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The War on Terrorism and International Humanitarian Law

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My focus today is on the broad question of the so-called "war on terrorism" and how it fits within the framework of the rules of international humanitarian law. Are these laws applicable? There have been a variety of claims since September 11th that humanitarian law needs some kind of revision. Some making this claim assert that the current legal regime is too generous to terrorists, while others insist that it is too generous to governments. The International Committee of the Red Cross (ICRC) has even convened various groups of experts to discuss this issue and the assumption among many has been that the law is inadequate.

My thesis today, however, is that international humanitarian law as currently developed does provide an adequate framework and that major revisions for it are premised on a variety of misconceptions about that law. I want to suggest four misconceptions about international humanitarian law and why understanding those will, I hope, convince you that the overall framework does not require major revision.

Before beginning, I should just point out—and indeed this supports the argument that I am making—that Abu Ghraib did not happen because of any ambiguity in international law. It may have happened because the signals sent to the people on the ground were not clear from the Justice Department or from the military; but international law, with respect to the treatment of civilians in occupied territory and POWs, could not be clearer. As a result, we certainly cannot say that the remedy for Abu Ghraib is to make the law clearer. Perhaps we need to work on its implementation and the people who are working on the implementation, but not the law itself.

The first misconception about international humanitarian law is that there is, in fact, a major gap regarding the war on terror and that therefore, we need a lot of new law. The common assumption among some academics is that the law is ill-equipped to address use of force by and against terrorist groups, and that while we have good and adequate

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law for interstate conflicts or civil wars or conflicts between states and liberation movements, we do not have guidance for terrorist movements. However the Geneva Conventions and the Protocols cover quite a lot of the war. They apply to much, if not most, of what happened in Afghanistan. If you see Iraq as part of the war on terrorism, you can also see it as in interstate war where the provisions of the Geneva Conventions clearly apply.

Now, of course, if a conflict does not meet the definitions in the Geneva Conventions or Protocols, then those treaties do not govern the conflict. Where the Conventions do not apply, international humanitarian law derived from "established custom, principles of humanity, and the dictates of public conscience" can serve as a place holder. I take that language from Additional Protocol I of 1977. Such language is not mere rhetoric. It includes at a minimum the principle of distinction, which is that combatants have to distinguish between civilians and other combatants when they use force and cannot target civilians directly or injure them disproportionately; it includes the status of being outside of combat, which protects prisoners and sick and wounded; and it includes various limitations on the methods of combat that do not cause unnecessary suffering. In fact, all states recognize in principle these obligations, and even the United States admits that there is such a thing as customary international law of armed conflict covering prisoners and sick and wounded, and includes various limitations on the methods of combat so as not to cause unnecessary suffering. Indeed, the full scope of custom is probably a lot more than those three principles. Killing somebody during a surrender, many provisions of Hague and Geneva law about armed conflict, rights to trial and various things in Common Article 3 and in Protocol I are, I think, regarded as customary international law.

I am not suggesting that every scenario in the war on terrorism is addressed by custom. There are certainly ambiguities about the definition of a combatant and the meaning and duration of hostilities. Custom has not had time to develop to address some of these ambiguities. However, that does not convince me that we need to have a major reconfiguration of international humanitarian law to deal with those discrete issues.

The second misconception about international humanitarian law is that it can be divorced from the law about recourse to force—that *jus in bello* can be divorced from *jus ad bellum*. One of the hallmarks of the

law of war is that victims of armed conflict should be protected regardless of the cause of the war and regardless of what side they are on—that the law applies to both the aggressor and the victim. Otherwise, combatants would argue that the justice of their cause allows for all sorts of indignities against opposing combatants and civilians. This idea—this separation of the two—is premised on a fundamental principle of human dignity that combatants and civilians deserve protection regardless of the merits of their side. With regard to terrorism, it would mean that who is right and who is wrong in the decisions by states and terrorist groups to fight each other should not detract from the need to regulate that conflict in a humanitarian manner, and that the victims and combatants on both sides should be protected.

My view is that the reality is not that clear cut on this so-called separation of the law of war and the law on the recourse to force. When Protocol I extended the Geneva Conventions to cover wars of liberation, that was done as part of a bargain whereby those groups also undertook obligations to respect humanitarian law. It was also done to legitimize the very war they were fighting—fighting against a colonial power was recognized as a legitimate form of war, and therefore, the people involved in it should be protected. I would say that even for clearly illegal wars of aggression, there is a sense among states that those wars are not so obnoxious that defenders, offenders, and their citizens should be denied humanitarian protections. In other words, states quietly accept that wars will still happen, that they might, after all, be the aggressor one day. As a result, they are not willing to say that the aggressor is so evil and that his goal is beyond the pale of civilized conduct that he forfeits all protections for his troops and his civilians. That is the connection that international law has made between these two branches, between the law of war and the law and recourse to force.

