The Lawyering of War

Peter Berkowitz on *The War on Terror and the Laws of War: A Military Perspective* by Michael Lewis, Eric Jensen, Geoffrey Corn, Victor Hansen, Richard Jackson, and James Schoettler.

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Michael Lewis, Eric Jensen, Geoffrey Corn, Victor Hansen, Richard Jackson, and James Schoettler. The War on Terror and the Laws of War: A Military Perspective. Oxford University Press. 248 Pages. $85

Since the late 1970s, experts have been pondering a “revolution in military affairs.” The revolution to which they usually refer has been generated by tremendous technological developments, particularly in computer science and telecommunications, which have brought fighters stunning improvements in combat mobility and knowledge of the battlefield, and have yielded staggering advances in the fire power and precision of their weapons. This revolution is not the first of its kind. Before it, breakthrough technologies — gun powder, mechanized tanks, steel battleships, and air power — changed the face of battle and compelled strategists to return to first principles to sort out the implications for waging and winning war. Nor is this revolution the only significant contemporary transformation in military affairs.

The other involves law. The last 30 years have witnessed a remarkable expansion in the scope, salience, and sum total of the laws that govern war; in the participation of lawyers in shaping overall strategy and battlefield tactics; and in the role of courts in declaring crimes and meting out punishments.

Of course laws and customary practices, and the opinions about justice that they embody, are not new to warfare. The ancient Chinese, Persians, and Greeks had their laws and customs of war. And warriors have always had their codes.

Since the Peace of Westphalia in 1648, in which the nations of Europe formally recognized the fundamental principles of national sovereignty on which the international order continues to be based, the community of nations has been consolidating and committing to writing a distinctive body of laws to regulate armed conflict. These laws of war — also referred to by professionals as the law of armed conflict, or international humanitarian law — embody the the characteristic view of liberal modernity that all human beings are by nature free and equal.

Landmarks in liberal modernity's legalization of warfare include the Lieber Code signed into law by President Abraham Lincoln in 1863 to provide rules of right conduct for Union soldiers; the mid-19th century establishment in Geneva of the International Committee of the Red Cross; the Hague Conventions of 1899 and 1907; the first Geneva Convention of 1929, the Geneva Conventions of 1949, and the Additional Protocols of 1977; the Nuremberg Trials in 1945 and 1946; the establishment of the International Court of Justice by the un Charter in 1945 and the establishment of the International Criminal Court by the Rome Treaty in 2002; and the international tribunals to try war crimes created for Yugoslavia in 1993 and for Rwanda in 1994.

In the past few decades, these developments have culminated in a new moment in the history of warfare. The obligation powerfully felt by American officers throughout the chain of command to regularly consult with lawyers to ensure that that their plans and objectives comply with legal requirements, and the conviction, ingrained in American soldiers, sailors, and airmen that elaborate rules rightly constrain every pulled trigger, fired round, dropped bomb, and launched missile, reflect a novel way of conducting military affairs.

The U.S. armed forces are playing a leading role advancing the legalization of warfare. It is no slight to the avid contribution of international human rights lawyers, ngos, activist courts, and the legal academy to observe that the Pentagon is by far the largest employer of lawyers specializing in the laws of war, and military lawyers are at the forefront of efforts to clarify the rules that cover the degrading, disabling, and destruction of the enemy; the capture, detention, interrogation, prosecution, and punishment of lawful and unlawful enemy combatants; and the protection during armed hostilities of noncombatants and civilians.

In the convergence of opinion inside the military and outside concerning the imperative to legalize war, some see the working out of the logic of liberal democracy, or what the French thinker Alexandre Kojève grandly referred to as "the universal juridification of the world." From this perspective, law represents the principal public expression of what human beings owe each other as free and equal beings. War can no more cancel the obligation to recognize our common humanity than it can suspend the laws of physics. That it requires a distinctive body of rules and regulations does not distinguish war from other undertakings and spheres of life. At the same time, law has its limits, perhaps nowhere more so than in the defense of one's country and the imperative to kill one's enemy. A failure to respect those limits can bring the law into disrepute and exacerbate the risks of death and destruction on both sides of a conflict.

In the foreword to this volume of excellent essays written by military lawyers on the daunting legal challenges that the U.S. armed forces have confronted in responding to post-9/11 threats, Major General Charles J. Dunlap, Jr. of the United States Air Force identifies several reasons for "the remarkable rise in the prominence of law in recent years" in military affairs:

The rise of globalized commerce with its insistence on legally binding arrangements — not to mention an ever-expanding number of international legal forums to resolve disputes — all serve to normalize law as a feature in international affairs to an unprecedented degree. Add to this the emergence of information technologies that enable the near instantaneous communication around the world of incidents that raise legal issues and it is readily apparent how law gets the attention it does these days. Indeed that such developments infuse law into almost every aspect of modern war, much as it has penetrated virtually every other aspect of contemporary life, is hardly surprising.

