leaders must recognize.” p. 430. Clark was also a fairly strong advocate for a NATO role in Afghanistan, claiming that US political and military leaders had learned the wrong lesson from the Kosovo campaign and his book. See Gen. Wesley Clark “An Army of One?” Washington Monthly, September 2002. Available online: <http://www.washingtonmonthly.com/features/2001/0209.clark.html>.

But though there was discussion in U.S. channels about striking unilaterally, we never did. We always maintained that no single target or set of targets was more important than NATO cohesion. This was the most crucial decision of the campaign, and one of its most important lessons, for it preserved Allied unity and gave to each member of NATO an unavoidable responsibility for the outcome. This made it a true Allied operation – a pattern for the future.¹⁷

Clark may have felt this way, but the comments of Short above make it clear that not everyone was eager to make this a model for future warfare.

The impact of Kosovo II – The ICTY's Report to the Prosecutor

But if the US government felt uncomfortable with the outcome and the implications of Kosovo, in their eyes the ICTY was about to add insult to injury. On 14 May, 1999, while hostilities were still ongoing over Kosovo, the ICTY Prosecutor, Carla Del Ponte, established a committee to investigate possible war crimes committed by NATO in its conduct of Operation Allied Force. The news was not taken well within NATO or the United States. As Adam Roberts remarks,

In 1999 the United States, having been campaigning diplomatically against the projected International Criminal Court for the previous six months on the grounds that the actions of US forces should not be the subject to a foreign prosecutor and tribunal, chose to wage war in the one part of the world where ongoing war was subject to such a tribunal.¹⁸

Although the ICTY eventually recommended that “neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific

¹⁷ Clark, *Waging Modern War*, p. 434.

¹⁸ Adam Roberts, “The Law of War After Kosovo”, in Wall, *Legal and Ethical Lessons of NATO's Kosovo Campaign*. pp. 401-432. p. 420.

incidents are justified” (due either to insufficient evidence or to the fact that the law in a particular area remained too unclear)¹⁹ – there was a sense of outrage by many in the United States. As the Americans saw it, it was they who put their money and soldiers on the line during a conflict to stop genocide. Any attempt to prosecute NATO officials was politically and unjustly motivated. Judith A. Miller, who served as General Counsel for the US Department of Defense during Operation Allied Force, argued that while she was gratified that the Report to the Prosecutor warranted that there should be no further investigation, the manner in which the committee reached its conclusions was “deeply disturbing”:

To have twenty-twenty hindsight scrutiny, done at leisure, of decisions and determinations made in the fog of war... based on allegations by those who do not hold Western nations in very high regard, is a chilling and frightening prospect. I fear that the reservations of the United States with respect to the International Criminal Court are well-founded, based on the aftermath of the Kosovo Conflict.²⁰

David B. Rivkin and Lee A. Casey gave a similar note of caution:

Significantly, while no prosecutions against NATO officials are currently planned, even the relatively tame Yugoslav tribunal did not give the alliance a clean bill of health. Future outcomes in the permanent ICC, a court that will be less dependent upon U.S. and NATO largesse than is the Yugoslav tribunal, may be very different.²¹

¹⁹ Text of the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia is available at <http://www.un.org/icty/pressreal/nato061300.htm>.

²⁰ Judith A. Miller, “Commentary”, in Wall, Legal and Ethical Lessons of NATO’s Kosovo Campaign. pp. 107-112. p. 111-2.

²¹ David B. Rivkin, Jr. and Lee A. Casey, “The Rocky Shoals of International Law” National Interest, Winter 2000/2001.

The significance of the ICTY's actions was also not lost on the American Congress. Controversial, yet influential American Senator, Jesse Helms, while he was Chair of the Foreign Relations Committee, argued:

Most recently, we learned that the chief prosecutor of the Yugoslav war crimes tribunal... conducted an eleven month investigation of alleged NATO war crimes during the Kosovo campaign... the very fact that she entertained the idea brings to light all that is wrong with the UN's conception of global justice, which proposes a system in which independent prosecutors and judges, answering to no state or institution, wield unfettered power to sit in judgement of the foreign policy decisions of Western democracies.²²

The ICTY's actions reinforced the suspicions emerging within the US towards the ICC but also the idea of international normative standards and international law. It was, after all, at this time that John Bolton argued that "while treaties may be politically or even morally binding, they are not legally obligatory. They are just not 'law' as we apprehend the term."²³

American Exceptionalism and the "New Sovereignists"

That the United States often sees itself as a "shining city upon a hill" is nothing new in its history. From the founding of the republic, Americans have often viewed their country as a good and great nation, divinely inspired to lead the world by example at home or activism abroad to promote individual freedom.²⁴ As such, the US has often viewed itself,

²² Jesse Helms, "American Sovereignty and the UN", *National Interest*, Winter 2000/2001.

²³ John Bolton, "The Global Prosecutors: Hunting War Criminals in the Name of Utopia", *Foreign Affairs*, Vol. 78 No 1, 1999. pp 157-164. pp. 158-159. For his critique of the ICC, see John R. Bolton, "Courting Danger: What's Wrong with the International Criminal Court", *The National Interest*, Winter 1998/1999.

²⁴ David P. Forsythe, "The United States and International Criminal Justice", *Human Rights Quarterly*, 24 (2002) pp. 974-991. p. 975.

its Constitution and Bill of Rights as exceptional among nations. So, to the American Exceptionalists, US law was not to be trumped by any international law to the contrary.²⁵

While American Exceptionalism was very prominent during the Reagan administration, its impact on thinking about international law began to be strongly felt in the 1990s. Many of those who were to become key figures in the administration of George W. Bush began to question the legitimacy, sources and even existence of international law. They were united in their critique of an “unaccountable” and “vague” international human rights agenda or any attempt, as they saw it, to limit the US Constitution.

In an article in Foreign Affairs, Peter J. Spiro referred to the application of American Exceptionalist thinking to international agreements as a “New Sovereigntist” vision of international law and proceeded to critique it.²⁶ In making his argument, Spiro outlines three New Sovereigntist lines of attack. The first is that the content of the emerging international legal order is vague and illegitimately intrusive on domestic affairs. The second condemns the international law making process as unaccountable and its results as unenforceable. Finally, New Sovereigntists argue that the US can opt out of any international legal regime as a matter of power, legal right and constitutional duty.²⁷

Given the name “New Sovereigntists”, it should come as no surprise that the key to these arguments is the idea of sovereignty which, according to this line of reasoning, protects the American Constitution that embodies the rights and way of life that Americans have chosen for themselves. Striking out against those who argue that sovereignty is constructed or “organized hypocrisy” (the idea that sovereignty does not really exist but happens to remain an organizing feature of the international system²⁸), New

²⁵ Forsythe, “The United States and International Criminal Justice”, p. 975. For some of the exceptionalist critics of international law, the only law that could or should matter is treaty law which is acknowledged as part of US law in the Constitution. For others, any form of international law is necessarily vague, fuzzy and, because it lacks any form of enforcement, is not real law.

²⁶ Peter J. Spiro, “The New Sovereigntists: American Exceptionalism and Its False Prophets”, Foreign Affairs, Vol. 79 No 6, November/December 2000 pp 9-15.

²⁷ Spiro, “The New Sovereigntists”

²⁸ In particular, New Sovereigntists argue with post-modern thinkers on sovereignty and realists such as Stephen Krasner (and his book Sovereignty, Organized Hypocrisy, Princeton: Princeton University Press, 1999).

Sovereignists lay out a moral defence of sovereignty as a doctrine underlying the social contract which determines how a particular people will let themselves be governed.²⁹ As Jeremy Rabkin argues “Sovereignty is at the heart of all [social] compromises, because it supplies the idea of a political authority which can accommodate differences...and yet still demand (and sustain) ultimate political allegiance.”³⁰ In other words, rights are best protected from within a sovereign community rather than by fuzzy international standards which international bureaucrats may wish to impose from above. Thus, any surrendering of sovereignty to international regimes or international courts is a threat to the American people. Naturally this poses problems for the application of international law.

New Sovereignists are reluctant to admit that international law even is “law”. In their book, The Limits of International Law, Jack L. Goldsmith and Eric A. Posner conclude:

International law is a real phenomenon, but international law scholars exaggerate its power and significance... [T]he best explanation for when and why states comply with law is not that states have internalized law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest....

More often, international legal rhetoric is used to mask or rationalize behaviour driven by self-interested factors that have nothing to do with international law.³¹

In a controversial article, Robert Bork argued in 1989 “There can be no authentic rule of law among nations until nations have a common political morality or are under a common sovereignty.”³² In 2000, John Bolton, who had worked in the Reagan and George H. W. Bush administrations, argued, “there is no reason to consider treaties as ‘legally’ binding internationally, and certainly not as law in themselves... There is no legal mechanism – no coherent structure – that exists today on a global level to enforce

²⁹ Jeremy Rabkin, Law Without Nations: Why Constitutional Government Requires Sovereign States, Princeton: Princeton University Press, 2005. p. 68

³⁰ Rabkin, Law Without Nations, p. 255.

³¹ Jack L. Goldsmith and Eric A. Posner, The Limits of International Law, Oxford: Oxford University Press, 2005. Also see the collection of essays, “The New York University-University of Virginia Conference on Exploring the Limits of International Law” Virginia Journal of International Law, Vol. 44 No. 1 Fall 2003.

³² Robert Bork, “The Limits of International Law”, The National Interest, Winter 1989/1990. pp. 1-10.

compliance with treaties, a fact that international law advocates flatly ignore.”³³ Combined with the fact that there are no agreed upon sources for international law, it follows that treaties are mere “promises” and international law is reduced to a political obligation for states to follow if it is in accordance with their national interest.

Thus, as the 1990s came to a close, there was a serious, significant and relatively powerful critique of international law that was attracting notice by sympathizers and detractors alike. Significantly, as already pointed out, many of these individuals would later assume influential positions within the George W. Bush administration, where their arguments have been applied to the standing issues of the day.

Reconsidering the relationship between ends and means in the laws of war

There is one more argument along these lines that merits attention. At a conference in early August 2001 titled “Legal and Ethical Lessons of NATO’s Kosovo Campaign” (the proceedings of which were later published into a book of the same name)³⁴ Professor Ruth Wedgwood, who has since been appointed by US Secretary of Defense, Donald Rumsfeld, to the Defence Policy Board, argued for a change of thinking about the laws of war after Kosovo:

It is commonly believed that the tactics of war must be judged independently of the purpose of a war... But this asserted independence of the two regimes may be no more than a fiction... Whether one’s framework is utilitarian or pure principle, it is possible to admit that the merits of a war make a difference in our tolerance for methods of war fighting. This teleological view can be incorporated, albeit awkwardly, in the metric for “military advantage” in judging proportionality, for surely we do not value military objectives for

³³ John Bolton, “Is There Really “Law” in International Affairs?”, *Transnational Law and Contemporary Problems*, Vol. 10 No 1, 2000. pp 1-48. pp.4-5.

³⁴ Andru Wall, *Legal and Ethical Lessons of NATO’s Kosovo Campaign*, Newport RI: Naval War College, 2002.

their own sake. But it may be better to be forthright, even at the cost of questioning homilies... Democratic leaders and publics may believe that there is an important link between the legitimate purpose of a war and its allowable tactics – at least within the limits of basic humanity and the protection of civilian lives.³⁵

In short, although she acknowledges that the “divorce of purpose and tactics is designed to allow agreement on humanitarian limits even when there is no consensus on the merits of the underlying dispute,”³⁶ Wedgwood is basically making the argument that noble ends justify almost any means.³⁷ This line of thinking is certainly a challenge to the laws of war as they have been written for at least the past 100 years. Concerned that such thinking may result in a blood bath of self-righteousness, proponents of the laws of war have argued that guilt, motives and moral standing should not influence the application of the relevant laws of war as such views are inherently political. Yet using World War II as an example, Wedgwood argues, “Defeating Nazism, for example, required measures that are now seen as harsh and even punitive. Even where their legality is conceded under the earlier standards of air war, it is commonly taught in American military curricula that their repetition would now be illegal.”³⁸ However, because the Allies had been fighting “radical evil represented by Nazism – an ideology posing the ultimate threat to human welfare”, we can still see these actions as justified, if not legal.³⁹ Therefore, according to

³⁵ Ruth Wedgwood, “Propositions on the Law of War after the Kosovo Campaign” pp. 433-441 in Wall, Legal and Ethical Lessons of NATO’s Kosovo Campaign. pp. 434-5.

³⁶ Wedgwood, “Propositions on the Law of War” p. 434.

³⁷ Where Wedgwood would draw the line is not exactly clear as she does not specify a limit in her argument, other than to mention “the limits of basic humanity” mentioned in the cited quotation. Wedgwood, “Propositions on the Law of War”, p. 434.

³⁸ Wedgwood, “Propositions on the Law of War” pp.434-5.

³⁹ For discussions about the ethics of fighting the “supreme emergency” faced by Great Britain in 1940, see one of the most famous arguments by Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations, Third Edition, New York: Basic Books, 2000. See especially the chapter on “Supreme Emergency” pp. 251-268. It is interesting to consider the implications for the discussion here. Walzer is clear that he is writing about a threat that poses an imminent danger and a nature that can be seen as “as evil objectified in the world” and how this may defend the adoption of extreme measures. He is clear that “the danger must be of an unusual and horrifying kind”, which although a common enough description in wartime, refers to a situation whereby a country is fighting for national survival. Although it would be wrong to downplay the significance of the 9/11 attacks, asserting that the United States is (or was) in a war of national survival of the kind that Walzer is describing is problematic. In this way, the argument here has chosen not to look at Walzer’s ‘supreme emergency’ doctrine. However, for an interesting discussion of

Wedgwood, a quiet linkage between *jus ad bellum* and the *jus in bello* often exists politically, if not explicitly legally.

The outcome of these arguments was a substantial and influential critique of international law within the United States by the late 1990s. This can be seen through a number of developments; critiques questioning the validity of international human rights 'norms' and international institutions that seek to hold states (and individuals) accountable for their actions beyond domestic authority; anger over the difficulties encountered in the Kosovo campaign as related to the pro-international criminal justice movement and allied warfare; and the emergence of a challenge to the traditional dichotomy between *jus ad bellum* and *jus in bello*. These arguments had all contributed to the creation of a strong skepticism among many academics and policy makers towards international law, including the laws of war. As Wade Mansell argues "there is a great deal of evidence which suggests that a reconsideration of international law and the use of force has been under way in the United States at least since the end of the Cold War."⁴⁰

Yet it is important to point out that this was not necessarily a universal attitude within the government of the United States.⁴¹ It is clear, that despite the difficulties encountered in

Walzer's arguments in light of the war on terror, see Nicholas J. Wheeler, "Dying for Enduring Freedom: Accepting Responsibility for Civilian Casualties in the War against Terrorism" International Relations, Vol. 16, No. 2, 2002. pp. 205-225.

⁴⁰ Wade Mansell, "Goodbye to All That? The Rule of Law, International Law, the United States and the Use of Force", Journal of Law and Society, Vol. 31 No 4, December 2004. pp. 433-56. p. 437.

⁴¹ This is a point that should certainly not be overlooked. A chorus of opposition has come from both sides of the political fence with democrats such as Dianne Feinstein and Patrick Leahy and Republicans such as Senator John McCain, Senator John Warner and Senator Chuck Hagel would all raise concerns over US detainee policy. See the Floor Statement of Senator Patrick Leahy "Guantanamo Bay Has Become A Blot And A Black Hole" 13 June 2005. Available online: <http://leahy.senate.gov/press/200506/061305.html> and "McCain Statement on Detainee Amendments" 5 October 2005. Available online:

http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1611 for a summary of the arguments against Guantanamo on both political sides. Former Clinton official have also spoken out against the treatment of detainees. For example, David J. Scheffer, who was the former U.S. Ambassador at Large for War Crimes Issues in the Clinton administration has spoken out against the Bush administration's arguments. See his letter in Foreign Affairs, "Court Order" November/December 2001, and comments made in Neil A. Lewis, "Broad Use of Harsh Tactics is Described at Cuba Base", New York Times, 17 October 2004. Available online at: <http://www.nytimes.com/2004/10/17/politics/17gitmo.html?ex=1255665600&en=67208a988fb44907&ei=5090&partner=kmarx> and his criticism of the Bush administration's policies regarding the military commissions at Guantanamo: David Scheffer, "Why Hamdan is Right about Conspiracy Liability" Jurist: Legal News and Research, 30 March 2006. Available online:

the military operations of the 1990s, many still considered the laws of war as alive and well, and very relevant to modern warfare. As James E. Baker, who served as the Special Assistant to the President and Legal Advisor to the National Security Council during the Kosovo campaign argued:

...the law of armed conflict is hard law. It is US criminal law. Increasingly, it will also serve as an international measure by which the United States is judged. The law of armed conflict addresses the noblest objective of the law – the protection of innocent life. And the United States should be second to none in compliance, as was the case with Kosovo.⁴²

Yet, political fallout from 9/11 clearly lent support to the arguments of the New Sovereignists, (many of whom had now found themselves in a role as advisors to the George W. Bush administration) when international law and the need for security seemed to collide.

“Unlawful Combatants” and “Quaint” Conventions⁴³

<http://jurist.law.pitt.edu/forumy/2006/03/why-hamdan-is-right-about-conspiracy.php>. Additionally, former Secretary of State Madeline Albright has questioned the policies regarding Guantanamo Bay. See William Douglas, “President Bush meets ex-secretaries of state, defense to discuss Iraq” Knight Ridder/Tribune Information Services, 12 May 2006 and Suzanne Goldenberg, “Guantanamo's day of reckoning in supreme court”, *The Guardian*, 29 March 2006. Available online:

<http://www.guardian.co.uk/guantanamo/story/0,,1741825,00.html>. Human Rights First has compiled a list of quotes from leaders speaking out against Guantanamo available online:

http://www.humanrightsfirst.org/us_law/etn/misc/call_commish.asp. American lead NGOs, especially Amnesty International and Human Rights Watch who have both set up special monitoring sections on their website and have repeatedly condemned Bush administration policies. See Amnesty's site at:

<http://web.amnesty.org/pages/guantanamobay-index-eng> and Human Rights Watch's site at:

http://hrw.org/doc/?t=usa_gitmo.

⁴² James E. Baker, “Judging Kosovo”, p. 18.

⁴³ As of July 2006 there are currently 450 detainees from roughly 40 countries speaking about 17 different languages at Camp Delta. (However, it should be remembered that the US is also holding prisoners in Afghanistan – approximately 560 in Bagram).⁴³ Additionally, the US and some of her allies are holding an unknown number of individuals in undisclosed locations throughout the world. Human Rights Watch has produced a list of 11 such detainees. See the ICRC “Operational Update”, May 2006.. Human Rights Watch provided a list of 11 detainees in an October 2004 briefing paper, “The United States’ ‘Disappeared’: The CIA’s Long-Term ‘Ghost Detainees’” <http://www.hrw.org/backgrounder/usa/us1004/7.htm>. Additionally there have been charges that the United States has been holding detainees in secret prisons in

The purpose of this section is not to provide a detailed history or description of Guantanamo Bay. Rather, it is to provide a brief overview of the events post-9/11 in terms of legal developments and in changes to national security policy to enable a discussion of the issues and arguments made for and against US policies affecting detainees in the war on terror. The Geneva Conventions, typically not a mainstream media issue, were thrust into the spotlight 11 January 2002 when US Secretary of Defense Donald Rumsfeld announced that the detainees in Afghanistan “will be handled not as prisoners of wars, because they're not, but as unlawful combatants. The – as I understand it, technically unlawful combatants do not have any rights under the Geneva Convention.”⁴⁴ But what was the background to this decision and how was it defended?

Defending the Detainee Policy

This chapter has tried to suggest that by 9/11 there existed a significant moral, political and legal critique of international law. As many of those who subscribed to these views (such as Bolton, Wedgwood and Yoo) held posts in the Bush administration, it should

Eastern Europe. See “Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe” 1 December 2005 <http://hrw.org/english/docs/2005/11/07/usint11995.htm>; and “Questions and Answers: U.S. Detainees Disappeared into Secret Prisons: Illegal under Domestic and International Law” 9 December 2005 <http://hrw.org/backgrounder/usa/us1205/index.htm>. For news stories on the alleged prisons, see Dana Priest “CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11” *Washington Post*, 2 November 2005, Page A1. Available online at: <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>; Brian Ross and Richard Esposito, “Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons: 10 Out of 11 High-Value Terror Leaders Subjected to ‘Enhanced Interrogation Techniques’”, ABC News, 5 December 2005. Available online at: <http://abcnews.go.com/WNT/Investigation/story?id=1375123>; Jon Boyle, “Europe ‘actively participated’ with CIA prisons” Reuters UK, 7 June 2006, Available online at: http://today.reuters.co.uk/news/newsArticle.aspx?type=topNews&storyID=2006-06-07T100214Z_01_L07492816_RTRUKOC_0_UK-SECURITY-CIA-PRISONS.xml. All governments involved have denied the charges. However, the true amount of detainees remains unknown.

⁴⁴ “DoD News Briefing - Secretary Rumsfeld and Gen. Myers”, 11 January 2002. Available at: http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html. It should be noted that the term ‘unlawful combatant’, although not in the Geneva and Hague Conventions have been used for at least a century. Some critics suggest that that any use of the term is purposefully and deliberately vague so as to escape international legal obligations. Cassese argues that this category can only be accepted for descriptive purposes: “it cannot be admitted as an intermediate category between combatants and civilians. In particular, it would be contrary to the law of war to hold that this category embraces persons who may be considered neither as legitimate belligerents nor as civilians... and are therefore deprived of any rights.” Cassese, *International Law*, p. 409.

come as little surprise that the administration's arguments regarding its detainee policies reflected in large part the views of the New Sovereignists.⁴⁵ These policies were defended on the basis of a complex mix of moral, political and legal opinions and an examination of the legal logic will be presented in this next section of the chapter. In order to fully flesh out the complexity of the arguments, a look at some of the background moral and political concerns will also be noted which will provide a better understanding of the legal reasoning employed by administration officials.

Almost immediately after the attacks of 11 September the Bush administration argued that they were fighting a new kind of enemy. In an interview with reporters on 17 September, Bush remarked:

I know that this is a different type of enemy than we're used to. It's an enemy that likes to hide and burrow in, and their network is extensive. There are no rules. It's barbaric behavior...

But we're going to smoke them out. And we're adjusting our thinking to the new type of enemy. These are terrorists who have no borders...

It's going to require a new thought process. And I'm proud to report our military, led by the Secretary of Defense, understands that; understands it's a new type of war, it's going to take a long time to win this war.⁴⁶

In this way the Bush administration maintained that the war on terror is a conflict unlike any other in history in terms of its scope, the participants involved and in the very nature of the fighting which is being undertaken world wide. As such, it was argued that the President requires powers which enable the executive to protect the United States from attack and use force against those who threaten the safety of the nation and its citizens.

⁴⁵ Bolton was the Undersecretary of State for Arms Control and International Security and was became the US Ambassador to the United Nations in August 2005. Wedgwood was appointed by Rumsfeld to the Defense Policy Board. She is also the US member of the United Nations Human Rights Committee and a member of the US Secretary of State's Advisory Committee for International Law. Yoo worked for the Justice Department's Office of Legal Counsel from 2001-3 and has subsequently returned to academia.

⁴⁶ "Guards and Reserves 'Define Spirit of America': Remarks by the President to Employees at the Pentagon." 17 September, 2001. Available at: <http://www.whitehouse.gov/news/releases/2001/09/20010917-3.html>.

These powers are in fact authorized by “the text, plan and history of the Constitution, its interpretation by both past Administration and the courts, the longstanding practice of the executive branch, and the express affirmation of the President’s constitutional authorities by Congress”.⁴⁷ Additionally, this authority was recognized by Congress in the Authorization for Use of Military Force of 18 September 2001 which indicated that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States” and authorized the President:

to use all necessary and appropriate force against those 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 United States by such nations, organizations or persons.⁴⁸

It was under this authorization, the President determined that the Taliban and al-Qaida constituted the organizations who carried out the attacks of 11 September.

Military Commissions

Consistent with the powers authorized by the Constitution and Congress, the President issued an executive order which set up military commissions to try enemy combatants captured either within or outside the territory of the United States on 13 November 2001. The use of military commissions, it was argued, is “firmly based in international law, [the US] Constitution, the Uniform Code of Military Justice..., our nation’s history, and international practice.”⁴⁹ This includes the use of commissions to try eight Nazi saboteurs

⁴⁷ Memo from the US Department of Justice Office of the Legal Counsel written by John Yoo, the then Deputy Assistant Attorney General, “Memorandum Opinion for Timothy Flanigan, the Deputy Counsel to the President” on “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them” 25 September 2001.

⁴⁸ 107th Congress, Authorization for the Use of Military Force, 18 September 2001. Public Law 107-40 [S. J. RES. 23].

⁴⁹ Statement of Daniel J. Dell’Orto, Principal Deputy General Counsel Department of Defense; Major General Thomas J. Romig, Judge Advocate General of the Army; Major General Jack L. Rives, Acting Judge Advocate General of the Air Force; Rear Admiral James E. McPherson, Judge Advocate General of the Navy; Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the United

during World War II (the 1942 *ex parte Quirin*) and some 500 war criminals at the cessation of that conflict.⁵⁰ Additionally, such commissions and other military tribunals are expressly recognized by Congress through Article 21 of the UCMJ as legitimate means to try violation of the laws of war. Article 36 of the UCMJ authorizes the President's authority to prescribe pretrial, trial and post-trial procedures for military commissions, and this includes rules about the conduct of the hearing and access to evidence.⁵¹

Prisoner of War Status

Aside from the tribunals, the Bush administration also made determinations as to the status of captured fighters in the war on terror. Lawyers, mostly from the Department of Justice, were tasked with determining the applicability of domestic and international law,

States Marine Corps Before the Senate Arms Services Committee Subcommittee on Personnel Military Justice and Detention Policy, 14 July 2005.

⁵⁰ See the judgement in *ex parte Quirin*, 317 U.S. 1 (1942).

⁵¹ Statement of Daniel Dell'Orto et al, 14 July 2005. Such commissions are appealing because the rules on evidence are much less demanding and they can help protect classified and sensitive information. Yet there is a striking comparison which can be made here. Perhaps one of the most interesting stories coming out of Kosovo in relation to the laws of war was the case of the Nis bus bombers. On 16 February 2001, a bus was blown-up by a group of Kosovar-Albanians resulting in the death of 11 Serbs. Four individuals were eventually detained for the incident. However, three out of four of the individuals thought to have been guilty were linked to the crime only by sensitive intelligence information – information that NATO officials did not want to have in an open court. The arrested were eventually transferred into US custody at Camp Bondsteel – but languished in prison for months as authorities debated exactly how the case could be prosecuted while protecting intelligence sources. Eventually UNMIK decided to create a Detention Review Commission of three international judges (from the US, UK and Germany) with security clearance to determine the case in a closed courtroom. According to UNMIK spokeswoman Susan Manuel: "This is sensitive information which sources will not release as evidence in courts. This judicial review panel will decide based on the information presented to them, whether further detention by executive order is warranted... According to the regulation which set up this special panel, the Commission has seven days to render its decision on further detention... The commission's decision will not be subject to appeal." Ultimately the court found that there was reason to detain the suspects for a further 90 days by which time charges were to be brought against them in a civilian court. However, without access to the intelligence in which to charge or convict the individuals involved, they were set free by Kosovo's Supreme Court. The parallels of this case with Guantanamo are striking – right down to the orange jumpsuits the detainees were allegedly wearing. However, there was very little outcry in this case with regards to the rights of the prisoners, NATO or UN policies. Perhaps this is because the court only extended detention for a further 90 days or that the Detention Review Commission was comprised of judges from different NATO countries. Still, the fact that the court went ahead with little outcry is interesting. However, because the incident deals with NATO and the UN rather than the US, and because the issue was relatively non-controversial, this work will not engage in a further discussion of these matters. The author feels that pointing out the similarities in these cases suggests an area of potential future comparison or research. For more information on these rather unknown events, see UNMIK-OSCE-EU-UNHCR Press Briefing, 20 September 2001,

including the Geneva Conventions, to enemy combatants. In a memo dated 9 January 2002, it was argued by John Yoo, the then Deputy Assistant Attorney General and Robert J. Delabunty, Special Counsel that “nether the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners.”⁵² In particular, the Geneva Convention and Common Article 3 did not apply because the Geneva Conventions never anticipated that there could be an insurgency movement that was not a nation state, it did not anticipate a conflict such as the global war on terror and that it is not clear that Congress would support an interpretation of Common Article 3 that supported its application in a war on terror. The same memo went on to conclude that “customary international law has no binding legal effect on either the President or on the military because it is not federal law, as recognized by the Constitution.”⁵³ Similar findings were put forward in a memo by Jay S. Bybee on 22 January 2002.⁵⁴ Adding to these legal findings, the then White House General Counsel, Alberto Gonzales argued that because the war on terrorism was essentially a new kind of war, the laws of war was rendered mostly irrelevant: “In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions...”⁵⁵

On 7 February 2002, President Bush accepted the conclusions of the Justice Department. The President “determined that the Geneva Convention applies to the Taliban detainees,

⁵² Memo from the US Department of Justice Office of the Legal Counsel, John Yoo and Robert J. Delabunty. “Memorandum For William J. Haynes II General Counsel, Department of Defense”, 9 January 2002.

⁵³ “Memorandum For William J. Haynes II General Counsel, Department of Defense”, 9 January 2002. The conclusion did go on to say that “Nonetheless, we also believe that the President as Commander-in-Chief, has the constitutional authority to impose the customary laws of war on both the al Qaeda and Taliban groups and the U.S. Armed Forces.”

⁵⁴ Memo from the US Department of Justice Office of Legal Council, Jay S. Bybee, the then Assistant Attorney General, “Memorandum for Alberto R. Gonzales Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees” 22 January 2002.

⁵⁵ Gonzales’ memo can be found online at Michael Isikoff “Memos Reveal War Crimes Warning” 19 May 2004, *Newsweek*. <http://msnbc.msn.com/id/4999734/>.

but not to the al-Qaida detainees.”⁵⁶ A final breakdown of the Bush administration’s legal argument was presented in a press release:

- The United States is treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a matter consistent with the principles of the Geneva Convention.
- The President has determined that the Geneva Convention applies to the Taliban Detainees, but not to the al-Qaida detainees. al-Qaida is not a foreign terrorist group. As such its members are not entitled to POW status.
- Although the US never recognized the Taliban as the legitimate Afghan government, Afghanistan is party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban do not qualify as POWs as they do not meet the criteria spelled out in Article 4 of the Third Geneva Convention.⁵⁷

⁵⁶ “Fact Sheet: Status of Detainees at Guantanamo”, 7 February 2002. Available at: <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

⁵⁷ Article 4 of the Third Geneva Convention reads:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: [

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

- Therefore neither the Taliban nor al-Qaida detainees are entitled to POW status.⁵⁸

Interrogation

Arguments regarding POW status and military tribunals rested on a powerful argument which put forward the idea that the President was authorized to do whatever it took to protect the nation's security in a national emergency. These arguments, which rested on the idea that the President needed strong powers to protect the nation, its citizens and their rights under the Constitution, went together well with the ideas of the New Sovereignists. In this "New Paradigm" of warfare, the President was morally, politically and legally obliged to violate international law if necessary in order to punish those who carried out the attacks of 11 September and to prevent future attacks.⁵⁹ This, naturally,

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

⁵⁸ This argument was set out in a White House press release "Fact Sheet: Status of Detainees at Guantanamo" 7 February 2002. Available online at: <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

⁵⁹ The term "New Paradigm" is taken from Jane Mayer. See Jane Mayer "The Hidden Power: The legal mind behind the White House's war on terror", *The New Yorker*, 3 July 2006. pp. 44-55.

included obtaining as much information as possible from those captured in the war on terror and suspects at home.