With terrorists, though, the calculus is totally different. If non-state actors have simply created terrorist groups to kill innocent people and terrorize a population, why should governments assume that such conflicts deserve regulation by detailed rules of international humanitarian law? When the goal of a group is so beyond acceptable conduct that it finds no defenders among governments, extending the protections of international humanitarian law to such conflicts and to such combatants, I think, only serves to legitimize them and is thus not acceptable.

The third misconception for those who say that international humanitarian law is not adequate to deal with terrorism is that humanitarian law, because it is nonreciprocal, requires that we protect even parties that violate it. One of the ideas of international humanitarian law is that if one side breaches the rules, the other side is not supposed to retaliate by doing the same. Normally, with respect to treaties, if one side breaches a treaty materially, the other side is allowed to invoke that breach and suspend its obligations under the treaty. But in international humanitarian law, if one side kills a group of prisoners of war, which is a violation of the law, the other side is not allowed to use a reprisal against prisoners. It is specifically banned in the Third Geneva Convention. Reprisals against civilians are banned in the Fourth Geneva Convention. Some people think that all reprisals should be banned in other contexts as well. Indeed, in Protocol I, if a liberation movement violates certain norms of international humanitarian law, it does not lose its status as a combatant group. It has to do certain other things to lose that status. Again, the idea is non-reciprocity. Under this view, one side should protect those on the other even if the latter are violating the norms, which would suggest that if Al Qaeda is violating the norms, they still deserve the protections because they are equal combatants.

I do not think that this idea of non-reciprocity is or should be so all-encompassing. In fact, reprisals during combat against combatants are allowed in international humanitarian law today. The protections with respect to Protocol I were part of a bargain whereby guerrilla groups received the protections of international humanitarian law in exchange for obligations on their own to respect that law. It denies combatant and POW status only if those groups do not follow certain basic requirements like carrying their arms openly during an engagement. With terrorist organizations, the modus operandi is simply targeting civilians. It pushes the problem of non- reciprocity very far. One side is determined from the outset to carry out its struggle regardless of the fundamental principals of humanity. Why should its members be afforded anything more than treatment consistent with those basic norms? We cannot have a legal regime where only one side of combatants benefits from the protection of international humanitarian law.

Now, of course, I do not take this as a prescription for a free-for-all in the war on terrorism. Basic principals of humanity still apply. Captured terrorists cannot be tortured; their families cannot be targeted.

Moreover, there may be a very important function to extending POW status to those who do not formally deserve it. We know now with hindsight that the Bush Administration's decision not to give POW status to Al Qaeda detainees, a position which I found legally justified, has turned out to have disastrous consequences for those detainees, both in Guantanamo and for people who clearly are protected at Abu Ghraib (as there is now evidence that the practices at Guantanamo against unprotected combatants were used against protected persons in Abu Ghraib). I think that even if forces do not deserve the status, giving it to them can cause their keepers to treat them with greater respect. As a result, there may be a policy rationale for affording these people POW benefits anyway.

The fourth misconception is that the paradigms of combat and combatants are somehow out of date as a result of the war on terrorism, or that the Geneva Conventions reflect an outdated notion of armed conflict and combatants. This concept appeared in an early memo of then-White House Counsel Alberto Gonzales in 2002. Since the Conventions only deal with interstate conflicts or conflicts between liberation movements and states or classic wars, this view asserts the need for some sort of new paradigm. Indeed, the U.S. has adopted the war theme with respect to Al Qaeda. What bothers a lot of people is that the United States government is trying to have it both ways. It is asserting various rights to commit armed acts against terrorists under *jus ad bellum*, the law on recourse to force, notably the right of self-defense; however, it denies the applicability of international humanitarian law, *jus in bello*. It seems two-faced that the United States can both invoke the war paradigm to use force against the terrorists, but then deny the war paradigm to say that no terrorists are entitled to protected status. How do we get around this?