Yet even as the legalization of warfare, propelled by globalization and advanced telecommunications, has become more routine, controversy over the laws of war has escalated. The main cause is the challenge of applying them to transnational terrorists — nonstate actors who have acquired the means to commit acts of war while thoroughly repudiating the requirements of lawful combat.

In the opening chapter, Geoffrey S. Corn, a law professor at South Texas College of Law and a retired lieutenant colonel in the Judge Advocate General's Corps, identifies the root of the problem:

On September 11, 2001, the legal framework for the regulation of armed conflict, the framework that guided military lawyers and that influenced decisions made in reliance on their advice, was thrown into disarray. Until that day of infamy, these lawyers applied an "either/or" law-triggering paradigm that dictated when the law of armed conflict (loac) applied to U.S. operations: either those operations involved hostilities against the armed forces of another State so as to qualify as international armed conflicts; or they involved hostilities against insurgent forces within a State on whose behalf the United States had intervened, thereby falling into the alternative category of internal armed conflict. Derived from Common Articles 2 and 3 of the Fourth Geneva Convention (1949), this law-triggering paradigm was a genuine article of faith for U.S. military lawyers trained in the loac at their respective introductory and advanced military law courses.

Since al Qaeda was neither another state's fighting force nor an insurgent force within a state, the struggle of the United States against it could not be readily classified as either an international armed conflict or an internal armed conflict. It seemed to follow to many experts that the laws of war therefore did not apply and so the proper response from the U.S. must fall under the paradigm of law enforcement.

Yet the lethality and physical damage of the September 11 attacks were on the scale not of crimes but acts of war. And the future attacks they portended — dispersed individuals and small secret cells conspiring to use weapons of mass destruction against civilian populations — posed a threat, like traditional acts of war, to the U.S.'s territorial integrity and political sovereignty. Moreover, the enemy was external, had publicly declared war against the U.S.,

and had previously been attacked by the U.S. under the authority of the law of armed conflict. For these reasons, the Bush administration adopted a laws of war framework for fighting al Qaeda and the Taliban forces that harbored them.

Corn respects this reasoning but, as he emphasizes, the Bush administration simultaneously claimed that the laws of war did not fully cover al Qaeda fighters. On the one hand, the administration asserted that a law of war framework provided authority to wage war against al Qaeda. This means that, in contrast to a law enforcement operation, the U.S. would have the right to use lethal force as a first resort and to detain prisoners without trial or charge until hostilities ended. On the other hand, the administration denied that all of the obligations imposed by the law of war framework applied to its handling of al Qaeda fighters. The principal obligations include avoiding unnecessary use of force, distinguishing between combatants and civilians, ensuring that incidental harm that befalls civilians owing to combat operations is proportionate to the military advantage gained, and avoiding the infliction of all unnecessary suffering including on enemy combatants. While the Bush administration accepted the first three as a matter of law, it argued that it would treat detainees humanely as a matter of policy and not law — and provided legal reasons for its decision.

In particular, the Bush administration denied that it was obligated to treat captured terrorists as prisoners of war, with all the rights and privileges that status entailed. Its argument was that by violating the laws of war — by not wearing uniforms, by not carrying their arms openly, by attacking civilians — al Qaeda fighters and other transnational terrorists disqualified themselves from the protections normally accorded enemy combatants. Consequently, the Bush administration interrogated captured terrorists — prisoners of war are not required to provide more than name, rank, and serial number — in some cases using harsh techniques.

Corn leaves no doubt that the Bush administration wrestled with a genuine gap in the law of armed conflict. And he makes clear that the asymmetry the Bush administration perceived between its legal authority to wage war and the limits of its legal obligations toward al Qaeda fighters could be traced to lacunae in the laws of war. But, according to Corn, “invocation of the loac authority without a counter-balance of loac obligation was inconsistent with the historic purpose of the law,” and thus he concludes that the balance the Bush administration struck was untenable.

Corn’s preferred solution is to restore the link between authority to engage in armed conflict and the minimum of fundamental obligations provided by the laws of war framework. The way to do that — and Corn suggests that the Bush administration was pushed in the proper direction by Supreme Court decisions in Hamdi v. Rumsfeld (2004), Rasul v. Bush (2004), Hamdan v. Rumsfeld(2006), and Boumediene v. Bush (2008) — is to change the trigger for law of war obligations. Instead of asking whether an international armed conflict or noninternational insurgency or civil war is involved, the relevant question should be whether authority to conduct military operations, characterized by use of lethal force as a first resort

and the detaining of prisoners until the conflict ends, has been claimed. If it has, then the minimum of fundamental legal obligations — the protections contained in Common Article 3 of the Geneva Conventions — should be activated.

That still leaves open an array of questions about how the laws of war, codified in the aftermath of World War II and with war between great powers in mind, must be adapted to deal with transnational terrorists. It is to these questions that subsequent essays in the book are devoted.