The idea that the United States now found itself in this “New Paradigm” was also used as a basis for the arguments regarding the interrogation of captured enemy combatants. On 26 February 2002 Bybee concluded that information derived from military interrogations may be admissible in court, even without *Miranda* warnings.⁶⁰ Also, a reading of the Torture Convention by Bybee argued that the text only prohibited “the most extreme acts” as criminal penalties only applied to “torture” and not “cruel, inhuman, or degrading treatment or punishment.”⁶¹ In a letter to Gonzales, Yoo maintained that because the President had determined al-Qaida members are not POWs under the Geneva Conventions, they could not be entitled to any protections of any of the Geneva Conventions. Therefore actions carried out during the interrogations of al-Qaida members or suspects could not constitute a war crime under Article 8 of the ICC Rome Statute.⁶² In October 2002 a series of memos were issued considering acceptable counter resistance techniques in interrogations. Aside from the 17 methods listed in Field Manual 34-52, 16 additional techniques were authorized by Secretary of Defense Donald Rumsfeld after a legal review.⁶³

⁶⁰ Memo from the US Department of Justice Office of Legal Council, Jay S. Bybee, the then Assistant Attorney General, “Memorandum for William J. Haynes II, General Counsel, Department of Defense Re: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan” 26 February 2006. *Miranda* warnings are given to suspects in police custody in the United States before they are asked any questions. The warnings are given as a way to protect an individual’s right against self-incrimination. Reminding suspects of their “right to remain silent” was seen as problematic by those who wanted to gather information from suspects. For more information on *Miranda* Warnings see, the US Supreme Court decision in *Miranda v. Arizona* 384 U.S. 436 (1966),

⁶¹ Memo from the US Department of Justice Office of Legal Council, Jay S. Bybee, the then Assistant Attorney General, “Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. Dated 26 February 2002.

⁶² Letter from the US Department of Justice Office of Legal Council to The Honourable Alberto R. Gonzales, Counsel to the President. 1 August 2002. In Article 8(2)(ii) the ICC Statute prohibits “Torture or inhuman treatment, including biological experiments”. Yoo was trying to determine if the ICC would be able to prosecute interrogators for their actions. He claimed that the Article 8 of the Rome Statute only applied to those protected by the Geneva Conventions but could not guarantee that the ICC, “rogue prosecutor” or other countries would see the legal argument the same way.

⁶³ See Appendix A. These memos and their timeline will be discussed in greater detail in Chapter 5.

In summary, the legal argument rested on the assumption that the United States had entered a “new paradigm” of warfare and a national emergency which required strengthened presidential powers which, according to this view, were authorized by Congress and the Constitution of the United States. This authority allows the President to override international law and state practice where necessary and for the safety of the United States and its armed forces. In this way, the laws of war and other international legislation (such as the Torture Convention) could either be overridden or reinterpreted in light of the imperatives of the global war on terror.⁶⁴

Internal Debate

As is fairly now well known not everyone in the US government was pleased with the outcomes of the legal review provided by (mostly) Department of Justice lawyers. From late 2001-2003 a debate emerged among the Justice, State and Defense Departments as to what exactly America’s obligations under international law entailed and whether or not the laws of war could and should apply. The Bush administration wanted to obtain as much information from detainees as possible and had asked its lawyers to investigate the applicable international law. What was perhaps peculiar about this arrangement, and came as surprise to many within the government, was *who* the administration had turned to for advice. Rather than turning to the experts within the Department of Defense or State, who had officials that were thoroughly familiar with the laws of war, state practice, US practice and had actually engaged in the process of negotiating the treaties to which the US was a party, the Department of Justice seems to have been asked to provide most of the advice. For example, while John Yoo had proficiency in the area of international law, he had little to no laws of war training or expertise and many felt that he had got some of his legal interpretations of the applicable treaties very wrong.⁶⁵

⁶⁴ An outline of the US argument was provided by the White House Press Secretary on 14 November 2005. Available online at: <http://www.defenselink.mil/news/Jan2006/d20060215legalbasis.pdf>

⁶⁵ That there were many within the government that were concerned with the interpretations of the laws of war being put forward by the administration has been made clear through discussions with officials in the research done by the author. One former State Department official confirmed that State was largely kept in the dark as to the debates going on. It was only after the advice had been asked for and received that internal concerns were raised about the detainee policies. Interview, Washington DC, 30 March 2006. This sentiment has also been noted by many news reports. See Jane Mayer, “The Memo”, *The New Yorker*, 27

It was not until late 2001 and early 2002 that officials in the Departments of State and Justice became aware of the legal opinions which had been rendered and were about to be put into practice. The legal advisor to the State Department, William Howard Taft IV and Secretary of State Colin Powell both spoke out within the administration against the policies that were being put in place.⁶⁶ Colin Powell, who was advising in his role the Secretary of State, but also as a former General, argued that the administration's position jeopardized the safety of captured US personnel and undermined previous policy:

It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions (sic) and undermine the protection of the law of war for our troops, both in this specific conflict and in general.⁶⁷

These views appear to have been largely ignored in favour of the arguments being put forward by the Department of Justice.

Given this history, it is reasonable to assert that the critiques of international law put forward by the New Sovereignists became very influential after 9/11. The Bush administration (and, it should be remembered, the Clinton administration) had already demonstrated a willingness to 'take on' the international community over Kosovo and the International Criminal Court. It is not surprising that the administration was willing to do the same with humanitarian norms in conflict, especially after 9/11. When pictures of detainees being transported to and living in Guantanamo emerged in early 2002, public shock and outrage over the 9/11 attacks lent support to the administration's arguments that the security needs and the right of self-defense gave the US the right to deny the full protection of the Geneva Conventions to the prisoners. Besides, it was argued, the methods employed by the Taliban and al-Qaida, their failure to live up to what the laws

February 2006 and John Barry, Michael Hirsh and Michael Isikoff, "The Roots of Torture", *Newsweek* 24 May 2005. Available online at: <http://www.msnbc.msn.com/id/4989481/>.

⁶⁶ See Colin Powell's memo of 26 January 2002 to Counsel to the President and Assistant to the President for National Security Affairs, "Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan". Also see the memo from William H. Taft, IV to the Counsel to the President, "Comments on Your Paper on the Geneva Convention", 2 February 2002.

⁶⁷ Colin Powell's memo of 26 January 2002.

of war required and their obvious contempt for western/international human rights norms meant that they did not deserve such protection, either legally or morally.⁶⁸

Yet, despite its downplaying of international law, the arguments that the US administration has and continues to rest on are legal arguments to some degree. It is clear that the Bush administration sought out a legal solution to carry out their desired security policy and relied on moral arguments to support this solution. While the Bush administration frequently referred to its enemies in the war on terror as “evil”, its arguments have continued to rely on the legal argument that those held in Guantanamo do not meet the requirements of the Geneva Conventions.

Perhaps this should not be surprising. This work has already made the claim that there is a dualistic tendency regarding the implementation of the laws of war to conflicts. That while policy and political concerns have often pushed for the downplaying of international law where there is a significant cost associated with full implementation, US administrations have still usually attempted to present legal arguments to back up their policies. Therefore, considering that the US had been very important in drafting many of the laws of war conventions, and that such conventions were considered “hard law” by many of the international lawyers in the Pentagon, a legal solution to the issue is more politically and morally palpable than a straight denial of the Geneva Conventions. Still, if it is not surprising, it is certainly ironic that the US had spent much time and effort making the exact opposite case with regards to its prisoners in Vietnam.⁶⁹

International Lawyers and the Legal Response

It is fairly clear that the “international legal community” – made up of mostly Western lawyers and NGOs – was not on best terms with the Bush administration even before 9/11. Despite a considerable amount of international support for the US after the attacks, international lawyers soon found themselves troubled with the measures that the US was

⁶⁸ See, for example, Jeremy Rabkin, “After Guantanamo: The War Over the Geneva Conventions”, The National Interest, Summer 2002.

⁶⁹ As discussed in Chapter Three.

taking to fight the war on terror.⁷⁰ Domestically, the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001* (More commonly known as the USA PATRIOT Act) gave new powers to the federal government to detain and monitor individuals suspected of being involved with terrorism, which was a matter of concern for some civil and human rights lawyers. Yet, our main concern here is the reaction to the announcement that detainees would not be provided with the full protections of the laws of war, specifically, the Geneva Conventions and customary aspects of the Additional Protocols, which the US had previously indicated that it would adhere to.⁷¹

There have been many legal arguments made against the Bush administration's argument that the detainees do not qualify, and therefore do not deserve the protections of the Geneva Conventions. Since the outbreak of hostilities, there have been several studies published by international lawyers arguing for the full application of the law to the military activities involved in the war on terror and criticizing the Bush administration's policies. For the sake of brevity, they can be summed up as follows:

- 1) No one is "outside" the protection of the Geneva Convention. If an individual is not protected under the Third Convention Relevant to the Treatment of Prisoners of War, they are automatically considered civilians under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Therefore there is no legal black hole into which the US can put the detainees.

⁷⁰ Michael Byers, *War Law: International Law and Armed Conflict*, London: Atlantic Books, 2005; Antonio Cassese, *International Law*, Second Edition, Oxford: Oxford University Press, 2005; Yoram Dinstein, *The Conduct of Hostilities*; Helen Duffy *The 'War on Terror' and the Framework of International Law*, Cambridge: Cambridge University Press, 2005; Forsythe, *The Humanitarians*; and Sands, *Lawless World*.

⁷¹ Although ultimately rejecting AP I, Ronald Reagan indicated that there were "sound elements" to the Protocols which the US would work with its allies to implement in conflict. See his "Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions," January 29, 1987. Accessible on the Ronald Reagan Presidential Library Website: <http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM>.

- 2) It is customary law that belligerents do not need to meet the requirement of wearing a uniform or having a fixed, distinctive mark – they need to only carry their arms openly.⁷²
- 3) If the administration wishes to argue that the detainees do not qualify for POW status, then it must be able to demonstrate why in a tribunal operating in accordance with internationally recognized legal principles and procedures.
- 4) The US is considering all of the detainees as a group, and not as individuals. This also violates the presumption of innocence.
- 5) The US actions undermine their own military manuals and procedures which make it clear that all prisoners are immediately assumed to be prisoners of war and that they must be treated in line with the laws of war. For example, Field Manual 27-10, “The Law of Land Warfare” deals extensively with the treatment of Prisoners of War as well as the military’s Operational Law Handbook.

Lawyers also point out that there is precedence for the US treating insurgents or those who do not strictly meet the requirements of that status. Duffy, for example argues that this was the case during Vietnam with regards to the Viet Cong and the North Vietnamese forces.⁷³

The summary of the legal arguments here has been brief – for several reasons. First, there have already been a number of detailed books written as to why the legal arguments made by the Bush administration are incorrect. While there is always room for debate and discussion, it would be difficult to add substance to what has already been written. Second, the intention for the argument and analysis being made here is to be more political than legal. This relates to the third point, that the main problem with the arguments being made by international lawyers is that they are, in fact, mostly legal. While this should not be a shocking revelation concerning lawyers, it does render their

⁷² It should be pointed out that has been a very contentious issue within the humanitarian and laws of war community since before 9/11. In the case of Afghanistan Dinstein argues that the Taliban did not meet the criteria for POW status because they were not in uniform and did not have an identifiable mark, Cassese argues that this is irrelevant in modern customary law. See Dinstein, The Conduct of Hostilities, pp. 47-48 and Cassese International Law, pp. 405-410.

⁷³ Duffy, Helen. The ‘War on Terror’ and the Framework of International Law, Cambridge: Cambridge University Press, 2005. p. 243 see also note 143 on the same page.

argument somewhat ineffective against an American administration which is essentially downplaying the importance of international law albeit partly through legal arguments about constitutional powers. If the argument being made is essentially “international law as it has operated in the past does not apply and cannot be applied to a war on terror”, counterarguments emphasizing the bits and pieces of customary law seem somewhat lacking in strength, if not substance.

The next part of the chapter will look at some of the political/moral arguments that have been and can be raised against the case being made by the “New Sovereignists”. In doing so, it is hoped that the chapter can provide an evaluation of the arguments being made by all sides and give us a better understanding of what the implications of international law are for the war on terror.

The Case against the “New Sovereignists”

The Constitution

The first and one of the most powerful arguments that challenging the New Sovereignist position is that their arguments are based on a particular reading of the US Constitution and its history. As Peter Spiro argued in Foreign Affairs:

These arguments are grounded in highly formalistic readings of the Constitution and selective interpretations of its history... [T]he New Sovereignists forget that the Constitution – hardly blind to the national interest – has always adapted itself successfully to new exigencies of the international system. Such values as federalism, the separation of powers, and individual rights are not so brittle that they will shatter at the intersection with globalization.

Indeed, the Constitution will have to adapt to global requirements sooner or later, for the New Sovereigntist premise of American impermeability is flawed.⁷⁴

Spiro raises an important point – to suggest that the Constitution cannot adapt, and that individual rights are so weak as to crumble when faced with globalization seems to be a flawed argument. Relying on Jacksonian thinking for problems that are occurring well over a century later may be emotionally appealing in its harkening back to the historical roots of the foundations of the Republic, but at the same time it seems to be somewhat completely out of touch with modern considerations.

Origins of the laws of war

New Sovereigntists argue that the laws of war and the norms that it embodies are standards which have been set by undemocratic international bodies that are accountable to no one – or international judges that do not have America’s best interest in mind: As Rabkin argues, “we cannot delegate our own decisions about national defense to prosecutors in The Hague or moral monitors in Geneva any more than we would give final word on these matters to the spiritual admonitions of the Pope in Rome.”⁷⁵

Some have argued against this point, stating that the Geneva Conventions and other laws of war treaties are international “objectively verifiable standards” that all parties are bound to meet in warfare.⁷⁶ One can only presume that “objective” in this case means politically neutral. Given the fact that the law has typically been drafted and decided upon after wars, largely influenced by its victors who are in turn also looking towards the next war, this does not quite fit. A better argument ironically stems from one of Rabkin’s own points – that the dispute over the Geneva Convention “is a dispute about treaty law – but law with a history.”⁷⁷

⁷⁴ Spiro, “The New Sovereigntists”, pp. 9-16.

⁷⁵ Rabkin, “After Guantanamo”.

⁷⁶ Duffy, *The “War on Terror”*, p. 2.

⁷⁷ Rabkin, “After Guantanamo”.

Unlike international human rights law (for which the New Sovereignists seem to save a special variety of loathing⁷⁸), the laws of war have been carefully acknowledged, negotiated and (mostly) accepted by states via diplomatic conferences where they were able to consult with their own military professionals and protect their national interest. Where international human rights law remains vague and full of generalities, the laws of war are generally more specific and can be broken down relatively easily to be incorporated into military doctrine and taught to soldiers during training and in the field. This does not render the law into “objective standards” but certainly a stronger form of law that states have explicitly agreed to through treaties. As the New Sovereignists themselves argue, it does create political obligation. However, this seems to imply to the New Sovereignists that this “political obligation” can be easily denied and down played without too much political consequence; given the relative strength of the US in the international system in comparison to its allies and enemies, it is contended that states will have to come back and conform to the US no matter what they wish. As Rabkin argues:

As the strongest and richest country in the world, the United States can afford to safeguard its sovereignty... we have every reason to expect that other nations, eager for access to American markets and eager for other cooperative arrangements with the United States will often adapt themselves to American preferences.⁷⁹

However, is a dismissal of political obligation really so easy? If it was, it is doubtful that so many words would have to be written justifying the Bush administration’s policies, or that this justification continues to rely on a legal basis. Even the New Sovereignists, in arguing that the laws of war do not fully apply to the war on terror often point to legal reasons why this is so, aside from constitutional limitations. Jeremy Rabkin argues that the Geneva Conventions are treaties and “a treaty, as The Federalist (No. 64) explained in

⁷⁸ For example, see Rabkin’s chapter “The Human Rights Crusade” in Law Without Nations or Bolton’s Foreign Affairs article, “The Global Prosecutors”.

⁷⁹ Jeremy Rabkin quoted in Spiro, “The New Sovereignists”.

1788, ‘is only another name for a bargain.’”⁸⁰ In other words, the Geneva Conventions do not apply because terrorists have not lived up to their side of the bargain. Therefore, what Rabkin’s argument ultimately comes down to on this point is a different interpretation of the law from that of the pro-laws of war lawyers – not that the law itself is entirely irrelevant.

The value of the laws of war

It is clear that the US military and Pentagon lawyers value the laws of war if only from the comments made prior to 9/11. Since Vietnam, laws of war training has become entwined with US military doctrine. Lawyers have become integral to the conduct of military operations. Although he was critical of the overall conduct of the campaign in Kosovo, Short argued:

My lawyer most of the time was a lieutenant colonel. It is very difficult for him to come in and say to a three star ‘you are out of bounds, sir you are about to break the law.’ But [military lawyers] have got to be able to do that. [They] have got to know [their] business inside and out and [they] have got to think like an operator.⁸¹

A fairly robust commitment to the laws of war within US military culture is apparent in other ways. Within the Pentagon there exists the Department of Defense Law of War Working group, and the US military has the highest number of judge advocates in the world – the Marine Corps, the smallest of the US armed services, has more active duty judges advocates than the UK, Canada, Australia and New Zealand combined.⁸² The Army has established a Centre for Law and Military Operations at the Judge Advocate General’s School which publish “lessons learned” reports which include rules of engagement and laws of war training information. While respect may at times be

⁸⁰ Rabkin, “After Guantanamo”

⁸¹ Short, “Operation Allied Force”, p. 26.

⁸² In 2002 there were 428 judge advocates in the Marine Corps alone compared with 102 in the UK, 100 in Canada, 90 in Australia and 17 in New Zealand. W. Hays Parks, “The United States Military and the Law of War: Inculcating an Ethos” in *Social Research*, Vol. 69 No. 4, Winter 2002. pp. 981-1015. p. 989.

grudging, it is clear that the laws of war are taken seriously by most Pentagon military lawyers and officials. It is clear that much effort has gone into ensuring that the applicable law has been incorporated into the everyday training of US soldiers.

Why this is the case is also understandable. Aside from addressing the ideal of protecting innocent life – something that is inherent in western human rights culture – it is widely acknowledged that soldiers who play by the rules in all respects of their training and in terms of operational doctrine are the ones that best accomplish their mission. Unruly and ill-disciplined troops are not only more likely to commit war crimes, they are also most likely not to effectively complete their mission.⁸³ This claim – of the consistency between following the laws of war and military effectiveness – is backed up by the Department of Defense’s report to Congress on the Persian Gulf War:

It is important to note that, with the possible exception of the Coalition’s need to direct considerable effort toward the hunt of the Iraqi scud missiles, no Iraqi action leading to or resulting in a violation of the law of war gained Iraq any military advantage. This “negative gain from negative action” in essence reinforces the validity of the law of war.⁸⁴

Considering this attitude towards what helps to ensure military effectiveness, it is unsurprising that Pentagon officials draw a link between war making, policy and law. These three factors are inherently intertwined to create a lethal yet effective fighting force that follows Clausewitz’s teaching on the economy of force.⁸⁵

If military lawyers and Pentagon officials can see this importance, then why are the New Sovereignists so casual about dismissing these links? In arguing that it is America’s right to take whatever steps are necessary to defend itself, are the New Sovereignists actually undermining some of the key components that the Pentagon has regarded for years as

⁸³ Parks, “The United States Military” pp, 983-4.

⁸⁴ United States Department of Defense, Final Report to Congress: Conduct of the Persian Gulf War, Washington DC: Department of Defense, 1992. p. 624.

⁸⁵ As explained in Chapter 3.

essentially required for fighting effective wars? Perhaps this is why several accounts report dissatisfaction within the Pentagon and the Department of State as to how the Bush administration handled the Guantanamo issue – and its attitude towards the laws of war.⁸⁶ As we have already seen from above, Colin Powell, had argued that the policies did not just contravene international law, but also undermined US state practice for over a century and put the lives of American soldiers at risk.

Therefore, the New Sovereignists can be accused of ignoring the views of many American military lawyers when they suggest that the US is above or can choose to ignore the laws of war.⁸⁷ Considering that those who were making these arguments in the Departments of Justice or Defense were political appointees (few had any military experience or any specialty in the laws of war), ignoring the link between effective fighting, policy and law seems to be a serious omission to their arguments.

The Pentagon, especially since the lessons learned in Vietnam, has valued the laws of war and sought to incorporate it in its training. Having previously argued that there is a link between effective fighting and adhering to the laws of war, it is clear that many soldiers felt they have an interest in preserving the latter in US military training and its implementation in war. After all, it is apparent that soldiers would probably know best that the laws of war are written in the blood of war's victims, and there is therefore a significant interest in ensuring that they are not thrown away.

⁸⁶ See for example, John Barry, Michael Hirsch and Michael Isikoff, "The Roots of Torture", Newsweek 17 May 2004. Available online at: <http://msnbc.msn.com/id/4989422/>. This also reflects the attitude expressed by several current and retired military officials when confidentially interviewed on the issue. The debate's paper trail has largely been captured in paper and published in Karen J. Greenberg and Joshua L. Dratel eds., *The Torture Papers: The Road to Abu Ghraib*, Cambridge: Cambridge University Press, 2005.

⁸⁷ For example, in the continuing battles over military tribunals, several Department of Defense lawyers have continually argued, against the position of the Bush administration, that suspected terrorists should be tried according to the standards set in the UCMJ which are internationally respected. See the testimony of the Senate Armed Services Committee, "To continue to receive testimony on the future of military commissions in light of the Supreme Court decision in *Hamdan v. Rumsfeld*", 2 August 2006. Available online at: http://armed-services.senate.gov/e_witnesslist.cfm?id=2032. *Hamdan v. Rumsfeld* will be dealt with later in the chapter. Also see Anne Plummer Flaherty, "Gonzales Holds Line on Terror Detainees", Associated Press, 2 August 2006.

Nature of the Threat

But what about arguments that the US is now in a new paradigm of war fighting? It is clear from the statements made by US officials and leaders since 9/11 that they, and much of the US public, believe that they are engaged in a new kind of war. Aside from the quotes listed above, six weeks after 9/11 US Vice President Richard Cheney argued:

We cannot deal with terror. It will not end in a treaty. There will be no peaceful coexistence, no negotiations, no summit, no joint communiqué with the terrorists. The struggle can only end with their complete and permanent destruction...⁸⁸

In other words, in fighting the war on terror, the US sees itself as confronting a dangerous, nihilist peril that seeks to destroy the liberties and freedoms of the West. In this sense, al-Qaida have become an enemy of all humanity and civilization, an enemy that cannot be negotiated with, only exterminated because of the nature of the threat they pose.

Thus it seems logical that when a nation is fighting a war against this kind of ultimate threat to the Western way of life that the requirement of restraint becomes questionable at best. To what extent should a nation restrain itself when it is clear that its opponent clearly rejects the idea of humanitarian limitations? This point is reinforced when one considers the fact that it is actually al-Qaida and the Taliban who brought the war onto themselves in a horrific and bloody manner on 9/11. Rumsfeld hinted at this line of thinking when he addressed the nature of the challenge that the US was facing:

We did not start the war... The Taliban, an illegitimate, unelected group of terrorists, started it when they invited the al Qaeda into Afghanistan and turned their country into a base from which those terrorists could strike out and kill our citizens.

⁸⁸ “Vice President Cheney Delivers Remarks at the 56th Annual Alfred E. Smith Memorial Foundation Dinner” 18 October, 2001. Available at: <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011018.html>.

So let there be no doubt; responsibility for every single casualty in this war, be they innocent Afghans or innocent Americans, rests at the feet of Taliban and al Qaeda.”⁸⁹

To Rumsfeld, where violations of the laws of war may have occurred, the US is excused, if not justified, because it is confronting a major threat to itself. The fault ultimately lies with the terrorists for making the war necessary and the laws of war should not constrain the US in doing what it needs to do to ensure its safety.

To anyone who has studied just war theory, these arguments are nothing new. Aside from the many books and articles which have been written on just war theory, there are the famous clichés such as that the Constitution or Bill of Rights should not be allowed to become “suicide pacts.”⁹⁰ Yet the controversies regarding humanitarian restraint and civil liberties in the war on terror seem to have placed a new urgency on old debates. Does the severe and extreme maliciousness of a threat justify a response that violates customary and/or legal norms? Does the fact that the terrorists brought war onto themselves mean that they deserve to suffer whatever harm befalls them in the ensuing conflict?

What unites these two questions is that consideration of the nature of the threat is key when considering the restrictions we want to place upon our response to the terrorists. We have already seen an argument for the first question emerge from Ruth Wedgwood before 9/11. She argues that Nazism was a threat so severe that it necessitated violation of the rules of war in order to confront that evil. At the time of her comments, she was arguing about the war in Kosovo; stopping the genocide on the ground in Serbia surely must legitimate a looser interpretation of targeting restrictions or even a bending of the laws of war to achieve this greater good.⁹¹ In other words, to Wedgwood, *jus ad bellum*

⁸⁹ “Excerpt: Rumsfeld Says Taliban to Blame for Casualties” 29 October, 2005. Excerpt available online at: <http://bangkok.usembassy.gov/news/press/2001/nrot113.htm>.

⁹⁰ There is actually some dispute as to who originated the phrase – Justice Jackson or Justice Goldberg. Most citations of the cliché usually refer to Justice Jackson in *Terminiello v. City of Chicago* (1949). See “The “Suicide Pact” Mystery: Who coined the phrase? Justice Goldberg or Justice Jackson?” David Corn, Slate.com, 4 January 2002. Available at <http://slate.msn.com/id/2060342/>.

⁹¹ Ruth Wedgwood, “Propositions on the Law of War after the Kosovo Campaign” pp. 433-441.

in both of these cases should (and politically did) alter the way *jus in bello* was considered.

As pointed out earlier, this line of argument challenges thinking about the laws of war as they have existed for the last 100 years. Yet the division between just war and just conduct in war has existed for centuries with the increased recognition that that no state had a monopoly on true religion or justice. This partition between the two branches of the law has been regarded by virtually every laws of war scholar as instrumental in preserving humanity and restraint through the insistence that no cause could ever undermine the need for restraint in warfare. Whether this argument is made on the basis of custom, honour or treaty, it is a cornerstone of modern law of war. But can it still hold in an era of nihilistic terrorism? And if it does not, does this mean that the terrorists are liable to suffer whatever consequences that the US can impose on them for engaging in activities which clearly violated international treaty and customary law – as well as virtually every norm of civilized conduct?

Finding a Lesser Evil

The legal, but more importantly, the political and moral debates over Guantanamo highlight the problems that democracies face when they are confronted with emergencies: a balance between liberty and security. The argument that Guantanamo Bay may represent an affront to international law, human rights or democratic values is a strong one. However, what has been argued here is that the Bush administration has based its case on necessity, security and honour – and no matter how much one may disagree with their line of reasoning, it is not an entirely incomprehensible argument. Not bestowing protections to those who not only refuse to play by the rules but disdain the very existence of the rules in the first place is not morally unintelligible. And allowing international law or constitutions to become the very instruments by which democracies expire (or become suicide pacts) will not ultimately serve the cause of human rights or freedoms.

Perhaps it needs to be recognized that arguments strictly over domestic and international law may only be able to take us so far in this dispute. Although law has certainly played a major role in the debate over security and liberty, in complex emergencies it may only take us to an unsatisfactory quandary as to what is legal and what is illegal; not what is right or not what is necessary. In the eyes of the Bush administration the political and moral imperatives of 9/11 take the dispute beyond a mere legal debate. But the same can probably be said for commentators, academics and individuals living in democracies. The events of 9/11 and the ensuing war on terror challenge commonly accepted notions as to how far a nation may act to protect itself from harm and threats that pose a significant risk to the life of its citizens.

“What lesser evils may a society commit when it believes it faces the greater evil of its own destruction?”⁹² This is the question that Michael Ignatieff tries to answer in his book The Lesser Evil: Political Ethics in an Age of Terror. In trying to answer the question he sets out, Ignatieff takes an approach which seeks to combine legal, political and ethical theory by looking at the lessons learned in emergencies in the UK, Canada, Italy, Germany, Spain, Israel and Sri Lanka.⁹³ In this way, Ignatieff provides an alternative approach for thinking about the role of law (including international law) when states are faced with acute threats that demand immediate action.

The crux of this problem, argues Ignatieff, is that for liberal democratic societies confronted with terrorism, “what works is not always right. What is right doesn’t always work.”⁹⁴ Necessity may require us to take actions in defence of democracy which will stray from democracy’s own foundational commitments to dignity. Therefore, liberal democratic societies must act on the principle the “lesser evil”. Ignatieff does not provide an exact definition of the ‘lesser evil’, but what is implied is the idea that in confronting terrorism, choices must be made on laws and rights – to what degree they should be

⁹² Michael Ignatieff, The Lesser Evil: Political Ethics in an Age of Terror, Edinburgh: Edinburgh University Press, 2004. p. 1.

⁹³ Ignatieff, The Lesser Evil, p. vii.

⁹⁴ Ignatieff, The Lesser Evil, pp. 8-9.

allowed to bend without breaking. That when societies are faced with a real threat or “evil” that stopping them may require methods that reply to that threat in kind.⁹⁵

Importantly, this differs from opportunistic selectivity; these are arguments for “cafeteria-style” international law where governments pick and choose to follow international law and norms where they can and when it suits their strategies. Rather, Ignatieff’s arguments imply the need for a greater deal of democratic oversight and, ultimately, democratic accountability when tough decisions need to be made in an emergency.

Yet, Ignatieff is cautious enough to specify several caveats in his description as “human beings can justify anything as a lesser evil as long as they only have to justify it to themselves.”⁹⁶ After all, there is a clear difference between claiming that emergency measures need to be put in place and having to justify such measures via democratic institutions. First, he argues that violence can be a lesser evil has real meaning only for liberal democratic societies as they are guided by a constitutional commitment to minimize the use of force, violence and dubious means.⁹⁷

Ignatieff’s second qualification is somewhat more defensive and relates to his larger argument – that qualifying evil would seem to excuse it. He notes that it is essential to the idea of a lesser evil position that one can justify a resort to it politically without ever denying that it is evil. The lesser evil is only justifiable because any other measure or means would be insufficient or unavailable.⁹⁸ The crucial factor is having the appropriate institutions that can guide debate and judgments that we have to make in extreme circumstances. As Ignatieff argues, democracy is designed to cope with tragic choice, and it does so by understanding that if anyone can justify anything, they are less likely to be able to carry out if they are forced to do so in adversarial proceedings before their fellow citizens.⁹⁹

⁹⁵ Ignatieff, *The Lesser Evil*, p. 12.

⁹⁶ Ignatieff, *The Lesser Evil*, p. 14.

⁹⁷ Ignatieff, *The Lesser Evil*, p. 16.

⁹⁸ Ignatieff, *The Lesser Evil*, p. 18.

⁹⁹ Ignatieff, *The Lesser Evil*, pp. 14-5

Greater Evils?

Ignatieff's approach is geared towards answering the age old question of liberty and security or how can rights be best preserved when democracies face emergencies. In this way it is a useful approach for assessing the arguments for security measures post-9/11 and for Guantanamo. However, (or perhaps unsurprisingly given the political and moral nature of the discussion) harsh evaluations of Ignatieff's argument are not in short supply. Much of this often passionate criticism stems from the idea that Ignatieff is using a model that is too legal or legalistic and places too much emphasis, if not faith, in democratic oversight. Ignatieff's arguments, caveats and explanations ultimately sound more like rationalization than restraint.¹⁰⁰

One of the most vocal critics has been Conor Gearty, who goes so far as to describe Ignatieff as "Rumsfeldian" and a "hand-wringing, apologetic apologist". In a scathing critique, Gearty argues:

...if we change our rules to allow us to respond in an evil way, or our operatives stray over the boundary into evil behaviour without our explicit authorisation, it is really not so bad (fine even?) because all that is happening is that evil is being met with (lesser/theoretically accountable) evil...

Our evil is better (because less bad) than theirs. If Abu Ghraib was wrong, then that wrongness consisted not in stepping across the line into evil behaviour but rather allowing a 'necessary evil' (as framed by the squeamish intellectuals) to stray into 'unnecessary evil' (as practiced by the not-so-squeamish Rumsfeldians).¹⁰¹

¹⁰⁰ This point was made by Ronald Steel in his harsh criticism of Ignatieff's book in the *New York Times*, July 25, 2004.