There is no question that the notions of armed conflict and combatant have changed since the Hague and Geneva Conventions. However, in my view, part of the core of humanitarian law is the creation of a physical and temporal space where it is, in fact, perfectly legal for certain categories of people to kill each other. That space is called combat and the people in it are combatants. The combatant privilege means that combatants may not be punished for lawful combat operations, although, they can be punished for war crimes. Even when Protocol I was drafted in the 1970s to cover liberation movements, there was still this idea about military engagements and military attack—that

the rules were covering combatants, a new class of combatants, but combatants during their combat activities. However, to expand the laws of war to cover any situation where an organization initiates force blurs the distinction between situations where the law allows individuals to lawfully kill each other and where the law does not allow and should not allow people to kill each other. It has the risk of turning every act of violence into an act of war and all those who commit it into lawful combatants who enjoy the combatant's privilege. Where would you draw the line between Al Qaeda attacks and those of the mafia or simply an insane person? For the combatant's privilege to remain as it should, international humanitarian law has to be confined to a highly limited set of circumstances and not to any individual or group that chooses to attack a military target.

So where do we go from here? The United States government obviously continues to see the struggle against Al Qaeda as a war, and it wants to expand the geographical zone of legitimate combat quite significantly, to cover the killing of Al Qaeda leaders anywhere, including in another country like Yemen. To expand the notion of combat temporally, the U.S. will not talk about when these hostilities are going to end, in part due to its desire to justify indefinite detention without trial of members of Al Qaeda and the Taliban. These two expansions of armed conflict of combatants—the geographical and the temporal—are the most vexing questions for humanitarian law today.

On the geographic side, I think it is hard to accept the U.S. position that Al Qaeda operatives around the world are legitimate targets for wartime killings, while at the same time rejecting the idea that they are lawful combatants when they kill U.S. soldiers. The U.S. squares the circle through the notion of illegal or unlawful combatant, under which a state can kill somebody without affording them the full protections.

How do we get over this geographic bleeding of the war paradigm? The simple solution is to say that the armed conflict paradigm does not apply at all. The United States would then categorize Al Qaeda as a group of criminals against whom the U.S. should use law enforcement techniques to try and punish and toward whom the U.S. should apply human rights law, which recognizes discretion for police acting in self-defense while protecting criminals from arbitrary killing. Now, whether the law enforcement paradigm will suffice if Al Qaeda gains access to weapons of mass destruction remains to be seen. There need to be

boundaries beyond which the special privileges that the law of war gives to combatants do not apply.

On the temporal question, there is no doubt that the indefinite detention of Al Qaeda fighters is clearly unsustainable legally. The U.S. has begun to recognize this by releasing fairly significant numbers of people from Guantanamo, while still leaving a lot there. International humanitarian law, international human rights law, and U.S. constitutional law make clear that individuals, whether lawful combatants, civilians, or others, cannot be held indefinitely without trial.

What is the solution? Rather than trying to find some kind of combatant status for the Al Qaeda and then trying to figure out when the hostilities end because they would then have to be released, we should pursue an alternative that would rely on the idea of basic notions of humanity. Some of these notions appear in Protocol I in Article 75 and should apply to any person. These include a human right to a trial and not indefinite detention without trial. If the notions of the basic minimal protections recognized by so-called civilized peoples were applied, it would be clear that the Al Qaeda or whoever is in Guantanamo has to be either tried or released.

In conclusion, as a normative matter, international humanitarian law does provide an overall adequate framework for the war on terrorism, principally through customary law. With regard to Afghanistan and Iraq, even if Iraq is somehow part of the war on terrorism, the Geneva Conventions apply on their own terms to interstate wars. Beyond that, any new codification is at best premature.

Codification obviously has benefits to addressing ambiguities, but it also serves to legitimize and send a signal to unconventional fighters that their tactics are acceptable, just as Protocol I sent a signal to colonial peoples that their tactics were acceptable. I think that signal should not be sent to people that regard their victories as crashing airplanes into commercial buildings or incapacitating cities with germ or chemical weapons.

The immediate threat to public order from these sorts of groups is civilian casualties. In fact, these groups reject the basic notions of the laws of war. It is difficult to see how a new round of codification would do anything to protect the victims of such acts, because these people are already illegitimate targets under international criminal law, international humanitarian law, and international human rights law. As

a result, any new codification would only benefit one side. I believe the ICRC has come to this realization after member states have suggested this is not a very good idea.

At the same time, however, states, and principally the United States, need to do a better job of figuring out how far the armed conflict model should apply as a geographic and temporal matter. Indeed, geography and time are the biggest issues in the current war on terrorism. As for the legal framework, the issue is not so much the law itself, but the respect for it and the need for political will and a bureaucracy in place for its implementation.