Lieutenant colonel Eric T. Jensen, Chief of the International Law Branch, Office of the Judge Advocate General, U.S. Army, points out that in fighting terrorists, lawfully targeting persons and property is especially complex. Terrorists are difficult to identify, deliberately mix with the civilian population, and depend on support from those who have varying degrees of involvement in their operations. In the end, however, Jensen believes that the core targeting principles of the law of armed conflict — the principle of distinction, or attacking only military targets and not civilian populations and objects, and the principle of proportionality, or avoiding attacks on military targets that would produce disproportionate incidental damage to civilian populations and objects — are adequate to the task. But his careful analysis of the practical difficulties inherent in applying these basic principles to transnational terrorists suggests that military lawyers, officers, and soldiers in the midst of battle are being called on to exercise Herculean feats of tactical analysis, prudential judgment, and empirical calculation to meet their legal obligations.

Other contributors are in general agreement that the pre-9/11 laws of war framework can be reformed or extended to meet the challenges of post-9/11 warfare. James A. Schoettler, Jr., an adjunct professor at Georgetown Law School and a reserve officer in the U.S. Army's Judge Advocate General's Corps, shows that the Bush administration had respectable reasons for classifying terrorists as unlawful enemy combatants or "unprivileged belligerents." But he also argues that the Supreme Court was right to require more effective judicial procedures for determining whether individual detainees were rightly so classified. And he maintains that the law of war framework obliges nations "to the maximum extent feasible" to grant all detainees the standard of treatment owed prisoners of war.

Richard B. Jackson — a former infantry man, a retired colonel, and Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters — examines the raging debates within the Bush administration and the Pentagon about the standards governing the interrogation of unlawful combatants. He criticizes the position taken early on by the Bush administration that, in light of the Congress's 2001 authorization to use military force and the president's inherent constitutional powers as commander-in-chief, the president's authority to determine interrogation techniques was, as a matter of constitutional law, all but unconstrained by domestic or international law. But that was just the beginning of the debate. Jackson notes that in no small measure because of the seriousness with which both the army and the administration took the need to be on the right side of the law, today "the U.S.

Army is left with the standards it began the War on Terror with." Even unlawful enemy combatants, he approvingly observes, are guaranteed "the minimum humane treatment standards" prescribed by the Geneva Conventions.

In a chapter on trial and punishment, Corn and Jensen observe that the decision by the Bush administration to use military tribunals to try al Qaeda fighters upended the pre-9/11 conventional wisdom that terrorists are subject to domestic law and that war crimes are punishable under international law. But the need to refine the structure of the Bush military commissions through protracted constitutional litigation did not undermine the Bush administration's compelling reasoning: "the basic proposition that provided the impetus for the president's initial order — that acts of transnational terrorism could be designated either as war crimes or in the alternative be subjected to the jurisdiction of a military commission — remained essentially unaltered."

Victor M. Hansen, an associate professor at New England Law School and a retired lieutenant colonel and former military prosecutor in the U.S. Army Judge Advocate General Corps, takes up the question of command responsibility and accountability. In recent years it has broadened considerably. Today, "commanders may be responsible not only for the loac violation they committed or ordered, but also for violations that could have been averted if they had discharged their responsibilities effectively by preventing violations they knew or should have known would occur." This broadening, Hansen argues, is necessary to "establish symmetry between the obligations of a battlefield commander and his authority," and this evolution in legal doctrine, he contends, properly covers commanders in the fight against transnational terrorists.

Michael W. Lewis, an associate professor of law at Ohio Northern University's Petit College of Law and a seven-year Navy veteran, explores the process by which militaries translate abstract legal obligations to the battlefield. From aerial bombardments and targeted killings to artillery fire missions and infantry combat, fighters face excruciatingly difficult split-second decisions concerning collateral damage to noncombatants in routinely complex and chaotic circumstances. Therefore, argues Lewis, they must be provided with legal instructions that are as simple and clear as possible. The more problematic the decision, the higher level of command at which it should be made.

Unfortunately, the convergence of high tech warfare and transnational terrorism has created a brutal paradox for both commanders and fighters. The enhanced accuracy of weapons, which in conventional circumstances enables combatants to better honor their legal obligation to protect civilians, also exposes combatants to greater legal jeopardy by heightening expectations that civilian lives will be spared. Islamic extremists have sought to take advantage of this paradox. By hiding among civilian populations and using schools, hospitals, residential apartment buildings, and mosques for the conduct of military operations, they exploit the laws of war to straitjacket conventional armies that seek to abide by them.

This important book demonstrates that the conviction that the laws of war are necessary and just is an essential element in the fighting creed of our men and women in uniform and a cause for American pride. But the triumph of that interpretation of the laws of war that requires the legalization of all aspects of warfare, which has coincided with the rise of transnational terrorists who scorn the laws of war and do their devious best to turn those laws against those who do honor them, is not without cost. We have a long way to go in understanding the consequences for war and peace of this most recent revolution in military affairs.

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