¹⁰¹ Conor Gearty, "Legitimising torture - with a little help", *Index on Censorship* issue 1/05. Available online at: <http://www.indexonline.org/en/news/articles/2005/1/international-legitimising-torture-with-a-li.shtml>. Apparently, by Rumsfeldians, Gearty is implying individuals who are "distinguished by their determination to permit, indeed to encourage, the holding of suspected 'terrorists' or 'unlawful combatants' ... in conditions which make torture, inhuman and degrading treatment well-nigh situationally inevitable." Given the nuances of Ignatieff's argument, it is certainly a provocative description.

From this point of view, the problem with Ignatieff's lesser evil argument is that even officially sanctioning or justifying emergency measures in democratic institutions does not make them right or just. It is to conflate morality and legality and/or process; or to use one of Gearty's examples, it is "like reacting to a series of police killings with proposals to reform the law on homicide so as to sanction officially approved pre-trial executions."¹⁰²

Does Ignatieff's argument, which emphasizes the virtue of democratic oversight, lead down paths where Ignatieff would no doubt be uncomfortable? Arguably, the most interesting lesser evil case study to come out of the war on terror is the issue of torture (a frequent accusation thrust at the Bush administration). Alan Dershowitz has argued that torture could be legalized and carried out under a warrant.¹⁰³ This would require the government to provide a heavy burden of evidence to show that torture was justified. The warrant would specify the individual to be tortured and set limits to the technique used and for how long it could be applied. Anyone who committed torture without a warrant would be considered to be committing a criminal offence. Therefore, rather than trying to adhere to an "unrealistic" ban on torture, the process would be subject to legal and judicial oversight.

To Dershowitz, this situation is superior to what the French did during the Algerian war for independence – where rebels were secretly (and not so secretly) tortured, despite France having signed up to the Geneva Conventions and other agreements against torture. In this case, despite being against torture in principle, the French carried it out anyway and in a fairly brutal manner. Argues Dershowitz, "If we ever came close to doing [torture]...I think we would want to do it with accountability and openly and not adopt the way of the hypocrite."¹⁰⁴

¹⁰² Gearty, "Legitimizing torture".

¹⁰³ See Jonathan Alter, "Time to Think about Torture" *Newsweek*, 5 November 2001. Alan Dershowitz, "Is There a Torturous Road to Justice?" *Los Angeles Times*, 8 November 2001. Dershowitz made this same argument while debating on CNN, 4 March 2003. Transcript available at: <http://edition.cnn.com/2003/LAW/03/03/cna.Dershowitz/>.

¹⁰⁴ Dershowitz, <http://edition.cnn.com/2003/LAW/03/03/cna.Dershowitz/>.

Herein lies the major difficulty for the lesser evil outlined above – that transparency and legality are often conflated with morality. It is true that France never tried to legalize its treatment of prisoners; for the French army in Algeria, *raison d'état* was enough and those who committed torture were never prosecuted. But the idea that democratic oversight, due process and legalities can morally excuse an activity is problematic.

In fairness to Ignatieff, he recognizes this point:

This legalisation of torture seeks to prevent it from becoming a first resort of interrogators in terrorist and criminal cases as well. The proposal seeks to bring the rule of law into the interrogation room and keep it there. All this is well-intentioned, but as an exercise in the lesser evil it seems likely to lead to the greater... The problem with torture is not just that it gets out of control, not just that it becomes lawless. It inflicts irremediable harm on both the torturer and the prisoner. It violates basic commitments to human dignity, and this is the core value that a war on terror, waged by a democratic state, should not sacrifice, even under threat of imminent attack.¹⁰⁵

Ignatieff has been fairly adamant on an absolute ban on torture, although he admits that certain coercive measures (such as sleep deprivation) would likely meet the standards of the lesser evil approach.¹⁰⁶ Yet there remain two problems with Ignatieff's line of thinking if we are to apply it to the problems encountered in this chapter. First, if we are truly fighting what he calls "apocalyptic" or "nihilistic" terrorists who will stop at nothing to carry out their goals, at what point can we say something is *not* justified?¹⁰⁷ If the enemies of liberal democratic societies plan to fight us using every means they can, at

¹⁰⁵ Ignatieff, *The Lesser Evil*, pp. 139-140. This argument can also be found online at the Kennedy School of Government website: http://www.ksg.harvard.edu/news/opeds/2004/ignatieff_torture_ft_051504.htm.

¹⁰⁶ Ignatieff, *The Lesser Evil*, p. 138. Ignatieff recently defended himself against the criticisms of Steel's review of *The Lesser Evil* in the *New York Times* arguing that Steel has mischaracterized his intentions.

¹⁰⁷ Ignatieff, *The Lesser Evil*. See in particular the chapter titled "The Temptations of Nihilism", pp. 112-144.

what point do we say that the means to protect ourselves is no longer appropriate? Labeling someone, or a group, apocalyptic is to imply their irrationality and this characterization would seem to create a slippery slope which would justify any and all means to combat them. Second, Ignatieff argues that if states act on threats, these threats must be real in order to be justified.¹⁰⁸ Yet he does not seem to acknowledge that threats are to a large extent constructs – *subjective* not *objective* calculations. What happens when a state acts in a way that they feel is consistent with the lesser evil, only to find out that the threat they have acted upon does not exist? Does this mean they have now become the greater evil? Does intention matter when evaluating the lesser evil? Or only outcome? If serious doubts have emerged over the usefulness of the information gathered from the detainees at Guantanamo, at what point has the greater/lesser evil distinction been crossed?

Re-claiming a balance?

Yet in some ways these criticisms seem to be somewhat off mark with regards to what Ignatieff is arguing. As mentioned above, he outlines in his first chapter, he is writing on the premise that “Democracy is designed to cope with tragic choice”.¹⁰⁹ He notes that his argument does not imply that politicians in democracy do not commit evil, but that “Only liberal democracies have a guilty conscience about punishment.”¹¹⁰ Lesser evil thinking suggests that a greater tragedy would be to pretend that there is no choice at all: that there are no circumstances in which rights may be violated; that there is no other way to combat terrorism. Both of these positions deny the possibility of choice and constitute an ‘easy-out’ for leaders and citizens who are faced with tough decisions. But the reality of the war on terror is that there are choices which must be made if democracies are to successfully balance liberty and security. In his book describing the activities of the American intelligence community after 9/11, Ron Suskind describes how the age-old dilemma of walking a fine line between “right” and “wrong” was opened for reappraisal in the days following 9/11:

¹⁰⁸ Ignatieff, *The Lesser Evil*, p. 165.

¹⁰⁹ Ignatieff, *The Lesser Evil*, p. 14.

¹¹⁰ Ignatieff, *The Lesser Evil*, p. 17.

The “dark side” is a complex, shape-shifting term – its meaning altered by tone and inflection. When Cheney spoke about it on national television a few days after the attacks, he had given it a note of resignation – *this is what we must do, where we must live, like it or not...*

There is, however, always a choice in such matters, in the actions that ultimately define character. The character of an individual or nation.¹¹¹

And, as Ignatieff describes his intentions:

The book is designed to make people think about hard choices – like interrogation, assassination and pre-emptive war – and to show how democratic societies can make these choices without sacrificing key liberties and key constitutional restraints.¹¹²

In this way, what lesser evil thinking implies is that the measures taken to preserve the security of liberal-democracies times of emergency need to be justified. But this justification cannot come about via claims that ‘there is no other way’. Rather, such measures need to be explained and defended through democratic institutions, such as courts, and limited through sunset clauses. Claims that Guantanamo Bay is morally acceptable are only valid in so much as the Bush administration can prove it is necessary – not by claims that there is no other choice in the matter.

The central problem of Guantanamo ultimately comes down to the debate at the heart of Ignatieff’s book – a conflict over the difficult choices that liberal democratic societies must make when confronting terrorism; in how it creates laws and interprets old ones. While complex emergencies *may* require new thinking about how we think about such laws, finding a balance between necessity and liberty in liberal democracies will always

¹¹¹ Ron Suskind, *The One Percent Doctrine: Deep Inside America’s Pursuit of Its Enemies Since 9/11*, London: Simon & Shuster UK Ltd, 2006. p. 42.

¹¹² Michael Ignatieff, “The Lesser Evil” Letter published in the *New York Review of Books* 15 August 2004. Ignatieff was responding to Ronald Steel’s criticism of *The Lesser Evil* that had been published in the Review on 25 July 2004.

require a set of domestic and international institutions created to deal with the dilemmas in times of crisis. They are, as Ignatieff describes it, “devised of reason, designed in moments of tranquility, to master temptation in times of danger.”¹¹³

Applying the Lesser Evil

Yet this is perhaps one of the areas where the Bush administration has failed the lesser evil test. In arguing for new powers after 9/11 the administration has done all it could to restrain the powers of Congress and challenge the powers of the Supreme Court to maintain its policies. While it should not be too shocking that a political body is trying to assert power in a time of crisis, it is possible to argue that the Bush administration is taking this practice to a new level. The administration’s defenders cite Lincoln’s example of suspending *habeas corpus* during the Civil War as a measure to protect national security. Or, they remind us that military commissions have been used through out US history to prosecute individuals in the “chaotic and irregular circumstances of armed conflict”.¹¹⁴ However, as Arthur Schlesinger argues, Lincoln never claimed an inherent right to do what he did. In this way, the Bush White House has seized on historical aberrations and turned them into a doctrine of presidential power.¹¹⁵

Therefore, it is not hard to understand why cynics might remain sceptical of a lesser evil approach – and for good reason. Democratic institutions are not always known for their willingness or ability to stand up to executive power. Congress has been relatively silent on the issue of law – the 2005 Detainee Treatment Act perhaps being a significant, albeit rather late, attempt by Congress to limit the administration’s policies towards detainees.¹¹⁶ Yet even here the Bush administration has sought to limit the impact of such legislation through “signing statements” – that is declarations upon Presidential signature of a piece of legislation which reserves the right to re-interpret or ignore portions of the

¹¹³ Ignatieff, *The Lesser Evil*, p. 31.

¹¹⁴ Dell’Orto, “Hearing on the Supreme Court’s Decision in *Hamdan v. Rumsfeld*”.

¹¹⁵ Mayer, “The Hidden Power”, p. 44.

¹¹⁶ 109-359 109th Congress, Making Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 2006 and for Other Purposes. 18 December 2005 (H.R. 2863, Title X). (Also referred to as the Detainee Treatment Act)

law. For example, on a bill that sought to prohibit federal funding to programs that collected intelligence in a manner that violated the Fourth Amendment, a signing statement was added upon signature which stated that the Commander-in-Chief had the right to collect intelligence in any way he deemed necessary.¹¹⁷ A similar signing statement was made on the Detainee Treatment Act.

It is possible, then, to remain sceptical about the ability or willingness for domestic and international institutions, including international law, to protect rights and freedoms. So far there have been many court cases and challenges to these policies – perhaps the truest test of the lesser evil argument. A look at one of these cases reveals the balancing of liberty and security through process.

Hamdan v. Rumsfeld

As mentioned above, on 29 June 2006 the Supreme Court rendered judgement on the Bush administration's policies in *Hamdan v Rumsfeld*.¹¹⁸ The case involved the legal situation of Salim Ahmed Hamdan, a Yemeni citizen and the former driver for Osama bin Laden who was captured in Afghanistan. Hamdan was charged with "conspiracy to commit terrorism" and was to be tried by a military commission. The government had argued that Hamdan was not a prisoner of war, the Geneva Conventions could not apply to him (or any enemy combatant that is not a POW) and that the President had the authority, given by Congress, to establish military commissions to try these enemy combatants in the war on terror. These assertions, of course, matched the political determinations and legal arguments presented to the public regarding the treatment of detainees that had been captured in the war on terror.

However, the arguments presented by the Bush administration were dealt a serious blow in the Court's ruling which declared that military commissions are not expressly

¹¹⁷ Mayer, "The Hidden Power", p. 55. Specifically, the signing statement read: "The executive branch shall construe these sections in a manner consistent with the constitutional authority of the President." The text of the signing statement is available online at:

<http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

¹¹⁸ *Hamdan v. Rumsfeld*, 548 U.S. ___, 2006.

authorized by any Congressional act. While Congress had sanctioned the use of military commissions to try offenders and offences against the laws of war, “conspiracy” is not a breach of the laws of war and therefore a suspect could not be tried for such an act in a military commission. Neither the Authorization for the Use of Military Force (AUMF) or the Detainee Treatment Act (DTA) can be read to provide specific overriding authorization for the military commission to try Hamdan.

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws including the law of war. Absent a more specific congressional authorization, this Court’s task is...to decide whether Hamdan’s military commission is so justified... The military commission at issue lacks the power to proceed because its structure and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949.¹¹⁹

Additionally, the Court added that the “procedures adopted to try Hamdan also violate the Geneva Conventions.” The Geneva Conventions were found to be applicable US law that the President’s authority could not overturn without the express direction/instruction from Congress. Finally, it was determined that Common Article 3 did apply to Hamdan as the Court found that it was intended to provide protection to individuals regardless of the characterization of the conflict. The argument that the Conventions did not apply because al-Qaida was a non-state actor and therefore not a party to the Geneva Conventions was not valid.

This ruling essentially undermined many of the Bush administrations arguments – that the AUMF and Constitution granted the President sweeping powers to deal with a national emergency and that the Geneva Conventions did not and should not apply to a war on terror. Naturally, the Bush administration was not pleased with this turn of events. Acting Assistant Attorney General Steven G. Bradbury of the Department of Justice

¹¹⁹ See the decision in *Hamdan v. Rumsfeld*, 548 U.S. ___, 2006.

indicated to the Senate Committee on the Judiciary that he found many aspects of the Court's judgments "problematic", although he indicated that the Bush administration would abide by the ruling.¹²⁰ Daniel J. Dell'Orto, the Defense Department's Deputy General Counsel, testified to the same Senate Committee that the military tribunals remained the best way to try enemy combatants for war crimes:

While tradition and common sense...provide strong support for alternative adjudication processes for terrorists and other unlawful enemy combatants, military necessity is perhaps the strongest reason of all. It is simply not feasible in times of war to gather evidence in a manner that meets strict criminal procedural requirements.¹²¹

Dell'Orto also expressed his wish that Congress and the President would work quickly to resolve the matter.

Given the above statements, it is clear that Bush administration officials are keen to work with Congress to preserve as much of the policy as it can. Yet it is also apparent that the ruling has forced some changes for the administration. On 7 July 2006, a two-page memo was issued by Gordon England, the Deputy Defense Secretary, which indicated that the US military will abide by Common Article 3 of the Geneva Conventions.¹²²

The significance of this memo is clearly important as it marks a change from the Bush administration's strict stance that the Conventions do not apply. The effect of this announcement, however, may be somewhat less revolutionary. Common Article 3

¹²⁰ Steven Bradbury, "Statement of Steven G. Bradbury Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, Before the Committee on the Judiciary United States Senate Concerning the Supreme Court's Decision in Hamdan v. Rumsfeld" 11 July 2006. Available online at: http://judiciary.senate.gov/testimony.cfm?id=1986&wit_id=5505.

¹²¹ Daniel Dell'Orto, "Statement of Daniel J. Dell'Orto Principal Deputy General Counsel, Office of General Counsel U.S. Department of Defense, Before the Committee on the Judiciary United States Senate Hearing on the Supreme Court's decision in Hamdan v. Rumsfeld" 11 July 2006. Available online at: http://judiciary.senate.gov/testimony.cfm?id=1986&wit_id=5506.

¹²² It should be noted that the application of Common Article 3 applies only to those detainees being held by the Department of Defense. Detainees being held around the world by other US government agencies (such as the CIA) do not benefit from this protection.

provides a bare minimum standard of humane treatment and is far less demanding than the full Conventions. It has always been the Bush administration's stance that they are treating detainees "humanely" and that all policies towards suspects in Guantanamo meet this requirement. If the administration insists that its procedures are already humane, there may be less dramatic change in the treatment of detainees than what some advocates may be hoping for.

Additionally, it is still unclear as to what path the administration will choose with regards to the tribunals. The administration has announced that it wants to work with Congress to come up with a legislative solution which would give Congressional blessing to the commissions. However, some Republicans such as Senators John McCain and John Warner have indicated that they would prefer a slower process which designed a legal tribunal that could not be knocked-down by the Supreme Court. Some reports have suggested that the issue of the commissions have been very divisive among Congressional Republicans – some who side with the administration and others who are more cautious or skeptical.¹²³ Either way, given the efforts of the Bush administration over the past five years in defending its policies, it would be surprising to see a complete surrender of its position.¹²⁴

¹²³ See Kate Zernike and Sheryl Gay Stolberg, "Detainee Rights Create a Divide On Capitol Hill" New York Times, 10 July 2006. p.1; Maura Reynolds, "Messages Conflict on Detainee Trials", Los Angeles Times, 14 July 2006. p. 22.

¹²⁴ By early August 2006, it was clear that the Bush administration was going to press Congress to support its policies regarding the military commissions. For example, the New York Times reported in July 2006 that after the *Hamdan* decision, legislation was being drafted by the Bush administration that set out new rules on bringing terror detainees to trial. The legislation would allow hearsay evidence to be introduced "unless it was deemed 'unreliable' and would permit defendants to be excluded from their own trials if necessary to protect national security, according to a copy of the proposal." See David S. Cloud and Sheryl Gay Stolberg, "White House Bill Proposes System to Try Detainees" New York Times, 25 July 2006. Additionally, testifying to the Senate Armed Services Committee, Gonzales stated; "We believe that Congress should enact a new Code of Military Commissions, modeled on the court-martial procedures of the Uniform Code of Military Justice, or "UCMJ," but adapted for use in the special context of military commission trials of terrorist unlawful combatants." See "Statement of the Attorney General Before the Armed Services Committee, United States Senate, Concerning Legislation in Response to *Hamdan v. Rumsfeld*" 2 August 2006. Available online: <http://armed-services.senate.gov/statemnt/2006/August/Gonzales%2008-02-06.pdf>. Gonzales did indicate that the administration's proposal for changes to the military commissions would permit hearsay to be used as evidence. This approach is not permitted under the UCMJ. (Whether or not Congress would approve of the new commissions was not clear as of the time of writing. According to news reports, Senate Majority Leader Bill Frist indicated in early August 2006 that he expected a detainee bill to be presented to Congress

Still, that the Bush administration has agreed to apply Common Article 3, the bare minimum treatment specified under the laws of war, to the conflict is, as has already been discussed, a significant move. This is especially so considering that the arguments against applying the Conventions had been put forward with considerable force. Whether or not major changes will result remains to be seen.

The Court ruling suggests that the Bush administration overreached in asserting powers in the post-9/11 environment. Specifically, the Court indicated that the administration needs to get permission from Congress and operate within the limits of the law – even when it comes to matters of national security. Additionally, despite being in a “new paradigm”, the Court recognized that there are still domestic and international standards and obligations which apply to the conduct of hostilities despite the assertions of the administration. Finally, the Courts recognized the role of international law that the US Congress has acknowledged as binding. In this way, the Courts recognized that there are limits on the treatment of detainees regardless of the characterization of the conflict. Although such limits are vague (just what constitutes “humane treatment” is still a matter of dispute) they can be interpreted and enforced.

Vindicating the lesser evil?

A look at the American detainee policy reveals that the facts on the ground are changing. The American detention policies of 2002 are not the same as the policies of 2003, 2004 or 2005, and they continue to evolve. For better or worse, American policy regarding detainee issues has been developing since 2002 – partially out of a response to domestic and international criticism. However, perhaps more important is the fact that many of the changes have been forced by democratic institutions, especially the Supreme Court decisions as well as legislation brought forward.

in September 2006.) See Anne Plummer Flaherty, “Senators Skeptical of Tribunal Plans” Associated Press, 2 August, 2006.

In this sense there may be some merit to the lesser evil argument. Domestic and democratic institutions seem to be having an effect on Bush administration policies where international pressure is not. Policies which restrict the rights of detainees, justified under arguments about a “new paradigm”, are being challenged in courts and legislatures. The overall effect thus far has proved to be mixed. The Courts seem to be willing to assert authority, but Congress has arguably been very lax in its monitoring of or input into detainee policies. But the changes coming out of democratic institutions are having at least some effect and are forcing the administration’s hand to act or respond to these developments. The end result is uncertain – but it would appear that change, albeit slow change, continues to be on the horizon. The courts have stepped in where the administration went too far, but the administration continues to fight back with new legislation to have the policies it wants.¹²⁵

Conclusion

The problems encountered when societies need to balance liberty and security are nothing new. The need to fight an effective campaign that also reflects the core humanitarian agreements of the last 100 years is a somewhat more recent problem – but was hardly a new issue by the time the war on terror began in 2001. Yet the horrific attacks of 9/11 and America’s Guantanamo policy has caused these questions to reemerge in an urgent manner.

In some ways, the questions come down to legal interpretation. But the underlying political and moral arguments which form the backdrop to the legal debate seem to hold the key in understanding why America chose the path it has taken and the justification for its policies. The arguments of the New Sovereignists are moral and political arguments in their defense of the idea that political communities should not be accountable to any form of international law, especially when it comes to their self-defense. The idea that actions to protect the life of a political community should be subject to an unaccountable

¹²⁵ For examples, see the above footnote.

prosecutor is, in this view, irresponsible, if not immoral. Yet humanitarians are correct to point out that such an attitude leaves open the road to unrestricted slaughter. The US has signed treaties on the laws of war because it participated in their negotiation and signed them because it was seen as being in its interest. In the last thirty years, they have put a remarkable amount of effort into ensuring that laws of war principles are included in training and targeting. That it should turn its back on such a tradition has come as a deep shock to many.

This chapter has put forth the argument that the origins of the Guantanamo controversy began with the rise of the New Sovereignist critique in the 1990s, as well as the frustrations encountered with the Kosovo campaign in 1999, both in terms of the requirements of coalition warfare under NATO, and the actions of the ICTY. The sudden and brutal realization of the nature of the threat that America (if not the West) was now facing after 9/11, suggested to many that the war on terror was going to require a new type of fighting, and that the nature of the threat called for a new evaluation of the international law applicable to warfare. Such arguments also emphasized the need for a Presidential powers which could override domestic or international legislation which, in the eyes of the Bush administration, are necessary to protect the United States.

This chapter has also tried to show that arguments criticizing US policy coming from the international legal community have been very thorough in their legal analysis and mostly very severe in their critique of the interpretation of the law that America has presented. The difficulty with these counter-arguments is that they ignore and thus fail to deal with the political and moral arguments being put forward by the New Sovereignists and the Bush administration. To argue that violations of international law are occurring to an administration that has essentially downplayed the relevance of international law is probably going to be ineffective. Instead, it has been domestic courts which have brought about the most (albeit gradual) change and political arguments that continue to hold sway. At the very least, on an academic level, arguments that take the New Sovereignist position seriously need to be presented.

One such argument, briefly touched on here, is that the New Sovereignists tend to downplay the links between law, policy and effective fighting. If effective fighting depends on policy, and policy to a great extent depends on law, including the laws of war, then is not the argument that the Geneva Conventions do not matter dangerous for US effectiveness? It may be argued that this is a very theoretical argument – but some argue that US willingness to ignore parts of the Geneva Convention directly lead to the controversy over Abu Gharib prison in 2004, doing damage to America's image in and outside Iraq. The events at Abu Gharib and the question of a possible link to Guantanamo will be addressed in the next chapter.

Chapter 5: Failure of an Ethos?

Operation Iraqi Freedom, America and the Law of Armed Conflict after Abu Ghraib

Introduction

If the 1991 Gulf War indicated how effective the laws of war could be in modern warfare, the 2003 Iraq war may be considered to demonstrate the opposite. In terms of the “war” aspect of Operation Iraqi Freedom, the fighting may be said to have been relatively uncontroversial in terms of the laws of war and certainly over with very quickly.¹ Beginning on 19 March 2003 and lasting for 27 days, Operation Iraqi Freedom was conducted with remarkable speed and in a relatively humane manner.² By 15 April, Coalition forces were in control of all major Iraqi cities and the Baathist leadership had disintegrated. On 1 May 2003 President Bush declared a formal end to major combat operations.³

Yet it was precisely when the fighting ended and the occupation phase of Operation Iraqi Freedom began that the troubles seemed to have started. The Coalition’s presence in Iraq has been plagued by a violent and bloody insurgency, described in July 2003 as “a classical guerrilla-type campaign” by Commander of the United

¹See, for example Michael N. Schmitt, “Conduct of Hostilities During Operational Iraqi Freedom: An International Humanitarian Law Assessment”, 6 Yearbook of International Humanitarian Law, 2003, pp. 73-110.

²NGOs critiqued the US for the decapitation strikes aimed at the Iraqi leadership on 20 March 2003 and for the use of cluster munitions. During the campaign, Amnesty International argued for “an immediate moratorium on the use of cluster bombs by US/UK forces and on other weapons that are inherently indiscriminate or otherwise prohibited under international humanitarian law”. See Amnesty International “Iraq: Civilians under fire” AI Index: MDE14/071/2003, 8 April 2003. Available online at: <http://web.amnesty.org/library/Index/ENGMDE140712003>; Also see Human Rights Watch, “Background on International Humanitarian Law, War Crimes and the War in Iraq” Available online: <http://www.hrw.org/press/2003/12/ihl-qna.htm>. Human Rights Watch concluded “U.S.-led Coalition forces took precautions to spare civilians and, for the most part, made efforts to uphold their legal obligations. Human Rights Watch nevertheless identified practices that led to civilian casualties in the air war, ground war, and post-conflict period.” Additionally, HRW argued that the Coalition did not investigate matters thoroughly enough as to why civilians had been killed in some circumstances. See Human Rights Watch, “Off Target: The Conduct of the War and Civilian Casualties in Iraq” December 2003. Available online: <http://www.hrw.org/reports/2003/usa1203/>.

³ For an overview of Operation Iraqi Freedom and the subsequent challenges that Iraq has faced, see the summary by Steve Bowman, “Iraq: U.S. Military Operations” Congressional Research Service, Library of Congress, Updated 23 January 2006. Available online: <http://fpc.state.gov/documents/organization/25375.pdf>

States Central Command (CENTCOM) General John Abizaid.⁴ It is typically assumed that the insurgency is led by a core group of fighters and supported by a larger pool of active and passive supporters sympathetic to the cause, predominantly drawn from the Sunni Muslim population.⁵

In terms of the law of war, this proved to be a frustrating situation. With the onset of looting and violence immediately following the invasion, as well as the emerging insurgency, the law which properly governed the military operations in Iraq was unclear. Did the situation remain an international armed conflict, or was it a case of an internal armed conflict, or a mixture of the two? On top of this, there was the legal issue of occupation to sort out in terms of policies and obligations on the ground.⁶ As Adam Roberts argues, there is no dispute about the fact that between April 2003 and 28 June 2004 there was a foreign military occupation in Iraq.⁷ However, after the transition to the Iraqi Interim Government on the latter date and the election of a government, the situation grew more confusing. While the Iraqis have increasingly taken charge of their own country, the continued presence of Coalition troops, ongoing hostilities, and the instability of the new Iraqi government suggests that the law governing occupation (albeit a changing occupation) and the law of war, remain important issues in post-war Iraq. In fact, in terms of law, the Iraq conflict appears to have been the most problematic for the US since Vietnam. And these issues only became more complicated when, in 2004, pictures of abuse committed by US troops at Abu Ghraib prison were splashed across the pages of newspapers around the world.

The last chapter examined how the case for a rebalancing of the need for security and obligations to international law was put forward by the Bush administration after 9/11, but also how a sceptical sentiment towards international law had been growing in certain legal circles and came to influence the administration's response. Yet when such a rebalancing was implemented, there appears to have been several crucial errors

⁴ US Department of Defense News Briefing "DoD News Briefing - Mr. Di Rita and Gen. Abizaid" 16 July 2003. <http://www.defenselink.mil/transcripts/2003/tr20030716-0401.html>.

⁵ Bowman, "Iraq", p. 7.

⁶ A good and brief summary of the law of belligerent occupation, Michael N. Schmitt "The Law of Belligerent Occupation", Crimes of War Project, 15 April 2003. Available online: <http://www.crimesofwar.org/special/Iraq/news-iraq5.html>.

⁷ Adam Roberts, "The End of Occupation in Iraq", Policy Brief, Harvard Program on Humanitarian Policy and Conflict Research, 28 June 2004. Available online: <http://www.ihlresearch.org/iraq/feature.php?a=51>.

made by the Bush administration, including failures of oversight, failures to consider the roles of new actors in the ongoing conflict and failure to establish whether the “new rules” were robust enough to withstand the pressures of an emerging insurgency. This chapter will look at the implications of Operation Iraqi Freedom for America’s relationship with the laws of war through the prism of the Abu Ghraib controversy.⁸ The argument will proceed on the basis that the abuse which took place at the prison highlights several issues for this relationship, including the Bush administration’s policies regarding the laws of war, private military firms and military training. In doing so it will look at whether American policies regarding the laws of war and its military doctrine which are designed to enforce an “ethos” are adequate for the ethical challenges posed by the war on terror.

What went wrong at Abu Ghraib?

Background

Even before the pictures of detainees being sexually humiliated, terrified and physically abused were made public in the spring of 2004, it had become apparent to many in Iraq and Washington that something was not quite right about the prison arrangement. The prison itself, which had been one of Saddam Hussein’s most notorious, was re-opened as the Baghdad Central Correctional Facility by the Coalition Provisional Authority in August 2003, after it was increasingly becoming apparent that the conflict was transforming itself from a traditional war to an insurgency.

Originally, the intention was to house only criminals, but as more and more insurgents and “security detainees” were captured throughout the autumn of 2003, these

⁸ As indicated above, there are several possible issues here that could be explored. There are, however, good reasons to focus the chapter on the scandal at Abu Ghraib. First, controversy over targeting is a perennial issue when it comes to the law of war in armed conflict. It would seem that every time bombs are dropped by Western forces that there are those who will always declare such actions illegal or controversial no matter the outcome. Second, and in this vein, the scandal over Abu Ghraib was a controversy in the way that targeting issues have not been. The shock and outrage that the abuse at the prison generated was substantial and provoked almost universal condemnation. Finally, as this work has primarily looked at issues surrounding prisoners of war and detention issues, focusing on Abu Ghraib makes sense in terms of the focus of the larger project being presented.

individuals were kept in the same centres. According to several military reports on conditions at Abu Ghraib, the flood of incoming detainees overwhelmed the staff. This was confounded by the fact that relatively few individuals were being released. Significantly, while this initial peak of detainees were being collected, many of the military police and interrogators coming from the US Reserves had reached the mandatory two-year limit on their mobilization time and were being sent home. According to one report, this resulted in a situation where “the ranks of soldiers having custody of detainees in Iraq fell to about half strength.”⁹

By virtually all accounts, conditions at Abu Ghraib were exceptionally poor for both detainee and military personnel alike. Part of the problem seems to stem from the fact that the Bush administration had failed to properly anticipate post-war conditions.¹⁰ This includes the failure to commit enough troops necessary to ensure order in post-war Iraq, the failure to anticipate a resistance that had been coordinating their efforts months before the initial invasion and, finally, an ideologically lead belief that Coalition troops would be welcomed as liberators. As a result, few had anticipated the resistance that American troops would encounter, and those who did had been shoved aside in the lead up to the invasion.¹¹

As a result, there was inadequate preparation for the establishment of prisons or a prison system, and the conditions at Abu Ghraib were appalling for soldier and prisoner alike. Janis Karpinski, the commanding general in charge of rebuilding the civilian prison system, described Abu Ghraib “as the worst MP assignment possible.”¹² A psychological assessment of the conditions at Abu Ghraib, included as a part of one of the reports on the prison scandal concluded, “all present at Abu

⁹ “Final Report of the Independent Panel to Review DoD Detention Operations Inspection” (The Schlesinger Report), August 2004. Cited in Karen J. Greenburgh and Joshua L. Dratel eds. The Torture Papers: The Road to Abu Ghraib. Cambridge: Cambridge University Press, 2005. p. 921.

¹⁰ Perhaps the one of the most critical of all of the accounts of the failures of Bush administration policies regarding Iraq is from Michael Gordon and Bernard Trainor, Cobra II: The Inside Story of the Invasion and Occupation of Iraq, London: Atlantic Books, 2006. Also see the remarks of a former Senior Advisor to the Coalition Provisional Authority in Baghdad, Larry Diamond, “What Went Wrong in Iraq”, Foreign Affairs, Vol. 83 No. 5, September/October 2004.

¹¹ As Larry Diamond argues, “Contemptuous of the State Department’s regional experts who were seen as too “soft” to remake Iraq, a small group of Pentagon officials ignored the elaborate postwar planning the State Department had overseen through its ‘Future of Iraq’ project, which had anticipated many of the problems that had emerged after the invasion.” Larry Diamond, “What went Wrong in Iraq”.

¹² Janis Karpinski, One Woman’s Army: The Commanding General of Abu Ghraib Tells Her Story, New York: Miramax Books, 2005. p. 208.

Ghraib were truly in personal danger. Daily mortar attacks from without and sporadic prisoner riots from within led to several deaths and numerous injuries of both Soldiers and detainees alike.”¹³ As conditions worsened, prisoners began to attempt to escape from the prison and several succeeded. By November 2003, there were riots in protest of living conditions. This led to the shooting of 12 detainees on 24 November with three fatalities. Through to the end of December 2003 there were at least four more shooting incidents and numerous escapes.

Although military staff at Abu Ghraib, requested more personnel to help with the situation, this was denied by superiors in Combined Joint Task Force-7 (CJTF-7)¹⁴, the Combined Forces Land Component Command (CFLCC) and US Central Command (CENTCOM). Still, as conditions deteriorated, it was becoming rapidly apparent that the situation at Abu Ghraib needed a great deal of improvement. Assistance was requested from the Provost Marshal General of the Army, Major General Donald Ryder who was tasked with providing suggestions and recommendations for reform. Yet, as the Schlesinger Report indicates, “There seemed to be some misunderstanding of the... intent, however, since MG Ryder viewed his visit primarily as an assessment of how to transfer the detention program to the Iraqi prison system.”¹⁵ In other words, Ryder, who assessed the operations at Abu Ghraib from 11 October to 6 November, seems to have failed to pick up on the major abuses of prisoners that were taking place by this point.

Indeed, according to the dates of the pictures of the prisoners being abused in Abu Ghraib, most of the abuses occurred from between October-December 2003. On 13 January 2004, Specialist Joseph Darby alerted his superiors to the abuse taking place and turned in a CD-ROM of incriminating pictures, taken from the laptop of one of the perpetrators. This immediately spurred an investigation into the abuse that was summarized in the March 2004 Taguba Report. Although the military did announce

¹³ Col Henry Nelson, “AR 15-16 Investigation – Allegations of Detainee Abuse at Abu Ghraib: Psychological Assessment” Annexed to “Article 15-16 Investigation of the 800th Military Police Brigade” (The Taguba Report), March 2004. Cited in Karen J. Greenburgh and Joshua L. Dratel eds. The Torture Papers: The Road to Abu Ghraib. Cambridge: Cambridge University Press, 2005. pp. 448-449.

¹⁴ Re-designated Multi-National Force-Iraq and Multi-National Corps-Iraq on 15 May 2004.

¹⁵ “Final Report of the Independent Panel to Review DoD Detention Operations” (the Schlesinger Report), Cited in Karen J. Greenburgh and Joshua L. Dratel eds. The Torture Papers: The Road to Abu Ghraib. Cambridge: Cambridge University Press, 2005. pp 908-986. p. 944.

that an investigation was taking place at a press conference in January 2004, the nature of the abuses which took place or public awareness of them did not truly turn into outrage until the photographs were made available to the public at the end of April 2004.

Source(s) of the Abuse?

Since the publication of the graphic pictures indicating the scale of abuse at Abu Ghraib there has certainly not been a shortage of theories as to how such actions – clearly in breach of international law, military codes of conduct and criminal law – could have occurred. How could trained soldiers of a western democracy treat individuals, detainees or not, in such a manner?

In terms of the theories, commentaries and criticisms which have emerged, it is possible to argue that there are two generalizable categories. The first group of theories are those which have often come out of US military investigations and reports themselves. These arguments tend to suggest that the source for the abuse at Abu Ghraib lies with low-ranking individuals and their direct superiors. In addition, they tend to argue that conditions, doctrinal training that did not match actual conditions and failures to supply adequately sufficient equipment, but more problematically, troops, to the prison, played a significant role in leading to the ultimate deterioration of order inside Abu Ghraib.

The second typically comes from journalists and human rights advocates who argue that Abu Ghraib is the direct result of America's failure to adhere to international law – that the abuse which occurred is undeniably linked to US policies in Afghanistan and Guantanamo Bay's Camp Delta. In this camp is the argument that the ultimate responsibility for Abu Ghraib lies at the highest levels of the George W. Bush administration.

What divides these two groups is where responsibility ultimately lies and whether the root causes of the abuse were in fact systemic. A brief look at these two groups of

arguments will be useful here in order to determine implications for the American military and its relationship with the laws of war.

Arguments for “condition specific” roots of the abuse

There have been several reports into the abuse at Abu Ghraib prison conducted by the US Department of Defense – some of which have already been mentioned.¹⁶ For the purpose of this section the reports examined include the March 2004 “Article 15-6 Investigation of the 800th Military Police Brigade” (the Taguba Report), the July 2004 “Department of the Army, The Inspector General – Detainee Operations Inspection” (the Mikolashek Report), the August 2004 “Final Report of the Independent Panel to Review DoD Detention Operations” (the Schlesinger Report) and the August 2004 “Investigation of Intelligence Activities at Abu Ghraib/Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, LTG Anthony R Jones/Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, MG George R. Fay” (the Fay-Jones Report).¹⁷

¹⁶ The major reports on the abuse are: MG Miller Report, “Assessment of Interrogation & Detention Operations in Iraq” (September 2003); MG Ryder Report, “Assessment of Detention & Corrections Operations in Iraq” (November 2003); BG Jacoby Report, “Inspection of Detainee Operation & Facilities in Afghanistan” (July 2004); Mikolashek Report, “Department of the Army, The Inspector General – Detainee Operations Inspection” (July 2004); MG Taguba Report, “Article 15-16 Investigation of the 800th Military Police Brigade” (July 2004); Schlesinger Report, “Final Report of the Independent Panel to Review DoD Detention Operations” (August 2004); Fay/Jones Report “Investigation of Intelligence Activities at Abu Ghraib/Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, LTG Anthony R Jones/Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, MG George R. Fay” (August 2004); BG Formica “Investigation Into Abuse (SOF) on Arabian Peninsula” (November 2004); Church Report “Review of Policy, Doctrine, Gaps & Seams” (February 2005).

¹⁷ Although all of these documents are available online through the DoD website, I have accessed them through an edited collection of papers, reports and memos regarding Abu Ghraib. Karen J. Greenberg and Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib*. Cambridge: Cambridge University Press, 2005. Page numbers will therefore refer to this collection. This section has chosen not to look at the MG Ryder Report as it deals more with the overall problems of the prison system in the fall of 2003 rather than the abuse directly. Certainly the Ryder Report should be taken as a document which forewarned of many of the problems that occurred. Other reports not discussed here are the Jacoby Report, Formica Report which were not released to the public until June 2006. The Jacoby Report was mainly concerned with the treatment of Afghan detainees and the Formica Report on detainees in Iraq by Special Forces. Both reports essentially agree with the points made by the others – that there were serious faults in training, oversight and that many of the actions taken (such as feeding prisoners only bread and water for 18 days) constituted abuse. Both reports also suggest problems with oversight and generally support the findings and recommendations of the above mentioned Reports. The Church Report, which investigated all Department of Defense detainee operations, has still not been fully released. However, an executive summary, again mostly supporting the contentions of the other reports, was presented to the public.

Although these reports were commissioned at different times, by different people with similar yet differing purposes, they all seem to suggest similar conclusions about what went wrong at Abu Ghraib. First, all of the above reports comment on the poor conditions at Abu Ghraib, not only for detainees, but also for the military staff working there. The reports make it clear that the prison was often under attack by insurgents and the staff was left to manage a mixed population of prisoners (who included both men and women, criminals, insurgents, enemy prisoners of war, “security detainees”) who were very hostile to their captors. Poor quality food for prisoners and military personnel, a lack of resources (such as secure radios for communication or an internet connection and even according to some reports, clothes) and a serious overcrowding of prisoners combined with a shortage of personnel (which in turn led to shortcomings in leadership oversight) to make an incredibly stressful environment. The Taguba Report included an annex dealing with a psychological assessment which argued “Given this atmosphere of danger, promiscuity, and negativity, the worst human qualities and behaviours came to the fore and a perverse dominance came to prevail, especially at Abu Ghraib.”¹⁸

Part of the problem, according to the above reports, included the fact that the training received by the individuals at Abu Ghraib was insufficient or inadequate. Detention training was only given to some of the soldiers. While the 800th Brigade – the brigade which most of those charged with war crimes came from – had planned for a major detention exercise during the summer of 2002, this was cancelled following the activation of many Reservist troops after September 11. The Schlesinger report also claimed that training in managing detention facilities at mobilization sites failed to prepare units for conducting detention operations:

Leaders of inspected reserve units stated in interviews that they did not receive a clear mission statement prior to mobilization and were not notified of their mission until after deploying. Personnel interviewed described being placed immediately in stressful situations in a detention facility with thousands of non-compliant detainees and not being trained

¹⁸ Nelson, “Psychological Assessment”, Annex to the Taguba Report, p. 448.

to handle them. Units arriving in theatre were given just a few days to conduct a handover from the outgoing units. Once deployed, these newly arrived units had difficulty gaining access to the necessary documentation on tactics, techniques, and procedures to train their personnel on the... essential attacks of their new mission. A prime example is that relevant Army manuals and publications were available only online, but personnel did not have access to computers or the internet.¹⁹

The Taguba report draws similar conclusions, especially as regards the laws of war:

I also find that very little instruction or training was provided to MP personnel on the applicable rules of the Geneva Convention relative to the Treatment of Prisoners of War, [and applicable Field Manuals]. Moreover, I find that few, if any, copies of the Geneva Conventions were ever made available to MP personnel or detainees.²⁰

Additionally, as the Mikolashek Report notes, because most personnel were not trained in detention operations, they were unaware of Army doctrinal requirements, or policies and procedures that address the responsibilities for confinement, security, preventative medicine and interrogation.²¹

Related to this, all of the reports conclude that military doctrine was also insufficient or inadequate for the situation that the personnel on the ground at Abu Ghraib found themselves in. As the Taguba report notes, the 800th MP Brigade was originally designed to conduct standard prisoner of war operations in Kuwait and that the doctrine used to train military personnel are based on templates predicated on a compliant, self-disciplining prison population rather than criminals or high-risk security detainees.²² The Mikolashek report also noted that:

¹⁹ Schlessinger Report, p. 934.

²⁰ Taguba Report, p. 419.

²¹ Mikolashek Report, p. 665.

²² Taguba Report, p. 411-2.

Doctrine does not address the unique characteristics of [Operation Iraqi Freedom] and [Operation Enduring Freedom], specifically operations in non-linear battlespaces and large numbers of detainees whose status is not readily identifiable as combatants, criminals or innocents.... Detainee doctrine does not address operations in a non-linear battlespace.²³

In other words, the doctrine that the military was dealing with had its origins and thinking firmly rooted in the Cold War and in European-battlespace mentality with compliant prisoners of war who would be quickly and relatively easily evacuated from the battlefield.

Yet although conditions were bad in Abu Ghraib, they did not have to lead to what several of the reports describe as “purposeless sadism.”²⁴ Clearly other brigades and soldiers faced moral dilemmas or shortfalls in doctrine while carrying out operations in Operation Iraqi Freedom or Operation Enduring Freedom but then did not lead to the same levels of abuse seen at Abu Ghraib. This is where the reports tend to place blame with low-ranking individuals who actually committed the abuse and, for the most part their direct superiors. As the Mikolashek Report claims, the occurrences of abuses at Abu Ghraib are “aberrations” and atypical of the military:

The abuses that have occurred... are not representative of policy, doctrine or soldier training. These abuses were unauthorized actions taken by a few individuals, coupled with the failure of a few leaders to provide adequate monitoring, supervision, and leadership over those soldiers.²⁵

And later on in the Report that “In those instances where detainee abuse occurred, individuals failed to adhere to basic standards of discipline, training or Army values...”²⁶

²³ Mikolashek Report, p. 664-5.

²⁴ For example, see the Schlesinger Report, p. 909.

²⁵ Mikolashek Report, p. 635.

²⁶ Mikolashek Report, p. 636.

Yet it is also interesting that two of the reports include psychological assessments of the situation of Abu Ghraib and of those who committed the abuse. The Schlesinger Report explicitly cites several studies dealing with obedience to authority and with prison environments, in trying to explain what went wrong in Abu Ghraib.²⁷ Taguba found that psychological factors played a major role in the abuse, including cultural differences, the poor quality of life and the real presence of mortal danger over an extended time period.²⁸ The report also notes that “There was a complex interplay of many psychological factors and command insufficiencies.”²⁹ The Mikolashek Report gives several reasons in its report as to why detainee abuse may occur despite efforts to eliminate detainee abuse including “the psychological process that increases the likelihood of abusive behaviour where one person has complete control over another”.³⁰

Arguably, by placing blame on psychological factors, the responsibility for the abuse can be placed more on individuals rather than on policy. Part of the criticism emerging from this line of argument is resounding criticism of the immediate leadership of the Abu Ghraib abusers for failing to observe and take note of the deteriorating material and psychological conditions at the prison. Taguba is extremely harsh in his criticism of the military leadership involved in the abuse at Abu Ghraib. This includes Brigadier General Janis Karpinski, Commander, 800th MP Brigade who, the Report alleges, did a poor job in allocating resources and ensuring that there were appropriate standard operating procedures for dealing with detainees at detention facilities in Iraq. Additionally the Report notes that Karpinski failed to take appropriate action regarding ineffective staff and that numerous and reported

²⁷ These include Haney, C., Banks C., and Zimbardo, “Interpersonal Dynamics in a Simulated Prison”, *International Journal of Criminology and Penology*, 1973, 1, 69-97; and the work of Dr. Robert Jay Lifton who has argued that ordinary people can experience a “socializing to evil”, especially in a war environment. Schlesinger Report, Appendix G, “Psychological Stresses”, pp 970-972. For his part, Lifton appears to agree, at least regarding the role of medical personnel in the War on Terror, writing: “We know that medical personnel have failed to report to higher authorities wounds that were clearly caused by torture and that they have neglected to take steps to interrupt this torture. In addition, they have turned over prisoners' medical records to interrogators who could use them to exploit the prisoners' weaknesses or vulnerabilities. We have not yet learned the extent of medical involvement in delaying and possibly falsifying the death certificates of prisoners who have been killed by torturers.” Lifton, Robert Jay, “Doctors and Torture” *New England Journal of Medicine*, Vol. 315, No 5. 2004 pp. 415-6.

²⁸ Taguba Report, p. 438.

²⁹ Taguba Report, p. 443.

³⁰ Mikolashek Report, p. 656.

accountability lapses were not corrected.³¹ The Schlesinger Report goes so far as to argue that Sanchez “should have taken stronger action in November when he realized the extent of the leadership problems at Abu Ghraib” and that both Lieutenant General Ricardo Sanchez, commander of CJTF-7 and Walter Wojdakowski, his Deputy General Commander, failed to ensure proper staff oversight of detention and interrogation operations.³²

The leadership point is an interesting one. Certainly the failures to punish those who were carrying out the abuse and to rectify the serious failing at Abu Ghraib seem to have led to a culture of permissiveness that allowed the abuse to continue. Yet this is one of the areas where the reports tend to differ. The Taguba Report concentrates most of its blame on the leadership of Karpinski and her immediate subordinates who failed to adequately monitor what was going on in Abu Ghraib. This may be a result of the fact that the report was researched and written before the photographs of the abuse were in the public domain and there was less pressure to look at leadership further towards the top or bottom of the command chain. The Mikolashek Report tends to place increased responsibility on the individuals who actually carried out the acts, several times stating that there were no “systemic” causes for the abuse.³³ The Schlesinger Report, perhaps the most political of the reports, makes specific arguments about higher levels of leadership, including Secretary of Defense Donald Rumsfeld. Rumsfeld, it is claimed, should have better utilized the legal opinions of the Judge Advocates and General Counsels regarding detainee policies so as to have ensured a more consistent practice.³⁴

This is perhaps indicative of the fact that there is still much uncertainty as to where the responsibility for the abuse should go. However, as mentioned above, there is another group of theories who believe that the events at Abu Ghraib were the direct result of the George W. Bush administration’s policies – and that the real responsibility lies at a much higher level.

³¹ Taguba Report, p. 439.

³² Schlesinger Report 915.

³³ Mikolashek Report – see the Foreword, p. 632. The Report specifically defines an issue as “systemic” if it can be found horizontally across many various types of units, or vertically through many command levels from squad through division or higher level. In this way, the Report argues that the abuse should be considered “isolated events.” P. 652.

³⁴ Schlesinger 924.

Systemic causes of the abuse

Since the discovery of the abuse at Abu Ghraib, there have been many editorials and books written that tend to blame systemic factors and deliberate actions by the Bush administration. These arguments tend to come from journalists, lawyers and academics who argue that it is possible to directly trace the actions of the prison guards at Abu Ghraib to the confused legal and material situation on the ground created by high-ranking military officials and even members of the Bush cabinet.³⁵ Although each argument comes with its own agenda³⁶ and understanding of the circumstances depending on the time it was written, it is possible to put forward a summary of points that are being made.

The first point relates to the discussion in the last chapter as to the alleged disdain for international law held by the Bush administration and its supporters. Philippe Sands argues that “Disdain for global rules underpins the whole enterprise”³⁷ and David Rose writes of the way the administration is “isolationist and disinclined to fetter its autonomy through treaties and international law”. Therefore, in the wake of 9/11, Bush’s decision that the war on terror would be fought “according to new rules of his own administration’s devising” was really a “reflex” response.³⁸ This disdain has led

³⁵ Of course there are many books from which one could choose in order to demonstrate this point. In order to make a concise argument, four books dealing with international law and the war on terror were chosen that were published between 2004-5. Two are by journalists (Seymour M. Hersh who played a role in bringing the Abu Ghraib scandal to light and David Rose, a British journalist who travelled to Guantanamo and who was writing shortly after the scandal emerged) and two lawyer/academics (Philippe Sands and Michael Byers.) This is, naturally, an arbitrary decision and allegations that the responsibility for the torture lies with the Bush administration are not limited to these books. Even in her relatively descriptive book on the role of international law in the war on terror, Helen Duffy, an international law and human rights advocate notes that “In light of the parallel allegations arising from Guantanamo Bay, Iraq, Afghanistan and elsewhere, others have emerged as to these practices revealing a systemic policy of either encouraging, purporting to justify or turning a blind eye, to such abuse.” Helen Duffy, *The ‘War on Terror’ and the Framework of International Law*, Cambridge: Cambridge University Press, 2005. p. 268. Still, it is the assertion here that a basic summary of the arguments put forward by this ‘group’ may be summarized by looking at these texts.

³⁶ It is fair to say that most of these works start from an anti-war/anti-Bush perspective. Virtually all of the authors listed here agree that the Iraq War was illegal under international law and that Bush administration policies are as wrong as they are dangerous. The works cited here should be understood in this context.

³⁷ Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules*, London: Allen Lane, 2005. p. 221.

³⁸ David Rose: *Guantánamo: America’s War on Human Rights*, London: Faber and Faber, 2004.

to the down playing of international humanitarian and human rights law and has encouraged policies which, when carried out against detainees, amount to torture.

This, it is argued, was arranged by a group of ‘political appointee’ lawyers who, rather than serving the cause of law, have bent, twisted and reinterpreted international rules to suit the purposes of their political masters. Sands provides what is, perhaps, one of the most resounding critiques of these lawyers writing that “The ‘war on terrorism’ has led many lawyers astray. This phoney ‘war’ has been used to eviscerate well-established and sensible rules of international law...”³⁹ He claims that the arguments and legal interpretations of whether or not the US is bound to particular treaties and international obligations has been made by “political appointees, many of whom had no real background in international law or were closely associated with a group of American academics known to be hostile to international law.”⁴⁰ On this point Sands lays out special criticism for former White House Council (and now Attorney General) Alberto Gonzales, former Assistant Attorney-General Jay S. Bybee and former Deputy Assistant Attorney-General John Yoo, who all had a role in “redefining” the administration’s obligation to adhere to the Geneva Conventions and international treaties on torture. Rose argues that “at every location in the global war on terror, from Washington DC to Afghanistan, previous restraints on the treatment of prisoners was being reconsidered and in significant ways abandoned” by lawyers from all branches of the military and intelligence agencies.⁴¹ These redefinitions and reclassifications of what constituted legal treatment of detainees, what obligations the US had to “detainees” as opposed to prisoners of war and what activities amounted to torture, created a climate of legal confusion which seemed to suggest that suspected terrorist had no rights under international law and could be subject to whatever treatment or abuse that was deemed to be prudent. The abuse at Abu Ghraib was therefore the tragic logical endpoint of this misleading legal strategy.

The systemic argument then rests on the idea that officials within the Bush administration pushed forward a legally (and morally) dubious interpretation of the law that was readily accepted as sound legal advice given the already skeptical view

³⁹ Sands, *Lawless World*, p. 205.

⁴⁰ Sands, *Lawless World*, p. 229.

⁴¹ Rose, *Guantánamo*, pp. 90-2.

of international rules that the Bush administration had. This created, throughout world where the global war on terror is being fought, a confused environment for military personnel on the ground. The administration had developed several categories of detainees – enemy prisoners of war proper, prisoners of war who were eligible for the protections of the Geneva Convention but failed to meet the criteria set out by the Conventions, “security detainees”, ordinary criminals, insurgents, etc. Each group was entitled to a different set of rights or, alternatively, a different set of interrogation methods that could be used. As Supreme Court Justice Sandra Day O’Connor noted in *Hamdi et al v. Rumsfeld*, the Bush administration never actually set out a list of criteria determining the distinctions between the different categories.⁴² In a situation where legal definitions and categories were in flux, it is not surprising that abuse took place. As Sands argues, “it seems pretty clear that the legal minds which created Bush’s doctrine of pre-emption in the use of force and established the procedures at the Guantánamo detention camp led directly to an environment in which the monstrous images from Abu Ghraib could be created.”⁴³

However, criticism is not just directed towards the executive branch of the American government, but also the complacency of Congress, lawmakers and even the media who have allowed the Bush administration to ‘get away with it.’ In the same way that military leaders failed to control and curtail the actions of the Abu Ghraib prison guards through a lack of oversight and regulation, Sands argues that the US Congress did not engage with the issues until late in the day. He also accuses the US media of taking its eye off the ball or becoming “engaged in the kind of 9/11 coverage that made it impossible to give rules which might constrain American actions a decent hearing.”⁴⁴ Although he notes that the allegations at Abu Ghraib are beginning to cause the evaporation of an unquestioned-environment for the Bush administration, Rose argues that the American responses to criticism on the war on terror had been marked with “complacency and insouciance.”⁴⁵ Even after the fact, there was a failure of Congress to follow up on what happened at Abu Ghraib and to determine who

⁴² Specifically, she argued in the majority opinion: “The threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.” There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.”

⁴³ Sands, *Lawless World*, p. 221.

⁴⁴ Sands, *Lawless World*, pp. 229-30.

⁴⁵ Rose, *Guantánamo*, p. 10.

knew and ordered what at which level. Seymour Hersh writes that in the wake of Abu Ghraib, “The problems weren’t confronted, and no independent Committee investigation was authorized into the policies that led to Abu Ghraib.” In fact, Senators who had pressed for further investigations into the matter came under pressure to cease their calls for an independent inquiry.⁴⁶

This is what has led many of those arguing for systemic responsibility to claim that the reports and investigations carried out by the Department of Defense into the abuse at Abu Ghraib a “whitewash”. It is a virtually unanimous consensus from this perspective that Bush administration officials bear responsibility for the abuse at Abu Ghraib. Michael Byers goes so far as to argue that “Had Saddam ratified the ICC statute, the chief prosecutor would, quite properly, already be investigating the Abu Ghraib situation, with a view to possibly laying charges for command responsibility against the secretary of defense and president.”⁴⁷

Hersh writes that of the official inquiries into the abuse, none have challenged the official Bush administration line that there was no high-level policy condoning or overlooking such abuse:

The buck always stops with the handful of enlisted Army Reservists...

It’s a dreary pattern. A military report is released and, within a few days, a high-level general or admiral appears before the Senate Armed Services Committee...and reveals under questioning, that he has no mandate to investigate the responsibility, if any, of higher-ups such as President George W. Bush and Secretary of Defense Donald Rumsfeld.⁴⁸

⁴⁶ Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib, New York: Harper Collins, 2005. pp. 66-8. Hersh argues that Senator John Warner, a Republican, Bush supporter and chairman of the Armed Services committee, as one of these antagonists. Warner, a former Marine was upset at the mistreatment of prisoners. However, within a few weeks of his calls for a full accounting of what happened, Warner began to backtrack under “a lot of pressure” to protect national security.

⁴⁷ Michael Byers, War Law: International Law and Armed Conflict, London: Atlantic Books, 2005. p. 145.

⁴⁸ Hersh, Chain of Command, p. 369.

As Hersh sees it:

The legal and moral issue is not high-level knowledge of the specific events in the photographs – of course the President and his senior advisors did not know of the particular acts of insanity repeatedly taking place on the night shift at the prison. The question that never gets adequately asked or answered, though, is this: What did the President do *after* being told about Abu Ghraib?...

It's what was not done at that point that is significant. There is no evidence that President Bush, upon learning of the devastating conduct at Abu Ghraib, asked any hard questions of Donald Rumsfeld and his own aides at the White House...There was no evidence that they had taken any significant steps upon learning in mid-January of the Abu Ghraib abuses to review and modify the military's policy toward prisoners.⁴⁹

Therefore, from this perspective, the abuse at Abu Ghraib prison originated from systemic sources, that is, problems having do with the confusion generated by legal definitions and standards in constant flux, a willingness on the part of the administration to achieve its goals in the war on terror at all costs, including the violation of international law, poor leadership oversight from all levels (horizontal and vertical) within the US government and military, and deliberately dubious legal advice. In this way, the blame for Abu Ghraib lies at the top of the chain of command, rather than the bottom. With their emphasis on conditions on the ground, psychological factors and low-lying leadership culpability, the official reports into the abuse really amount to little more than a cover-up for the Bush administration and high ranking US officials.

For example, as Hersh questions in his book, why did a group of Army Reserve military policemen, most of them from small towns, torment their prisoners as they did, in a manner that was especially humiliating for Iraqi men? He postulates that such techniques were learned from special forces and intelligence operatives who

⁴⁹ Hersh, Chain of Command, p. 372-4.

were also at work at Abu Ghraib. Karpinski, in writing her side of the Abu Ghraib story, agrees indicating that the young soldiers who were involved:

...could not have had an inkling of President' Bush's decision to exempt the terrorists of Afghanistan from the Geneva Conventions, permitting more extreme interrogation techniques that eventually leached over into Iraq. They could have had no understanding of the conflicting and confusing rules for interrogation issued at various times... They had no part in General Miller's mission to 'Gitmo-ize' Abu Ghraib, introducing a tougher style of questioning. They had not studied Arab psychology, giving them the tools to humiliate security detainees without physically harming the great majority of them. While it's true that the 372nd MP Company was a patchwork outfit suffering like many Reserve units from the ills of cross-levelling, sloppy training, and spotty leadership, the soldiers had demonstrated one consistent trait throughout their seven months of service in Iraq: They did as they were told...For the rest of my days I will believe that, at Abu Ghraib, these soldiers also were following orders when they humiliated and abused detainees.⁵⁰

Hersh argues these trained figures "had been authorized by the Pentagon's senior leadership to act far outside the normal boundaries, the normal rules of engagement."⁵¹ Such techniques then, authorized by the top, were unsurprisingly adopted by the bottom of the command chain. The responsibility for passing these techniques is therefore directly linked to higher-ups.

Analysis: Who is responsible?

⁵⁰ Karpinski, *One Woman's Army*, pp. 207-208. Of course it is important to read this quote with the understanding that Karpinski's book is written for the purpose of clearing her name in the scandal. It also does not answer the question as to why the soldiers did not recognize that such orders were patently illegal. In this way, Karpinski's book comes out of the military, but tends to fall in the 'systemic' side of the debate. Interestingly, Karpinsky's assertions both complement and contradict the testimony given by the soldiers charged with their participation in Guantanamo, discussed below. Many of the soldiers did argue that they were acting under orders, but many of them also admit to knowing what they did was wrong at the time. Certainly they should have known that obeying an illegal order is a violation of the Uniform Code of Military Justice.

⁵¹ Hersh, *Chain of Command*, p. 373.

In the political and legal fallout of the scandal at Abu Ghraib, it is certainly possible to point to factors that probably did contribute to the situation on the ground, aside from a failure to plan adequately for the problems of post war Iraq. That many of the troops did not have, and were not provided with training in their duties, and that military doctrine did not take into consideration the circumstances that the military personnel at the prison found themselves confronting, is clear. Additionally, if the accounts of the conditions that both detainee and soldier found themselves in are accurate, it is certainly possible to argue that the environment at Abu Ghraib, with its poor supplies, understaffed personnel and constant risk of danger from shelling probably was a factor in creating stressful conditions for those individuals stationed there.

Naturally, this does not excuse such sadistic behaviour. Certainly the troops of the 800th Military Brigade were not the only ones to face harsh circumstances in the war on terror. Then why did circumstances turn out as they did at Abu Ghraib? The photos of soldiers standing around and over hooded, beaten and terrified prisoners beg the question ‘how did this happen?’

One thing that the systemic and non-systemic views of Abu Ghraib have in common is the idea that there was a confused legal situation on the ground. According to the military reports, this stemmed from a lack of adequate training in the laws of war and US military doctrine and the inability to obtain training or resources in this area. Yet even some of the military reports, such as the Schlesinger Report go further than this. In this way, both the systemic and non-systemic theories agree that there was a confusing situation originating from the decisions made by the Bush administration since 2002.

A closer look at the timeline will make this clear. What was in place with regards to interrogation of prisoners of war before 9/11 was listed in Army Field Manual 34-52. This included as list of 17 authorized interrogation methods.⁵² In October 2002, authorities at Guantanamo requested approval for stronger interrogation techniques to

⁵² See Techniques A-Q listed in Appendix B

counter “tenacious resistance” by some detainees.⁵³ On 2 December 2002, Secretary of Defense Donald Rumsfeld authorized 16 additional techniques for use at Guantanamo.⁵⁴ However, the Navy General Council Alberto J. Mora, raised concerns with these new techniques and on 15 January 2003 Rumsfeld rescinded the majority of the approved measures in the December 2002 authorization.⁵⁵

At this time, Rumsfeld directed the Department of Defence General Council to establish a working group to study interrogation techniques. According to the Schlesinger Report, 35 techniques were reviewed and 24 were eventually recommended to the Secretary of Defense – although this was not shown to all members of the working group. On 16 April 2003, a list of approved techniques, strictly limited for use at Guantanamo, was secretly approved.⁵⁶

Meanwhile, in Afghanistan, from the beginning of the war on terror through to the end of 2002, all forces used the field manual as a guide for interrogation. However, as the Schlesinger Report points out, more aggressive interrogation of detainees appears to have been on-going. In January 2003, a list of techniques being used in Afghanistan, including some not explicitly set out in the field manuals was forwarded to the working group that had been set up by the Secretary of Defense. This included Special Operations Forces Operating Standard Operating Procedures. According to the Report, the 519th Military Intelligence Battalion, which was later sent to Iraq, assisted in the interrogations in support of the Special Operations Forces and was fully aware of their interrogation techniques.⁵⁷

This, the Report states, made it clear that during this time “Interrogators and lists of techniques circulated from Guantanamo and Afghanistan to Iraq.”⁵⁸ When the officer in charge prepared the draft interrogation guidelines, they were a near copy of the Special Forces Standard Operating Procedures. Techniques which had been approved

⁵³ This is the term of the Schlesinger report, p. 910.

⁵⁴ See Appendix A

⁵⁵ For an interview with the Mora and an account of the internal debate within the Pentagon, see Jane Mayer “The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted”, *The New Yorker*, 20 February 2006. http://www.newyorker.com/fact/content/articles/060227fa_fact

⁵⁶ For a list of the techniques, see Appendix B.

⁵⁷ Schlesinger Report, p. 911.

⁵⁸ Schlesinger Report, p. 911.

for very particular circumstances in Guantanamo were now migrating and being applied elsewhere – outside of Guantanamo’s controlled conditions.

This was further confused when Major General Geoffrey Miler, who had been in charge at Guantanamo, was sent to Iraq to conduct an assessment of DoD counter-terrorism interrogations and detention operations.⁵⁹ According to the Schlesinger Report, Miller brought with him the April 2003 approved guidelines for Guantanamo and gave them to the CJTF-7 as a possible model for the command-wide policy that he recommended be established. At this time Miller called for the military police and military police intelligence soldiers to work cooperatively in “setting the conditions” for interrogation. While previously military police had played a passive role in collecting intelligence, a cooperation on this level had not yet been tried outside of Camp Delta.

Most of the military reports indicate that Miller stated that his model was approved only for Guantanamo. However, CJTF-7, using reasoning from the President’s argument that the Geneva Convention did not apply to “unlawful combatants”, believed that additional, tougher measures were warranted “because there were unlawful combatants mixed in with Enemy Prisoners of War and civilian and criminal detainees.”⁶⁰ On 14 September, 2003, LTG Sanchez signed a memorandum authorizing a dozen interrogation techniques beyond Field Manual 34-52 – five beyond those approved for Guantanamo. CENTCOM, however viewed this policy as unacceptably aggressive and on 12 October 2003, the interrogation techniques approved by CJTF-7 were rescinded.

Clearly, this created a confusing situation. As the Schlesinger report notes, “The existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques were condoned.”⁶¹ Again, the involvement of other government agencies in the collection of intelligence and treatment of detainees contributed to the belief that methods harsher than those which

⁵⁹ In much of the critical literature on this, it is often said that Miller was deliberately sent to “Gitmo-ize” the prisons. See Hersh, Chain of Command, p. 31 and Rose, Guantánamo, p. 82.

⁶⁰ Schlesinger Report, p. 912.

⁶¹ Schlesinger Report, p. 912.

are found in Field Manual 34-52 were allowed.⁶² But even more confusing was the fact that where military personnel at Abu Ghraib did consult field manuals, they used versions that were out of date. The 1987 version of Field Manual 34-52 authorized interrogators to control all aspects of the interrogation to include light, heating, food, clothing, and shelter given to detainees. This was changed in the 1992 version of the Manual and again led to a variance of opinion as to what techniques were permissible. The lack of attention paid by commanders to these kinds of details leads the Schlesinger Report to assert, "We cannot be sure how much the number and severity of abuses would have been curtailed had there been early and consistent guidance from higher levels."⁶³

Given the length and detail in the reports, (as well as the sheer number of them) it is hard to disagree with this assessment. It is obvious that there was serious confusion as to which law applied where and to whom. That a military reservist might become confused by this constant flux of rules seems very reasonable.⁶⁴ It also is clear that

⁶² Schlesinger Report, p. 921.

⁶³ Schlesinger Report, p. 926.

⁶⁴ A survey of the legal defences presented by those charged with abuse at Abu Ghraib is telling as to whether these individuals felt their actions were legal. At his courts-martial, Charles Graner argued that the abuse was carried out at the behest of military intelligence officers and that he was following orders. However, Graner seems to have known that the activities being carried out were illegal, stating in his testimony "A lot of it was wrong, a lot of it was criminal." Kate Zernike, "Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years" New York Times, 15 January 2005, p. 12. Graner also acknowledged that the abuse was in direct violation of the law of war: "I know the Geneva Conventions, better than anyone else in my company. And we were called upon to violate the Geneva Conventions." T.R. Reid, "Graner Gets 10 Years for Abuse at Abu Ghraib" Washington Post, 16 January 2005, p. A01.

Lynndie England's defence rested on the fact that she was an overly compliant person who participated in the detainee abuse to please her then boyfriend, Granier – even though she knew the actions were wrong. "England sentenced to 3 years for prison abuse" MSNBC, 28 September 2005. Available online: <http://www.msnbc.msn.com/id/9492624/>; T.A. Badger, "Jury deliberations expected in Lynndie England's Abu Ghraib abuse case" Associated Press, 26 September 2005.

Ivan Frederick indicated that he knew his actions were wrong, but when he brought up the matter with his military commanders that he was instructed to do that he was told. At his courts-martial, Frederick came "to the conclusion that his actions broke the law" and plead guilty to charges of maltreating detainees, conspiracy to maltreat detainees, dereliction of duty and wrongfully committing an indecent act. Hugh Williamson, "Charges likely for two officers" Financial Times, 25 August 2004. Tony Paterson, "Soldier Will Admit Role in Abu Ghraib Abuse" The Independent, 24 August, 2004. Tim Reid, "Abu Ghraib abuser jailed for 8 years", The Times, 22 October 2004, p. 4.

Armin J. Cruz also plead guilty to the abuse on similar grounds, indicating that he knew his actions were wrong and Specialist Cruz said. "There's no way to justify it." Norimitsu Onishi, "Military Specialist Pleads Guilty to Abuse and Is Jailed" New York Times, 11 September 2004; "US soldier pleads guilty in Iraq detainee abuse scandal" Agence France Presse, 11 September 2004.

Jeremy Sivits, the first soldier charged with abuse at Abu Ghraib testified that while some of his colleagues at the jail indicated that their actions were ordered or condoned by military intelligence, but he did not believe the man. James Drummond "Court martial sentences US soldier to year in jail for abusing Iraqi prisoners" Financial Times, 20 May 2004, p. 9.

Miller's advice was very problematic for the Iraq theatre. When his model was applied outside the controlled Guantanamo environment it led to disaster. Guantanamo has a 1 to 1 prisoner to guard ratio and is in a (very) remote area. Given the chaotic prison conditions of Abu Ghraib, the shortage of personnel, and the lack of training for applying the 'advanced' techniques, the same approach, ethical or not, was bound to fail. What all of the military reports also tend to criticize is Miller's suggestion that the military police play a larger role in collecting intelligence by 'setting favourable conditions'. The Taguba, Schlesinger and Fay-Jones Reports argue that in the environment of Abu Ghraib, this was taken to be an excuse for abusive behaviour towards detainees.

In this way, it is fairly clear that there were mistakes and errors made as well as confusions propagated at many levels of the command chain. Given this chaotic state of affairs, it is difficult to assign blame in the way that systemic or non-systemic proponents seem to want to. In some ways it seems as wrongheaded to suggest that these actions were solely the responsibility of low-ranking 'sadistic' military personnel as it does to suggest that all blame should rest with President Bush for starting the war in the first place. Certainly, policy confusion was generated from the top, but it is also clear that individuals acted inappropriately and interpreted their orders in what must have been one of the worst ways possible.

Given the policy confusion, it is not that difficult to see why critics would want to start with the initial decision to reinterpret or redefine the laws of war. The argument presented in the last chapter suggested that it may be reasonable to reconsider (but not reject) the balance of liberty, law, freedoms and security in the context of an existential threat or nihilistic terrorism. However, the Bush administration has done

Specialist Sabrina Harman also argued that she knew the abuse was wrong but apparently felt "powerless to stop the sadistic activities when her superiors - Colonel Thomas Pappas, commander of military intelligence at the prison, and Lieutenant Colonel Steven Jordan, head of Abu Graib's interrogation centre - knew what was going on." "Hearing of US soldier accused of posing with Iraqi corpse raises questions" Agence France Presse, 25 June 2004.

In this way, the individuals charged seemed to have realized that the activities they were doing were wrong and illegal but carried out the activities for different reasons. Those who argued that they had been given directions from their superiors claimed to have been rebuked when they brought up the issue of abuse. Therefore it seems that none of the individuals believed that their actions were legal but that some may have been operating under the impression that they were either allowed to or were being forced to carry out the abuse regardless of the law and that the abuse was considered permissible.

more than merely ‘reconsider’ the laws of war. Instead, between 9/11 and the end of 2004, it was clear that the administration reinterpreted and redefined the rules every 3-6 months, and did so in a highly secretive and inconsistent manner. It is one thing to change the rules of the game when that game changes, it is entirely another thing when those rules change every few weeks.

Clearly, in this respect, senior officials are to blame for creating this initial confusion. Some of the ‘political appointee’ lawyers in the Departments of Justice and Defence sought to challenge the restrictions that Vietnam and Watergate had placed on the powers of the President, especially in war time. John Yoo argued that, after 9/11, all decisions on how to defend the country under the American Constitution “are for the President alone to make”.⁶⁵ Arguments defending this authority were made with reference to the USA PATRIOT Act and, as we have seen, to the argument that America was fighting a new kind of war. As such, commitments to international law were significantly downplayed. Yet, what really seems to have been the driver of abuse was that after the rules had been broken, nothing substantial or concrete was put in place. Concerns of government and military lawyers over these new legal interpretations were overlooked and it appears that the way to disaster was paved. As even the Schlesinger report notes, the Secretary of Defense clearly did not make use of all of the legal advice open to him. In retrospect, he only used the legal advice that would get him what he wanted.

Interrogation: A case study of ethics in war

The last chapter looked at whether a nation should consider the nature of the threat which it faced when it applied the laws of war. US policies in Iraq can then be considered a case study of the results of tampering with the standard separation of the two, and as such the arguments here have moved from the theoretical to the very practical. It has been argued that US policy in the area of the laws of war has taken the step of essentially re-linking the concepts of *jus ad bellum* and *jus in bello*. It has also been suggested that this does not have to be, as some international lawyers would

⁶⁵ Quoted in Mayer, “The Memo”.

argue, an immoral or entirely unreasonable argument, provided that such actions are subjected to open political debate, democratic oversight and unambiguous guidelines are put in place with certain fundamental guarantees.⁶⁶ It is clear that this is precisely what did not take place in the case of the Bush administration and Abu Ghraib. If the end result of this process is Abu Ghraib, the potential for abuse and scandal is very high indeed.

Still, it is possible to argue that Abu Ghraib represents an example of what can happen rather than being a guaranteed certainty whenever occupations take place. It represents a worst case scenario where righteous fury in soldiers (who become convinced that they are doing the 'right thing') is unchecked and leaders fail to monitor the effects of their decision. It is the end point of the clichéd 'slippery slope' on which nations may find themselves when they begin to tamper with the law in a reckless manner. In failing to have a set of concrete, easy to understand guidelines for its troops, in failing to enforce a code of conduct or standard operating procedures, and in failing to act when it was clear that the prison in Abu Ghraib was in serious legal and moral jeopardy, the US went down that slippery slope.

The growing insurgency in Iraq and the always pressing need for timely and useful intelligence in relation to the war on terror were key considerations for the military and the Bush administration. This placed significant demands on individuals and interrogators on the ground. As the Schlesinger Report notes:

With the active insurgency in Iraq, pressure was placed on the interrogators to produce "actionable" intelligence... A number of visits by high-level officials to Abu Ghraib undoubtedly contributed to this perceived pressure... Despite the number of visits and the intensity of interest in actionable intelligence, however, the Panel found no undue pressure exerted by senior officials. Nevertheless, their eagerness for intelligence may have been perceived by interrogators as pressure.⁶⁷

⁶⁶ See Chapter Four.

⁶⁷ Schlesinger Report, p. 940.

However, even the Schlesinger Report notes that detention operations, especially in the War on Terror, are not just for detaining prisoners of war from returning to the battlefield, but also for the key purpose of intelligence gathering.⁶⁸ The role of intelligence gathering has been heavily emphasized by the Bush administration in this war. Yet, as the outcome of the war so far has demonstrated, it is one of those areas which is the most subject to grey areas and legal violations when not carried out correctly.

One of the most interesting accounts of the US military in the war on terror in this regard has come from Chris Mackey, who served with the intelligence corps in Afghanistan from December 2001 until the summer of 2002.⁶⁹ During his time in Operation Enduring Freedom, Mackey supervised all military interrogations at Bagram airfield. In his book, he describes his training, the environment in which interrogations took place, the resistance offered by prisoners and some reflection on the events he experienced and the subsequent controversies regarding US detention centres in Iraq.

The need to get intelligence from these prisoners posed moral dilemmas for the interrogators in Afghanistan in establishing exactly how far they could go. Mackey refers to the techniques that he had been taught in his interrogation training as “schoolhouse” and not at all effective against the new breed of prisoner who would swear, spit and threaten when confronted about their activities.

When we arrived in Afghanistan, I had an unshakable conviction that we should follow the rules to the letter...

But, as I realized now, the trouble was that the safe route was ineffective. Prisoners overcame [our] model almost effortlessly, confounding us not with clever cover stories, but with simple refusal to cooperate. They offered lame stories, pretended not to remember even

⁶⁸ Schlesinger Report, p. 917.

⁶⁹ Chris Mackey and Greg Miller The Interrogators: Task Force 500 and America's Secret War Against Al Qaeda, New York: Back Bay Books, 2005. According to the book, “Chris Mackey” is a pseudonym.

the most basic of details, and then waited for the consequences that never really came.⁷⁰

Therefore, argues Mackey, the interrogators began, incrementally, to use harsher means.⁷¹ Later on this graduated to forcing detainees into stress positions. Upon reflecting on these experiences Mackey writes:

Of course, these changes really amounted to minor tinkering with technique, tiny encroachments on the rules. But during the coming months in Bagram, a combination of forces would lead us – lead me – to make allowances that I wouldn't have even considered [earlier on].⁷²

What is striking about Mackey's account is that the decisions made were not taken lightly. Considerations of law, morality and necessity played a significant role when determining "how far to go". Mackey writes that he and his team "had been left largely on our own to sort out the ethical boundaries of our job."⁷³ This may then be an indication of where things may have also gone so horribly wrong in Abu Ghraib. In a section titled "Ethical Issues" the Schlesinger Report notes:

For the United States and other nations with similar value systems, detention and interrogation are themselves ethically challenging activities. Effective interrogators must deceive, seduce, incite and coerce in ways not normally acceptable for members of the general public....

In periods of emergency, and especially in combat, there will always be a temptation to override legal and oral norms for morally good ends. Many in Operations Enduring Freedom and Iraqi Freedom were not well prepared by their experience, education and training to resolve such ethical problems.⁷⁴

⁷⁰ Mackey and Miller, *The Interrogators*, p. 288.

⁷¹ Although Mackey maintains that the interrogators remained well aware of their obligations under the Geneva Conventions. In an interview, Mackey added that at no time did anyone tell them that the Geneva Conventions did not apply. Interview with author via phone 11 March 2006.

⁷² Mackey and Miller, *The Interrogators*, p. 287.

⁷³ Mackey and Miller, *The Interrogators*, p. 471.

⁷⁴ Schlesinger Report, pp. 974-5. (Appendix H)

The Report goes on to indicate that training had clearly failed in this regard and that a professional ethics program addressing these situations would help equip them with “a sharper moral compass for guidance in situations often riven with conflicting moral objections.”⁷⁵ In this way, the Report seems to be confident that improved ethical training could help improve the overall situation.⁷⁶

However, increasingly there is another element in warfare – certainly in Operation Iraqi Freedom – that is posing serious challenges to the ability of military training and responsible command chains to put a stop to violations of the law of war: private military firms.

Private Military Firms

Although the trend has certainly been growing since the end of the Cold War, the 2003 Iraq war has highlighted the role of Private Military Firms in contemporary warfare.⁷⁷ As has been pointed out in many stories on the Iraq war, PMFs have been contracted out to provide logistical support, food and services to troops and armed security for humanitarian organizations and even high ranking officials like the former head of the Coalition Provisional Authority, Paul Bremer.

The sheer numbers of PMFs operating in Iraq are noteworthy alone. Even the Economist has referred to the conflict as “the first privatised war.”⁷⁸ More than 60 firms employing more than 20,000 private personnel were estimated to be in Iraq by mid-2005. This amounts to the roughly the same number of troops as provided by all

⁷⁵ Schlesinger Report, p. 975.

⁷⁶ More on training will be discussed at the end of the chapter.

⁷⁷ There is some controversy over what PMFs should be called. Frequently one can find references to “Private Military Companies” (PMCs) or “Private Security Companies” (PSCs) in the literature. P. W. Singer, who has written several articles and a book on the phenomenon as of this writing argues that “firm” implies a broader context and “thus encompass the overall industry rather than just a subsector, but is also more theoretically grounded, pointedly drawing from the business economics ‘theory of the firm’ literature.” See P. W. Singer, “Corporate Warriors: The Rise of the Private Military Industry and Its Ramifications for International Security.” International Security, Vol. 26, No. 2, Winter 2001/2, pp. 186-220. p. 186-7, note 2.

⁷⁸ Economist, “Military Industrial Complexities” 29 March, 2003, p. 56.

of the United States' coalition partners combined.⁷⁹ This means that the ratio of private contractors to US military personnel in the Gulf is roughly one to ten, ten times the ratio during the 1991 Gulf War.⁸⁰

Yet the role of PMFs has also been highlighted for reasons other than numbers. PMFs have been involved in several controversies and incidents regarding the law of war which have raised some serious questions regarding the increasing numbers of PMFs in warfare. One of the most controversial issues (and most significant for our purposes here) is accountability. When questions are put to PMFs for their actions, very often there is no one to give answers regarding conduct and possible breaches of the law of war. Even the legal grounds for asking such questions or prosecuting individuals responsible for various actions is very problematic – exactly whom are multinational PMFs to answer to, if not a military code of justice or even domestic laws? Given the increasingly controversial nature of the participation of PMFs in military operations, it is becoming clear that these are issues which needs to be addressed. The reports coming out of the Abu Ghraib investigation revealed that PMFs had played a role in the abuse which took place. The Taguba Report goes so far as to cite two contractors of a Virginia based PMF, CACI, as partially responsible for what took place.⁸¹

Part of the problem is that PMFs have a very ambiguous status in both domestic and international law. This of course, relates back to the less-savoury antecedents of PMFs, mercenaries. The first international legislation dealing with mercenaries came out of 19th Century laws that were mostly concerned with implications for neutrality. A country that allowed its national territory to be used for the purpose of recruitment

⁷⁹ P. W. Singer, "Outsourcing War: Understanding the Private Military Industry", *Foreign Affairs*, Vol. 84, No. 2. March/April 2005, pp. 119-132. Singer notes that this may imply that the "coalition of the willing" might thus be mores aptly described as the "coalition of the billing."

⁸⁰ Cited in P.W. Singer, "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law", *Columbia Journal of Transnational Law*, Vol. 42 No. 2, Spring 2004, pp. 521-550. p. 523.

⁸¹ Mr. Steven Stephanowicz, with CACI was cited for giving false statements to investigators and for allowing MPs who were not trained in interrogation techniques to facilitate interrogations by "setting conditions" which were not authorized. As the report states: "He clearly knew his instructions equated to abuse." Taguba Report, p. 442-3. Another CACI employee, Mr. John Israel, was also cited for giving false testimony. Taguba concludes that along with some of the other military personnel that were charged, Stephanowicz and Israel were "either directly or indirectly responsible for the abuses at Abu Ghraib." Taguba Report, p. 443.

or enlistment of mercenaries was deemed to be in support of a belligerent.⁸² This principle was codified into the 1907 Hague Convention but was not a very strong one – certainly not for the purposes of any kind of regulation. Serious attempts to do anything about the issue were not made until the 1960s and 1970s, after mercenaries became involved in various civil wars, wars of national liberation and coups in Africa. In December 1968, UN General Assembly Resolution 2465 was passed which designated mercenaries as outlaws. This position was further endorsed through subsequent resolutions concerned with colonialism.⁸³

Only two countries have really attempted to draft legislation in this area – the US and South Africa, but even here the legislation is weak.⁸⁴ There are several US laws or

⁸² Christopher Kinsey, “Challenging international law: a dilemma of private security companies”, *Conflict, Security & Development*, Vol. 5 No. 3, December 2005. pp. 269-293. p. 271.

⁸³ Interestingly, this marked a significant move away from the idea that states were responsible for policing their own population’s mercenary activities, toward individual criminal liability. Kinsey, “Challenging international law”, p. 273. On this point Kinsey also cites James Taulbee “Myths, Mercenaries and Contemporary International Law” *California Western International Law Journal*, Vol. 15 No. 2, p. 339-363. These developments and resentment regarding the participation of private military forces in African conflicts lead to several declarations on mercenary activities, including the 1976 Luanda Draft Convention on the Prevention and Suppression of Mercenaries. This made government officials criminally responsible for employing, aiding or recruiting mercenaries. The anti-mercenary sentiment was also encapsulated into the 1977 Additional Protocols to the Geneva Convention which denied mercenaries the opportunity to be considered either a combatant or a prisoner of war. Yet the definition which was developed was highly controversial and in reality so specific as to be practically useless. Article 47(2) defines a mercenary as any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

In order for someone to be declared a mercenary, they must fulfil all of these criteria – leaving a definition that is very easy for anyone caught fighting to get out of. How, for example, could anyone ever demonstrate motivation for fighting? Even the religious Taliban in Afghanistan typically fight for a combination of religious fanaticism but also for financial gain. As Geoffrey Best (somewhat colourfully) argues, anyone who manages to get prosecuted under this definition “deserves to be shot – and his lawyer [with him]” Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict*, p. 328 note 83. Considering that almost any subsequent definitions have relied on this definition of a mercenary, regulation has mostly been left in the domestic sphere.

⁸⁴ As the argument here is concentrating on the US, other attempts at regulation will be ignored. Information on South Africa’s legislation as well as any other relevant legislation put forward by (mostly) Western states is usefully summarized in Annex B of the Green Paper on mercenaries published by the UK government in 2002. “HC577 Private Military Companies: Options for Regulation” 12 February 2002. Foreign and Commonwealth Office, London: The Stationary Office.

acts which seek to regulate PMFs. The Uniform Code of Military Justice only covers transgressions by the US military and not any civilians accompanying the forces overseas. The 2000 Military Extraterritorial Jurisdiction Act was intended to fill in the gap with respect to operations outside the US but it only applies to civilian contractors working for the US Department of Defense on US military facilities. The Act therefore does not apply to contractors working for another US agency (such as the Central Intelligence Agency), or for US nationals working overseas for a foreign government or organization. Even then, as Singer argues it is still not clear when and where this law would apply:

Thus, if an American PMF employee commits any offense abroad, under the frequent conditions that do not meet the above standards, only the host nation may prosecute. However, for many likely areas of [PMF] activity, prosecution against a PMF or its individual employee is unlikely to occur.⁸⁵

Under the International Traffic in Arms Regulations (ITAR), there is limited licensing within the US of PMFs in cases where their contracts involve arms transfers. Yet the licensing procedures have been described as “idiosyncratic”.⁸⁶ The input that the Defense and State Departments have regarding the licensing processes varies from case to case and neither companies nor independent observers have clear guidelines as to how the process works.⁸⁷ Additionally, if the contract is less than US\$50 million, any US military firm can work without notifying Congress. Many contracts already fall under this category and larger ones are easily broken-up.⁸⁸ Finally, as Singer points out, once a contract is awarded, there is little to no follow-up by the US government, or any other agency, to monitor the firms or their activities.⁸⁹

⁸⁵ Singer, “War, Profits and the Vacuum of Law”, p. 537. For example, the host state may be too weak to challenge the PMF as it is common in these areas that there is no enforcement or legal system capable of handling such a case.

⁸⁶ Singer, “War, Profits and the Vacuum of Law”, p. 538.

⁸⁷ On this point Singer cites Deborah D. Avant, “Privatizing Military Training”, Foreign Policy in Focus, May 2000. Singer, “War, Profits and the Vacuum of Law”, p. 538-9.

⁸⁸ Singer, “War, Profits and the Vacuum of Law”, p. 539.

⁸⁹ Singer, “War, Profits and the Vacuum of Law”, p. 539.

Many of the problems, controversies and difficulties regarding the use of PMFs to support military operations was already becoming apparent before 9/11. Two cases demonstrate the difficulty of enforcing accountability for actions committed and violations of the laws of war. In 1998 a Florida-based PMF, Airscan, coordinated an air strike which resulted in the accidental death of eighteen civilians, including nine children. In 2001, an Alabama-based PMF, Aviation Development Corporation (ADC) accidentally shot down a small plane of missionaries and businessmen in Peru.⁹⁰ In neither case was anyone brought to account for their actions. In Bosnia and Kosovo, employees of Virginia-based PMF DynCorp, who were fulfilling part of the US governments commitment to the peacekeeping operation there, were found to have committed statutory rape, abetted prostitution and accepted bribes. While none of the employees were ever charged in the incident, the “whistleblowers” that brought these actions to light were fired by the firm in retaliation.⁹¹

The role of PMFs in Abu Ghraib has thrust these issues into the spotlight. The inability to properly control or regulate PMFs has contributed to the abuses which took place in the prison. Military investigations have found that contractors from two PMFs, Titan and CACI, were involved in 36 percent of the proven incidents of abuse.⁹² The Fay-Jones Report listed 6 PMF employees who should be referred to the Justice Department for prosecution and another PMF employee who was ‘confused’ about what constituted improper interrogation techniques.⁹³ However, there have been no arrests or charges laid against any of the six PMF employees identified by these investigations (although the Justice Department still maintained that it did not consider the investigation closed in April 2006).⁹⁴ Why this is so is still not entirely clear – especially considering that the Army had successfully prosecuted 11 soldiers

⁹⁰ See Julian Borger and Martin Hodgson, “A plane is shot down and the US proxy war on drug barons unravels” *The Guardian*, 2 June 2001.

⁹¹ Singer, “War, Profits and the Vacuum of Law”, p. 538.

⁹² Singer, “Outsourcing War”.

⁹³ These individuals are listed as *CIVILIAN-05, CACI employee; CIVILIAN-10, Translator, Titan employee; CIVILIAN-11, Interrogator, CACI employee; CIVILIAN-16, Translator, Titan employee; CIVILIAN-17, Interpreter, Titan employee; CIVILIAN-21, Interrogator, CACI employee*. The individual who was ‘confused’ is listed as *CIVILIAN-20, CACI employee*. See the Fay-Jones Report pp. 1122-1125.

⁹⁴ Mark Benjamin, “No justice for all” *Salon.com*, 14 April 2006. Available online at: <http://www.salon.com/news/feature/2006/04/14/contractor/>.

involved in the Abu Ghraib scandal.⁹⁵ As Singer observes: “The only formal inquiry into PMF wrongdoing on the corporate level was conducted by CACI itself. CACI investigated CACI and, unsurprisingly, found that CACI had done no wrong.”⁹⁶

These controversies and the still somewhat unclear role that PMFs played at Abu Ghraib suggest that there are some serious gaps in the law that the US and the international community need to address, especially regarding accountability. It would seem that most PMFs operate on the principle that employees, caught up in incidents where crimes or abuse may have taken place, are to be evacuated from the area which it occurred as soon as possible to avoid prosecution.

Additionally, it is fairly clear that there has been little attention paid to what the kind of training these individuals have received and probably none whatsoever to training in the laws of war. That the PMF employees at Abu Ghraib lacked proper training on the Geneva Conventions was one of the findings made in the Fay-Jones Report:

The necessity for some sort of standard training and/or experience is made evident by the statements of both contractor employees and military personnel... Likewise, numerous statements indicated that little, if any, training on Geneva Conventions was presented to contractor employees.... Prior to deployment, all contractor linguists or interrogators should receive training in the Geneva Conventions standards for treatment of detainees/prisoners. This training should include a discussion of the chain of command and the establishment of some sort of ‘hotline’ where suspected abuses can be reported in addition to reporting through the chain of command.⁹⁷

⁹⁵ Benjamin, “No justice for all”. Those prosecuted include: Spc. Megan Ambuhl, 372nd M.P. Co.; Spc. Armin J. Cruz Jr., 325th M.I. Battalion; Sgt. Javal S. Davis, 372nd M.P. Co.; Pfc. Lynndie England, 372nd M.P. Co.; Staff Sgt. Ivan Frederick II, 372nd M.P. Co.; Cpl. Charles A. Graner Jr., 372nd M.P. Co.; Spc. Sabrina Harman, 372nd M.P. Co.; Spc. Roman Krol, 325th M.I. Battalion Spc. Jeremy Sivits, 372nd M.P. Co.; Sgt. Santos Cardona, 320th M.P. Co.; Sgt. Michael J. Smith, 523rd M.P. Detachment. Also, in April 2006 Lt. Col. Steven L. Jordan became the first officer to face charges associated with the prison scandal. Most of the higher ranking officials, such as Karpinski, have faced non-judicial punishment.

⁹⁶ Singer, “Outsourcing War”.

⁹⁷ Fay-Jones Report, pp. 1052-1056.

Considering the significant role that PMFs had in the 2003 Iraq War, it is likely that the issues and controversies surrounding them will remain in future conflicts unless some sort of accountability mechanism is derived on legal or some other grounds.

Preventing Atrocity in War

At Abu Ghraib, Iraqi prisoners found themselves as the victims of some very serious abuse and the US found itself in a highly embarrassing situation which, in a graphic manner, created serious doubts about its claim that all prisoners were being treated humanely. It has been the argument here that the wavering of the Bush administration with regards to the laws of war, its assessment that different laws applied in different places to different individuals at different times and its failure to set in place a single set of guidelines for its troops, created an environment whereby abuse was likely to occur. It has been further suggested that the involvement of PMFs in Abu Ghraib has also added to this confusion as to which rules apply where and whether or not those rules can be enforced.

However, what the situation in Abu Ghraib ultimately seems to amount to is that a group of soldiers felt that it was acceptable, or even proper, to carry out the actions which created the abuse scandal. These actions have been attributed to poor quality circumstances, harsh and dangerous living, racism, or psychological factors. Inadequate training has also been mentioned by most of the reports investigating the abuse. Yet, it seems almost intuitive that soldiers would automatically regard such abuse as a violation of the principles of laws of war, or barring this, codes of basic decent behaviour. These actions were not committed in the 'fog of war' or in the 'heat of battle', circumstances which sometimes allow us to at least understand how atrocity may occur (if not excuse it).

What happened at Abu Ghraib seems to go beyond a failure of training and to go into something more towards the core of the military code which democracies try to instil in their armies. Several authors who write about the subject of military training and

the laws of war refer to this idea as the military “ethos” which is necessary in order for the laws of war to be instilled and maintained in the conduct of military activity.⁹⁸

A military ethos can be described as an ethical culture embedded within every day operations. This culture reflects the fundamental values and character particular to the military and therefore the culture should reflect the way operations are conducted. The opposite should then hold true as well – that actions should reflect ethos. If respect for life and the principles of the laws of war are seen as a priority for the military and the society in which it sits, respect for the laws of war needs to be cultivated within the military ethos.

Ethos-advocates have set out a list of requirements in order for this approach to enforcing the laws of war to work. First, there needs to be appropriate internal regulations and/or doctrine for a variety of issues.⁹⁹ This may be set out in field manuals, codes, rules and regulations which are geared towards every day operations. These are set policies to which soldiers can refer to provide guidelines as to proper conduct. Second, these guidelines and policies must be linked to training and become an integral part how soldiers are taught to perform their jobs. The training a soldier goes through is not categorized explicitly as law of war training, but instead as instruction in set doctrine or regulations.¹⁰⁰ If troops are taught to perform their tasks in accordance with military doctrine (which, in turn, is in accordance with the laws of war), the conduct of soldiers becomes ingrained and automatically compliant with international obligations. For example, soldiers taught not to pillage or attack innocent civilians follow these rules not because they are taught explicitly that this is part of an international treaty obligation, but because this is the way operations are conducted, period. Respect for civilians then becomes automatic. As Anthony E. Hartle writes of his experiences in Vietnam:

⁹⁸ I here refer to two authors and commentators on the laws of war: W. Hays Parks and Charles Garraway – both of whom have practiced as military lawyers specializing in the laws of war. Both of them comment on the importance of military ethos in a special issue of Social Research on “International Justice, War Crimes and Terrorism: The U.S. Record”. See Charles H. B. Garraway, “Training: The Whys and Wherefores” and “The United States Military and the Law of War: Inculcating an Ethos” in Social Research Vol. 69 No. 4 (Winter 2002) pp 949-962 and pp 981-1015 respectively.

⁹⁹ Parks, “The United States Military and the Laws of War”, p. 982.

¹⁰⁰ Parks, “The US Military and the Law of War”, pp. 982-3.

As a young lieutenant in [the military], I learned what it meant to function effectively and professionally... I knew what was expected of me as a leader and as an officer. I knew the established procedures. When our [Vietnamese guide] suggested torturing the prisoner, I really did not give the matter a second thought. As I look back, I recognize that my reaction resulted from the training that I had received and my experience in the Army.¹⁰¹

Of course this is just one experience of one individual. However, the value of such a policy is maintained by those who train, teach and comment on the laws of war. Yet there is one more crucial requirement, namely that relating law to procedures and rules must be linked to common sense. Law embedded within procedures must make sense for the soldier told to carry out a specific operation. Training should be tailored to individual soldiers, consistent with their mission and responsibilities. The training should cover all of the circumstances that a particular soldier will be dealing with but at the same time not overload that individual with complex international legislation. For example, for those members of the military whose job involves target selection, more complex training is needed than for someone whose job is more focused on logistics. In addition to this, as Charles Garraway argues, law within procedures should reflect reality and reflect principles of proportionality.¹⁰² This then ensures that soldiers can look upon the rules as their ally in getting tasks done correctly rather than as a restricting annoyance.¹⁰³

However, what is also crucial is whether or not such training is insisted upon by higher-ups in the military and by political leaders – and there was a clear failure in this regard at Abu Ghraib. Political and military leaders can enforce and insist upon law of war training to be carried out. However, commanders of troops and soldiers also play a huge role in ensuring that the laws of war are embedded into training, are taken seriously, and are violations are followed up. As W. Hays Parks notes, “Commands promulgate directives and provide guides for law of war instruction

¹⁰¹ Anthony E. Hartle, “Atrocities in War: Dirty Hands and Noncombatants” *Social Research*, Vol. 69 No. 4 (Winter 2002), pp. 963-979. p. 964.

¹⁰² Garraway, “Training” p. 954-5.

¹⁰³ Garraway, “Training”, p. 955-7.

while integrating law of war issues into training exercises at all levels.”¹⁰⁴ Garraway also notes that while military lawyers are useful adjuncts in creating an ethos, the prime responsibility rests with the commanders:

History shows that leaders can be good or bad. If we want to instil in our soldiers an ethos of doing what is right, of moral integrity and obedience to the law, then it is to the commanders that we must look. Unless the commander is prepared to take his or her responsibilities in this field seriously, there is little chance of anyone else doing so.¹⁰⁵

Parks notes that, like any topic necessary for soldiers to know in order to complete their missions or tasks correctly, law of war training competes with other mandatory subjects in units that are busy returning from deployment, getting ready to go on a deployment or are on deployment.¹⁰⁶ Because there is considerable competition for training time, commanders must believe that law of war training is a necessary and important task for their troops rather than supply another ‘box to tick’.

Parks acknowledges that it is understandable that military commanders might view law of war training in this way – that it is natural to believe that soldiers of western democracies will automatically behave in a way that will support human rights or that soldiers will instinctively ‘do the right thing.’ “Commanders and their soldiers undoubtedly tire of receiving law of war training because they do not believe they or members of their unit are capable of violating the law of war...[the] response was simple ‘Marines don’t do that.’”¹⁰⁷ Garraway agrees that this seems to be the consensus, arguing that “in many Western countries there is still a belief that our forces do inherently know ‘what is right.’”¹⁰⁸

Yet if the experiences of Mai Lai or Abu Ghraib demonstrate anything, it is that under the right (or more correctly, wrong) conditions soldiers will violate the laws of war. While it may seem natural to citizens or soldiers of a western-style democracy that

¹⁰⁴ Parks, “The US Military and the Law of War”, pp. 994.

¹⁰⁵ Garraway, “Training”, p. 955-6.

¹⁰⁶ Parks, “The US military and the Law of War”, p. 996-7.

¹⁰⁷ Parks, “The US military and the Law of War”, p. 997

¹⁰⁸ Garraway, “Training”, p. 951.

their soldiers would never commit atrocities, the very nature of war and violence is that they just might. Emphasis on law of war training is crucial and necessary to prevent abuse of the sort that happened in Iraq, or, perhaps phrased in a more ugly way, we need to put emphasis on the laws of war because we cannot trust human nature in war. Where actions are too easily justified as necessary or where proportionate or pressures intense, the laws of war can be very easily overlooked. Therefore, in terms of results, it is hoped that law of war training embedded into an ethos will result in a system where adherence to the laws of war becomes automatic, where soldiers do not torture their prisoners because it's wrong, but also because it has been ingrained in their training. This training then needs to be emphasized in terms of comprehensive rules of engagement, discipline and command supervision.

The reports of the various investigations into Abu Ghraib are interesting in this respect. While Schlesinger ultimately concludes that what is needed is better doctrine regarding the new conditions that soldiers are facing (such as the working relationships between military police and military intelligence) and a "professional ethics program" he also states that:

Major service programs such as the Army's core values" however fail to adequately prepare soldiers working in detention operations....

Core-values programs are grounded in organizational efficacy rather than the moral good. They do not address humane treatment of the enemy and non-combatants, leaving military leaders and educators an incomplete tool box with which to deal with "real-world" ethical problems.¹⁰⁹

This seems to be suggesting that training can only take soldiers so far, that when conditions that go beyond training and pose ethical dilemmas, complex decisions will have to be made. Soldiers on the frontlines, who may not be the best educated, need references through which they can make ethical judgements. In this way, future training may have to make the ethical component more prominent.

¹⁰⁹ Schlesinger Report, p. 975.

While ethics training for soldiers may seem unrealistic as demands for soldiers training time are already so high, it may be the case that the US military is starting to take this approach seriously. In June 2006 it was announced that troops in Iraq were immediately to undertake a course on battlefield ethics after allegations were made that 11 civilians were shot by marines near Haditha. The course involves an explanation of “core warrior values” which included a slideshow on ethical standards under fire.¹¹⁰ President Bush described the program as “a reminder for troops in Iraq, or throughout our military, that there are high standards expected of them and that there are strong rules of engagement”.¹¹¹ It would appear that, in the wake of Abu Ghraib, Bush administration and military officials are taking such charges very seriously and are eager to be seen as responding quickly to allegations of war crimes. However, it also suggests that the military is taking seriously the idea that it may need to contextualize its law of war training within a program of ethics and moral values in order to make such training more relevant and, perhaps, accessible to its personnel.

The Lessons of Iraq and Abu Ghraib?

It is clear from the investigations of what went wrong at Abu Ghraib that what took place was not solely a failure of training – though this can certainly be considered one of the causes. It was noted above that western societies and militaries typically expect that their soldiers, when in a grey area, will be able to tell right from wrong and act in a manner which supports the values of the military and society from which they come. However, unless a sense of the rules is cultivated under high-pressure and stressful conditions, this is not what will occur. Human nature alone will not ensure that soldiers will ‘do the right thing.’ In this way, it may be more correct to say what really happened at Abu Ghraib was a failure of ethos on many levels. The worst of human nature gave way in a stressful environment because individuals did not seek out, or could not seek out, the rules. Commanders did not ensure that the proper procedures

¹¹⁰ Julian Borger, “US troops ordered to undergo ethical training after killing of Iraqi civilians” *The Guardian*, 2 June 2006. Available online: <http://www.guardian.co.uk/Iraq/Story/0,,1788643,00.html>; Ned Parker, “US orders coalition troops to take lessons in the ethics of battlefield” *The Times*, 2 June 2006. Available online: <http://www.timesonline.co.uk/article/0,,7374-2207570,00.html>; Hamza Hendawi, “U.S. Troops in Iraq to Get Ethics Training” CBS News, 1 June 2006. Available online: <http://www.cbsnews.com/stories/2006/06/01/ap/world/mainD8HVL8EO3.shtml>

¹¹¹ Cited in Borger, “US Troops ordered to undergo ethical training”.

were in place and being followed. Worse, they ignored indications that something was seriously wrong. Military superiors and, ultimately, the political administration, neglected to ensure that commanders were doing their jobs, created an environment of legal confusion and failed to provide a set of comprehensive and easy to follow guidelines for the troops in the field. The ethos – or military culture which reinforces the rules in the conduct of its activities – was significantly altered in the wake and rush of 9/11 and did not long survive in the new conditions.

The addition of PMFs to this picture only serves as a serious complication, especially to the military ethos model. Many of the employees of private military firms are former soldiers of western democracies. However, despite their ever increasing role in military operations, there is certainly no guarantee as to the origins of a PMF's employees, or as to the training they have received, especially regarding the law of war. Regulation may be one solution to this problem, but consensus the of the literature suggests that this is not a likely development in the near future.¹¹² As for the firms themselves, they prefer a system of self-regulation (such as that which already exists in the form of security industry associations in the domestic security market). This would be a system which essentially rests on a corporate social responsibility model whereby “reputable” companies would set standards to be voluntarily adhered to in the absence of domestic and international legislation. Certainly this is an interesting idea in the absence of a regulation regime, but as Clive Walker and Dave Whyte argue, this model does not really seem appropriate for an industry where companies are often established for one purpose – military or security services – and often disbanded after a tour of duty.¹¹³

Even if such a model were to be created, there is an additional problem – humanitarian organizations such as the ICRC have a very problematic relationship with PMFs and do not see them as appropriate organizations to affiliate with¹¹⁴ or to

¹¹² This was certainly the opinion of the UK green paper on the subject which looks at different regulating options. See “Private Military Companies, Options for Regulations” pp. 20-27.

¹¹³ Clive Walker and Dave Whyte, “Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom”, *International and Comparative Law Quarterly*, Vol. 54, July 2005, pp. 651-690, p. 665.

¹¹⁴ Although by its own admission, the ICRC has used PMFs when operating in “exceptional cases and exclusively for the protection of premises”. See “The ICRC to expand contacts with private military and security companies”, ICRC website, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/63HE584> August, 2004.

instruct in the laws of war due to their questionable legal status and mercenary roots. In recognizing the way war was changing in this respect, the ICRC announced in 2004 that it would plan for “a more systematic approach focusing on companies operating in conflict situations or providing training and advice to armed forces” with regards to the law of war.¹¹⁵ Yet, even in its announcement, it was clear that the ICRC is uncomfortable with the idea, indicating that it is important to look at PMFs on a case by case basis in terms of legitimacy and that the “ICRC does not plan to take a position on the legitimacy of these private companies.” The announcement also calls for states to play a larger role in terms of monitoring mercenary activity for violations committed by “individuals operating on or from their territory.”¹¹⁶ While this is certainly a step forward in terms of promoting the laws of war among PMFs, given the problems listed above regarding regulation, it will hardly solve the problems of accountability and enforcement of the law for countries where PMFs are deployed and those from which they are deployed. For the US, a step forward was taken when a federal jury, under domestic legislation, indicted David Passaro, a contractor working for the CIA for committing acts of torture in Afghanistan, claiming jurisdiction over US “diplomatic, consular, military or other US government missions or entities in foreign states, including buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities irrespective of ownership.”¹¹⁷ Still, this is just one case – and much of the legalities involved relate to whom the PMF was contracted to (ie: which government department) and where.

The question remains then, what next for the laws of war in America? There seems to be an agreement in the literature, as argued previously, that Mai Lai was a wake-up call for the US military in the 1970s. As a result, there was an entire restructuring and reconceptualization of the way the laws of war were taught to soldiers. However, after 9/11, the security environment has not been very conducive to such a rethinking in a way that would strengthen adherence to America’s international law of war obligation. It seems clear that in times of war, the pressure on a military’s adherence to the laws of war is always downwards. While a descent down a slippery slope is by

¹¹⁵ ICRC “The ICRC to expand contacts with private military and security companies”.

¹¹⁶ ICRC “The ICRC to expand contacts with private military and security companies”.

¹¹⁷ Human Rights Watch, “Q&A: Private Military Contractors and the Law”, http://hrw.org/english/docs/2004/05/05/iraq8547_txt.htm 5 May 2004. Human Rights Watch indicates that this law is Title 18, section 7(9)(A) of the U.S. Code.

no means unavoidable (though accidents and at least some violations in warfare seem inevitable), in a permissive environment, with unclear law and an increasingly unstable ethos, the journey down that slope is going to be made that much quicker.

American leaders and military commanders have clearly paid a political cost for the scandal over Abu Ghraib and have indicated as much.¹¹⁸ That the response to an alleged massacre at Haditha has come swiftly and with the implementation of an ethics training program after the allegations were made, suggests that there have been lessons learned. That a legislative tug-of-war continues in the US government over detainee policy suggest that these lessons may only go so far.

Conclusion

In looking at the challenges posed to America's relationship with the laws of war through the controversy that came out of Abu Ghraib, the chapter has not spent much time looking at the actual insurgency and fighting that has been underway since the end of formal hostilities in Iraq. This is not to down play the important issues that have arisen out of the conflict but merely to recognize that the methods of fighting employed raise more or less traditional concerns regarding the laws of war – what weapons can be used, how the law of occupation applies and the rights of insurgents are not new questions for the law of war.¹¹⁹

The scandal at Abu Ghraib prison, however, represents new challenges and questions – or at least old issues in a newer light. The full implications of America's rebalancing of its commitment to international law in the face of a new security threat, the changing and increasing role of PMFs, (including in detention operations) and the need to address gaps in terms of training and military doctrine in the wake of the war

¹¹⁸ See the remarks of President Bush at a press conference in May 2005 where he indicates that Abu Ghraib is one of his biggest regrets about the Iraq invasion” “President Bush and Prime Minister Tony Blair of the United Kingdom participate in Joint Press Availability” 25 May 2006. Available online at: <http://www.whitehouse.gov/news/releases/2006/05/20060525-12.html>

¹¹⁹ New and significant challenges in these areas are actually being felt by the UK, America's main ally, since the UK High Court of Justice ruled that certain human rights laws and treaties applied to areas under British control.

on terror, have had a major impact on the way the American relationship with the law of war is conceived.

There have been several arguments put forward in this chapter. First, that the Bush administration's policies, which downplayed America's traditional commitment to the laws of war as they are, for the most part, internationally understood, failed to replace this commitment with any thing concrete enough to withstand the pressures of the war on terror. This resulted in a situation of confusion with regards to which law applied and as a result, not only did soldiers completely fail to uphold the law, in some cases they felt they were doing the right thing through their abusive actions towards prisoners. Second, related to this, the soldiers at Abu Ghraib failed to uphold the military ethos that their training was designed to instil in them. There are several reasons why this appears to be the case. Training was inadequate for the purposes of the mission as circumstances rapidly went beyond what soldiers had been prepared for. When faced with ethical dilemmas in an incredibly stressful environment, soldiers failed entirely to maintain proper conduct. In part this seems to be due to a failure of command responsibility, that is an environment of permissibility generated by legal confusions and lack of accountability. However, the increasing roles of PMFs seem to have only complicated this as the training and accountability of PMFs involved in military operations remains undefined and unclear. There is substantial evidence to suggest that there was PMF involvement in what happened in Abu Ghraib, yet it appears there will be no prosecutions of the personnel involved.

In this way there is no one clear reason why Abu Ghraib occurred but rather a considerable number of factors came together to generate the circumstances in which the abuse could take place. The implications of all of this, however, suggest that America needs a serious reconsideration of its policies towards the laws of war. After taking away the stable foundation for conduct and prosecution of offences provided by international law, the Bush administration's failure to set standards of its own is an incredibly risky approach that may lay the foundation for further incidents like Abu Ghraib.¹²⁰

¹²⁰ In July 2006, Human Rights Watch released a report which argued that detainee abuse had become part of the "standing operation procedure" for US forces. The report cites several soldiers who witnessed or took part in the abuse. It also indicates that any soldier concerned about what was taking

place was told to stop their line of inquiry or were presented with legal arguments that such actions were permitted. In this way the report seems to agree with the assertion that the overall confused and permissive environment allows abuse to take place. Human Rights Watch, “No Blood, No Foul’: Soldiers’ Accounts of Detainee Abuse in Iraq” Human Rights Watch, Vol. 18, No. 3(G), July 2006. Available online: <http://hrw.org/reports/2006/us0706/us0706web.pdf>.

Chapter Six: Conclusion

The United States and future of the law of war

Introduction

It has been almost 60 years since the signing of the four Geneva Conventions in 1949. Since then, the way states wage war and engage in conflicts has undergone a dramatic change. This is partially due to rapid developments in technology which have enabled more accurate targeting and deadlier weapons. Because of this increasingly sophisticated machinery, the advance of the coalition in Operation Iraqi Freedom in 2003 was the fastest recorded in world history. However, warfare has also changed in terms of *who* is doing the fighting. Large-scale national armies fighting set-piece battles on open fields have been replaced by guerrillas in the tropics, insurgents in Iraq or, perhaps saddest of all, child soldiers in Africa. Clearly, none of these groups were likely to have been in the minds of the negotiators in Geneva when they drafted the rules of the Conventions.

In the past 60 years the American armed forces, who have engaged in many of these post-World War II conflicts, have changed as well. The military has adapted from a conscription-based force to one based entirely on enlisted volunteers. It is technologically superior to any other army on the planet, and although it is not the largest, it remains the strongest. In terms of the law of war, the US forces have increasingly taken matters seriously. The Uniform Code of Military Justice was developed, as was 'operational law' after the mistakes of Vietnam. US weaponry allows for discriminate attacks and efforts are made to try to spare innocent civilian life wherever possible. Yet, as this study has demonstrated, adapting to pressures and changes involving the law of war has always been, and clearly remains, a challenge.

But the law of war itself has not remained a constant in the past 60 years. It has changed and developed – becoming increasingly more specific and complex. There are increasing pressures to blend “international humanitarian law” with human rights law. There are

more non-governmental organizations concerned with, and seeking to monitor, the law of war in conflict situations than ever before.

This study has tried to examine developments in the approach of the United States to the laws of war, given these changes which have occurred in the nature of fighting and warfare, in its armed forces and in international law. In order to make these changes clear, it has advanced in a chronological fashion. Yet the interaction between these factors through the years makes apparent certain trends and ‘themes’ in America’s relationship with the law of war, and this concluding chapter will attempt to draw out some of the major ‘themes’ of the preceding chapters to help provide a sense of the bigger picture. These include the issue of the role of ideology, a ‘dualistic tendency’, implementation, and complications with the involvement of new actors. Because a project such as this cannot engage in all of the questions that may be raised, issues and problems which emerge, it will conclude by looking at areas for further research.

Ideology

Perhaps in its simplest terms, ideology is best understood as that which helps to take us from our ideas to understanding issues. It forms the prism through which we view the world and ourselves in it. Ideology plays an important part in self-identification and in forming expectations. As such, ideology has a major impact on the way we conduct our behaviour and, it can be said, how states conduct their foreign policy.

A major claim of this work is that the United States, in its conduct of foreign policy, is greatly influenced by the idea of American exceptionalism. Again, this is the idea that there is a powerful strand of thinking in the United States which views the republic as ‘exceptional’ among nations; that the United States is unique in the world for its founding values and for its way of life. While Chapter 2 discussed the impact of “Jacksonianism” on America’s attitudes towards international law, American exceptionalism is strongly

reflected in what Walter Russell Mead describes as “Wilsonianism”.¹ This is a belief that both democracy and democratic institutions are good for America and the world as they promote domestic and international stability. He notes that Wilsonians, inspired by missionary-like zeal, are the ones who have sought to limit the scourge of war through anti-war movements, humanitarian activities (including the development of the laws of war) and international institutions. The spreading of American and democratic values is conceived as an important impediment to war.

But Wilsonians have also been driven by their desire to promote the “global triumph of democracy and the rule of law”, as well as an American understanding of human rights abroad.² Where necessary, this translates into a desire to promote military interventions into countries like Cuba and the Philippines, with the idea of transforming these societies into American-style democracies. Max Boot usefully differentiates between “soft” and “hard” Wilsonians; the former being those who prefer to work multilaterally and with international institutions in their foreign policies and the later those who are willing to commit US military might to secure Wilsonian ideas.³

Yet what unites all Wilsonians is that they are inspired by American-exceptionalist conceptions of democracy and the rule of law. In this way, the American role in the world has manifested itself into a mission to promote and defend those values which are perceived as making the nation great. In the 19th Century, this was a civilizing mission to the First Nations within its own borders and in the Philippines. In the 20th Century, this

¹ Walter Russell Mead, *Special Providence: American Foreign Policy and How it Changed the World*, New York: Alfred A. Knopf, 2001. See the discussion in Chapter Five. Mead argues that although “Wilsonianism” takes its name from President Woodrow Wilson, its origins are much older than his presidency. Instead, he looks back to the American missionaries who, for the most part, believed in universal values. As he writes: “Wilsoniansim is a universal, not a particular, ideal. That is, no races, individuals, countries, or cultures are in principle excluded from the Wilsonian vision of a world of peaceful democracies treating one another with respect.... All nations an all peoples are assumed to be, or at least capable of becoming, equal.” p. 169.

² Mead, *Special Providence*, p. 172.

³ Max Boot, “What the Heck is a ‘Neocon’?” *Opinion Journal*, 30 December 2002. Available online: <http://www.opinionjournal.com/editorial/feature.html?id=110002840>. As Boot argues, “Advocats of [hard Wilsonianism] embrace Woodrow Wilson’s championing of American ideals but reject his reliance on international organizations and treaties to accomplish out objectives.”

role translated into that of a defender of freedom against fascism, communism and today, Islamic radicalism.

Clearly, such a world view and self-understanding are going to affect the way that America regards its enemies. In the 19th Century, America attempted to bring its ideas of civilization to the First Nations and Filipinos. When these ideas were rejected and fighting began, employing methods which fell outside of the American understanding of war, the results were bloody and brutal. Those who rejected America's mission in the world, its ideas and conducted their fighting in ways that 'civilized' nations did not recognize, were shown little mercy. It is not hard to draw parallels to America's engagements in the Vietnam War or the ongoing insurgency in Iraq. In this way, it appears to be the rejection of values and a refusal to adhere to a set of expectations which often influenced the restraints the US chose to impose on its fighting campaign.

This rejection matters more than either race or religion. While America's notion of civilization, the implications of this understanding and the practical results of its civilizing mission may today be characterized as racist, it would appear to be that the rejection of 'civilized' values, including 'civilized' warfare, over racial notions and conceptions, were of paramount importance as to how America's enemies were regarded. The campaign against Vietnam was carried out with much brutality on both sides. However, the Korean War, which fitted the classic model of interstate warfare far better than the conflict in Vietnam, saw the US treat the prisoners it had taken relatively well. The overall violence and bloodshed in Korea should, of course, not be underestimated. Yet, in many ways, the conflict, which fell into a recognized category of warfare, does not have the same notions of mayhem and savagery associated with it.

The US is not exceptional in that its ideology influences its world view and behaviour. Clearly the same may be said for every nation which needs to choose between priorities and engage with others politically. Instead it is the ideology itself which makes America unique in the world. More often than not, it is an imperative that the United States act in accordance with its ideological vision of itself. Surely this is the case with how it has

interacted with international law, including the law of war. Treaties, which become the supreme law of the land, are not to be undertaken lightly, and those who sign on with the United States are expected to live up to their end of the bargain.

The discussion here is not meant to imply that American exceptionalism automatically dictates a dislike or disinclination towards international law. Rather, because the US sees itself as exceptional in its virtue, the United States will only sign those treaties to which it fully intends to adhere. It would violate America's view of itself to only partially implement a commitment that it had made. So, while one may be tempted to point out the differences between Democrat and Republican administrations, (such as the differences between the administrations of George H. W. Bush and Bill Clinton, or Clinton and George W. Bush) it is clear that the ideological imperatives of exceptionalism have played a role in most American administrations regardless of political affiliation.⁴ Although Clinton (often described as a "soft Wilsonian") may have been more willing to engage multilaterally, or with international institutions, when examined closely, it is clear that his administration was not willing to bind itself to international law much more than the current one. For example, while Clinton did sign the Kyoto Protocol (fully aware that it would not pass in the Senate), it only gave lukewarm support to the ICC during its negotiations and the treaty was only signed on the last day of his presidency. He refused to sign the 1997 Landmine Treaty and did not take any steps to sign legislation such as the 1989 United Nations Convention on the Rights of the Child. In this way, differences between administrations may be more in lip-service to the international community rather than substantial differences in attitude towards international law.

Dualistic Tendencies

America's ideology can thus be said to give it a unique relationship as regards the laws of war and its enemies. The above argument suggests that American exceptionalism results

⁴ The Foreign policy of the Nixon administration, clearly influenced by the *realpolitik* of Henry Kissinger, being a possible exception.

in a set of understandings and expectations regarding international law and the laws of war. In terms of understandings, American administrations have tended to view international law as a binding contract which is not to be undertaken lightly. International law is signed and ratified because it matters, not because it 'looks good' in either domestic or international circles. In this way America undertook its negotiations at The Hague and Geneva in the 19th and 20th Centuries very seriously, with a real commitment to the further development of international law. As discussed above, this was inspired its liberal vision for the world, which included the rule of law and a desire to end, or limit, all wars.

On the other hand, such understandings results in an expectation that the other side will live up to its side of the bargain. In order to qualify for the restraints set out in the laws of war, enemies were expected to act within a set of boundaries of 'civilized warfare'. Where its opponents failed to do so, its enemies could expect little mercy. This helps to explain a 'dualistic tendency' when it comes to America's implementation of the laws of war. The Confederate Army's actions fell within the set of understandings that the laws of war had set out, and, as such, Southern prisoners fared relatively decently under the care of the Union Army. On the other hand, as seen in Chapter 2, the First Nations and Filipinos fell outside this understanding and were not afforded the same rights or restraints.

This 'dualistic tendency', influenced by ideology, was also supported by the generally accepted notion of reciprocity as applicable to the laws of war in the 19th Century. Under this notion, when an opponent fails to live up to their obligations under the laws of war, they lose any protections or restraints that would otherwise be applied. However, after the Second World War and the signing of the 1949 Geneva Conventions, reciprocity began to lose its normative basis. Common Article 3 of the Conventions stated that parties would agree to treat their prisoners humanely, no matter how a conflict was characterized and what law applied. States were increasingly expected to apply the law in all circumstances. Thus, the 'dualistic tendency' began to clash with the idea that some restraints were

always applicable, no matter how enemies conducted their campaigns or what kind of conflict was being fought.

The events of Vietnam as relating to the laws of war can, perhaps, be explained by these conflicting ideas. The US applied POW status to the prisoners it captured in the conflict because it was seen as the morally correct course of action and politically prudent. However, the nature of the insurgency, which frustrated the US military, began to push for harsher tactics against an entrenched foe. As US soldiers became increasingly frustrated, some, albeit a small minority, took their frustrations out on those they could get their hands on – villagers and civilians who were seen as collaborating with the enemy. While such behaviour was never condoned, there was very little political will to prosecute those who were responsible for massacres like Mai Lai.

Implementation

However, the problems in regarding the implementation of the laws of war in Vietnam did illustrate a point to the US military: that when soldiers are untrained, poorly disciplined and failed to adhere to the laws of war, the results can be militarily disastrous. In the post-Vietnam era, military lawyers who had taken part in the conflict began a process that tried to impress this point on their military commanders. It was argued that enforcing the laws of war made good military sense. The Vietnam War demonstrated that units who were well disciplined, adhered to international standards, and domestic codes of conduct, were the ones that were ultimately far more effective in accomplishing their missions.

Essentially, the principle was as old as Clausewitz's dictum on the 'economy of force': effort wasted on pointless murder and pillage takes away from the overall effectiveness of a military campaign. If soldiers are trained to do their tasks in such a way as to automatically and fully implement the laws of war, the US military was more likely to complete its missions efficiently and effectively. Thus, the "re-branding" and "re-selling" of the laws of war back to the US military resulted in the development of "operational

law.” Conceived as a tool that would help commanders conduct their missions (rather than just restrict them), operational law would demonstrate its usefulness in the conduct of the 1991 Gulf War. In this way the military lawyers had proven that the laws of war were something more than an impractical list laid out by lawyers in Geneva; law, policy and effectiveness were essentially linked. Put simply, following the laws of war made good military sense.

So why was this view rejected after 9/11?

The argument contained in this work has tried to suggest why this might be the case. It has looked at the Bush administration’s argument that the ‘war on terror’ has placed the United States in a ‘new paradigm’ of warfare. This new paradigm requires new thinking about issues such as the relation of law to policy, including policy towards the laws of war. The President requires new and sweeping powers to defend the United States from attacks and these powers, it was argued, were granted by the Constitution and authorized by Congress. This included the power to override international law wherever and whenever necessary.

And it was clear that the Bush administration did think it was necessary. The need to prevent further attacks, to gather intelligence and to disrupt al-Qaida as much as possible meant that rights traditionally afforded to prisoners of war could not be given to those who were potentially so valuable for the fight against terrorism. While the Geneva Conventions allow for the questioning of prisoners, the administration believed that their interrogations needed to go beyond this level, especially when facing fanatics willing to die for their cause. Because the President needed to protect the United States at all cost, the Geneva Conventions did not, and should not, apply to the war on terror in Afghanistan.

Ultimately, when the Geneva standard was taken away, nothing firm was put in its place. As the war on terror expanded to encompass Iraq, different sets of rules began to apply to different areas. One set of rules was set for to Guantanamo Bay, another applied at

Bagram Air Base and yet another in Iraq. Different sets of rules began to migrate from one area of operations to another. Guantanamo's rules, intended for its strict and isolated environment, were applied to the relative chaos of Abu Ghraib. It was under these confusing conditions that the opportunity for abuse at Abu Gharib emerged.

In this way it can be argued that the link between law and policy holds; and this may be the strongest argument for the implementation of the laws of war. Where there is one clear standard, soldiers in a zone of conflict, already burdened with many pressing and demanding tasks, know what is expected of them. When this guidance is taken away, the confusing can lead to disaster. As has been acknowledged by the administration, nothing was served by Abu Ghraib, and a lot was lost.

New Actors

Yet the nature of the threat, and those who impose this threat, should not be forgotten. The United States has typically faced difficulties in applying the laws of war when it has been confronted with fighting that has fallen outside of its understanding of 'legitimate' warfare. The same may be said for when it has confronted new actors. As this work has tried to demonstrate, when confronted with the First Nations and Filipinos, who used tactics deemed 'uncivilized', or with the style of guerrilla fighting in Vietnam, the US has had difficulties in applying restraints on its fighting. Today, it is the tough Taliban fighters, determined insurgents and globally networked al-Qaida who pose challenges to the US military and comprise the threat to the United States. These are groups unlike any other enemy the US has faced, and again serious challenges have materialized as these new actors have emerged. But it is not only America's enemies that have posed difficulties in this regard. As argued in Chapter 5, the dramatic increase in the number of private military firms (PMFs) mean that new problems of regulation and enforcement of the laws of war have transpired.

Arguably, the emergence of these new actors fall outside of the concept of warfare that is implicit in the 1949 Geneva Conventions. As such, insurgents, terrorists and PMFs have

challenged both international law and the ability for the United States to implement it. On top of this, the illegal (or at least immoral) tactics of insurgents against civilians make it difficult to apply restraints to such a dangerous foe. The unaccountability of PMFs also create challenges as to how the law is applied. Given that indications suggest that these 'new actors', in terms of war fighting, are here to stay, the problems that they pose, in terms of the ability for the US to apply the laws of war, may become increasingly problematic. If these new actors are here to stay, how the US chooses to deal with these actors may have major significance as to how the laws of war are regarded, or applied, in the future.

Law as Politics

Ultimately, one of the main goals of this thesis has been to demonstrate that the debate over America's relationship with the law of war is telling about the way international law is viewed by both international relations scholars and international lawyers. Although the tendency has lessened within the last ten years, there is still an inclination for students of international relations to dismiss international law as ineffective or as a set of rules developed in times of peace which can be, and usually are, overlooked in times of crisis. International law is seen as the stale rules of conduct drafted in boardrooms in New York and Geneva. Compared to the forceful and active world of international politics – wars, great powers, diplomacy – international law is, quite frankly, boring. It tells us nothing much about the way the world works and never could as international law can only be based on naïve idealism.

Most lawyers on the other hand tend to view international law as the final word on many matters of international politics. While there is always room for interpretation and arguments in front of international legal bodies on the matters of war, aggression and the rules of conduct in conflicts, there are set rules which bound states. These rules which control major international political actions are largely unambiguous and give little room for compromise no matter what the context. In writing on the relationship between law and the war on terror, many international lawyers have done no more than provide lists of

applicable law, how it applies and to provide a 'checklist' of items which states must follow if they are to act with any kind of legitimacy. Where international law is ignored, actions are to be condemned. To these international legal scholars legality is implicitly, if not explicitly tied to morality.

Of course, for the most part, these are exaggerated stereotypes with a vast majority of scholars falling somewhere in between. But these stereotypes do point to a problem when looking at issues of international law and politics – the tendency to let one, either law or politics, dominate the other. That the relationship between the two is of necessity dynamic and intimately related seems to be either ignored entirely, or often bemoaned, by those who believe that law should guide politics or that politics should not be constrained by a dubious international community. The history of international law, and the law of war, makes clear that the interpretation, development and implementation of international law has been and always will be accomplished through the prism of both international and, indeed, domestic politics.

Therefore, it is not only important to look at legal texts when faced with international developments, but the historical context, and the context of the law in its relationship to politics. Such an approach provides us better insight to our present predicaments and guides our interpretation of the law. While it would be wrong to chain ourselves to past understandings of the law, a full appreciation of how law relates to a particular situation will not occur unless we acknowledge the other forces at work, such as history and politics, that help to give us our present understandings.

In this way, the story of America and the laws of war is far less a legal as opposed to a political story. As the argument presented in the chapters of this work has tried to demonstrate, the role of politics has been central to the way the law of war has been implemented by the United States. Politics, influenced by both ideology and national priorities, determine how enemies of the United States have been viewed, regarded and, treated. Politics influences the way that training is conducted, the laws of war are implemented and ultimately how the law of war is perceived. In this way, a full

understanding of how America has engaged with the laws of war is as much political as it is legal.

Issues for further research

The multifaceted story of the United States and the politics of the law of war raise many interesting points, but also many questions. Despite the very intriguing nature of these matters, time and space constraints prevent a full investigation of these issues. However, it is clear that there are several areas of future research on both theoretical and pragmatic issues that would help to enhance not our understanding of American policies towards the law of war, but also our understanding of the law of war itself. A brief survey of some of these issues follows below.

Post-Vietnam Military Reform

There has been surprisingly little written on the changes which occurred in the US military after Vietnam – especially regarding the law of war. The development of “operational law”, and major changes regarding training and implementation of the law of war in the 1980s were quite substantial and, as has been argued here, enough to suggest that a legal revolution occurred in the US military at this time. The emergence of “activist lawyers” who, having seen mistakes made in Vietnam, worked their way into the trust of commanders to push the cause of their new legal approach also seems to have been largely ignored by both political and legal literature.

The changes of this period have been documented in some respect by military lawyers, historians and Department of Defense personnel. However, these writings tend to come from official histories and documents rather than through independent academic sources. This is not to suggest that the official histories are flawed or untrustworthy – indeed, they are often very critical of past US actions. Nevertheless they are united in the fact that they come from a military perspective and usually, at least in part, are aimed at a military audience. Additionally, while there are articles written by military lawyers in non-

military, scholarly, journals on the issue of changes in the military, there is still a lot of room for academic analysis on the matter. Again, while these military-affiliated individuals may claim to not be writing in an official capacity, they still come from a specific view point. The literature on this matter would perhaps benefit from non-military perspectives on the matter, critical or not. But, perhaps more importantly, scholarly works which highlight the post-Vietnam debates and activities that the US military lawyers engaged in, would also be of much use and interest to mainstream international relations and international legal studies.

Given the difficulties that have occurred in Afghanistan and Iraq, such an analysis might be useful in examining “where next” for the US in its implementation of the law of war. Media reports have made it clear that there are many civilian administrators as well as military lawyers and advisors who are upset with the current US policies and what their effect has been on the US military.⁵ If or when the war on terror winds down or if the US withdraws from Iraq, such a perspective might be useful if there is another ‘retrospective’ in terms of how training and implementation of the law of war takes place. Such a research project might prove very important for future reform or for governments who wish to revamp their current law of war program within their military.

Training

Aside from examining the development of international law, it would also be beneficial for there to be more academic work on training methods in the law of war. As mentioned in chapters two and five, the US military currently takes an approach which automatically incorporates the rules of the law of war into the job training for individual soldiers.⁶ This

⁵ Some of these reports have been listed in Chapters 4 and 5. Again, useful source are the articles by Jane Mayer in the New Yorker. See Jane Mayer “The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted”, *The New Yorker*, 20 February 2006. Available online: http://www.newyorker.com/fact/content/articles/060227fa_fact; and Jane Mayer “The Hidden Power: The legal mind behind the White House’s war on terror”, *The New Yorker*, 3 July 2006. pp. 44-55; John Barry, Michael Hirsh and Michael Isikoff, “The Roots of Torture”, *Newsweek* 24 May 2005. Available online at: <http://www.msnbc.msn.com/id/4989481/>.

⁶ Again, most of the sources for this section are those used in Chapter 5. See also, Maj. Gen (Ret) William L. Nash “The Laws of War: A Military View”, *Ethics and International Affairs*, Vol 16. No. 1, 2002.

approach, which has been in place since the reforms of the 1980s, is custom-tailored to the needs of individuals in their various jobs on a need-to-know basis rather than as a large block of treaty text. In this way, the principles of the law of war are largely taught as US military doctrine rather than as direct principles of international law. Again, the aim of this approach is to keep matters as simple as possible for soldiers who may not have more than a high school education; that implementation of the responsibilities of the law of war becomes automatic rather than the result of a conscious decision.

As suggested in Chapter 5, the problem of this approach is what happens when matters go 'outside the box' in terms of training. If soldiers are trained to automatically deal with a given situation – what happens when that given situation goes well beyond the training of a particular group of soldiers? While the investigations into the scandal at Abu Ghraib indicate that there were in fact deficiencies in the training of the guards who were sent to that prison facility (for example a training simulation was canceled prior to deployment) it is also clear that the situation the guards were presented with went far beyond their training and perhaps intellectual capacity. While this is a problem that command oversight should have been more aware of at the time, it is questionable whether or not it is even possible to train a soldier for the circumstances that they would have faced at Abu Ghraib. Given that training in prisoner of war operations has traditionally put camps far from the battlefield and in a controlled environment, Abu Ghraib went far beyond these conditions. Between the shortage of supplies, the constant shelling and lack of manpower that affected the operations, is it reasonable to suggest that training for this situation could ever be adequate? Or in another scenario, how do you train a soldier to manage and control an entire town after an occupation where the inhabitants speak another language and belong to an entirely different culture?

In this way there is room for an examination of current military training policies to determine if there is room for improvements and/or alternatives. It has been suggested here, albeit quite briefly, that an approach which stressed the making of ethical decisions at the officer level, rather than approach which only emphasizes rules and doctrine, may be beneficial. Individuals given this training would therefore be given training or skills in

making ethical decisions in stressful and complex environments. The drawbacks to this approach is that such a method may be unrealistic in that training time is already at a premium within the US military and an approach which encourages judgments rather than following orders on the battlefield is not necessarily one that the US military wants to encourage. Still, further research on this question would be interesting and perhaps useful in developing training techniques.

Private Military Firms

One of the issues that Operation Iraqi Freedom highlighted was the reliance of western armies on private military firms in their operations. While the issue of contractors had certainly been acknowledged in previous conflicts, including Kosovo and the 1990-1 Gulf War, the sheer number of PMF personnel in Iraq indicates that this trend is likely to continue in the future, especially in western armies.⁷ The increasing role and integration of PMFs with modern military forces, especially those of the west, was also highlighted as reports of abuses by PMF personnel have been reported in the press. The argument here has briefly looked at the issue of PMFs and the problems they have posed in terms of the law of war. The fact that the US forces are so dependent on PMFs has brought problems in terms of regulation and prosecution for alleged war crimes.

Given that problems related to prosecuting PMF/contractor personnel have existed since at least Vietnam, it is surprising that there has been very little done in this area. Yet, traditionally, international lawyers and organizations such as the ICRC have been very reluctant to examine, research and develop relating to PMFs. This hostility stems from the deep antagonism and suspicions that the decolonizing and non-aligned states felt towards PMFs, more commonly referred to as mercenaries, in the 1960s through the 1990s. Because international legislation such as the 1977 Protocols Additional to the Geneva Conventions and certain UN General Assembly resolutions explicitly outlawed

⁷ A May 2006 estimate by the Associated Press suggested that there were around 20,000 PMF personnel operating in Iraq. Alexandra Zavis, "Rise of guns-for-hire in Iraq creates regulatory quandary", Associated Press, 8 May 2006.

the participation of mercenaries in conflict, there was some reluctance to deal with the issue.⁸

Yet given the increased participation of PMFs in armed conflicts, it has become increasingly obvious that the issue cannot be ignored. In the past few years there has been a number of books published on PMFs and international legal scholars as well as strategic studies and international relations scholars have turned their attention to the issue of the participation of PMFs in armed conflict.⁹ Presently, most of the research has been on regulation of the companies to ensure they remain in line with state interests and support at least reasonably ethical causes.¹⁰

There is clearly much room for more discussion on the relationship between PMFs, the laws of war and responsibility/prosecution for war crimes in conflict. It would seem that a large part of the problem is for NGOs to overcome their own reluctance to engage with PMFs, which increasingly seems to be the case. Research on regulations that would enhance accountability, better define legality of participation and tactics as well as the status of PMF personnel would be interesting and valuable for improving our understanding of the complexities surrounding PMFs in armed conflicts. Given the involvement in several scandals involving the law of war, a better understanding of the responsibilities of PMFs, as well as of the rights they have in a war zone, would be greatly beneficial.

America and the Laws of War after Iraq

⁸ See UN General Assembly Resolution 3103 (XXVIII) 12 December 1973 and Article 47, Protocol Additional to the Geneva Conventions of 12 August 1949. For a critical discussion of what went on during the negotiation of Article 47, see Henry W. Van Deventer, "Mercenaries at Geneva", American Journal of International Law, Vol. 70, No. 4. (October 1976), pp. 811-816.

⁹ Some of these have already been highlighted in chapter 5. Of those worth highlighting, the work of Peter Singer has been very influential. Relating to the law of war, see P.W. Singer, "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law", Columbia Journal of Transnational Law, Vol. 42 No. 2, Spring 2004.

¹⁰ Again, the work of Singer is key here. But see also the work of David Shearer, "Outsourcing War", Foreign Policy, Issue 112, Fall 1998 and Private Armies and Military Intervention, Adelphi Paper 316, Oxford: Oxford University Press for the International Institute for Strategic Studies, 1998.

At the time of this writing, it is unknown how much longer the United States will be in Iraq and Afghanistan or engaged in the broader war on terror. While the Bush administration has promised a long-term commitment, falling domestic support for the conflict, a sense of fatigue in the military and spiralling costs may curtail US military activity sooner rather than later. The effect of current and emerging threats, such as instability in the middle east, (including a hostile and nuclear Iran), may also have an effect on US military policy in the near future, or the effects of natural disasters (such as a Katrina-style hurricane) or instability close to the US homeland (such as the possibility that the ongoing crisis in Haiti may spill over into a refugee crisis) may also prompt changes in US military activity in the coming months or years.

The purpose of this section is not to speculate on where or how the US will be involved in conflicts around the globe throughout the world, but only how such changes may or may not prompt changes in US policies towards the law of war in the future. What can be expected of how the US will engage with the laws of war after Iraq? Given the recent past and the challenges ahead, there is plenty of opportunity for ongoing research into this complex relationship.

One scenario may be that after the scandals and controversies over the prison at Guantanamo Bay's Camp Delta, the death of prisoners at Bagram Air Base in Afghanistan, the abuse at Abu Ghraib, and allegations of war crimes at Haditha in Iraq, US military lawyers or the Department of Defense may take an approach to the laws of war like that of their post-Vietnam predecessors. In this, a post-Vietnam model scenario, military lawyers, unsatisfied with what they have seen regarding the implementation of the laws of war in America's current military engagements, might argue and push for new approaches of looking at and implementing and adhering to the law of war – not just because it is the 'right thing to do', but so that operations continue to run smoothly and so that controversies which take away from the purpose of a mission (such as the above-mentioned scandals) are avoided. This would require a new generation of so-called "activist-lawyers" to emerge in the Department of Defense who would again, argue their

case for operational law, one consistent legal policy and the role of lawyers in the war room. Such a shift might entail what otherwise might be referred to as a 'second legal revolution' or 'renaissance' within the US military.

On the other hand, the experiences regarding the politics of the law of war in the war on terror may provoke the opposite response. If there is a perception that the law of war prompted difficulties and frustrations in US military operations, or if the task of implementing the law of war leaves a bitter taste in the mouths of soldiers and commanders, there may be a great deal of resistance or hostility to the general idea of the law of war in combat. If the whole principle behind operational law is that it helps to make operations run smoother, and if that is no longer considered to be the case by US military personnel, suggested improvements or a full implementation of the law of war may be rejected. Attitudes towards the law of war within the Department of Defense should therefore remain an area of research for those interested in America's relationship with the law of war.

This second 'rejection' scenario would be aided by a continued or increased acceptance of the neo-conservative/new sovereigntist critique of international law. If such a position attracts a sympathetic ear or even explicit approval within the US government in the future, there would be even greater pressure to reject the development of international law, especially in the areas of human rights and the law of war. Such an approach would mark an increasing tendency to base arguments regarding international law on political and moral grounds rather than legal arguments based on legal interpretation. It is probably too extreme to suggest that such an approach would result in the US withdrawing from the 1949 Geneva Conventions or the 1984 United Nations Convention Against Torture. However, it may mean a significant downplaying of the significance of such international legislation (perhaps going beyond the 'quaint' remarks of Alberto Gonzales), a clear indication that current international treaties on the matter (such as the Ottawa Convention to ban landmines) will not be ratified or even presented to the Senate to ratify, and a refusal of the US to participate in the drafting of further treaties of this nature.

The actual course of the US regarding its policies towards the law of war in the future is likely to fall somewhere in between these two scenarios. A second legal revolution may not be necessary in so far as what seems to be required is maintaining US military doctrine in *all* situations, rather than the ‘mixed bag’ approach mandated by the current administration. And, as has been argued here, the reluctance of the US to be seen as totally disregarding international rules will probably prevent a full-on ‘rejection’ approach to the law of war.

What then may remain indicative of the direction of US policies are arguments relating to linking purpose and tactics in fighting the war on terror. As was argued in Chapter 4, an increasing tendency for certain US legal scholars as well as Bush administration officials to justify the means employed based off of the political and moral imperatives to win the war on terror essentially involves re-linking *jus ad bellum* and *jus in bello* – a reversal of the legislative history of the last 160 years and customary trends of at least the last two centuries.

While this may seem an issue of semantics or even political and moral rhetoric, there are serious practical implications to the question. The need to win the war on terror has already caused many in the US government and in America to re-think the rules on torture and such an approach has clear implications for how issues like extraordinary rendition and the treatment of prisoners of war are handled in future conflicts.

Nor is it clear that a change in Administration will make a difference to this debate. Democratic President Bill Clinton demonstrated that, when push came to shove, he was willing to go against international legal opinion and it is fairly clear that Democrats or “soft Wilsonians” are not willing to sacrifice perceived American political and security interests in the name of international law. The debate here frequently crosses domestic political lines with many Democrats voting for the USA PATRIOT Act, and Republicans such as Senator John McCain speaking out against torture. Perhaps, then, the only thing which is clear is that the role of politics, ideology and perceptions of national imperatives

will continue to have an effect on how the laws of war are considered and implemented by the United States and its military.

The Law of War after America

The issues highlighted in this study point to several questions regarding the future for the law of war. Perhaps the most blatant of these has been whether or not the law of war will survive beyond the war on terror and if so, in what form? In a speech on the need to reexamine the laws of war, one commentator stated:

Historically, of course, laws have always been adapted to better suit the times. When they have become out-dated, or less relevant, or less applicable to the realities of the day they have been modified or changed. This is true of all laws, domestic or international...

...since some change is less perceptible, more incremental, the balance between considerations such as obligation and entitlement, and freedom and security needs to be continually reviewed and, where necessary, re-forged. If we act differently today from how we behaved yesterday, it is not necessarily wrong. Indeed it may be wrong not to. We owe it to ourselves, to our people, to our forces and to the cause of international order to constantly reappraise and update the relationship between our underlying values, the legal instruments which apply them to the world of conflict, and the historical circumstances in which they are to be applied, including the nature of that conflict.¹¹

The remarks did not come from the Bush administration or neo-conservative think-tank but from the British Secretary of State for Defence – an elected MP of the Labour Government. In his speech, titled “Twenty-first Century Warfare – Twentieth Century

¹¹ Rt Hon Dr John Reid MP, Secretary of State for Defence “Twenty-first Century Warfare – Twentieth Century Rules”, Banqueting House, Royal Palace of Whitehall, 3 Apr 2006. Whether or not this accurately reflects the opinion of Ministry Defense lawyers is, of course, unclear.

Rules” he went on to question whether or not society was adequately convinced that it was protected from the threat of international terrorism under the current frameworks of domestic and international law.

What the speech demonstrates is that many of the questions and issues which are currently affecting America and international law also affect and stir other countries around the world. The way that America chooses to answer these quandaries will naturally affect the way the rest of the world perceives these issues. However, it is fair to say that the way the rest of the world answers the same challenges will probably also have an affect the United States.

Do we need new thinking on the laws of war? As suggested in Chapter 4, the issue was raised long before the war on terror began. The issue was raised, practically, in the Kosovo campaign. Today, the argument that we need new rules to combat a new breed of networked international terrorists, is the main moral and political justification for the Bush administration’s policies on Guantanamo Bay and interrogation.

Despite the outrage of human rights organizations, humanitarians and activists, these arguments are not incomprehensible. It can only be natural that when presented with a conflict that is, if only in size and scale, unprecedented, that the rules and restrictions which apply are put under some scrutiny. Should we compromise the safety of our troops, or even our societies, for the rights of terrorists? Should the West really engage in a war, with one hand tied behind its back, against an enemy who holds the very idea of restraint in disdain?

The premise of the question is, of course, that the law of war is the restraint which does hold the ‘one arm back.’ As argued above, this is not necessarily the case. Rather, the law of war is a tool which may be used to facilitate operations to help them go smoother. Because the law of war imposes both duties and rights on combatants, regarding the law as only restrictions and restraints is a mischaracterization.

Perhaps then what we need is not so much ‘new thinking’ about the law of war in the war on terror, but a return to ‘old thinking’. Old thinking in this context refers to the approach that was outlined by the “activist lawyers” in the 1980s but also resonates with the approach taken in 1949. Old thinking recognizes that the law gives both rights and responsibilities to combatants and acknowledges that law which gives one side a distinct advantage is unworkable. In other words, defenders have an obligation not to base themselves in or near civilian areas and then expect that the other side will refrain from attacking. Additionally, old thinking emphasizes the need to keep the rules as simple and straightforward as possible for military personnel. This means that approaches that seek to over complicate the law of war with new and increasingly specific or complex regulations. However, keeping the rules simple also mean sticking to one policy – approaches which seek to apply different sets of rules to different areas of operation (or even in the same area) result in confusion and misunderstandings. Having one approach and sticking to it helps to keep things clear in confusing and dangerous situations and, crucially, it helps to prevent the abuse that occurred in Abu Ghraib.

Yet, what is key about ‘old thinking’, especially when compared to arguments for ‘new thinking’ on the law of war is the belief that the law of war can be flexible and be applied to unfamiliar and unprecedented situations. Where the ‘new game, new rules’ argument tends to look upon our current law as outdated or no longer appropriate for the war on terror, old thinking looks for parallels and ways that our current law can apply in such a way that political and military imperatives can still be met.

As he sets out to look at the applicable law in the war on terror, Christopher Greenwood notes that much of the controversy over the American approach to the war on terror:

...has its roots in the fact that the events of 11 September – a terrorist attack of unprecedented savagery, apparently carried out by a shadowy organization operating outside the control of any state – did not fit easily within any of the obvious categories of international law. To some observers, the attack can only be regarded as an entirely new phenomenon

falling wholly outside the existing framework of international law... For the members of that school of thought, a challenge on this scale of a non-state actor to the one superpower calls for an entirely new thinking about the nature of international law. There is much substance in this argument, but does not help to answer the immediate questions about what law is applicable now. The fact that the events of 11 September may demonstrate a need to re-examine some of the assumptions on which the international legal system rests does not mean that those events occurred in a legal vacuum.¹²

Thus, questions about new thinking and old thinking are clearly an interesting area for further research. However, the point being made in this short discussion is that even where there is not a perfect fit between events and international law, this does not mean that there are no conventions to govern a particular operation or conflict. Custom and norms provide rules and surely most, if not all, circumstances in the war on terror can draw on at least one parallel from past conflicts or emergencies. In this way, our current law is flexible and is more adaptable than has been considered by many academics, politicians and even international lawyers. Ideas about precedence and finding ways to make the law work were the goals of “activist lawyers” in the post-Vietnam military context. A return to this kind of old thinking may then be more useful than finding and agreeing on alternatives in a fractured, post-9/11 world.

Conclusion: Putting it all together

Drawing on the previous chronological chapters, the final section of this work has tried to highlight the issues surrounding the United States and the politics of the law of war in a thematic manner. In doing so it has attempted to demonstrate that when it comes to these issues there are no clear separating lines. The major themes that run through this study all

¹² Christopher Greenwood, “International law and the ‘war against terrorism’” *International Affairs*, Vol. 78, No. 2, 2004. pp. 301-317. p. 301.

relate and engage with one another. It is impossible to speak of a dualistic tendency or implementation without reference to ideology.

Therefore, this Conclusion, and the overall project, have also tried to emphasize the need for a hybrid approach to study these issues. The role of law in politics and the nature of politics in law need to be considered and examined. A political account which too easily dismisses the effect of international law and a shallow reading and analysis of a legal text tell us very little of how America engages with the law of war in modern conflicts.

Ultimately, rather than presenting a model, this study has tried to tell a story about how America has engaged with the law of war since 1945 and why, it chose to act in a particular manner. It has done so in the hope that interested individuals will be able to draw lessons and, perhaps better understand where the United States stands in relation to the law of war today and why. Such an understanding remains important because, despite its current pressures, America remains the world's only superpower and is likely continue on in this role for at least the next few decades. As such it is reasonable to estimate that the US will remain militarily engaged, if only in the defense of its own territory. The dilemmas America faces in terms of the law of war are therefore likely to remain with important to us all for the foreseeable future.

If the past is any indication, it is likely that America's relationship with the law of war will continue to change because of the effect of ideology, national tendencies and politics. America has an effect on international law and international law has an effect on America and this certainly includes the law of war. After all, it has been said that the law of war has been written in the blood of past conflicts – and much of this blood, it may be said, has been American.

APPENDIX A

Interrogation Techniques requested by the commander of the US Southern Command for use at Guantanamo Bay. Memo dated 25 October 2002.

On 2 December 2002, Secretary of Defense Donald Rumsfeld approved all of the techniques in Category I and II and the fourth technique in Category III.

This permission was rescinded on 15 January and a working group was set up to assess the legal, policy and operational issues relating to the interrogation of detainees.

Category I

1. Yelling at Detainee
2. Techniques of Deception
 - a. Multiple interrogator techniques
 - b. Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an interrogator from a country with a reputation for harsh treatment of detainees.

Category II techniques

1. The use of stress positions (like standing), for a maximum of four hours.
2. The use of falsified documents or reports.
3. Use of isolation facility for up to 30 days. Requests must be made to through the OIC¹, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected detainees, the OIC, Interrogation Section will approve all contacts with detainee, to include medical visits of non-emergent nature.
4. Interrogating the detainee in an environment other than the standard interrogation booth.
5. Deprivation of light and auditory stimuli.
6. The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.
7. The use of 20-hour interrogations
8. Removal of all comfort items (including religious items)
9. Switching the detainee from hot rations to MREs²
10. Removal of clothing
11. Forced grooming (shaving of facial hair, etc)
12. Using detainee individual phobias (such as fear of dogs) to induce stress.

Category III techniques

¹ Officer in charge

² "Meals Ready to Eat"

1. The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.
2. Exposure to cold weather or water (with appropriate medical monitoring).
3. Use of a wet towel dripping water to induce the misperception of suffocation.
4. Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.

APPENDIX B

Interrogation Techniques approved by Secretary of Defense Donald Rumsfeld for use at Guantanamo Bay after review by a working group in the Department of Defense. Memo dated 16 April 2003.

Techniques A-Q: from Field Manual 34-52

- A. Direct: Asking straightforward questions.
- B. Incentive/removal of incentive: Providing a reward or removing a privilege, beyond those that are required by the Geneva Conventions.
- C. Emotional love: Playing on the love a detainee has for an individual or a group.
- D. Emotional hate: Playing on the hatred a detainee has for an individual or a group.
- E. Fear up harsh: Significantly increasing the fear level in a detainee. (This is generally interpreted as yelling or throwing things but not touching the detainee.)
- F. Fear up mild: Moderately increasing the fear level in a detainee.
- G. Reduced fear: Reducing the fear level in a detainee.
- H. Pride and ego up: Boosting the ego of a detainee.
- I. Pride and ego down: Attacking and insulting the ego of a detainee, not beyond the limits that would apply to a prisoner of war. (Caution given that this may violate Article 17 of the Third Geneva Convention and consideration on these grounds should be given prior to application of this technique.)
- J. Futility: Invoking the feeling of futility in a detainee.
- K. We know all: Convincing a detainee that the interrogator already knows the answer to the question he is asking.
- L. Establish your identity: Convincing a detainee that the interrogator has mistaken him for someone else.
- M. Repetition approach: Continuously repeating the same question to a detainee within interrogation periods of normal duration.
- N. File and dossier: Convincing a detainee that the interrogator has a damning and inaccurate file that must be fixed.

O. Mutt and Jeff: Pairing a friendly interrogator with a harsh one.

P. Rapid fire: Questioning in rapid succession without allowing detainee to answer.

Q. Silence: Staring at a detainee to encourage discomfort.

Techniques which go beyond Field Manual 34-52 and require “Further implementation guidance”

R. Change of scenery up: Removing a detainee from the standard interrogation setting — generally to a more pleasant location, but not to a worse one.

S. Change of scenery down: Moving a detainee from the standard interrogation setting to one less comfortable, but not one that would constitute a substantial change in environmental quality.

T. Dietary manipulation: Changing the diet of a detainee, but with no intended deprivation of food or water and without an adverse cultural or medical effect. e.g., hot rations to MREs

U. "Environmental manipulation": Altering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell). Conditions would not be such that they would injure a detainee. Detainee would be accompanied by an interrogator at all times. [Caution: Based on court cases in other countries, some nations may view application of this technique in certain circumstances to be inhumane. Consideration of these views should be given prior to use of this technique.]

V. Sleep adjustment: Adjusting the sleeping times of a detainee (e.g., reversing sleep cycles from night to day.) This technique is NOT sleep deprivation.

W. False Flag: Convincing the detainee that individuals from a country other than the United States are interrogating him

X. Isolation: Isolating a detainee from other detainees while still complying with the basic standards of treatment.³

³ A lengthy guidance note here indicates that this technique requires detailed implementation instructions and that this technique has generally not known to be used for interrogation purposes for longer than 30 days. Additionally, the note specifies that this technique may be in violation of Article 13, 14, 34 and 126 of the Geneva conventions which outline guidance on acts of intimidation, respect for the person, standards of treatment, etc.

Appendix C

Interviews

**Professor Michael N. Schmitt, former Senior Legal Adviser US Air Force
London,UK, 16 May 2006**

**Gary Solis, former Captain, US Marines, Visiting Professor of Law United States
Military Academy at West Point
Washington DC, 30 March 2006**

BIBLIOGRAPHY

- af Jochnick, Chris and Roger Normand. "The Legitimation of Violence: A Critical History of the Laws of War", Harvard International Law Journal, Vol. 35 No. 1, 1994. pp. 49-95.
- Aldrich, George H. "New Life for the Laws of War", American Journal of International Law, Vol. 75 No. 4 October 1981. pp. 764-783.
- . "Some reflections on the origins of the 1977 Geneva Protocols", in Christophe Swinarski, ed. Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet, Hague: Martinus Nijhoff Publishers, 1984. pp. 129-137.
- . "Comments on the Geneva Conventions" International Review of the Red Cross, No 320, October 1997. pp.508-510.
- Alter, Jonathan. "Time to Think about Torture" Newsweek, 5 November 2001.
- Applebaum, Anne. Gulag: A History of the Soviet Camps, London: Penguin Books Limited, 2004.
- Avant, Deborah D. "Privatizing Military Training", Foreign Policy in Focus, May 2000.
- Baker, James E. "Judging Kosovo: The Legal Process, the Law of Armed Conflict and the Commander in Chief", pp. 7-26 in Andru E. Wall, Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies Volume 78, Newport, RI: Naval War College, 2002.
- Best, Geoffrey. Humanity in Warfare: The Modern History of International Law of Armed Conflicts, London: Methuen & Co. Ltd., 1980.
- . War and Law Since 1945, Oxford: Oxford University Press, 1994.
- Benjamin, Mark. "No justice for all" Salon.com, 14 April 2006. Available online at: <http://www.salon.com/news/feature/2006/04/14/contractor/>.
- Bilton, Michael and Kevin Sim. Four Hours in My Lai: a war crime and its aftermath, London: Viking, 1992.
- Bolton, John R. "Courting Danger: What's Wrong with the International Criminal Court", The National Interest, Winter 1998/1999.
- . "The Global Prosecutors: Hunting War Criminals in the Name of Utopia", Foreign Affairs, Vol. 78 No 1, 1999. pp 157-164. pp. 158-159.

- . "Is There Really "Law" in International Affairs?", Transnational Law and Contemporary Problems, Vol. 10 No 1, 2000. pp 1-48.
- Boot, Max. "What the Heck is a 'Neocon'?" Opinion Journal, 30 December 2002.
Available online:
<http://www.opinionjournal.com/editorial/feature.html?id=110002840>.
- Booth, Ken and Tim Dunne eds. Worlds in Collision, Houndmills: Palgrave Macmillan, 2002.
- Booth, Ken. The Kosovo Tragedy: The Human Rights Dimension, London: Frank Cass Publishers, 2000.
- Borch, Frederic L. Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti, Washington DC: Office of the Judge Advocate General and Center of Military History United States Army, 2001.
- Bork, Robert. "The Limits of International Law", The National Interest, Winter 1989/1990. pp. 1-10.
- Bowman, Steve. "Iraq: U.S. Military Operations" Congressional Research Service, Library of Congress, Updated 23 January 2006. Available online:
<http://fpc.state.gov/documents/organization/25375.pdf>.
- Byers, Michael. Custom, Power and the Power of Rules: International Relations And Customary International Law, Cambridge, Cambridge University Press, 1999.
- ed. The Role of Law in International Politics: Essays in International Relations and International Law, Oxford: Oxford University Press, 2000.
- . War Law: International Law and Armed Conflict, London: Atlantic Books, 2005.
- Carr, E. H. The Twenty Year's Crisis 1919-1939: An Introduction to the Study of International Relations, Houndmills: Palgrave, 2001.
- Carvin, Stephanie. "Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War", Journal of Conflict and Security Law, Vol. 11, No. 1, 2006. pp. 67-92.
- Cassese, Antonio. International Law, Second edition. Oxford: Oxford University Press, 2005.
- ed. The Rome Statute for an International Criminal Court: A Commentary Oxford: Oxford University Press, 2002.

- Clark, Wesley K. Waging Modern War: Bosnia, Kosovo and the Future of Conflict, Oxford: Public Affairs, 2001.
- . "An Army of One?" Washington Monthly, September 2002. Available online:
<http://www.washingtonmonthly.com/features/2001/0209.clark.html>.
- Clausewitz, Carl von. On War, ed. and trans. Michael Howard and Peter Paret, Princeton: Princeton University Press, 1976.
- Cooke, John D. "Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition" Military Law Review, Vol. 165, September 2000, pp. 1-20.
- Corn, David. "The "Suicide Pact" Mystery: Who coined the phrase? Justice Goldberg or Justice Jackson?", Slate.com, 4 January 2002.
- Daalder, Ivo H. and Michael E. O'Hanlon. Winning Ugly: NATO's War to Save Kosovo, Washington: Brookings Institute Press, 2000.
- Detter, Ingrid. The Law of War, Second Edition. Cambridge: Cambridge University Press, 2000.
- Dershowitz, Alan. "Is There a Torturous Road to Justice?" Los Angeles Times, 8 November 2001.
- Diamond, Larry. "What Went Wrong in Iraq", Foreign Affairs, Vol. 83 No. 5, September/October 2004.
- Dinstein, Yoram. The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge: Cambridge University Press, 2004.
- Duffy, Helen. The 'War on Terror' and the Framework of International Law, Cambridge, Cambridge University Press, 2005.
- Dillon, Richard H. North American Indian Wars, Wigston: Magna Boods, 1983.
- Eckhardt, William George. "Lawyering for Uncle Sam When He Draws His Sword", Chicago Journal of International Law, Vol. 4, 2003. pp. 431-444.
- Ethics and International Affairs. "Roundtable: The New War – What Rules Apply?" Vol. 16, No. 1. pp 1-26, 2002.
- Falk, Richard. (ed.), The Vietnam War and International Law, Vol. 2. Princeton: Princeton University Press, 1969.
- Feith, Douglas J. "Law in the Service of Terror - The Strange Case of the Additional Protocol", National Interest, No.1 1985.

- . "‘International responses', in Uri Ra'anan *et al* eds. Hydra of Carnage, International Linkages of Terrorism, Lanham, MD: Lexington Books, 1986.
- . "Protocol I: Moving Humanitarian Law Backwards", Akron Law Review, Vol. 19, 1986. pp. 531-5.
- Fritz, David L. "Before the 'Howling Wilderness': The Military Career of Jacob Hurd Smith, 1862-1902", Military Affairs, Vol. 43, No. 4, December 1979, pp. 186-190.
- Forsythe, David P. "The United States and International Criminal Justice", Human Rights Quarterly, 24 (2002) pp. 974-991.
- . The Humanitarians, Cambridge: Cambridge University Press, 2005.
- Garratt, David. "The role of legal advisors in the armed forces," in The Gulf War 1990-91 in International and English Law, ed. Peter Rowe, London: Routledge, 1993.
- Garraway, Charles H. B. "Training: The Whys and Wherefores Social Research Vol. 69 No. 4, Winter 2002. pp 949-962.
- Gartner, Scott Sigmund and Marissa Edson Myers. "Body Counts and 'Success' in the Vietnam and Korean Wars", Journal of Interdisciplinary History, Vol. 25, No. 3, Winter 1995. pp. 377-395.
- Gearty, Conor. "Legitimising torture - with a little help", Index on Censorship Issue 1/05, 2005.
- Gordon, Michael and Bernard Trainor. Cobra II: The Inside Story of the Invasion and Occupation of Iraq, London: Atlantic Books, 2006.
- Greenberg, Karen J. and Joshua L. Dratel eds. The Torture Papers: The Road to Abu Ghraib, Cambridge: Cambridge University Press, 2005.
- Goldsmith, Jack L. and Eric A. Posner. The Limits of International Law, Oxford: Oxford University Press, 2005.
- Graham, David E. "Operational Law (OPLAW) – A Concept Comes of Age" The Army Lawyer, July 1987. pp. 9-10.
- Green, L.C. Essays on the Modern Laws of war, Second Edition, New York: Transnational Publishers, Inc., 1998.
- Greenwood, Christopher. "Customary international law and the First Geneva Protocol of 1977 in the Gulf Conflict" in The Gulf War 1990-91 in International and English Law, ed. Peter Rowe, London: Routledge, 1993. pp. 63-88.

- . "International law and the 'war against terrorism'" International Affairs, Vol. 78, No. 2, 2004. pp. 301-317.
- Gutman, Roy and David Rieff, eds. Crimes of War: What the Public Should Know, New York: W. W. Norton and Company, 1999.
- Hampson, Françoise J. "Means and methods of warfare in the conflict in the Gulf", in The Gulf War 1990-91 in International and English Law, ed. Peter Rowe, London: Routledge, 1993.
- Haney, C., C. Banks, and P. Zimbardo. "Interpersonal Dynamics in a Simulated Prison", International Journal of Criminology and Penology, No.1, 1973. 69-97.
- Hartle, Anthony E. "Atrocities in War: Dirty Hands and Noncombatants" Social Research, Vol. 69 No. 4, Winter 2002, pp. 963-979.
- Hay, John. "Instructions to the American Delegates to the Hague Conferences", as reprinted in: World Peace Foundation Pamphlet Series, Vol. III No. 4. April 1913.
- Henckaerts, Jean-Marie and Louise Doswald-Beck. Customary International Humanitarian Law, Volume 1: Rules, Cambridge, Cambridge University Press, 2005.
- Hartigan, Richard. The Forgotten Victim: A History of the Civilian, Chicago: Precedent, 1982. p. 31.
- Helms, Jesse. "American Sovereignty and the UN", National Interest, Winter 2000/2001.
- Hersh, Seymour M. Cover-Up: The Army's Secret Investigation of the Massacre at My Lai 4, New York: Random House, 1972.
- . Chain of Command: The Road from 9/11 to Abu Ghraib, New York: HarperCollins Publishers, 2005.
- Hibbert, Christopher. Red Coats and Rebels: The War for America 1770-1781, London: Penguin Books Ltd, 2001.
- Hoge, James F. and Gideon Rose, eds. How Did This Happen? Terrorism and the New War, New York: HarperCollins Publishers, 2001.
- . War on Terror: Updated and Expanded, New York: Council on Foreign Relations, 2003.
- . Understanding the War on Terror, New York: Council on Foreign Relations, 2005.

- Horseman, Reginald. Expansion and American Indian Policy, 1783-1812, Norman: University of Oklahoma Press, 1992.
- Howard, Michael. “*Temperamenta Belli: Can War Be Controlled*” in Michael Howard, ed. Restraints on War: Studies in the Limitation of Armed Conflict, Oxford, Oxford University Press, 1979.
- Human Rights Watch. ““No Blood, No Foul’: Soldiers’ Accounts of Detainee Abuse in Iraq” Human Rights Watch, Vol. 18, No. 3(G), July 2006. Available online: <http://hrw.org/reports/2006/us0706/us0706web.pdf>.
- Ignatieff, Michael. Virtual War: Kosovo and Beyond, Toronto: Viking, 2000.
- . The Lesser Evil: Political Ethics in an Age of Terror, Edinburgh: Edinburgh University Press, 2004.
- . “The Lesser Evil” Letter published in the New York Review of Books 15 August 2004.
- Johnson, James Turner and John Kelsay eds. Cross, Crescent and Sword: the Justification and Limitation of War in Western and Islamic Tradition, New York, Greenwood Press, 1990.
- Johnson, James Turner. The Holy War Idea in Western and Islamic Traditions, University Park, Pa.: Pennsylvania State University Press, 1997.
- Judah, Tim. Kosovo: War and Revenge New Haven: Yale Nota Bene, 2000.
- Karnow, Stanley. In Our Image: America’s Empire In the Philippines. New York: Random House, 1989.
- Karpinski, Janis. One Woman’s Army: The Commanding General of Abu Ghraib Tells Her Story, New York: Miramax Books, 2005.
- Keeva, Steven. “Lawyers in the War Room” American Bar Association Journal, December 1991. pp. 52-59.
- Kinsey, Christopher. “Challenging international law: a dilemma of private security companies”, Conflict, Security & Development, Vol. 5 No. 3, December 2005. pp. 269-293.
- Koskenniemi, Martti. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 Cambridge: Cambridge University Press, 2001.
- . “The Politics of International Law”, European Journal of International Law, Vol. 1, No. 1. 1990.

- Lammers, Stephen. "Approaches to Limits on War in Western Just War Discourse," in James Turner Johnson and John Kelsay eds., Cross, Crescent and Sword: the Justification and Limitation of War in Western and Islamic Tradition, New York, Greenwood Press, 1990.
- Lauterpacht, Hersch. "The Limits of the Operation of the Laws of War", British Yearbook of International Law, Volume 30, 1953. pp. 206-43.
- Lewy, Guenter. America in Vietnam, New York: Oxford University Press, 1978.
- Lifton, Robert Jay. "Doctors and Torture" New England Journal of Medicine, Vol. 315, No 5. 2004. pp. 415-6.
- Linn, Brian McAllister. The US Army and Counterinsurgency in the Philippine War 1899-1902, Chapel Hill: The University of North Carolina Press, 1989.
- Lowe, Vaughan. "Legal Issues Arising in the Kosovo Crisis"; International Review of the Red Cross, "Special issue: The Kosovo crisis and international humanitarian law", International Review of the Red Cross, No. 837, March 2000.
- Mackey, Chris and Greg Miller. The Interrogators: Task Force 500 and America's Secret War Against Al Qaeda, New York: Back Bay Books, 2005.
- Maguire, Peter. Law and War: An American Story, New York: Columbia University Press, 2001.
- Mandelbaum, Michael. "A Perfect Failure" Foreign Affairs Vo. 98, No. 5, 1999.
- Mansell, Wade. "Goodbye to All That? The Rule of Law, International Law, the United States and the Use of Force", Journal of Law and Society, Vol. 31 No 4, December 2004. pp. 433-56.
- Matheson, Michael J. "The United States Position on the Relation of Customary Law to the 1977 Protocols Additional to the 1949 Conventions" in American University Journal of International Law and Policy, 1987 pp. 419-431.
- Mayer, Jane. "The Memo", The New Yorker, 27 February 2006.
- . "The Hidden Power: The legal mind behind the White House's war on terror", The New Yorker, 3 July 2006. pp. 44-55.
- McCain, John. Faith of My Fathers, New York: Random House, 1999.
- McGoldrick, Dominic. From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity, Portland: Hart Publishing, 2004.
- Mckeogh, Colm. Innocent Civilians: The Morality of Killing in War, Houndmills: Palgrave Macmillan, 2002.

- Mead, Walter Russell. Special Providence: American Foreign Policy and How It Changed the World, New York: Alfred A. Knopf, 2001.
- Mertus, Julie A. The United Nations and Human Rights: A guide for a new era, London: Routledge, 2005.
- Miller, Judith A. "Commentary", in Andru E. Wall, Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies Volume 78, Newport, RI: Naval War College, 2002. pp. 107-112.
- Moorehead, Caroline. Dunant's Dream: War, Switzerland and the History of the Red Cross, London: HarperCollins, 1999.
- Morgan, Edmund M. "The Background of the Uniform Code of Military Justice," Military Law Review, Vol. 28, April 1965.
- Murphy, Sean D. ed. United States Practice in International Law: Volume 1: 1999-2001, Cambridge: Cambridge University Press, 2002.
- Nash, William L. "The Laws of War: A Military View", Ethics and International Affairs, Vol. 16, No. 1, 2002.
- Nolan, Cathal J. "Americans in the Gulag: Detention of US Citizens by Russia and the Onset of the Cold War, 1944-9", Journal of Contemporary History, Vol. 24 No. 4, October 1990, 523-545.
- Normand, Roger and Chris af Jochnick "The Legitimation of Violence: A Critical Analysis of the Gulf War" Harvard International Law Journal, Vo. 35, No. 2, 1994. pp. 387-416.
- Onuf, Nicholas. "Do Rules Say What they Do? From Ordinary Language to International Law", Harvard International Law Journal, Vol. 26. No. 2, 1985.
- Owens, Mackubin Thomas. "Men@War: Hadithah in context", National Review Online, 30 May 2006. Available online at: <http://article.nationalreview.com>.
- Parks, W. Hays. "Crimes in Hostilities", Marine Corps Gazette LX, No. 9, September 1976. pp. 38-9.
- . "The Law of War Advisor", JAG Journal, Vol. 31 Summer 1980. pp. 1-52.
- . "Rolling Thunder and the Law of War" Air University Review, Vol XXXIII No. 2, 1982 and "Linebacker and the Law of War", Air University Law Review, XXXIV No. 2, 1983.

- . "Air War and the Laws of war", Air Force Law Review, Vol. 32. 1990. pp. 1-225.
- Parks, W. Hays. "The Gulf War: A Practitioner's View", Dickinson Journal of International Law, Vol. 10 No. 3, 1991-2. pp. 393-423.
- . "The United States Military and the Law of War: Inculcating an Ethos", Social Research, Vol. 69. No 4, Winter 2002. pp. 981-1015.
- "The ICRC Customary Law Study: A Preliminary Assessment" American Society of International Law Proceedings, Vol. 99. 2005.
- "Means and Methods of Warfare" George Washington International Law Review, Vol. 38 No. 3, 2006. pp. 511-539.
- Pictet, Jean S. ed. Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War, Geneva: International Committee of the Red Cross, 1960.
- Provost, René. International Human Rights and Humanitarian Law, Cambridge: Cambridge Studies in International and Comparative Law, Cambridge University Press, 2002.
- Prugh, George S. Law at War: Vietnam 1964-1973, Washington DC: Department of the Army, 1975.
- . "Observations on the Uniform Code of Military Justice: 1954 and 2000" Military Law Review, Vol. 165, September 2000, pp. 21-41.
- Rabkin, Jeremy. "After Guantanamo: The War Over the Geneva Conventions", The National Interest, Summer 2002.
- . Law Without Nations: Why Constitutional Government Requires Sovereign States, Princeton: Princeton University Press, 2005.
- Ramsey, Paul. War and the Christian Conscience: How Shall Modern War be Conducted Justly, Durham, N. C.: Duke University Press, 1961.
- Reus-Smits, Christian. ed. The Politics of International Law, Cambridge: Cambridge University Press, 2004.
- Rivkin Jr., David B. and Lee A. Casey. "The Rocky Shoals of International Law" National Interest, Winter 2000/2001.
- Roberts, Adam and Richard Guelff. Documents on the Laws of War, Third Edition, Oxford: Oxford University Press, 1999.
- . "Nato's 'Humanitarian War' over Kosovo" Survival, Vol. 41. No. 3, 1999, pp. 102-23.

---. "The Law of War After Kosovo", in Andru E. Wall, Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies Volume 78, Newport, RI: Naval War College, 2002. pp. 401-432.

---. "The End of Occupation in Iraq", Policy Brief, Harvard Program on Humanitarian Policy and Conflict Research, 28 June 2004. Available online: <http://www.ihlresearch.org/iraq/feature.php?a=51>.

Rogers, A.P.V. Law on the Battlefield, Second Edition, Manchester University Press, 2004.

Rose, David. Guantánamo: America's War on Human Rights, London: Faber and Faber, 2004.

Rowe, Peter. The Gulf War 1990-91 in International and English Law, ed. Peter Rowe, London: Routledge, 1993. pp. 188-204.

---. "Prisoners of War in the Gulf Arena" in The Gulf War 1990-91 in International and English Law, ed. Peter Rowe, London: Routledge, 1993. pp. 188-204.

Russell, Frederick H. The Just War in the Middle Ages, Cambridge: Cambridge University Press, 1975.

Sands, Philippe. Lawless World: American and the Making and Breaking of Global Rules, London: Allen Lane, 2005.

Schabas, William. An Introduction to the International Criminal Court, Cambridge: Cambridge University Press, 2001.

Scheffer, David J. "Court Order" Letter published in Foreign Affairs, November/December 2001.

Scheffer, David. "Why Hamdan is Right about Conspiracy Liability" Jurist: Legal News and Research, 30 March 2006. Available online: <http://jurist.law.pitt.edu/forumy/2006/03/why-hamdan-is-right-about-conspiracy.php>

Schmitt, Michael N. "Conduct of Hostilities During Operational Iraqi Freedom: An International Humanitarian Law Assessment", 6 Yearbook of International Humanitarian Law, 2003, pp. 73-110.

---. "The Law of Beligerent Occupation", Crimes of War Project, 15 April 2003.
Available online: <http://www.crimesofwar.org/special/Iraq/news-iraq5.html>.

---. "Targeting and Humanitarian Law: Current Issues", 34 Israel Yearbook on Human Rights, 2004, pp. 59 - 104.

Schwarzenberger, Georg. A Manual of International Law, 5th Edition. London: Stevens & Sons Limited, 1967.

Shearer, David. "Outsourcing War", Foreign Policy, Issue 112, Fall 1998.

---. Private Armies and Military Intervention, Adelphi Paper 316, Oxford: Oxford University Press for the International Institute for Strategic Studies, 1998.

Short, Michael. "Operation Allied Force from the Perspective of the NATO Air Commander" pp. 19-26 in Andru E. Wall, Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies Volume 78, Newport, RI: Naval War College, 2002.

Singer, P.W. "Corporate Warriors: The Rise of the Private Military Industry and Its Ramifications for International Security." International Security, Vol. 26, No. 2, Winter 2001/2, pp. 186-220.

---. "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law", Columbia Journal of Transnational Law, Vol. 42 No. 2, Spring 2004, pp. 521-550.

---. "Outsourcing War: Understanding the Private Military Industry", Foreign Affairs, Vol. 84, No. 2. March/April 2005, pp. 119-132.

Slaughter, Anne-Marie. "International Law and International Relations Theory: A dual Agenda" American Journal of International Law, Vol. 87, No. 2, 1993.

Slaughter, Anne-Marie and Stepan Wood. "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," American Journal of International Law, Vol. 92, No. 3, 1998.

Smith, Thomas W. "The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence" International Studies Quarterly, Vol. 46, No. 3, 2002. pp. 355-374.

- Smyth, Frank. "The Gulf War" in Crimes of War: What the Public Should Know eds. Roy Gutman and David Rieff, New York: W.W. Norton and Company, 1999. pp. 162-168.
- Social Research on "International Justice, War Crimes and Terrorism: The U.S. Record". Vol. 69 No. 4, Winter 2002.
- Solis, Gary. Marines and Military Law in Vietnam: Trial by Fire, Washington DC: History and Museums Division Headquarters, U.S. Marine Corps, 1989.
- . "Obedience to Orders: History and Abuses at Abu Ghraib Prison", Journal of International Criminal Justice, Vol 2. No. 4, 2004. pp. 988-998.
- Spiro, Peter J. "The New Sovereignists: American Exceptionalism and Its False Prophets", Foreign Affairs, Vol. 79 No 6, November/December 2000. pp 9-15.
- Stolberg, Eva-Maria. "Yalta Conference", in Encyclopedia of Prisoners of War and Internment. ed. Jonathan F. Vance, Santa Barbara: ABC-CLIO, 2000. pp. 345-5.
- Suskind, Ron. The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11, London: Simon & Shuster UK Ltd, 2006.
- Swofford, Anthony. Jarhead: A Soldier's Story of Modern War, London: Scribner, 2003.
- Taulbee, James. "Myths, Mercenaries and Contemporary International Law" California Western International Law Journal, Vol. 15 No. 2, p. 339-363.
- Van Deventer, Henry W. "Mercenaries at Geneva", American Journal of International Law, Vol. 70, No. 4., October 1976, pp. 811-816.
- Vance, Jonathan F. ed. Encyclopedia of Prisoners of War and Internment. Santa Barbara: ABC-CLIO, 2000.
- Verchio, Donna Marie. "Just Say No! The SIrUS Project: Well-Intentioned but, Unnecessary and Superfluous", Air Force Law Review, Vol. 51, 2001. pp. 183-228.
- Virginia Journal of International Law, "The New York University-University of Virginia Conference on Exploring the Limits of International Law", Vol. 44 No. 1, Fall 2003.
- Wall, Andru E. Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies Volume 78, Newport, RI: Naval War College, 2002.

- Walker, Clive and Dave Whyte. "Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom", International and Comparative Law Quarterly, Vol. 54, July 2005, pp. 651-690.
- Walzer, Michael. Just and Unjust Wars: A Moral Argument with Historical Illustrations, Third Edition, New York: Basic Books, 2000.
- Warren, Marc L. "Operational Law – A Concept Matures", Military Law Review, Vol. 152, 1996, pp. 33-73.
- Wedgwood, Ruth. "Propositions on the Law of War after the Kosovo Campaign" pp. 433-441 in Andru E. Wall, Legal and Ethical Lessons of NATO's Kosovo Campaign, International Law Studies Volume 78, Newport, RI: Naval War College, 2002.
- Wheaton, Henry. Elements of International Law: The Literal Reproduction of the Edition of 1866, Richard Henry Dada Jr. Ed. George Grafton Wilson, Oxford: The Clarendon Press, 1936.
- Wheeler, Nicholas J. "Dying for Enduring Freedom: Accepting Responsibility for Civilian Casualties in the War against Terrorism" International Relations, Vol. 16, No. 2, 2002. pp. 205-225.
- . "The Kosovo Bombing Campaign" in Christian Reus-Smit ed. The Politics of International Law, Cambridge: Cambridge University Press, 2004.
- Wiggers, Richard D. "Forcible Repatriation" in Encyclopedia of Prisoners of War and Internment. Ed. Jonathan F. Vance, Santa Barbara: ABC-CLIO, 2000. pp 100-102.
- White, Andrew D. The First Hague Conference. Boston: The World Peace Foundation, 1912.
- Zagovec, Rafael. "World War II – Eastern Front" in Encyclopedia of Prisoners of War and Internment. ed. Jonathan F. Vance, Santa Barbara: ABC-CLIO, 2000. pp. 329-333.
- Zamoyski, Adam. 1812: Napoleon's Fatal March on Moscow, London: Harper Perennial, 2004.
- Zinni, Anthony. "The SJA in Future Operations" Marine Corps Gazette, February 1996, pp. 15-17.

News Stories

- Agence France Presse. "US soldier pleads guilty in Iraq detainee abuse scandal", 11 September 2004.
- Agence France Presse. "Hearing of US soldier accused of posing with Iraqi corpse raises questions", 25 June 2004.
- Badger, T.A. "Jury deliberations expected in Lynndie England's Abu Ghraib abuse case" Associated Press, 26 September 2005.
- Barry, John, Michael Hirsch and Michael Isikoff. "The Roots of Torture", Newsweek 17 May 2004. Available online at: <http://msnbc.msn.com/id/4989422/>
- BBC News. "Nato leadership splits revealed", 9 March 2000. Available online at: <http://news.bbc.co.uk/1/hi/world/europe/671420.stm>.
- BBC News. "UN sexual allegations double" 6 May 2005. Available online at: <http://news.bbc.co.uk/2/hi/americas/4521481.stm>
- Borger, Julian and Martin Hodgson. "A plane is shot down and the US proxy war on drug barons unravels" The Guardian, 2 June 2001. p.3.
- Borger, Julian. "US troops ordered to undergo ethical training after killing of Iraqi civilians" The Guardian, 2 June 2006. Available online: <http://www.guardian.co.uk/Iraq/Story/0,,1788643,00.html>
- Boyle, Jon. "Europe 'actively participated' with CIA prisons" Reuters UK, 7 June 2006, Available online at: http://today.reuters.co.uk/news/newsArticle.aspx?type=topNews&storyID=2006-06-07T100214Z_01_L07492816_RTRUKOC_0_UK-SECURITY-CIA-PRISONS.xml
- Cloud, David S. and Sheryl Gay Stolberg. "White House Bill Proposes System to Try Detainees" New York Times, 25 July 2006. p. 1.
- CNN. "NATO grapples with 'war by committee'", 9 April 1999. Available online at: <http://www.cnn.com/US/9904/19/war.by.committee>.
- Douglas, William. "President Bush meets ex-secretaries of state, defense to discuss Iraq" Knight Ridder/Tribune Information Services, 12 May 2006.
- Drummond, James. "Court martial sentences US soldier to year in jail for abusing Iraqi prisoners" Financial Times, 20 May 2004, p. 9.
- Economist. "Military Industrial Complexities" 29 March, 2003, p. 56.
- Goldenberg, Suzanne. "Guantanamo's day of reckoning in supreme court", The Guardian, 29 March 2006. Available online: <http://www.guardian.co.uk/guantanamo/story/0,,1741825,00.html>.

- Greenhill, Kelly M. "Don't Dumb Down the Army" New York Times, February 17, 2006. p. A23.
- Harding, Thomas. "Britain's Armed Forces 'under legal siege'" Daily Telegraph, 15 July 2005.
<http://www.telegraph.co.uk/news/main.jhtml;jsessionid=UCQBOHAGB0MNPQFIQMFCM5WAVCBOYJVC?xml=/news/2005/07/15/nforces15.xml>
- Hendawi, Hamza. "U.S. Troops in Iraq to Get Ethics Training" CBS News, 1 June 2006. Available online:
<http://www.cbsnews.com/stories/2006/06/01/ap/world/mainD8HVL8EO3.shtml>
- Lewis, Neil A. "Broad Use of Harsh Tactics is Described at Cuba Base", New York Times, 17 October 2004. Available online at:
<http://www.nytimes.com/2004/10/17/politics/17gitmo.html?ex=1255665600&en=67208a988fb44907&ei=5090&partner=kmarx>.
- Lynch, Colum. "U.N. Sexual Abuse Alleged in Congo" Washington Post, December 16, 2004. p. A26. Available online at:
<http://www.washingtonpost.com/wp-dyn/articles/A3145-2004Dec15.html>.
- MSNBC. "England sentenced to 3 years for prison abuse", 28 September 2005.
Available online: <http://www.msnbc.msn.com/id/9492624/>
- Onishi, Norimitsu. "Military Specialist Pleads Guilty to Abuse and Is Jailed" New York Times, 11 September 2004. p. 9.
- Parker, Ned. "US orders coalition troops to take lessons in the ethics of battlefield" The Times, 2 June 2006. Available online:
<http://www.timesonline.co.uk/article/0,,7374-2207570,00.html>.
- Paterson, Tony. "Soldier Will Admit Role in Abu Ghraib Abuse" The Independent, 24 August, 2004. p. 23.
- Plummer Flaherty, Anne. "Senators Skeptical of Tribunal Plans" Associated Press, 2 August, 2006.
- Priest, Dana. "CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11" Washington Post, 2 November 2005, Page A1. Available online at: <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

- Reid, Tim. "Abu Ghraib abuser jailed for 8 years", The Times, 22 October 2004, p. 4.
- Reid, T.R. "Graner Gets 10 Years for Abuse at Abu Ghraib" Washington Post, 16 January 2005, p. A01.
- Reynolds, Maura. "Messages Conflict on Detainee Trials", Los Angeles Times, 14 July 2006. p. 22. p. A22.
- Ross, Brian, David Scott and Rhonda Schwartz. "U.N. Sex Crimes in Congo" ABC News, 10 February 2005. Available online at:
<http://abcnews.go.com/2020/UnitedNations/story?id=489306&page=1>.
- Ross, Brian and Richard Esposito. "Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons: 10 Out of 11 High-Value Terror Leaders Subjected to 'Enhanced Interrogation Techniques'", ABC News, 5 December 2005. Available online at:
<http://abcnews.go.com/WNT/Investigation/story?id=1375123>.
- Smith, Michael. "Iraq battle stress worse than WWII" The Sunday Times, November 6, 2005. p. 1.
- Westhead, James. "Planning the US 'Long War' on terror" BBC News, 10 April 2006. Available online at:
<http://news.bbc.co.uk/1/hi/world/americas/4897786.stm>.
- Williamson, Hugh. "Charges likely for two officers" Financial Times, 25 August 2004. p. 5.
- Zavis, Alexandra. "Rise of guns-for-hire in Iraq creates regulatory quandary", Associated Press, 8 May 2006.
- Zernike, Kate "Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years" New York Times, 15 January 2005, p. 12.
- Zernike, Kate and Sheryl Gay Stolberg. "Detainee Rights Create a Divide On Capitol Hill" New York Times, 10 July 2006. p.1

Floor Statements/Press Releases

- Gonzales, Alberto. "Statement of the Attorney General Before the Armed Services Committee, United States Senate, Concerning Legislation in Response to

Hamdan v. Rumsfeld” 2 August 2006. Available online: <http://armed-services.senate.gov/statemnt/2006/August/Gonzales%2008-02-06.pdf>.

Leahy, Patrick. "Guantanamo Bay Has Become A Blot And A Black Hole" 13 June 2005. Available online: <http://leahy.senate.gov/press/200506/061305.html>

McCain, John. "McCain Statement on Detainee Amendments" 5 October 2005.

Available online at:

http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1611.

United States Department of Defense. "DoD News Briefing - Secretary Rumsfeld and Gen. Myers", 11 January 2002. Available online at:

http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html.

United States Department of Defense. "DoD News Briefing - Mr. Di Rita and Gen. Abizaid" 16 July 2003. Available online at:

<http://www.defenselink.mil/transcripts/2003/tr20030716-0401.html>.

United States Department of Defense. "The Legal Basis for Detaining Al Qaida and Taliban Combatants", 14 November 2005. Available online at:

<http://www.defenselink.mil/news/Jan2006/d20060215legalbasis.pdf>.

United States Department of State. "Excerpt: Rumsfeld Says Taliban to Blame for Casualties" 29 October, 2005. Excerpt available online at:

<http://bangkok.usembassy.gov/news/press/2001/nrot113.htm>.

White House. "Guards and Reserves 'Define Spirit of America': Remarks by the President to Employees at the Pentagon." 17 September, 2001. Available at: <http://www.whitehouse.gov/news/releases/2001/09/20010917-3.html>.

White House. "Vice President Cheney Delivers Remarks at the 56th Annual Alfred E. Smith Memorial Foundation Dinner" 18 October, 2001. Available at:

<http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011018.html>.

White House. "Fact Sheet: Status of Detainees at Guantanamo", 7 February 2002.

Available at:

<http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

Government Reports

United States

White House. "The National Security Strategy of the United States" September 2002.

Available online at: <http://www.whitehouse.gov/nsc/nss.pdf>.

---. "Progress Report on the Global War on Terror", September 2003. Available online at: <http://www.whitehouse.gov/homeland/progress/>.

United States Department of the Army. "Report of the Department of the Army

Review of the Preliminary Investigations into the My Lai Incident",

Washington: United States Department of the Army, 1970. (AKA "The Peers Report")

United States Department of Defense. "Conduct of the Persian Gulf War: Final Report to Congress", Washington: Department of Defence, April 1992.

---. Quadrennial Defense Review Report, 6 February 2006. Available online at: <http://www.defenselink.mil/qdr/report/Report20060203.pdf>.

United Kingdom

Foreign and Commonwealth Office. "HC577 Private Military Companies: Options for Regulation" 12 February 2002. Foreign and Commonwealth Office, London: The Stationary Office.

Reports from other organizations

Final Report to the Prosecutor by the Committee Established to Review the NATO

Bombing Campaign Against the Federal Republic of Yugoslavia,

Available online at <http://www.un.org/icty/pressreal/nato061300.htm>.

Websites Used in Research

Amnesty International: <http://www.amnesty.org>.

Avalon project: Documents in Law, History and Diplomacy, Yale University:

<http://www.yale.edu/lawweb/avalon/>

Coalition for the International Criminal Court: <http://www.iccnw.org>.

International Committee of the Red Cross: <http://www.icrc.org>

International Criminal Court: <http://www.un.org/law/icc>.

Human Rights First: <http://www.humanrightsfirst.org>.

Human Rights Watch: <http://www.hrw.org>.

Ronald Reagan Presidential Library, <http://www.reagan.utexas.edu/>.

United States Senate Committee on Armed Services: <http://armed-services.senate.gov>.

United States Senate Committee on the Judiciary: <http://judiciary.senate.gov>.